Prosecuting Justice for Victims of Post Election Violence-Why the Hague Option

A CANDID PLATFORM FOR ENGAGEMENT WITH THE ICC FOR VICTIMS AND KENYANS

Kingdom of the Netherlands

This publication was made possible through the generous support of the Kingdom of the Netherlands Embassy .The views expressed herein do not in any way represent the position of the Kingdom of the Netherlands Embassy.

Design and Layout
Centrepress Media, P.O. Box 19063-00100 Nairobi
Tel: 020 21 00 705/6 • info@centrepressmedia.com

Printing
Imposition Agencies

Cover photos by
Boniface Mwangi

Table of Contents

Acronyms

AU	African Union
AG	Attorney General
CID	Criminal Investigations Department
CIPEV	Commission of Inquiry into the Post Election Violence
ECK	Electoral Commission of Kenya
ICC	International Criminal Court
IDP	Internally Displaced Person
KNDR	Kenya National Dialogue and Reconciliation Accord
NCIC	National Cohesion and Integration Commission
NGO	Non- Governmental Organisation
NSIS	National Security and Intelligence Service
ODM	Orange Democratic Movement
PNU	Party of National Unity
TFV	ICC Trust Fund for Victims
TJRC	Truth Justice and Reconciliation Commission
UN	United Nations

Definitions

Assembly of States Parties: This is the International Criminal Court's management oversight and legislative body, which consists of one representative from each state party. Each state party has one vote. The Assembly is presided over by a president and two vice-presidents, who are elected by the members for three-year terms.

Complementarity: Essentially, the principle of Complementarity holds that the ICC will not substitute national courts and it will only intervene in cases where the prosecutor is able to prove that national courts have neither the desire nor the means to initiate and conduct proceedings. In other words, states retain the primary role in punishing crimes over which even the court has jurisdiction and thus by its complementary role, the ICC is a court of last resort.

Confirmation of Charges Hearing: A confirmation of charges hearing is held to determine whether there is sufficient evidence to establish substantial grounds to believe that each suspect committed each of the crimes being charged. If the charges are confirmed for a suspect, the Pre-Trial Chamber commits the person to trial before a Trial Chamber, which will conduct the subsequent phase of the proceedings: the trial.

Crimes Against Humanity: These are acts that are covered by the Rome Statute under Article 7 of the Rome Statute, which are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Crimes against humanity may include murder, deportation, rape, torture, persecution, forced disappearance and apartheid, and other inhumane acts.

ICC: This is the International Criminal Court which is currently based in The Hague, Netherlands. The Judicial Division of the ICC consists of eighteen judges organized into the Pre-Trial Division, the Trial Division and the Appeals Division. The judges of each Division sit in Chambers which are responsible for conducting the proceedings of the Court at different stages. Assignment of judges to Divisions is made on the basis of the nature of the functions each Division performs and the qualifications and experience of the judge. This is done in a manner ensuring that each Division benefits from an appropriate combination of expertise in criminal law and procedure and international law.

Jurisdiction: The international Criminal Court has jurisdiction over all crimes committed in the territory of a State that has ratified the Rome Statute, or that has expressed its agreement to the jurisdiction of the court. In addition, the Court has jurisdiction on all crimes committed by nationals of States that have ratified the Statute or that have expressed agreement to the jurisdiction of the Court. If the perpetrator is a national of a ratifying state, the Court has jurisdiction, even if the territorial state (i.e. where the crime was committed) has not accepted the jurisdiction of the Court. Where the perpetrator is a national is a national of a state that has not accepted the jurisdiction of the

Court, as long as the territorial State has done so the Court is enabled to proceed.

Pre – Trial Chamber: The Pre-Trial Division is composed of no less than six judges with predominantly criminal trial experience and it plays an important role in the first phase of judicial proceedings until the confirmation of charges upon which the Prosecutor intends to seek trial against the person(s) charged.

Prosecutor of the ICC: Responsible for conducting investigations and prosecutions, assisted by two Deputy Prosecutors. The Prosecutor may open an investigation under three circumstances: when a situation is referred by a state party (e.g. the Ugandan situation); when a situation is referred by the United Nations Security Council, acting to address a threat to international peace and security (e.g. the Sudan situation); or when a Pre-Trial Chamber authorises the Prosecutor to open an investigation on the basis of information received from other sources, such as individuals or non-governmental organizations (e.g. the Kenyan situation).

Rome Statute of the International Criminal Court: This is the international treaty that established the International Criminal Court. The Statute was adopted at a diplomatic conference in Rome on 17th July, 1998 and came into force on 1st July, 2002.

Summons to Appear: This is a court order to an individual to appear in court at a specified place and time. In the context of the International Criminal Court, it is an order of the Chamber requiring a suspect to appear before the ICC.

Warrants of Arrest: This is a written document issued by the Court for the arrest of a person or the search of his property. If for example, a suspect refuses to appear before the ICC when expected to, the Court may issue warrants of arrest to enforce his appearance, or if the Court does not believe that such a person shall willingly agree to appear before the Court.

Executive Summary

This booklet re-visits the incidences preceding and succeeding the December 2007 to February 2008 post-election violence in Kenya. It demystifies the status of the Kenyan case before the International Criminal Court (ICC) and the plight of the suspects and victims of the post-election violence (PEV). It seeks to clarify between political interpretations of the ICC process and the true status and possible results and outcomes for the affected parties for both the victims and the suspects. The booklet seeks to inform and educate the victims of PEV and the general public about the misconceptions surrounding the Kenyan cases before the ICC, the participation of the victims/witnesses and the issue of reparations for the victims. The booklet is divided into five Chapters: Chapter One takes us back to when the violence erupted and how it started, the causes, and the brokering of the power sharing deal by African Union Panel of Eminent Persons led by former AU Secretary General Koffi Annan, which culminated to the signing and coming into force of the Kenya National Dialogue and Reconciliation Agreement. The booklet also highlights the government's reluctance to prosecute the perpetrators of the violence as agreed in the peace accord which led Kenya to the International Criminal Court at The Hague. Chapter Two explains the status of the Kenyan case before the ICC and the possible outcomes of the confirmation of charges hearing; Chapter Three deals with Reparations and general assistance for the victims under the Rome Statute, this includes demystifying the Trust Fund for Victims and its mandate and the kind of assistance offered by the Trust Fund; Chapter Four covers the complementary role of the Kenyan government and the ICC- as well as the lack of political will by the Kenyan government to prosecute the perpetrators locally and finally, Chapter Five puts down the conclusions and the way forward for the ICC process.

Ndungu Wainaina, Executive Director, International Center for Policy and Conflict (ICPC)

Acknowledgement

We would like to acknowledge Christine Muthoga for her research and compilation of this booklet. Without her concerted efforts, this booklet would not have been a reality. We also appreciate the guidance and advice offered to the author by Ndung'u Wainaina (ICPC) and Paul Mwaura (ICPC) as well as the input by James Mawira (ICPC), which saw the success of this endeavor.

We wish to acknowledge the financial support offered by the Royal Netherlands Embassy, without whom this toolkit would not have been realized. We also acknowledge anybody who in one way or another might have contributed to the success of this manuscript.
Thank you all!

Chapter 1
INTRODUCTION

"War should belong to the tragic past, to history: it should find no place on humanity's agenda for the future."

Pope John Paul II
(Quoting the Polish Pope of 1920-2005)

Tracing our footsteps to The Hague

After heated and passionate campaigns throughout 2007, Kenyans cast their ballot on 27th December, 2007 in a hotly contested presidential, parliamentary and civic election. However, the confusion caused by the delay in the relay of election results blamed on the defunct Electoral Commission of Kenya (ECK) created doubt as to the legitimate results of the election. Soon thereafter on 29th December, violence broke out and on 30th December, the ECK declared President Mwai Kibaki as the winner of the election.

It was originally thought that the delay in announcing results and the resulting dispute over the winner of the presidential election was the primary cause of the eruption of violence. It later emerged, through the Report of the Commission of Inquiry into Post Election Violence "(the CIPEV Report)", that a significant portion of the violence was planned before the election exercise begun.

The National Security and Intelligence Service (NSIS) gave government intelligence reports as early as September, 2007 that tension was brewing between the Kalenjin, the Kikuyu and Kisii with some Kalenjin tribesmen terming the two communities as their political enemies and threatening to evict them. In the NSIS's Hot Spot/Flash Point Report of 19th October, 2007 the NSIS noted that the debate around Majimbo was being used by some politicians in Nairobi, Rift Valley and Coast Provinces scheming and organising local youth to attack perceived outsiders. The NSIS added that "generally, the debate has elicited a strong anti-kikuyu sentiment due to the fact that the community is robustly opposed to the system". Despite these and other early – warning reports, the police and provisional administration did not take any effective measures to prevent or prepare for the outbreak of violence.

Key characteristics of the violence

On 29th December, 2007, the ECK chairman Samuel Kivuitu announced that he had lost touch with some of the returning officers in areas that had not sent in their reports. This announcement was soon followed by incidents of looting, blocking of roads and violence begun to be reported across the country. Due to the rising tension, ECK decided to invite representatives of the ODM and PNU parties to scrutinise all the contentious results overnight. ODM was led by James Orengo and PNU by Martha Karua. They reached to agreement on all but 47 constituencies. On 30th December, 2007 the continued tension at the KICC (Kenyatta International Conference Centre) tallying centre heightened tension across the country which was being televised nationwide, culminating in confrontation between the political leaders and ECK. The leaders of ODM announced that they would not accept the results and accused the ECK of inflating the numbers in favour of Mwai Kibaki. The ODM leaders announced that they would hold a public rally the following morning to announce the next course of action to the country. As they announced to the media, the power at KICC was switched off. A few minutes later, the Chairman of ECK announced Mwai Kibaki as the winner of the presidential election and the President was sworn in for a second term of office.

Suddenly, violence broke out with the epicentre of the post-

election violence being the northern part of the Rift Valley province. It is documented that Kikuyus were driven out of Kisumu and Nyanza in general by Luos. In Eldoret and Kericho, Kikuyus were driven out by Kalenjins and their farms and properties stolen. Subsequently, retaliatory attacks followed in the Rift Valley against Luos and Kalenjins.

In the urban centres such as Kibera in Nairobi, attacks of Kikuyus started, but were soon stopped by the introduction of militia groups and in particular, the **Mungiki**, who then attacked non-Kikuyu groups believed to have supported the ODM party. The retaliatory attacks greatly reduced the frequency and frenzy of the initial surge of killings and gross human rights abuses. At the same time, the military was deployed to restore and maintain law and order.

In the chaos, many innocent lives were lost, women and girls raped and humiliated before being slaughtered, and property worth millions of Kenya shillings destroyed or stolen.

As reports of violence were streaming through media houses, the Ministry of Information made a decision to ban live broadcast transmissions, though there was no "gag-order" on reporting the violence as long as there was a signal delay. The ban on live reporting had an unspoken threat to media houses to ensure that they reported the violence in a responsible manner to avoid fuelling an already volatile situation, failure to which, they would be taken off-air.

Figure 1 - Armed Maasai men engaged in battle against Kikuyu youths in Narok.

On 31st December, 2007 ODM announced their intention to hold a rally to swear-in Raila Odinga as the 'people's president' but the government had banned holding political rallies which was perceived as an attempt to impede communication with their supporters. Public outrage against the violence and calls for peaceful resolution of the disputed election mounted with the murder of 35 perceived PNU supporters who were mainly women, children and elderly persons taking refuge in a church in Eldoret on 31st December, 2007.

Figure 2 - Young men demonstrate in support of Raila Odinga in Mathare North, Nairobi.

