



# The International Criminal Court's cases in Kenya: origin and impact

## INTRODUCTION

On 23 January 2012, the fate of the six Kenyans accused by the International Criminal Court (ICC)'s Office of the Prosecutor (OTP) of committing crimes against humanity was made known by the ICC's Pre-Trial Chamber II (PTC II).<sup>1</sup> Four of the six will be proceeding to trial in April 2013 in two cases.<sup>2</sup> The defence teams for all four accused requested leave to appeal from the PTC II on 30 January 2012. Leave was granted but their appeals were denied on 25 May 2012.<sup>3</sup>

The PTC II's confirmation of the charges against the four accused is particularly significant in that it represents the first ICC cases that will proceed to trial as a direct result of the OTP's exercise of its own mandate<sup>4</sup> – rather than on the basis of a state referral or a UN Security Council resolution as has previously been the case.<sup>5</sup>

Three scenarios pertained in advance of the PTC II's decisions: The PTC II could have confirmed all charges against all six persons in the two cases. It could have confirmed some of the charges against some but not all of the six persons in either or both of the two cases. Or it could have nullified all charges against all six persons.

In view of the continuing political mobilisation of ethnicity in Kenyan politics, and the potential that this has to influence understanding of and attitudes towards the ICC process in Kenya, each possible scenario would have had a distinct impact on Kenya's prospects as it moves towards its first general elections under its new Constitution.<sup>6</sup> Given that the second scenario prevailed, and that charges were ultimately confirmed against presidential hopefuls of majority ethnic communities – one Kalenjin and one Gikuyu – the potential impact of these ICC proceedings on the political mobilisation of ethnicity should be closely followed.

Kenya's new Constitution was promulgated in August 2010 after almost two decades of demands for constitutional change. These demands gained new impetus as a result of the Kenya National Dialogue and Reconciliation (KNDR), the African Union (AU)-based mediation process which ended the violence that followed the 2007 general elections.<sup>7</sup> It is the KNDR that also – eventually and indirectly – resulted in the cases being brought before the ICC. Beyond creating the Grand Coalition Government, the KNDR aimed to address both the causes and consequences of the flawed presidential elections as well as the violence that followed.<sup>8</sup>

With that in mind – and in the context of the other legal, policy and institutional reforms either set in motion or ushered in by the KNDR to lessen the intensity of competition for the presidency, and increase accountability for the political mobilisation of ethnicity in that competition and thus reduce elections-related violence – it is useful to assess what the impact of the ICC has been in Kenya as well as what Kenya's prospects are moving forward. In assessing the ICC's impact, two aspects will be considered: complementarity (that is, the effect of the ICC on accountability in Kenya by advancing reforms throughout the criminal justice system); and deterrence (that is, the effect of the ICC on ensuring that violence of the nature experienced in 2007–8 does not re-occur). Given that deterrence is not only linked to retributive justice assured by legal accountability, but also to diverse factors that address not just the consequences but the causes of violence, the background to the 2007–8 violence is also examined. This reveals that while the elections were the catalyst for the violence, the attacks were fuelled by deeper, historical and material causes. In addition, the ICC

is situated as just one indirect outcome of the KNDR agreements, which means that deterrence would depend not just on the ICC fulfilling one of its intended functions, but on full realisation of the other KNDR agreements.

The paper ends with a number of conclusions and recommendations aimed at mitigating risks associated with the scenario presented by the PTC II's decisions as well as to assist not just the ICC's retributive justice work in Kenya, but also other possible options for retributive and restorative justice.

## BACKGROUND TO THE POST-ELECTIONS VIOLENCE AND THE ICC'S CASES

### *The backdrop: partial transition from the 2002 general elections*

In December 2002, the Kenya African National Union (KANU) – the political party that had governed Kenya since its independence in 1963 – was defeated at the polls by the National Rainbow Coalition (NARC). NARC included Mwai Kibaki's National Alliance Party (NAK) and Raila Odinga's Liberal Democratic Party (LDP), the latter having benefitted from a mass walkout from KANU occasioned by the then President Daniel arap Moi's choice of successor, Uhuru Kenyatta, a son of Kenya's first president.<sup>9</sup> Over 62 per cent of the Kenyans who participated in the polls voted for NARC's presidential candidate, Kibaki,<sup>10</sup> giving the party a clear mandate to achieve key pillars of its electoral platform: concluding the stalled process of constitutional reform, and ending impunity for 'grand' corruption and past human rights violations.<sup>11</sup>