ODM kept its public campaign for the resignation of Mwai Kibaki and rejected suggestion to file an election petition in the judiciary. On 4th January, 2008 the US Assistant Secretary of State, Jendayi Fraser arrived in Nairobi to support efforts to resolve the crisis. PNU insisted that they had won the election with President Mwai Kibaki stating they would only accept a re-run if it was ordered by Court. He however suggested the formation of a government of national unity but this offer was rejected by the ODM party which insisted on a re-run. After the visit from Fraser, the two Principals appeared to soften their position to allow for mediation. However, on 8th January, 2008, President Kibaki announced a partial cabinet and named Kalonzo Musyoka as Vice President much to the chagrin of the ODM party and called for further protests throughout the country.

Towards the end of January 2008, reports of the deployment of the militia group Mungiki conducting reprisal attacks in Nakuru and Naivasha started to stream in. In Naivasha town, 19 members of the Luo community perished in an arson attack allegedly caused by the Mungiki. By the end of January, approximately 60 people had been killed in the Rift Valley in addition to the killing of two ODM parliamentarians.

The army was then deployed in Nakuru and Naivasha to restore peace and towards the end of January, ODM party softened its stance.

Figure 3 – An Army and General Service Unit (GSU) stand-off against rioting youths in Nairobi.

The Police were also accused of using excess force in some areas, whilst in others; the police were complicit in their responses to calls for assistance. It has been documented that after requests for assistance were raised, the police would take more than an hour to arrive at the scene, well after people had been victimised.

Figure 4 - A man pleads for his life in the midst of armed state security forces.

The international community and the African Union (AU) became involved in a bid to end the violence. The president of Ghana, His Excellency Hon. John Kuffour, who was the Chairman of the AU at the time, flew into Nairobi in an attempt to reconcile the warring factions. He facilitated the agreement between his Excellency President Mwai Kibaki and Prime Minister Hon. Raila Odinga, to constitute a Panel of Eminent African Personalities led by Dr. Kofi Annan, to mediate over the crisis.

One month later on 28th February, 2008, the two main parties – the Party of National Unity (PNU) and the Orange Democratic Movement (ODM), represented by the President and Prime Minister respectively, signed the Agreement on Principles of Partnership of the Coalition Government. The Agreement was witnessed by the President of the United Republic of Tanzania and new Chairman of the African Union, Mr. Jakaya Kikwete, and the Chair of the Panel of Eminent African Personalities, Dr. Annan. This Agreement was to be effected by the Kenya National Dialogue and Reconciliation (KNDR) framework, which was implemented under the National Accord and Reconciliation Act, to end the political crisis. It was at the signing of this Agreement that Kenyans and the world at large witnessed the iconic handshake between the two leaders signifying an end to the violence.

Figure 5 - The President Mwai Kibaki and Prime Minister Raila Odinga shake hands for the first time since the violence begun on 28th February, 2008 signalling an end to the violence as the country breathes a sigh of relief.

The KNDR framework set out the agreements and principles to be followed as the basis for stopping the violence and for sharing political power. The framework encapsulated four main agenda items. The first agenda item was **stopping the violence;** the second agenda item was **addressing the Humanitarian crisis and promoting healing and reconciliation;** the third agenda item was **the agreement on power sharing and overcoming the political crisis;** and lastly the fourth agenda item was aimed at **tackling long term issues** with a range of measures to secure sustainable peace, institute reforms and address social inequalities.

We shall briefly discuss the features of the four agenda items and progress to date.

Agenda Item 1

Stopping The Violence

"States Parties shall seek lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity."

Article 11, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (Adopted on 23rd October, 2009)

(The Kenyan government has not ratified the Convention)

At the time of signing of the Agreement on Principles of Partnership of the Coalition Government the country was still burning. It would therefore be correct to say that **the immediate purpose of the Agreement, and hence the National Accord and Reconciliation Act, 2008, was to stop the violence.**

The preamble of the National Accord Act sums up succinctly the purpose of the Act as "to give effect to the Agreement on the Principles of Partnership of the Coalition Government, to foster national accord and reconciliation, to provide for the formation of a coalition Government and the establishment of the offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, [and] their functions".

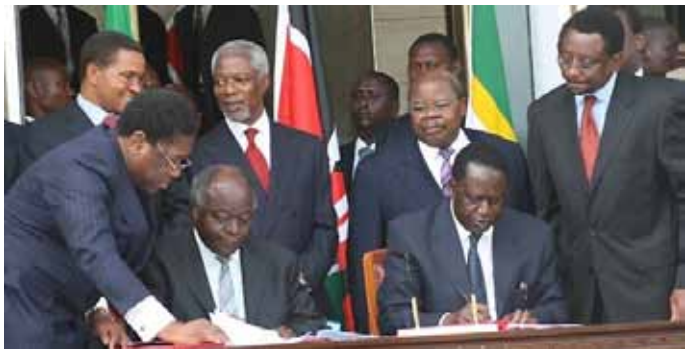


Figure 6 – The President Mwai Kibaki and Prime Minister Raila Odinga sign the Agreement on Principles of Partnership of the Coalition Government as Dr. Kofi Annan and Tanzania's President Jakaya Mrisho Kikwete share a light-hearted moment.

Given that the violence was seemingly based on the two parties PNU and ODM's right to be in power, it is no wonder that the Agreement on Principles of Partnership of the Coalition Government was annexed as a Schedule to the Act. The (now repealed) Constitution was amended to include this and give effect to the changes in government. The observations and the summaries made in the schedule capture a number of important things including:

i. If the crisis triggered by the 2007 elections was left unaddressed, the divisions would threaten the very existence of Kenya as a unified country.
ii. Given the situation, it was recognised that neither side could realistically govern the country without the other. Therefore, there had to be real power-sharing to move the country forward and begin the healing and reconciliation process.
iii. Through the agreement, the political leaders were stepping forward together to overcome the crisis and to set the country on a new path. As partners in the coalition government, the leaders committed to work together in good faith as true partners, through constant consultation and willingness to compromise.
iv. There would now be a Prime Minister and two Deputy Prime Ministers, who would be included in Cabinet in addition to the President, Vice President and other Ministers.
v. The National Accord and Reconciliation Act would be entrenched in the Constitution.

These changes were meant to appease the populace and instil confidence in all stakeholders. This was the beginning of the process of recovery from the post-election violence and notably upon signing of the Agreement, the violence witnessed in the country drastically reduced.

Notably, the Agreement on Principles of Partnership of the Coalition Government provided for the establishment of the Commission of Inquiry into Post Election Violence "(CIPEV)" mentioned above. CIPEV was mandated with several tasks, the key ones being:

(i) To investigate into the facts and circumstances related to Post Election Violence;
(ii) Investigation of the actions and omissions of state security agencies;
(iii) Making recommendations to prevent a repeat of electoral violence in future;
(iv) Recommend measures to promote national reconciliation in Kenya; and
(v) Recommend legal, political and administrative measures to address issues of violence.

The CIPEV team was constituted on 23rd May, 2008 via a Gazette Notice, and took oath of office on 3rd June, 2008. The Commission begun its investigations thereafter and although its mandate was initially for 3 months until 22nd August, 2008, the Commission requested for a further sixty (60) days but only obtained a thirty (30) day extension. It interviewed the then Police Commissioner, the NSIS, the Criminal Investigation Department (CID), victims, civil society groups, humanitarian aid agencies and witnesses. The CIPEV team then published its results in a 529 page report that made wide ranging conclusions on the causes and the developments leading to the post-election violence. The Report notably recommended the establishment of a Special Tribunal for Kenya which would be a hybrid court of local and international personnel of judges, prosecutors, investigators and defence counsels.

The recommendation to establish a hybrid Court was informed by views from Kenyans that the present judiciary could not be entrusted to bring the main perpetrators of the post-election violence to justice. The CIPEV investigation also identified persons that the commission considered were most responsible for the violence. The names of these persons were placed in an envelope and handed over to Dr. Kofi Annan together with the CIPEV Report and evidence on 17th October, 2008. The recommendation by CIPEV included a provision that should the President and the Prime Minister fail to establish a special tribunal within 60 days, then, Dr. Annan should hand over the envelope and the evidence to the Chief Prosecutor of the International Criminal Court to initiate a preliminary investigation into Kenya for international crimes against humanity.

On 9th July, 2009, the African Union Panel of Eminent African Personalities chaired by Kofi Annan announced that it had submitted to the Prosecutor of the International Criminal Court the envelope containing the names of the persons that the CIPEV Commission had identified as the masterminds of the post election violence.

This was after several extensions and debates in the Kenyan Parliament leading to no serious show of commitment by the Government of Kenya.

Efforts to establish a Special Tribunal for Kenya

The 60 day countdown for the President and Prime Minister to establish a Special Tribunal for Kenya started on 17th October, 2008 when the CIPEV Report was handed over to

the Dr. Kofi Annan. He was also handed a sealed envelope with the names of persons singled out by the Commission as probably bearing the greatest responsibility for the post election violence with instructions that if the government failed to establish a local/special tribunal, the envelope would be handed over to the ICC Prosecutor.

At first, the government seemed determined to establish a special tribunal and members of parliament expressed support for a tribunal to avoid the threat of an ICC investigation and prosecution. The government through the Ministry of Justice, National Cohesion and Constitutional Affairs, published a Constitutional Amendment Bill on 28th January, 2009 which sought to entrench a special tribunal into the Constitution. On the same day, the Special Tribunal Bill was published. Both the constitutional amendment and the bills were defeated in Parliament.
Prime Minister Raila Odinga then sought an extension of the 60 days deadline, which was granted by Kofi Annan until May 2009. A further extension was granted by Kofi Annan to the end of August. In July 2009 the Justice Minister Mutula Kilonzo presented two draft bills on the special tribunal which the Cabinet rejected. The main issues in contention were clauses that would strip presidential immunity from prosecution, remove the power from the president to pardon convicted persons and the removal of the Attorney General's power to enter a **Nolle Prosequi** in the tribunal proceedings.

After these failures to establish a special tribunal, Kofi Annan travelled back into Kenya on 8th October, 2009 with the message to the Principals that the ICC and a special tribunal were required in order to punish the perpetrators of the post election violence.

Shortly, on 27th October, 2009 the Prosecutor sent a letter to Kenyan authorities explaining that a preliminary examination of the crimes that were committed in Kenya during the post election violence had revealed that crimes against humanity may have been committed and, as at that date, there were no national judicial enquiries that had been initiated. The Prosecutor in this letter explained that there were two options for initiating an investigation – either a self-referral from the Government of Kenya or for the Prosecutor to request authorisation from the Pre-trial chamber to start an investigation into the Kenyan situation. On 5th November, 2009 the Chief Prosecutor travelled to Kenya and met with the President and Prime Minister, where the Prosecutor informed them that all the statutory requirements in accordance with the Rome Statute had been met and therefore it was his responsibility or duty to apply to open an investigation into Kenya. This announcement was made in a joint press conference of the two Principals and the Prosecutor.

The President and Prime Minister simultaneously issued a joint statement in which the government noted that it remained fully committed to honour its international obligations and cooperate with the ICC in accordance with the Rome Statute as well as to establish a judicial mechanism to deal with the perpetrators of Post Election Violence within the Framework of the Rome Statute and the Kenyan International Crimes Act, 2009, the legislation that domesticated the Rome Statute in Kenya. However, the

President and Prime Minister declined to refer the Kenyan situation to the ICC saying that doing so would be admitting that Kenya was a failed state.

Subsequently, on 6th November, 2009 the President of the ICC issued a decision that assigned the situation of Kenya to Pre-trial Chamber II in anticipation that the Prosecutor would make a request to initiate an investigation into Kenya. A Member of Parliament, Gitobu Imanyara, through a private members motion tabled a Bill to establish a special tribunal through a Constitutional Amendment. This Bill never took off as other Members of Parliament (MPs) decided to boycott parliamentary sessions so as to avoid any debate on this Bill. For instance, on 11th November, 2009 when the bill was scheduled to be discussed, only 30 of 222 MPs were present and the Bill was postponed to 18th November, 2009 on account of lack of quorum. On the said date, only 17 MPs were in attendance.

Left with no local mechanisms for ensuring justice for the post election violence, the Prosecutor filed the request for authorization of an investigation pursuant to Article 15 of the Rome Statute on 26th November, 2009. Soon after on 31st March, 2010 the Pre – Trial Chamber II consisting of 3 judges (hereinafter referred to as "the Chamber") gave the Prosecutor authorisation/permission to open an investigation into Kenya. The Chamber was persuaded that crimes against humanity had occurred in Kenya during the Post Election Violence. The temporal jurisdiction of the investigation given to the Prosecutor was to investigate the Kenya situation from as far back as 1st June 2005 (i.e. the date of the Rome Statute's entry into force for the Republic of Kenya) to 26th November 2009 (i.e. the date of the filing of the Prosecutor's Request). The Chamber took notice of the fact that it was apparent that certain areas of Kenya had experienced violence prior to 2007 and even after 2008. The chamber highlighted that these events had led some victims to request that any possible investigation by the Court encompass a broader temporal scope – namely the time before 27th December 2007 and after 28th February, 2008.

Agenda Item 2

Addressing The Humanitarian Crisis And Promoting Healing And Reconciliation

"This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all."

Preamble, Agreement on the Principles of Partnership of the Coalition Government signed on 28th February 2008

Internal Displacement

The post-election violence caused internal displacement of persons who were either evicted from their homes and others who were running away from the violence. It is estimated that over 650,000 people were displaced within Kenya. A lucky few were able to take refuge with relatives and friends in other parts of the country, but the majority of Internally Displaced Persons "(IDPs)" sought refuge in transit camps that were set up by humanitarian aid agencies and the Government of Kenya.

Figure 8 – One of many IDP Camps established at the peak of the violence paying testimony to the vast number of people who were displaced.

There have been some efforts to resettle IDPs, but these efforts have not been consistent or well organised. In some instances, funds designated for resettlement have been misappropriated by the provincial administration or diverted to people masquerading as IDPs thereby leaving many genuine IDPs locked out of assistance. This is primarily as a result of the Government failing to keep adequate records of internally displaced persons contrary to international practice. The CIPEV Report captured a number of issues concerning the IDP situation and concluded by noting that the IDP problem was likely to persist unless the Government and people of Kenya address the underlying socio-economic issues or problems that led to the eviction of men, women and children from their homes and businesses.

According to a 2009 Report by the United Nations Office for the Coordination of Humanitarian Affairs, the number of IDPs had reduced. However, it is noteworthy that the numbers reported in the said Report are mainly those of transit persons. The numbers of people in IDP camps are still high and living in squalid conditions. Individuals and humanitarian organisations have been instrumental in re-settling IDPs. For instance, a few individuals have donated tracts of land for resettlement of displaced persons, whilst some organisations have built houses for those affected. However, without the government's commitment and structured response, the resettlement programme as viewed by those internally displaced has been a failure in some areas.

In particular, the government began IDPs resettlement with a rushed push to return IDPs to their original areas of residence from which they had been displaced. This initiative, dubbed "Operation Rudi Nyumbani" (Operation Return Home), was poorly conceived, uncoordinated and unsuccessfully executed.

This Operation failed to address the concerns and wishes

of the displaced persons and only served to re-victimize the IDPs by forcing them to return to the areas of their original violation without credible security guarantees. Further, the exercise has been executed in a manner to create dangerous exclusive ethnic enclaves in complete disregard of the Constitution guarantees of owning property and residing anywhere in the country.

The flawed operation was followed-up by an even more defective humanitarian assistance programme labelled as "compensation initiative" where the government sought to pay each household returning from the IDP camps Kshs. 25,000 for reconstruction of houses and Kshs. 10,000 as start-up funds. While this assistance was a good gesture, there were no methodical criteria and/or formulae for the allocation of these funds, nor did the payments take into consideration the actual losses of the individual households through a proper profiling of IDPs. Furthermore there was no consultation with the interested parties to secure a proper platform for the design of strategic interventions.

In addition, many of the displaced expressed a desire to return back to their homes where they had purchased land and were involved in various economic activities. However, a comprehensive and supported return programme has not featured on the government's agenda for internally displaced persons. As a result, in many places where people were expelled on the basis of ethnicity, the culprits have gotten away with stealing and destroying other people's property thus remaining as highly polarised communities. In many of these areas, people were driven out so that their land could be taken-over by members of that community. To date, land belonging to IDPs remains in the possession of these culprits and the justice system has not bothered to rectify this situation.

Figure 9 - More than a year after the violence, internally displaced persons are still living in camps that were meant to be no more than a temporary measure.

The 2010 Constitution provides that every person has a right to acquire and own property of any description in any part of Kenya. However, the government itself appears to be unaware of this provision or unwilling to enforce it. The government had planned to resettle 8,000 IDPs in Mau Narok, but was intimidated when members of the Maasai community opposed the resettlement. Similarly, the government had planned to resettle IDPs in Taita Taveta, a move which was opposed by the community leaders. In fact, members of this district threatened to attack IDPs if they were resettled in Taita Taveta. The leaders argued that the government should not prioritise the resettlement of IDPs in the area, before addressing the landless from that region!

The government has therefore backed down in the face of this opposition and is planning to instead give IDP families

Kshs.500,000/= for them to find their own land, which as per the previous experience in disbursement of IDP funds, will undoubtedly be misappropriated.

This is a poor display of the lack of a cohesive thought in the process and a lack of seriousness on the part of the government to have an effective resettlement process. Why should the government surrender in the face of this opposition, instead of sensitising these communities on the importance of the resettlement programme? If the government cannot enforce the land rights in the Constitution, who can? This situation is a re-victimisation of the internally displaced.

The CIPEV Commission collected statistics from police and provincial administration records that approximately 65,716 residential houses were destroyed throughout the country with the largest number of homes being burnt in the Rift Valley where 64,414 homes were destroyed or burnt and approximately 2526 commercial properties were destroyed.

Figure 10 - An aerial view of a church and its neighbouring property set on fire.

As far as law and justice are concerned, this is a continuing violation of displaced persons' constitutional rights.

Whilst the Kenyan government has not signed the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, it has ratified the Great Lakes Pact with its ten Protocols and four Programmes of Action, which is one of the few international agreements that address internal displacement in a comprehensive and holistic manner. The Pact entered into force in June 2008 and has been ratified by the 11 member states. Two of its ten protocols deal with protection of IDPs – the Protocol on the Protection and Assistance to Internally Displaced Persons, and the Protocol on the Property Rights of Returning Populations.

The Protocols put a particular emphasis on implementation by providing model legislation on the implementation of the Protocol as well as a regional action programme for the protection, assistance and search for durable solutions for displaced populations and communities that host them. The 2010 Constitution provides in Article 2 (6) that any treaty or convention ratified by Kenya shall form part

of the laws of Kenya. In particular, the Property protocol asserts the property rights of displaced people. Its four core objectives as set out in Article 2 are: establishment of the legal principles which govern the recovery of property by displaced people; creation of a legal basis for resolving disputes relating to property including the identification of both judicial and local traditional mechanisms; Guaranteeing special protection for returning women and children and "communities with special attachment to land in the Great Lakes Region", and assuring legal remedies for loss or destruction of property for the forcibly displaced.
Therefore, on the strength of the provisions in the Protocols and on the Constitution, IDPs have a legal basis for demanding socio-economic redress which can be enforced by the judiciary if need be.

Healing and Reconciliation National Cohesion and Integration Commission (NCIC)

Part of the Healing and Reconciliation efforts was the establishment of the National Cohesion and Integration Commission (NCIC) with a view of resettling IDPs and to foster reconciliation amongst the affected communities in Kenya. The NCIC was established under the National Cohesion and Integration Act, Act No. 12 of 2008, as one of the instruments to respond to the post-election crisis and initiate efforts toward lasting peace, sustainable development and harmonious co-existence among Kenyans. Amongst other responsibilities, the NCIC was expected to **promote; the elimination of all forms of discrimination on the basis of ethnicity or race; the tolerance, understanding and acceptance of diversity in all aspects of national life and encourage full participation by all ethnic communities in the social, economic, cultural and political life of other communities; the respect for religious, cultural, linguistic and other forms of diversity in society; the equal access and enjoyment by persons of all ethnic communities and racial groups to public or other services and facilities provided by the Government; arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace;** and **plan, coordinate and promote educational and training programmes to create public awareness, support and advancement of peace and harmony among ethnic and racial communities.**

The NCIC was also given a special mandate to investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney-General, the Human Rights Commission or any other relevant authority on the remedial measures to be taken where such complaints are valid. It also has the mandate to monitor and make recommendation to government, public and private bodies on factors inhibiting harmonious relations in the society. Unfortunately, the NCIC does not appear to have realised its relevance and scope of its powers as it is only known for its focus on incidents of hate speech. The NCIC referred the issue of hate speech against MP Wilfred Machage, MP Fred Kapondi and Chrisine Nyaguthia Miller to the Police, who subsequently charged the two in June 2010 under the National Cohesion and Integration Act. It is said that Machage is accused of having made four statements targeting the Maasai, Kikuyu and the Luo. Kapondi allegedly uttered words meaning some communities in Trans Nzoia and Bungoma would be forced out if the Constitution was passed. The two cases were taken over by the DPP's of-

fice. In August 2011, the NCIC informed the Court that they wanted to withdraw the charges. This withdrawal would be an anticlimax to the first prosecution in the Kenyan justice system over alleged hate speech.

The Truth, Justice and Reconciliation Commission (TJRC)

On the other hand, the Truth, Justice and Reconciliation Commission (TJRC) established under the Truth, Justice and Reconciliation Act was intended to bring into effect the desire for Kenya to achieve its full potential in social, economic and political development. The concerns as captured by the Act include the fact that since Kenya's independence, there have been gross violation of human rights, abuse of power and misuse of public office. Many of these transgressions cannot be properly addressed by the judicial institutions due to procedural and other hindrances. The TJRC was meant to obtain a true account of Kenya's history by investigating the atrocities of the past. The Commission was to consciously address these past violations in order to prepare for the future by building a democratic society based on the rule of law. There was also a recognition that the process of achieving lasting peace and harmonious co-existence among Kenyans would best be served by enabling Kenyans discuss such matters in a free and reconciliatory forum and address the entrenched polarization and feelings of resentment among Kenyans exemplified by the tragic 2007 post election violence. The TJRC was to be a fresh start.

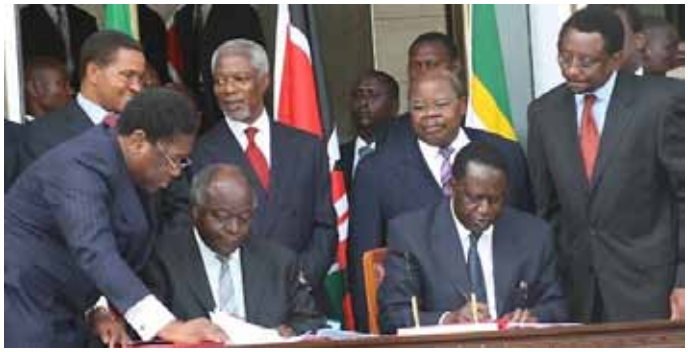
Instead, reports and allegations about the Chairman of the TJRC Amb Bethuel Kiplagat emerged indicating that he had been adversely mentioned in the disappearance and murder of the former Minister of Foreign Affairs, Robert Ouko, that he had illegally and irregularly acquired public land, but principally, that he participated in a security meeting that preceded the Wagalla massacre of 1984 in North-Eastern Province. It was felt by civil society organisations that these allegations against the chair were issues that fell within the general mandate of the TJRC and thus created a conflict of interest. The former Chairperson of the South African Truth and Reconciliation Commission Desmond Tutu also appealed to Amb Kiplagat to resign for the sake of the Commission. Kiplagat however refused to resign or step aside which plunged the TJRC into debates about the credibility and ability of the Commission to provide an accurate account of historical injustices in Kenya.