Just after the 2002 general elections, a Gallup poll found Kenyans to be the world's most optimistic people.<sup>12</sup> A new constitution was promised within 100 days of NARC coming to power and the so-called 'Bomas process' – the constitutional conference<sup>13</sup> – gained momentum.<sup>14</sup> The new president appointed a special advisor on ethics and governance, John Githongo, former executive director of the Kenyan chapter of Transparency International, and there were reports of citizens' arrests being made of public servants, including of police officials demanding bribes.<sup>15</sup> A task force headed by Professor Makau Mutua, a founding director of the Kenya Human Rights Commission (KHRC), was appointed to investigate Kenyans' desire for a truth, justice and reconciliation commission. Furthermore, Kenya was quickly set on a new growth trajectory. Although supported by bilateral and multilateral grant-makers in several sector-wide programmes, the government achieved about 90 per cent of its recurrent budget from Kenyan taxpayers and required about 50 per cent of its development budget from external sources.<sup>16</sup> This,

arguably, weakened the influence of bilateral and multilateral grant-makers and lenders, while increasing the impetus for citizens' participation and the accountability of the government to its citizens.

It did not, however, take long for the optimism to fade. The president's section of NARC, the National Alliance Party, walked out of the 'Bomas Process' over demands central to the constitutional change process, namely reducing presidential powers, restoring separation of powers, checks and balances, and devolution. The president's section of the party also broke its memorandum of understanding with its NARC partner, the Liberal Democratic Party, through which it had committed to reducing presidential powers by introducing the position of prime minister. The Attorney General, Amos Wako, oversaw further amendments to the draft constitution produced by the 'Bomas process' and the National Alliance Party section of NARC presented the resulting 'Wako draft' to the country in a referendum in 2005, despite the protests of its Liberal Democratic Party coalition member for having failed to honour the National Alliance Party–Liberal Democratic Party memorandum of understanding on power sharing. The 'Wako draft' was resoundingly rejected during a subsequent national referendum, with 58 per cent of Kenyans voting against it.<sup>17</sup>

Meanwhile, the president's special advisor on ethics and governance had gone into exile from where he released tape recordings showing the involvement of the president's section of NARC in a new grand corruption scandal ('Angloleasing') that he had urged the president to address.<sup>18</sup> 'Angloleasing' involved contracts between the government and a number of externally registered companies, some of which turned out not to exist, ostensibly for the development of forensic capacity and new passport printing facilities. The contracts were awarded without following a proper tendering process; were remunerated at a level significantly above actual costs; were brokered through third parties who were not legitimately registered; and payments were made through Government of Kenya promissory notes.<sup>19</sup> After initial denials, the official position became that the money had been returned and therefore no scandal had taken place. To date, nobody has been successfully charged in relation to 'Angloleasing' and the Treasury continues to allocate budgetary payments against the promissory notes associated with the 'Angloleasing' contracts. Despite NARC's initial commitment to 'zero tolerance' of corruption, legal accountability thus revealed itself to be as far away as it was under former President Daniel arap Moi.

Meanwhile, the report on establishing the Truth, Justice and Reconciliation Commission had been shelved. If accountability for 'grand corruption' was not to be realised,

neither, apparently, was accountability for past gross and systemic human rights violations.

Thus, by the time the 2007 general elections were approaching, the only positive aspect of the NARC administration was Kenya's restored growth trajectory, which had reached seven per cent in December 2007 on the eve of voting.<sup>20</sup>

### *The trigger: 2007 general elections and the violence that ensued*

Odinga established the Orange Democratic Movement (ODM) to contest for the presidency in the 2007 general elections.<sup>21</sup> His former partner in the NARC, Kibaki, led the belatedly pulled together Party of National Unity (PNU). While both touted themselves as political parties with national followings, as campaigning continued, PNU came to be perceived of as representing the economic and political interests of the Gikuyu and Central Kenyan 'old guard'<sup>22</sup> and ODM as representing everybody else.