Some civil society groups also felt that with the exception of 2 or 3 Commissioners of the TJRC, the other Commissioners were more interested in preserving their high paying jobs than ensuring truth and justice prevails by declining to take a principled approach on this issue. As it were, a Truth Commission is an institution that should be above reproach and have the interests of the citizens first before all other interests. The work of the Commission stagnated for approximately 8 months and many civil society organisations refused to support it. Eventually, the Commission decided to charge ahead and conduct a haphazard exercise of collecting statements and conducting interviews. The interviews to date have brought forth some revelations of the county's history but the Commission has failed to have the cathartic effect on the Kenyan population that uncovering the truth is intended to bring.

Agenda Item 3

How To Overcome The Political Crisis – Power Sharing

The third agenda item was concerned with the sharing of political power and the formation of the grand coalition government. It was agreed that there would be a Prime Minister with authority to coordinate and supervise the execution of the functions and affairs of government. Each member of the collation would nominate one person from the National Assembly to be appointed as Deputy Prime Minister. The Prime Minister and the Deputy Prime Ministers could only be removed from office if the National Assembly passed a motion of no confidence with a majority vote.



The Coalition would only stand to disbanded it if the Tenth Parliament was dissolved, or if the parties agreed in writing to dissolve the coalition, or if one partner withdrew from the coalition. These agreements were entrenched in the Constitution through the National Accord and Reconciliation Act 2008, and the Act would cease to apply once the Tenth Parliament was dissolved, or if the coalition was dissolved or a new Constitution was enacted.

The 2010 Constitution in its transitional provisions recognised the Principles of the Partnership of the Coalition government and provided that its power sharing agreements would continue to be in force until the next general election.

One of the requirements of the Agreement on the Principles of Partnership of the Coalition Government and the recommendations made by the CIPEV Commission was that those most responsible for the various crimes committed would be investigated and prosecuted in order to address the fundamental root causes of recurrent conflict and create a more secure Kenya for all. In this regard, the attitude of the Kenyan Coalition Government has not been very direct as certain people in the coalition did not want to have the names forwarded to the ICC whereas others supported that idea. For instance, whilst the government publicly stated that it intends to honour its obligations under the Rome Statute on one hand; the Vice President Kalonzo Musyoka was assigned a shuttle diplomacy errand to garner support to have the Kenyan situation deferred by the UN Security Council.

Agenda Item 4

Tackling Long – Term Issues

"Justice delayed is justice denied"

Agenda Item 4
Tackling Long – Term Issues

The fourth agenda item - (commonly referred to as Agenda 4) had a range of measures that were expected to secure long-term and sustainable peace through constitutional and institutional reforms such as the police force, ensure legislative and land reform to address social and economic inequalities and foster national cohesion.

The long standing issues identified under Agenda Item 4 were:

(a) Undertaking constitutional, legal and institutional reforms;
(b) Undertaking land reforms;
(c) Tackling poverty and inequality, and combating regional development imbalances;
(d) Tackling unemployment, especially among the youth;
(e) Consolidating national cohesion and unity; and
(f) Addressing transparency, accountability and impunity.

Agenda 4 issues have had mixed success. The ratification of the constitutional Referendum and the subsequent Promulgation of the 2010 Constitution is the most prominent success of Agenda 4 items. The Constitution, promulgated on 29th August, 2010, contains provisions that are expected to secure good governance, promotion of fundamental Human Rights and respect for the Rule of Law – factors essential to the realization of long-term peace.

The Judiciary has received a small face lift with the selection of a new Chief Justice from the civil society sector but a lot of personnel and procedural reforms remain to be implemented within the judiciary, something that the new Chief Justice has yet to begin to deal with.

Police reforms have been slow if not non-existent. With the exception of the Police Commissioner Mohammed Hussein Ali being transferred to head the Postal Service as Postmaster General, the police reform agenda has only involved a reshuffle of police personnel across departments and jurisdictions. Most astounding in the police shuffle in the guise of reform was the promotion of Mr. Kingori Mwangi to the all important position of Deputy Director of Police Reforms yet he has been publicly and severally accused of extrajudicial killings in Mombasa during the Post Election violence, which the police and the Director of Public Prosecutions have refused to investigate or prosecute.

"Peace is not a matter of prizes or trophies. It is not the product of a victory or command. It has no finishing line, no final deadline, no fixed definition of achievement. Peace is a nerve-ending process, the work of many decisions by many people in many countries. It is an attitude, a way of life, a way of solving problems and resolving conflicts. It cannot be forced on the smallest nation or enforced by the largest. It cannot ignore our differences or overlook our common interests. It requires us to work and live together."

Bruno Stagno Ugarte, President of the Assembly of State parties, 2005 – 2008.

A Police Oversight Board was established in 2008, whose objective was to strengthen the public complaints mechanism. In addition, a police oversight law was drafted for enactment which would establish a police oversight authority with the power to investigate complaints and conduct of police officers. Police oversight commissions successfully worked in other countries such as the United Kingdom and South Africa, where the work of the oversight bodies have caused a significant reduction in extrajudicial killings and police brutality. The bill known as "the Independent Policing Oversight Authority Bill 2011" is currently before Parliament and had its second reading on 18th August, 2011. If the Bill is passed, and a well resourced Authority equipped with qualified staff and its own independent forensic laboratories, then the Authority is bound to have a real impact on the police force operations. One significant achievement has been the disbandment and reconstitution of the Witness Protection Unit which was previously under the office of the Attorney General. The Unit has been replaced by an independent Witness Protection Agency with the support of the United Nations Office on Drugs and Crime (UNODC). The Agency, though in its infancy stage, will make it possible for persons at risk to give evidence against individuals that commit crimes. A case in point is police whistleblower Bernard Kirrinya, who in 2007 documented 24 separate occasions in which a police death squad extrajudicially executed some 58 suspects. Mr. Kiriinya was subsequently assassinated in October, 2008. Had the Agency being in placed at the time, it may have been possible to have him admitted into the programme to allow him to give testimony against perpetrators within the police force.

Some of the other long-term achievements made, pursuant to Agenda Four, include the transparency of nominations into constitutional offices and the Chapter in the Constitution on Leadership and Integrity that has set a higher standard by which state officers are assessed and allowed into public office.

Chapter 2
STATUS OF THE CASES BEFORE THE ICC

"All Human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Article 1, Universal Declaration of Human Rights (UDHR), 1948

Authorisation having been given to the Chief Prosecutor to investigate crimes in Kenya on 31st March, 2010 by the Pre-Trial Chamber, the Prosecutor started gathering information and evidence to identify those most responsible for the violence. The Prosecutor was obligated under the Rome Statute to establish the truth and investigate both incriminating and exonerating circumstances equally. The Prosecutor was required to present the evidence he had obtained against specific individuals before the Pre-Trial Chamber ("the Chamber") and ask the Chamber to issue either warrants of arrest or summons to appear to secure their attendance in Court.

After collection of the necessary evidence, the Prosecutor made it known through an application dated 15th December, 2010 that the Office of the Prosecutor had decided to prefer charges against six suspects. The six suspects being: William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang commonly referred to as case 1; and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Maj-Gen (Rtd) Mohammed Hussein Ali commonly referred to as case 2.

The Application asked the Chamber to find that there were reasonable grounds to believe that the six suspects were most responsible for crimes against humanity committed in Kenya and to therefore issue summonses to the six suspects to appear before the Chamber.

Following the Application, on 16th February, 2011 the Chamber requested the Prosecutor to submit all witnesses' statements to be relied on for the purposes of the Application no later than 23rd February, 2011. The Chamber then made its decision on the Prosecutor's application on 8th March 2011. It held that in respect to Case 1 involving Ruto, Kosgey and Sang, the Chamber found reasonable grounds to believe that Ruto and Kosgey were criminally responsible as indirect co-perpetrators that is, committing crimes through another person for the crimes against humanity of murder, forcible transfer and persecution committed in select locations in Kenya. The Chamber, however, found that there were no reasonable grounds to believe that Sang was an indirect co-perpetrator because his contribution to the commission of the crimes was not essential. Instead, the Chamber was satisfied that there were reasonable grounds to believe that Sang, otherwise contributed to the commission of these crimes. As to the count of torture, the Chamber did not find reasonable grounds to believe that acts of torture were committed.

Regarding Case 2 involving Muthaura, Kenyatta and Ali, the Chamber found reasonable grounds to believe that Muthaura and Kenyatta were criminally responsible as indirect co-perpetrators for the crimes against humanity of murder, forcible transfer, rape, persecution and other inhumane acts. The Chamber however found that there were no reasonable grounds to believe that Ali is an indirect co-perpetrator because his contribution to the commission of the crimes was not essential. Similar to Sang above, the Chamber was satisfied that there were reasonable grounds to believe that Ali otherwise contributed to the commission of the crimes.

It should be noted that the Chamber held that in Case 2 (Muthaura, Kenyatta and Ali), there was no reasonable

basis to believe that any of the three were responsible for crimes committed in Kisumu and Kibera. On 21st September, 2011, the ICC prosecutor made a public announcement that he has other witnesses and evidence that would prove that the three organised attacks in Kisumu and Kibera which he would present to the Pre-Trial Chamber.

Nonetheless, based on the findings in the Court's decision of 8th March, 2011, the Chamber issued the summonses to appear for the six suspects subject to the following four conditions:

(i) to have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which the suspects have been summoned;

(ii) to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence;

(iii) to refrain from committing crime(s) set forth in the Statute;

(iv) to attend all required hearings at the International Criminal Court;

It is noteworthy that Judge Hans-Peter Kaul, one of the Chamber's judges, disagreed with the majority on the question of whether the crimes alleged amounted to crimes against humanity under the jurisdictional ambit of the Court. He held the view that the Prosecutor had failed in both cases to establish reasonable grounds to believe that the crimes were committed pursuant to or in furtherance of the policy of an organisation within the meaning of Article 7(2)(a) of the Rome Statute. The said Article 7 (2)(a) explains that an attack directed against any civilian population means a course of conduct involving the commission of crimes against humanity pursuant to or in furtherance of a State or organisational policy to commit such an attack. Judge Kaul was of the belief that the Court lacked the subject-matter jurisdiction in both cases.

Pursuant therefore to the said decision of the Chamber and a subsequent decision dated 18th March, 2011, the suspects were summoned to appear before the Court on 7th April, 2011 in The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Case 1) and on 8th April, 2011 in The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Case 2).

However, in the intervening period, on 4th April, 2011 before the suspects could appear before the ICC, an application was made by the Government of Kenya pursuant to Article 19 of the Rome Statute challenging the admissibility of the cases before the ICC. The Chamber considered the application before the suspects could appear and decided that, while reviewing the application, the Rome Statute and the Rules of Procedure and Evidence did not provide for any specific time-limit during which the Judges should make a decision regarding the application, and therefore the ongoing judicial proceedings would not stop.

The suspects appeared before the Court as had been scheduled. On 7th April 2011, Pre-Trial Chamber II of the

International Criminal Court (ICC) set the date for the beginning of the confirmation of charges hearing in Case 1 (Ruto, Kosgey and Sang) for 1st September, 2011. On 8th April, 2011 the Chamber set the date of the beginning of the confirmation of charges hearing in Case 2 (Muthaura, Kenyatta and Ali) for 21st September 2011.