It was clear throughout 2007 that the battle for the presidency would be tightly waged. Opinion polls routinely gave Odinga's ODM the lead, but with a slim majority at the presidential level.<sup>23</sup> The campaigns became increasingly characterised by ethnic prejudice and stereotyping, particularly in relation to Odinga's Luo community.<sup>24</sup> The bigotry was especially evident in the local language used on private radio stations, on bulk short message services (SMSs), and on Kenyan blogs, discussion groups and list serves.<sup>25</sup> Much disinformation was spread in this manner too – including allegedly from the National Security and Intelligence Service deemed to be largely in support of Kibaki's PNU. Anger and distrust grew between supporters of PNU and ODM and was aggravated further by the president's backtracking on one of the reforms reached through the Inter-Parties Parliamentary Group agreements of 1997 that enabled all parties with a parliamentary presence a say over appointments to the Electoral Commission of Kenya.<sup>26</sup> What this meant was that the electoral commission was perceived to be stacked in favour of PNU.

However, although the political atmosphere was tense, for the second time since the restoration of de jure political pluralism in 1991, no violence preceded the 2007 general elections except in Kuresoi in the Rift Valley.<sup>27</sup> There were reports of crude weapons (pangas) being shipped into the Rift Valley (by and for whom and for what purpose has not yet been established although the ICC cases may shed light on this). When the violence in Kuresoi was investigated, it was found to have resulted from local political rivalries rather than – as had been the case in 1992 and 1997 – attempts at ethnic cleansing (of non-'indigenous' communities in the Rift Valley by 'indigenous' communities made up largely of Masaai and Kalenjin) to

create ethnically homogenous voting blocs (which were believed to be also politically homogenous).<sup>28</sup>

Against this backdrop, Kenyans went to the polls on 27 December 2007, having been urged by the aspirants at all levels in both ODM and PNU to vote for 'three piece suits' – either ODM or PNU at all three levels of government, namely civic, parliamentary and presidential.<sup>29</sup> Polling was relatively quiet and uneventful, generally running smoothly across the country, with problems with voting registers in some constituencies being quickly resolved.<sup>30</sup>

Initial results came in quickly and seemed to indicate that ODM was in the lead. But by the second day of counting and tallying, the returns slowed to a trickle and then stopped altogether, particularly from those constituencies believed to be PNU strongholds. The chair of the Electoral Commission of Kenya appealed publicly for returning officers from constituency tallying centres – who had gone missing – to appear at the national tallying centre with their returns. Party representatives in the national tallying centre began to complain about discrepancies between polling station tallies and overall constituency tallies, noting alterations to the latter that did not correspond to totals of the former.

As ODM's advantage slowly began to dwindle, tempers among ODM and PNU leadership and supporters frayed further. By the end of the third day after the poll, party representatives conducted an initial re-tallying, which went on into that night. The next day, ODM's party representatives tried in vain – in full view of the public – to demand that the Electoral Commission of Kenya address the discrepancies. Eventually, some of the missing constituency tallying centre returning officers appeared, with various explanations for their disappearance, including that they had been threatened. The Kenya Police Force

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## **Campaigns ahead of the 2007 general elections became increasingly characterised by ethnic prejudice and stereotyping**

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and its paramilitary General Service Unit (GSU) then moved into the national tallying centre. All broadcasters and media, except the ostensibly public but still government-controlled Kenya Broadcasting Corporation, were ordered to leave. The Chair of the Electoral Commission of Kenya then appeared to announce Kibaki as the presidential winner. Less than half an hour later, as night was falling, the chief justice presided over a prepared but small swearing-

in ceremony at State House. All public demonstrations were banned and all broadcasters were ordered to halt live broadcasting by the president, ostensibly to calm the situation.<sup>31</sup> With that, the country erupted.

### *The 'fire this time': the post-elections violence*<sup>32</sup>

ODM rejected the announcement of the so-called presidential results and refused to go to court to challenge the outcome, claiming that the judiciary had already been prepared by the executive branch of government to dismiss any electoral petition by ODM.<sup>33</sup> The party called instead for its supporters to protest at Nairobi's Uhuru Park.