During the two hearings, in the presence of the Prosecutor and the suspects, assisted by their Defence teams, Pre-Trial Chamber II verified the identity of the suspects and ensured that they were clearly informed of the crimes which they are alleged to have committed and their rights under the Rome Statute of the ICC.

Figure 11 - The Pre-Trial Chamber II in session.

At the first appearances of the suspects, the Presiding Judge, Ekaterina Trendafilova stressed that:

> **"It came to the knowledge of the Chamber through following some articles in the Kenyan newspapers that there are movements towards retriggering the violence in Kenya, by way of delivering dangerous speeches. I would like to remind the suspects - and note that I am not referring to anyone in particular. This is a general point to be made to all the suspects - such action could be perceived as a breach of one of the conditions clearly set out in the summonses to appear namely, to continue committing crimes within the jurisdiction of this Court. Accordingly, this might prompt the Chamber to replace the summonses to appear with warrants of arrest. However, the Judges would not prefer to resort to such a drastic measure and would rather (and we assume the suspects endorse this view) continue carrying out the proceedings smoothly and respecting the liberty of the three suspects".**

The suspects were ordered to appear before the Pre-Trial chamber for confirmation hearings on 1st September, 2011 for Case 1 and on 21st September, 2011 for case 2. It is important to note that a confirmation of charges hearing is not a trial.

Confirmation of charges hearings are proceedings where the Prosecutor presents his evidence to the Pre-Trial Chamber so that the Chamber can determine whether there is sufficient evidence to establish substantial grounds to believe that each suspect committed each of the crimes they are charged with. The suspects are also granted the opportunity to review the Prosecution evidence as well as present their own evidence and witnesses in their defence to rebut the Prosecution's case.

Possible Outcomes of the Confirmation of Charges hearing
At the close of the confirmation hearing, the Pre-Trial Chamber may:

(a) Confirm totally or partially the charges and commit the person(s) to trial.

(b) Decline to confirm the charges, a decision that does not prevent the Prosecutor from returning with a subsequent request on the basis of additional evidence.

(c) Adjourn the hearing and ask the Prosecutor to consider providing further evidence or to pursue further investigation or, alternatively, to amend the charges because the available evidence shows a different crime.

The Prosecution is required to support each of the charges with sufficient evidence to establish substantial grounds to believe that the person(s) committed the alleged crimes.

If the Pre-Trial Chamber finds that there is enough evidence to support the reasonable belief that the suspects are responsible for the crimes they are charged with, then the charges will be confirmed and the Pre-Trial Chamber will commit the person to trial before a Trial Chamber which will conduct the case. Once the Pre-Trial chamber confirms the charges, the six persons charged will cease being suspects and they will become accused persons. The trial Chamber is composed of three judges who are different from the three judges who presided in the Pre-Trial Chamber.

Chapter 3
REPARATIONS AND GENERAL ASSISTANCE FOR VICTIMS UNDER THE ROME STATUTE

"Justice delayed is justice denied"



Every war or war-like situation in which war crimes, crimes against humanity or genocide are committed, community and family life is always disrupted. In all cases, people are left homeless and without any economic activities to become self –reliant. More significantly, most families endure the death of a member, are inflicted on a disability or deformity and continue to suffer the trauma of the injustice inflicted upon them.

Trust Fund for Victims

The shortcomings of retributive justice as dispensed through the criminal justice system is that even where a perpetrator is found guilty, the injustices visited upon the victims still remain with the victim long after the violation has taken place. Therefore the drafters of the Rome Statute saw it fit to attempt to provide more comprehensive redress to victims other than just retributive justice. Therefore, the Rome Statue provided for the establishment of a Trust Fund for Victims which would have the power to assess the violations suffered by victims and provide proposals for redress. This would assist in restoration of communities and assist victims to move forward both socially and psychologically.

The Rome Statute creates a component for both reparations and general assistance for victims. Both these components are operated under the Trust Fund for Victims ("Trust Fund") which was established under Article 79 of the Rome Statute. The Trust Fund was established in order to improve and restore the dignity of the victims of the crimes covered by the Rome Statute. In this way, the ICC would be able to achieve retributive justice against the perpetrators of these crimes, but also be able to achieve social and restorative justice by assisting the actual victims who have suffered these crimes.

The first mandate of the Trust Fund: Reparations

Reparations per the Rome Statute refers to compensation that is ordered by the Court to be granted to particular victims who have been classified as victims in a specific case once the accused person has been convicted of a crime. Reparations can include restitution, compensation and rehabilitation of victims. It is encouraged that, as much as possible, the funds for reparations should be paid out from the assets that belong to the convicted person in that case. The Court does this by making an order that a fine or any assets – such as property or money – are paid to the Trust Fund to be given to the victims as reparation award. The ICC has not completed any cases as yet and convicted an accused person and therefore the Trust Fund has not yet been called upon to grant this financial compensation/ award to any particular victims.

The second mandate of the Trust Fund: General Assistance

The Trust Fund is mandated to give general assistance to victims where the ICC has jurisdiction. This assistance is different from reparation because the assistance can be given to general victims of a situation as opposed to particular victims in a case and the assistance can be given before any convictions have been delivered by the Court. In addition, the assistance is not based on whether an accused person has been found guilty or not – even in the event that an accused person is acquitted, the assistance can still be granted by the Trust Fund.

How the Trust Fund works

The Trust Fund is mandated to seek and receive funding and grants from countries that are part of the Assembly of States as well as from well wishers and other donor organisations.

Once a case has been opened in a particular country, the Trust Fund conducts an assessment in the affected communities with an aim to finding out what kind of harm has been suffered by the affected community and the nature and extent of the violations that have occurred to the victim survivors.

The Trust Fund then makes proposals for assisting victims and the affected communities and it notifies the Trial Chamber of its proposal. The Chamber reviews the proposal and may either accept or reject the proposal with or without recommendations. The Court would ordinarily not reject a proposal unless the proposal affects the judicial aspect of the case or where the victims or the affected community in the proposal are outside the Court's jurisdiction.

The type of assistance offered by the Trust Fund

The Trust Fund groups the types of assistance it provides to victim survivors into four categories which are: assistance to help victims rebuild their communities; assistance to victims of torture or mutilation; assistance to children and youth; and assistance to victims of sexual and gender-based violence.

The Trust Fund considers the nature of the crimes that have occurred, the types of injuries suffered by the victims, the evidence supporting the injuries and the size and location of the affected community and survivor groups as it maps out what type of support it should dispense.

The Trust Fund has explained that its rehabilitation and assistance projects are focused on the most vulnerable groups of victims that have acute or distinct injuries resulting from the crimes committed. The Trust Fund also makes an assessment of the environment and any services that are accessible to the affected community and tries to identify the gaps that exist. To provide an illustration, if the Trust Fund discovers that there are humanitarian organisations that have provided housing for victims who have been displaced but there is no medical assistance that is available for victims who have suffered amputations, the Trust Fund is likely to make recommendations to begin a medical programme to assist these victims.

Due to funding constraints, the mandate of the Trust Fund and in an effort to avoid duplication of efforts, the Trust Fund does not deliver humanitarian assistance such as provision of shelter, water and sanitation or food distribution.

Local Groups and the Trust Fund

Local community groups and Non - Governmental Organisations can be instrumental in generating visibility and getting assistance for victims and affected groups. The Trust Fund selects the projects that it wants to fund and implement from a list of proposals that have been submitted to it. Community based organisations and non-governmental associations can help the Trust Fund carry out a needs assessment in those areas and make proposals as to how best

to assist these victims and the affected communities. These project proposals should as much as possible have the participation of victims and their families. In addition, if these organisations/groups consider that they have the capacity to implement the proposals, they can apply to receive funding but on condition that they work together in the geographically affected areas that are under the jurisdiction of the ICC.

The Future of the Trust Fund in Kenya

With regard to the situation of Kenya, in a public bulletin dated July, 2011, the Trust Fund for Victims ("TFV") stated the following:

> **"The Kenyan Situation for purposes of generating support from the TFV is premature given the uncertainties related to the ICC's jurisdiction [in Kenya].**
>
> **The TFV Regulation 50 provisions prescribe the manner in which the TFV may become seized for purposes of conducting projects in a situation. Chambers is required to consider numerous factors when evaluating a TFV project filing such as whether or not the TFV would successfully respond to the provisions pertaining to the Rome Statute's Article 19 on jurisdictional determination. Jurisdictional challenge by summoned individuals (Art. 19 2 (a)) and the state (Art. 19 2 (b)) are ongoing and unresolved for the present for the Kenya Situation. Because these jurisdictional issues are unsettled it is for the time being not certain that the TFV would be successful in its Regulation 50 filing with the Pre – Trial Chamber.**
>
> **The legal posture of the Kenya proceedings are still evolving and in some respects it may not be considered a situation in which the TFV may yet respond. Once there are further developments on the proceedings, then the Board of Directors of the TFV may make a determination as to whether rehabilitation assistance should be initiated in Kenya. This may not be expected until at least the end of 2011."**

What does this mean?

This announcement meant that until the Pre-trial Chamber II and subsequently the Appeals Chamber made a ruling that the two cases against the 6 individuals were properly within its jurisdiction at the Confirmation of Charges hearing, the Trust Fund will not be operative in Kenya. As the Pre-trial Chamber and the Appeal Chamber rejected the Kenyan government's application, the Trust Fund for Victims is able to render assistance to victims in Kenya. The only other factor that would hinder the operation and jurisdiction of the Trust Fund is if none of the charges against all the 6 suspects are confirmed. However, this is a very remote possibility.

It is therefore important for community based organisations and NGO's to conduct needs assessments and draft proposals for consideration before the Trust Fund as they may be in the best position to articulate the needs of the communities that they serve. At the same time, these organisations should remember to manage the expectation of victims which is vital in ensuring that even as these proposals are drafted, victims are not given false impressions that these proposals will necessarily be approved by the Trust Fund.

Chapter 4
THE INTERFACE BETWEEN POLITICS AND THE ICC

The Principle of Complementarity

The Rome Statute has an obligation to allow a State which has jurisdiction over the crimes the opportunity to investigate and prosecute those who are responsible for crimes that are under the ICC's jurisdiction. By doing so, the ICC recognises the supremacy of national jurisdiction and encourages states to exercise their national criminal jurisdiction. This is by way of the Principle of Complementarity.

Because of this principle, before the Court can hear and determine a matter, the Rome Statute obligates the Court to first make an assessment as to whether a case before it is admissible. A case will therefore be held to be inadmissible if;

(a) The case is being investigated or prosecuted by the State that has jurisdiction over the case, unless **the State is unwilling or unable genuinely to carry out the investigation of prosecution**

(b) The case has been investigated by a state that has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness of inability of the State genuinely to prosecute

(c) The person concerned has already been tried for conduct which is the subject of the complaint unless the proceedings were for the purpose if shielding the person from criminal responsibility or the proceedings were not independent or impartial

(d) The case is not of sufficient gravity to justify further action by the court.[1] This basically means that if a State is or has genuinely investigated or prosecuted the same individuals for the same conduct/actions that the ICC would ordinarily have jurisdiction of, the ICC will have no choice but to find that case inadmissible.

However, if the State concerned is unable or unwilling to do so, the ICC has the right to exercise its own jurisdiction over the crimes in accordance with the principle of complementarity, acting irrespective of the will of the State. In Kenya, the ICC Prosecutor could only proceed against Kenya on the basis of the fact there were no local investigation or prosecutions being conducted by the Police and the AG's Office and Kenya had consistently failed to establish a local Tribunal to deal with post election violence suspects.

Whenever the ICC exercises its jurisdiction, it implies a declaration of unwillingness and inability of the States with the jurisdiction over the crimes. The principle regulates the relationship between the jurisdiction of the ICC and of domestic courts.

Inability versus unwillingness (to investigate and prosecute)

In the Democratic Republic of Congo (DRC) where systemic gross violations of human rights have occurred after many successive wars since 1994, the government of the DRC faced challenges of reconstruction and establishment of the Rule of Law. It also considered that it did not have the capacity to investigate and prosecute those most responsible for the conflict. After the war, there were no judicial institutions that remained in addition to a lack of qualified judicial personnel to try the suspects. Therefore, in March

1 Article 17, Rome Statute of the International Criminal Court.

2004, the DRC government referred the situation in the DRC to the ICC to investigate and prosecute crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute on 1st July, 2002. In particular, the DRC government took the opportunity in 2006 to hand over to the ICC, a rebel leader Thomas Lubanga Dyilo that it had managed to capture.[2] Since then, the DRC has made attempts to deal with international crimes by use of its military courts. The military courts have exclusive jurisdiction over cases that involved international crimes even when the defendant is a civilian. These military courts have invoked the Rome Statute and its Military Penal Code in a remarkable effort to deal with the perpetrators of international crimes.

The above is contrasted to Kenya, where despite the issues raised about the effectiveness and independence of the judiciary at the peak of the poll violence, there is a fully functional judiciary and police service that could deal with perpetrators of post election violence, if there was sufficient political will. All suggestions such as using the current judiciary, establishments of a special tribunal or creating a special division of the High Court were rejected and legislators were happy to leave things as they were. In any event, the CIPEV Report recognized that there would be obstacles to the investigations of the Post-Election Violence, lack of political will and a judicial fear of the political establishment. It therefore provided timeframes for compliance with the establishment of a special tribunal with a view of facilitating the conduct of the trials in Kenya and keeping the ICC jurisdiction at bay. However, these timelines were not met and it is this judicial void that gave the ICC Prosecutor sufficient grounds to seek leave to initiate an investigation into the Kenyan situation.

The admissibility challenge and the jurisdiction of the ICC in Kenya

An application was made by the Government of Kenya challenging the admissibility of the cases before the ICC based on the fact that the government had started constitutional and institutional reforms and in particular, judicial reforms.

The government argued that the issue of admissibility was interrelated with the principle of complementarity that if Kenya was genuinely willing and able to handle the cases domestically, the ICC should halt the proceedings before it. The government submitted in its admissibility challenge that it was keen on prosecuting those most responsible for the post election violence. On 30th May, 2011, the Pre-trial chamber rejected the government's application based on the grounds under which an admissibility challenge may be brought. Article 19 (2) (b) of the Rome Statute, provides that a challenge for admissibility and hence the jurisdiction of the Court, must be made on the facts that it is investigating or prosecuting the case or it has investigated or prosecuted. The Kenyan government attached letters from the Attorney General written in 2011 ordering the Police Commissioner to include the six suspects in its investiga-

2 Thomas Lubanga Dyilo (born 29 December 1960) is a former rebel leader from the Democratic Republic of the Congo (DRC). He founded and led the Union of Congolese Patriots (UPC). On 17 March 2006, Lubanga became the first person ever arrested under a warrant issued by the International Criminal Court and was charged with the war crime of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities. Rebels under his command have been accused of massive human rights violations, including ethnic massacres, murder, torture, rape, mutilation, and forcibly conscripting child soldiers.

tions into the post election violence. However, the Court explained that the government had not provided sufficient proof that it was or it had investigated the cases.

It can be anticipated that the government of Kenya shall launch some form of an investigation or prosecution into the six suspects. The objective of those investigations will be to file another application before the ICC that it is now investigating or prosecuting the six suspects arguing that it has primary jurisdiction of the case(s). However, the government of Kenya fails to appreciate the provisions of Article 17 of the Statute, which provides guidance to the ICC as to what factors it should consider when accessing the admissibility of a case before the ICC. These factors include whether the investigations or prosecutions are **genuine,** whether the proceedings are being **undertaken for the purpose of shielding the suspects, and** whether the proceedings are **for the same conduct for which they are being prosecuted before the ICC.**

The Kenyan government then launched an appeal before the Appeals Chamber of the ICC. The Appeals Chamber delivered its Decision on 30th August, 2011. The Chamber emphasised the principle of 'same person, same conduct' which is interpreted to mean that in order to challenge the admissibility of the case before the ICC, the Kenya Government had to show that investigations were underway for the same person (the suspects) and the same conduct (PEV) that is before the ICC. In the words of the Court, 'it follows that for such a case to be inadmissible under Article 17 (1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court. Those cases are only inadmissible before the Court if the same suspects are being investigated by Kenya for substantially the same conduct'. The Appeals Chamber made the finding that whatever investigations were underway, they were not in relation to the six suspects or those most responsible for the crimes committed at the material time and further, no evidence had been led to indicate how far the investigations had reached.

One can see that the arguments advanced are twofold: one, that investigations had to have been commenced as against the same suspects over the same conduct by the Kenya Government; and, secondly, there had to be sufficient evidence furnished to the Court as to what investigations, if any, were ongoing in Kenya as at the time of challenging the admissibility of the cases.

It is worth mentioning the dissenting opinion of Judge Usacka. The Judge's contention was that the Kenya Government had a viable appeal, especially in light of the fact that Kenya's is the first **proprio motu** case, where the prosecutor applied for an investigation.[3]

Ultimately, however, the Appeal Chamber rejected the appeal.

3 Article 15(1) of the Rome Statute of the International Criminal Court provides that 'The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court'. Proprio motu means that the Prosecutor on his own initiative opens an investigation into a situation. Kenya is the first country in which the Prosecutor has exercised his powers under this provision of the Statute.

Chapter 5
CONCLUDING REMARKS AND MAPPING THE WAY FORWARD OF THE ICC PROCESS

Are the six suspects eligible to contest and hold public office?

Whether any of the six suspects will be able to contest and hold public office is a contentious issue that has been interpreted in different ways by various legal scholars.

In particular, people want to know whether Uhuru Kenyatta and William Ruto will be eligible to contest in the General Election of 2012 particularly as the two are being endorsed in some quarters, as community leaders for Presidential office in the next general election. [1]

The Constitution and Kenyan law does not expressly provide whether individuals or public officers charged with an offence should be suspended or banned from holding or seeking public office.

Strictly speaking, there is no legal bar that would prevent any of the 6 suspects from pursuing and assuming public office. However, if the charges that were read out to the 6 suspects are confirmed by the Pre-trial chamber, it can be argued that in accordance with the Public Officer Ethics Act (Cap 183) as well as Chapter 6 of the Constitution, they would not be allowed to be in office or participate in the next General Election. Article 99 (1) (b) states that a person is eligible for election as a Member of Parliament if the person satisfies any educational, moral and ethical requirements prescribed by the Constitution or by an Act of Parliament; and Article 99 (2) (h) provides that a person is disqualified from being elected a Member of Parliament if the person is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.

Chapter Six of the Constitution is about leadership and integrity of State Officers. Members of Parliament are State Officers that according to Chapter Six of the Constitution, demonstrate respect for the People of Kenya, bring honour to the Nation and dignity to the office and promote public confidence in the integrity of the office. Therefore, these provisions could make a case that the crimes for which the 6 suspects are charged with that include responsibility for murders and rapes against Kenyans is not in tandem with inspiring confidence in the public office or bring honour and dignity to the public office.

However, with the current political climate, it is doubtful that the government will suspend the suspects who are in public office or prevent them from participating in the general election.[2] The suspects will also contend that in any event, the Constitution upholds the principle of the presumption of innocence. This means that even where someone has been charged with a criminal offence, the law considers that person to be innocent until they are proven guilty by a Court of law. Therefore, if they were to be refused to run for office, their rights would be violated.

In addition, the language used in Article 99 (2) (h) of the new constitution that the individual should have been "found" to have misused or abused a State office, signifies that a **judicial finding** should be delivered that the six suspects are

1 A Petition (Nairobi Petition No. 21 /2012) was filed early 2012 at the High Court in Nairobi to determine this issue.

2 Following the confirmation of Charges against four of the six suspects due to immense pressure from civil society, two of the accused persons Uhuru Kenyatta & Francis Muthaura) resigned from state offices. However, Uhuru Kenyatta still holds the position of Deputy Prime Minister.

unfit to hold office to disqualify them from holding public office. In the end, this means that if the charges against the 6 are confirmed, civil society groups or individuals will have to take the initiative to seek the enforcement of the ideals and standards in the Constitution before a Court of law to make a finding that the nature of offences that the six suspects are charged with, the fact that the cases are before an International Tribunal being followed by the whole world, make the six suspects unfit to continue to hold office.

What will happen if any of the six suspects are in public office and the ICC finds them guilty?

It is readily acknowledged that the political allies of Uhuru Kenyatta and William Ruto are relying on the fact that the cases before the ICC will be completed well after the next general election. They anticipate that by the time the cases are decided, they will still be in Parliament and more importantly, they hope that one of the suspects will be President of Kenya which would make the prosecution of these cases very complicated and embarrassing for both Kenya and the international community.

However, if the suspects are found guilty, Article 99 (2) (g) of the new constitution is very clear, that they should not continue to hold office. The section provides that a person is disqualified from being elected a Member of Parliament if the person is subject to a sentence or imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election. This means that if they are found guilty and sentenced to more than six months' imprisonment, whether or not the ICC or Kenya has an obligation to extradite them to serve their sentence according to the law, they would not be able to continue to hold office as long as the sentence has been pronounced by the Court.

What will happen if the charges against the six suspects are not confirmed?

It is more of a political issue than a legal one as to what will happen if the charges against the six suspects are not confirmed. This is especially so in light of the emphasis that Confirmation of the Charges is not a finding of guilt. The confirmation stage is only the threshold required to cross over to the main hearing of the cases.

In the history of the ICC, it is only in one case that a suspect has been successful at the confirmation of charges stage. This was in the case of **The Prosecutor v. Bahar Idriss Abu Garda**[3]. On 8 February, 2010, Pre-Trial Chamber I refused to confirm the charges against Abu Garda. Thereafter on 23rd April, 2010, Pre-Trial Chamber I issued a decision rejecting the Prosecutor's application to appeal the Chamber's decision that declined to confirm the charges. However, even where the Pre-trial Chamber fails to confirm charges, it does not preclude the Prosecution from subsequently requesting the Chamber to confirm the charges if the Prosecutor is able to supply additional evidence.

The effect is therefore that the ICC may decide to confirm the charges against all or some of the accused persons before it.[4] It is therefore probable that if the charges are

3 ICC-02/05-02/09 - Situation in Darfur, Sudan

4 On 23rd January 2012, the ICC Pre-Trial Chamber II delivered ruling on the two cases on the Kenyan situation before the court. Cases against four of the six suspects were confirmed (Uhuru Kenyatta, Francis Muthaura, William Ruto and Joshua Arap Sang). The two whose cases were not confirmed are Major Hus-

confirmed, the divide will widen between those who support the ICC process and those who are opposed to it.

It has to be mentioned that whether or not the Prosecutor's application is successful, the Government of Kenya has made it appear that they are not in support of the Prosecutions. The Kenyan Government challenged the admissibility of the ICC cases on the grounds that Kenya had initiated investigations into the post election violence. It is uncertain as to whether the Kenyan government will continue to honour their obligations under the Rome Statute given that it has raised reservations about the Court's jurisdiction over the post election violence.

With regard to victims, if the Charges are confirmed, victims will have hope that justice may be done in addition to general assistance offered under the trust fund for victims.

What local options exist for the victims of the post election violence?

(i) The first option: The government of Kenya through parliament and the Directorate of Public Prosecutions

The future for ensuring justice for post election violence using government systems is bleak. The proposals to establish a Special Tribunal for Kenya have since failed and forgotten. Since 2008, the Attorney General's office and in particular the former Department of Public Prosecutions that is in charge of prosecutions in Kenya have done nothing to ensure that credible investigations and prosecutions are conducted. With the passage of time, the availability of evidence and testimony becomes more difficult to collect and rely on.

The 2010 Constitution made the Department of Public Prosecutions a Constitutional Office – the Directorate of Public Prosecutions (DPP). The DPP's office was headed by Mr. Kerriako Tobiko who was then selected to head the Directorate. Therefore, it is unlikely that the previous position of inaction and complicity of his office will suddenly change now.

(i) The second option: The Truth, Justice and Reconciliation Commission (TJRC)

The Truth, Justice and Reconciliation Commission, as the name suggests has a component/mandate to endure for "Justice". However, the justice aspect of the TJRC is limited to making recommendations to the Director of Prosecutions to investigate and prosecute alleged perpetrators of past injustices. There is no specific charge on the Commission to recommend investigations for the post election violence in particular, and at the end of the day, they are merely recommendations.

Victims of the post poll violence must therefore seek alternative methods of redress.

(ii) The third option: Litigation

Three Non-governmental organisations have teamed up in an effort to file a suit against the government as a result of the post election violence. It may be instrumental for these organisations to seek justice on behalf of a constituent of victims to ensure achievement of tangible justice.

Armed with a new constitution with a robust bill of rights and a more receptive judiciary, victims and groups that

sein Ali and Henry Kosgey. See ICC-01/09-02/11 & ICC-01/09-01/11.

provide victim assistance should come together and file declaratory and civil suits against the government for systemic failures to protect and offer redress in the face of the violence. In addition, in places where property such as land was forcibly taken, those who have lost their property can file suits to compel those in possession either to relinquish the property and/or pay compensation for such property.
There is a strong case for taking judicial action against injustices inflicted on victims as long as there are strong willed civil society groups that are willing to work with victims to achieve real results.

(iii) The forth option: The National Cohesion and Integration Commission

The NCIC has a broad-spectrum of powers to eliminate discrimination and promote tolerance and acceptance of diversity in all aspects of national life. In particular, the NCIC should work hand in hand with the government to support the government in the resettlement of IDPs. The actions and sentiments from community leaders of rejecting **in toto** internally displaced communities are at the core of discrimination on the basis of ethnicity and tribalism. The NCIC has been unconscionably silent on this issue. The NCIC's mandate to **"identify and analyze factors inhibiting the attainment of harmonious relations between ethnic communities, particularly barriers to the participation of any ethnic community in social, economic, commercial, financial, cultural and political endeavours, and recommend to the Government and any other relevant public or private body how these factors should be overcome"**[5] is a mandate that if utilised, could be used to realise harmony and understanding between previously estranged sections of community. The NCIC should be encouraged to analyse and make recommendations for the implementation of reintegration programmes for IDPs that would prefer to return to their homes instead of being resettled on land that may be less viable than their previous homes.

5 Section 25 (2) (j) National Cohesion and Integration Act (Cap. No. 12 of 2008) Laws of Kenya

CONCLUSION

At the end of the day, Kenya's relationship with the ICC is one that would never have developed if the government was sincere about the promises and ideals that it subscribed to at the peak of the violence. This publication has sought to remind us and analyse the post election violence and the promises that we made to each other to save this country.
As many of us enjoy the comforts of our homes, we have forgotten the scale of atrocities visited upon thousands of Kenyans. We have easily forgotten that ensuring justice, both retributive and socio-economic is essential in ensuring we do not repeat past mistakes. Kenya should be a legacy worth leaving to our children, and it should not be a legacy of ethnic hostilities that we pass on to future generations. Peace and reconciliation cannot be achieved by having a series of meetings in hotel conference rooms where we invite victims to relieve their tragic pasts. Reconciliation can only be effective when there is an admission of culpability by perpetrators which is cushioned by remorsefulness.

Moreover, the systematic failures in Agenda 3 and 4 issues raise fears that we are either not brave enough, not affected enough, or just not Kenyan enough. The government must take a leadership role in all the post election issues raised,

such as IDP resettlement, justice and reconciliation. The government should renew its resolve to address the past and continuing violations in a genuine and comprehensive manner to ensure non-repetition of violence.

As Kenya fast approaches the 2012 election, the political landscape is unclear in the face of possible ICC indictments. We must therefore remember and reiterate that the ICC process only targets individuals most responsible for crimes but it does not target communities. The ICC is an independent court that is only concerned with dispensing justice in the hope that by ending impunity, the same human rights violations will not occur again. **We must also recall that the Office of the Prosecutor and the Judicial Division of the ICC are separate entities and thus we must refrain from disparaging and condemning the ICC on the whole basis of ethnic biases that we may have.**

For some victims, the victim trust fund is an opportunity that could be instrumental in rebuilding a way of life that was invariably disrupted. The assistance may help victims rebuild their communities, assist victims of torture or mutilation, assist children and the youth, as well as victims of sexual and gender-based violence. Civil society and particularly community based organisations, should make efforts to reach out to the trust fund and provide it with the necessary guidance to allow it to effectively carry out their mandate.

Civil society has an important role to play in lobbying and benchmarking the progress by government in addressing Agenda 3 and 4 issues. Equally important is the responsibility placed on civil society to ensure that justice and peace options that are available for victims are realised. Civil society must engage with the various Commissions that have been established in response to various Agenda items, from legislation on the Police Oversight Authority, to the government's IDP resettlement programme to the NCIC. Civil society must be the bridge that connects victims and victims' rights to these Commissions to ensure that their rights and interests are articulated and enforced.

We therefore remain hopeful and vigilant that peace and justice is achieved in order to ensure non-repetition of the violence and break a culture of impunity.

Chapter 6
APPENDICES

A TRAIL OF LIES AND DECEPTION

Post-Election Violence: Impunity Constraint to Justice [1]

About International Center for Policy and Conflict

The International Center for Policy and Conflict (ICPC) is a non-profit and non-partisan organisation founded in 2005 to create a platform to foster democratic, peaceful, secure and just societies in Africa and globally. The Great Lakes and Horn of Africa region which have experienced widespread political instability for decades is the ICPC major focus. The Center is registered in Kenya under the Trustees (Perpetual Succession) Act Chapter 164.

Institutional Objective

The International Center for Policy and Conflict reflects and engages in public policy and law making dialogues, research and analysis as well as advocacy and capacity building on the broad realms of transitional justice, human security, conflict resolution and gender justice in order to prevent conflict recurrence; promote accountability and equality; and deepen culture of justice and respect for human rights and democracy. The Center is meant to establish, promote and build a sustainable human development; and democratic human rights adhering states.

Background information

The Commission of Inquiry into Post-Election Violence (Waki Commission) was set up by the Kenyan coalition government as part of the peace and reconciliation mediation process that brought the violence of early 2008 under control. The commission reported in October, recommending a series of reforms and establishment of a special tribunal of international and Kenyan judges to investigate and prosecute those most responsible for the violence. The Waki report contained a strict timeline for setting up the tribunal and putting it to work, which, if breached, would require the mediator -Kofi Annan- to pass a sealed envelope with the names of chief suspects to the International Criminal Court (ICC).

On February 12, 2009, the Kenyan parliament voted against a Constitutional Amendment Bill establishing the proposed tribunal made up of Kenyan and international judges. The Waki Commission had set a deadline of January 30 to pass the legislation but on February 24, Annan granted the government of Kenya more time to re-introduce the bills.

The International Center for Policy and Conflict has been working and advocating for the enactment of the Special Tribunal for Kenya (STK) to try the perpetrators of the 2007/8 post election violence. The Center engaged vigorously with the Commission of Inquiry into Post-Election Violence (CIPEV) popularly known as 'Waki Commission' in conjunction with, Kenyans for Peace with Truth and Justice (KPTJ) and other Civil Society organizations (CSOs).

Waki Commission released its report on October 16th 2008. Immediately, ICPC initiated consultations with CSOs, particularly those working under the auspices of MultiSectoral Task Force on Transitional Justice, and held a

1 This briefing report is prepared by the International Center for Policy and Conflict(ICPC) as part of its advocacy and monitoring of the post-election violence prosecutorial mechanisms measures

series of consultative meetings on the Special Tribunal for Kenya. These meetings interrogated the Waki Commission proposals and looked at practical technicalities and challenges (legal and political obstacles) to be overcome. They made the following proposals/ requirements to be met;

- Constitutional safeguards and tribunal statute to meet criteria set by the Waki report
- For tribunal to win confidence of victims it must be credible, impartial and have independent investigations and prosecutions done
- It must guarantee international standard of fair trials
- It must uphold appropriate penalties in event of convictions The criminal jurisdiction must ensure that as wide crimes and perpetrators are prosecuted
- It must have financial and political independence
- A strong effective victims and witness protection mechanisms must be provided

The official government Bills for the Special Tribunal were published in late December 2008. But due to its deep flaws and lack of consultations the Constitutional Amendment Bill 2008 was defeated in Parliament on February 12, 2009. Since then there has been no serious genuine commitment, will and intention to prosecute the perpetrators of the post-election violence crimes.

Preliminary Assessment Report

Introduction

Today marks almost one year after the Commission of Inquiry into Post-Election Violence (CIPEV) handed over its groundbreaking report on October 16th, 2008. The report set the date of March 31st, 2009 as default line for the Kenyan Government to enact the Special Tribunal for Kenya. On December 16th, 2008 President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement detailing the roadmap towards executing the CIPEV recommendations. However, the agreement roadmap omitted certain key aspects of the recommendations while overlooking others. The Office of the Chief Prosecutor of the International Criminal Court (ICC) made its examination of the Kenyan Situation public on February 2008. The Chief Prosecutor has received numerous Article 15 communications on the post-election violence including the CIPEV report, envelop containing the prime suspects and the documents with supporting evidence and materials.

Special Tribunal for Kenya

In a desperate attempt to enact the Special Tribunal for Kenya, the Government of Kenya convened a special session of the Parliament. Regrettably no substantial business relating to the Tribunal was conducted. Instead, the Government waited until the last moment to the deadline and without serious consultations introduced a deeply flawed Constitutional Amendment 2009 Bill on February 12, 2009. Civil society (see media advert February 9th, 2009), a section of Parliamentarians and international community pleaded for the withdrawal of the Bill to allow for more consultations and amendments to the flaws with no avail. The Bill was defeated. Consequently, the Kenyan government requested for extension of the deadline to August 2009.

Between March 29 and April 2, 2009, Civil Society Delegation

held consultations with Kofi Annan and the International Criminal Court on the Complementarity nature of the ICC and the Special Tribunal for Kenya. It was agreed that ICC would only intervene if the Kenyan Government fails to enact a national mechanism that meets international standards and lack of genuine investigations and prosecutions. There was also a felt need for the ICC to conduct an outreach program to cause an understanding of its jurisdiction, operations and its work in general among the Kenyan population and more specifically, the victims.

International Criminal Court

Kenya became a member of the ICC in 2005. This means that without any further action on the part of Kenyan authorities or any international actor, the ICC prosecutor may choose to seek to open an investigation into genocide, crimes against humanity, and/or war crimes that have been committed in Kenya or by Kenyan nationals. In order to determine whether to seek to open an investigation, however, the ICC prosecutor must first carry out an analysis of whether alleged crimes fall within the court's jurisdiction and whether any case based on these crimes would be admissible. See below for discussion of the factors that the prosecutor will take into account in his analysis. This analysis or active monitoring, thus, precedes any decision to investigate, and may in fact lead to a decision not to investigate.

On 3rd July 2009, the Kenyan government delegation including the Justice Minister, Lands Minister and the Attorney General met the ICC Chief Prosecutor. This was one day after meeting the Chief Mediator Dr. Kofi Annan. After the meeting with Prosecutor, a common statement was issued in The Hague by a Government delegation from Kenya and the Chief Prosecutor. It stated that in order to prevent a recurrence of violence during the next election cycle, those most responsible for previous post-election violence must be held accountable. Kenyan authorities committed themselves to refer the situation to the Court if efforts to conduct national proceedings fail.

Two months later, after the signing of the agreement between the ICC and Kenyan government delegation, no substantial progress has been made. It is significant to observe that since October 16th, 2008 when the CIPEV was released, nothing tangible has been implemented flowing from the groundbreaking report. This raises grave legitimate concerns as to the genuinety, commitment and or will on the part of the Coalition Government, specially the President, to bring to justice those bearing responsibility for the post-election violence.

On 9th July 2009, the African Union Panel of Eminent African Personalities, Chaired by Kofi Annan, submitted to the ICC Chief Prosecutor the sealed envelope containing a list of persons allegedly implicated and supporting materials previously entrusted to Mr. Annan by the Waki Commission on the post election violence.

On 16th July, Prosecutor Moreno Ocampo received the sealed envelope and 6 boxes containing documents andsupporting materials compiled by the Commission. The Prosecutor opened the envelope, examined its content and resealed it. On 14 July, the Prosecutor received two

reports from the Kenyan authorities on witness protection measures and on the status of legal proceedings carried out by national authorities(this is partly adhering to the agreement signed on the 3rd, July 2009).

On 17th September, 2009, the Prosecutor met with Kenyan Minister of Lands James Orengo. The Minister emphasized the need to fight impunity for post election violence in Kenya in order to prevent a recurrence of violence in 2012. The Prosecutor confirmed his invitation to Justice Minister Kilonzo to visit The Hague again at the end of the month i.e. September 30th , 2009. On 18th September 2009, the Chief Prosecutor met with representatives of Kenyan civil society and the national statutory human rights institution, Kenya National Commission on Human Rights (KNCHR). The civil society present included International Center for Policy and Conflict (ICPC), Kenya Human Rights Commission (KHRC), Kenyan Chapter of the International Commission of Jurists (ICJK) and the International Center for Transitional Justice (ICTJK) in The Hague (see picture below). The Prosecutor emphasized that Kenya can prove an example of how to work together with the international community and the Court to prevent recurrence of violence in future.

Kenyan CSOs representatives together with the ICC Chief Prosecutor Moreno Ocampo at The Hague, Netherlands.

International Criminal Court Intervention Procedures

According to ICC procedures, the ICC prosecutor must first make an independent determination to proceed with an investigation and must seek authorization to initiate an investigation, and any other aspect, from a chamber of ICC judges. The suspects' names contained in the envelope prepared by the Waki Commission would be further information in addition to that which the prosecutor has already received from the Kenyan National Human Rights Commission, individuals, and NGOs-on which to base his decision as to whether or not to seek to open an investigation. If the ICC prosecutor determines that there is no reasonable basis to proceed with an investigation under the ICC's statute, he is not required to seek to open an investigation. He may always reconsider this decision on the basis of new facts of information. ICPC has compiled and tried to answer a few commonly asked questions below:

1. What is the ICC prosecutor taking into consideration in determining whether or not to begin an investigation?

The ICC prosecutor's decision to initiate an investigation is guided by requirements set out in the ICC treaty. First, there must be a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed. ICC crimes include genocide, crimes against humanity, and war crimes. 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. This is known as "complementarity" and makes the ICC's international jurisdiction secondary to that of national authorities.

2. Why is the ICC's jurisdiction complementary? What are the advantages of national trials?

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.

3. If the ICC prosecutor opens an investigation in Kenya, how many people will be charged?

It is the policy of the ICC prosecutor to target only those persons bearing the greatest responsibility for the gravest crimes. While ICPC has advocated that the ICC Chief Prosecutor apply this standard flexibly, it is unlikely that more than a handful of persons would be charged were the ICC to open an investigation and proceed with prosecutions in Kenya. The prosecutor's case in Uganda yielded five arrest warrants, while the two cases in the DRC have yielded two arrest warrants each. The prosecutor has sought a total of six arrest warrants in the Darfur situation, and just one in the Central African Republic.

Therefore, even if the ICC acts with regard to the situation in Kenya, it will most likely prosecute at most a handful

of individuals. To bring full accountability and, moreover, to break long-standing cycles of impunity, Kenyan authorities will need to pursue national investigations and prosecutions. Indeed, it is legally obliged to do so under national and international law. As the UN special rapporteur for extra-judicial executions, Philip Alston, concluded in his recent report, the Waki Commission-recommended special tribunal "is absolutely indispensable if justice is to be done and if the appropriate lessons are to be learned before the next elections. An international tribunal cannot possibly achieve justice on a broad scale in this regard."

The UN special rapporteur also suggested that he saw powerful reasons for the ICC's involvement to try those most responsible. The complementary nature of the ICC's jurisdiction means, however, that it should only intervene if Kenya's authorities demonstrate that they are unable or unwilling to prosecute these individuals, and if the ICC's other jurisdictional pre-requisites are met.

4. Even after Kofi Annan has handed over the envelope to the ICC, and Gitobu Imanyara's Bill is up for debate in parliament soon, what steps should be taken to ensure a more credible process this time around?

Efforts to pass legislation establishing the special tribunal were marred by a failure of leadership. President Kibaki and Prime Minister Odinga made little effort to marshal support for the bills and to impress upon lawmakers their collective responsibility to establish the tribunal as a means to provide accountability. Severe limits were placed on the consultation process leading up to the tabling of the special tribunal legislation. Calls by civil society for further amendments to ensure the tribunal's credibility and independence were repeatedly rebuffed; as a result, the special tribunal bill and the constitutional amendment bill were poorly drafted. This allowed, in the words of the UN special rapporteur on extra-judicial executions, "opportunistic efforts by politicians with a clear vested interest in promoting impunity to undermine the steps required to create the Special Tribunal."

Every effort must now be made to avoid a repeat of this same outcome. The Kenyan government should hold consultations with civil society and legal experts to incorporate the many criticisms of the special tribunal and constitutional amendment bills as currently published, and parliament should involve itself in these consultations to guarantee that the concerns of members of parliament are addressed before the bills are introduced. Criticism of the bills and the process may be justified. It is important to note, however, that even if the special tribunal is established, the ICC will retain jurisdiction and can step in as needed. Thus, any member of parliament who argues that the special tribunal should be rejected in favor of the ICC option could be proving a lack of understanding of the fact that the two processes are not mutually exclusive.

International partners also have a role to play in ensuring a successful outcome. Foreign governments should impress upon Kenyan authorities that the establishment of the special tribunal is the key test of the commitment of the coalition government and the 10th parliament to the reform agenda brokered by Kofi Annan. Foreign governments could also pledge their financial support to the special tribunal,

if it is established in a credible process. The International Criminal Court should continue its monitoring and analysis of the process.

5. If the special tribunal is established, but does not act independently and impartially, does this mean that the perpetrators of the post-election violence will not be brought to book?

Even if a special tribunal is established, the ICC retains its jurisdiction over the situation in Kenya. Regardless of the fact that Kofi Annan has transmitted the Waki Commission envelope to the ICC prosecutor, the prosecutor could decide at any point to seek to initiate an investigation and to bring prosecutions if he considers that the crimes alleged are sufficiently grave and that national proceedings are not being conducted credibly or have not been conducted with regard to particular individuals or incidents. Proceedings conducted in Kenya in a manner designed to shield those responsible from criminal responsibility or which suffer from unjustifiable delays or are not independent or impartial would not act as a barrier to the ICC's subsequent jurisdiction.

Right of Victims

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. As pointed out by Lord Denning: "a right without a remedy is no right at all".

The United Nations Commission on Human Rights has recognized the interests of victims of violations. The "Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law" (hereinafter "UN Principles on the Right to a Remedy"), adopted by the United Nations Commission on Human Rights at its 56th session in 2008 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.

There are a number of things the Kenyan government needed to do before the 30th September deadline for it to submit a clear roadmap on a national mechanism it had put in place to punish the perpetrators of post election violence

as recommended by the Waki Report. First on card was for it to provide a detailed report on genuine investigation and prosecution steps it had taken since adopting the recommendation of the Waki Report and secondly, to report on the witness protection and evidence preservation Acts.

The government has partly perfumed on the above two but has failed on the third one which was to submit a clear roadmap on a national mechanism it had put in place to punish the perpetrators of post election violence as recommended by the Waki Report and this is the crux of the matter. It is clear that the attorney general has already submitted a report that his department had already prosecuted over 500 cases related to the post election violence. The government has come up with the witness protection act and its operationalisation mechanism. The question that renders itself for determination is whether by this action or omission, the country has done an act of self referral to the International Criminal Court. Experts are giving varying answers to this question. There are those whose school of thought is that by the country's reneging on its commitments after clear time frames, the country has automatically made a self referral and saves the ICC Chief Prosecutor the rigors of the pre trial chamber for the ICC to commence investigation for the Kenyan Case.

There are those who insist however that the Rome Statute will have to be followed to the latter before the Kenya case can see the light of the day. Be that as it may, indeed the events of the 2nd of July 2009 are very clear. That Constitutional Affairs minister and his lands counterpart met with the chairperson of the Committee of eminent persons Koffi Anan and one day later with the International Criminal Chief Prosecutor Luis Moreno Ocampo where the 30th September deadline was fixed. It was agreed that the country will come up with a mechanism to deal with post election violence perpetrators to stem recurrence of such violence.

As matters stand now, the deadline given by the International Criminal Court are final and any argument to the effect that it is not cast in stone is circular and a game of musical chairs to say the least. This was as advanced by Lands minister James Orengo. It is also without any doubt that the decision by the cabinet on the 30th of July to expand the mandate of the Truth Justice and Reconciliation Commission was vague and null and void ab initio. We need not reiterate that TJRC and the ICC are two quite different organs whose mandates are mutually exclusive and non substitutable.

Indeed the implementation of the Commission of Inquiry into post election violence was given impetus by signing of an agreement by both the President and the prime minister on the 16th of December 2008. Article one of that agreement concerns the setting up of a special local tribunal. Article four of this agreement provides express provisions that those implicated in the post election violence should be suspended from any public office. Any attempt to circumvent the creation of a special tribunal for Kenya and adherence to the rigors thereof is an exercise in futility.

There are number of problems with the situation as it

stands now.

1. The government is not likely to make a self referral. Yet the government has made an admission that it is unwilling or and unable to deal with post election violence.
2. The ICC can move on its own motion and refer the Kenyan case to the International Criminal Court. However, the Pre Trial chamber will asses whether it has the requisite jurisdiction over Kenya and whether the country has the necessary tools to deal with and legal competences to conduct credible investigation and impartial prosecution. At this stage, the Attorney General as the Chief government advisor is likely to come up with a preliminary objection on the ICC move claiming that Kenya is willing and competent to handle post election violence. If the Pre trial chamber upholds this argument then the country will be back to square one. However the consequences of dismissal of the preliminary objection are that the ICC chief prosecutor will now move in and prosecute the Kenya Matter.
3. The second phase will involve the Chief Prosecutor moving to the pre trial chamber to submit on the relevance, reliability and admissibility of the evidence at hand. At this juncture he will also submit on the threshold jurisdiction of the ICC upon the Kenyan case. If the pre trial chamber accedes to the submission on the above the prosecutor will move in and take specific cases already admitted at the pre trial chamber. The next procedure is the application of warrants of arrest from the pre trial chamber. Once it is granted, the ICC chief prosecutor will do akin to what he did against Sudanese's president Omar el Bashir and his two ministers.

With Kenya having not only ratified but also domesticated the Rome statute, it is obliged to corporate with the ICC; and should this not happen, the ICC has a wide discretion and can enforce its orders through any other country.