The Kenya Police Force and its GSU had, however, already been deployed en masse around Uhuru Park to prevent any access by potential demonstrators. Police officials were also deployed to block key access routes from low-income neighbourhoods to the city centre and from neighbourhoods deemed to be ODM supportive. Reports streamed in of clashes between citizens and the security services in these neighbourhoods.<sup>34</sup> There were also clashes between youth groups in these neighbourhoods, who were quickly militarising in support of either PNU or ODM, and using ethnicity as a proxy for political support – with the Gikuyu in favour of PNU and everybody else in favour of ODM.

Furthermore, the city of Kisumu in Nyanza province (where the Luo originate), was already in flames with demonstrators and looters taking advantage of the confusion and turmoil, which the Kenya Police Force and its GSU were indiscriminately and violently suppressing.

In the north Rift Valley, the reaction of ODM supporters – who had initially been blocking transit routes – quickly degenerated into attacks on those believed to be PNU supporters. Here ethnicity was also used as a proxy for determining political support. During these attacks, the Kenya Police Force and its GSU were largely absent, ostensibly overwhelmed by the spreading violence. Reports of non-Kalenjin (who as noted above, were non-'indigenous' to the Rift Valley) fleeing the area were widespread: middle- and upper-income citizens made for the airport under armed escort, but lower-income citizens were not so fortunate in their ability to flee the escalating violence. In areas where the Kenyan Armed Services had a presence, the militarising youth were to some extent kept in check, even though the soldiers did not have the mandate to intervene. Then came reports of the burning down of Kiambaa church, killing those who had sought refuge within it – mainly Gikuyu and other non-Kalenjin.<sup>35</sup>

Within days, reports were received about Mungiki – a Gikuyu youth militia – moving into the south Rift Valley with the aim of reaching the so-called 'Kalenjin warriors' in the

north Rift Valley. Mungiki's advance was apparently undeterred by the presence of the Kenya Police Force and GSU along the highways, giving rise to the claim that Mungiki was acting on behalf of the executive branch of government. Here, non-Gikuyu were the targets. Violence broke out in the south Rift Valley, culminating in 19 people – who were predominantly Luo and perceived of as supporters of ODM – being burnt alive in their homes.<sup>36</sup> With Mungiki moving north and what had become known as the 'Kalenjin warriors' moving south, violent clashes seemed inevitable.

### **KNDR: POST-ELECTIONS EFFORTS TO REINSTATE ORDER AND SEEK JUSTICE**<sup>37</sup>

ODM had been protesting publicly, within the region and internationally, about the election results since Kibaki's swearing-in as president on 31 December 2007. Party supporters gathered and drew upon evidence from their own experiences in the national tallying centre and that of their party agents countrywide. They also relied upon facts compiled by civil society, as well as reports emerging from various regional and international electoral observation groups.

Without the escalating violence it is unlikely that their protests would have found traction, particularly since the United States (US) had initially signalled its acceptance of the election results through its ambassador and its Assistant Secretary of State for African Affairs.<sup>38</sup> Few other countries supported the US' position. Only four African states had sent congratulatory messages to the incoming president: Ethiopia, Mauritania, Somalia and Uganda.<sup>39</sup> The AU reacted quickly. The then chair of the AU, President John Kuffour, arrived in Kenya, but his calls for talks between ODM and PNU were politely dismissed.<sup>40</sup> The Forum of Retired African Presidents came and spoke to all stakeholders. The AU then appointed a Panel of Eminent African Personalities (AU Panel) to oversee a mediation process to end the electoral and political stalemate between ODM and PNU. The stalemate had arisen because while PNU had assumed power and appointed a cabinet, ODM retained the parliamentary majority and disputed the so-called presidential results. The AU Panel included Dr Kofi Annan, former Secretary General of the UN; Graca Machel, the African Peer Review Mechanism Panellist then responsible for Kenya; and former Tanzanian President Benjamin Mkapa.

In addition, civil society, the private sector, the media and the diplomatic corps played significant roles in reinstating order and seeking justice, not least by appealing for calm from the start of the violence albeit in different ways or in ways that changed over time. For example,

while some were concerned solely with the violence, others were concerned with the so-called electoral outcomes as being a catalyst for the violence.

The development and peace sectors of civil society had grouped under Concerned Citizens for Peace (CCP).<sup>41</sup> While the bulk of CCP's members called for an end to violence, including by the police, in parallel, the leadership was active in the initial attempts to get ODM and PNU to the dialogue table. The organisation was also behind the invitations sent to prominent Africans, who included South Africans Cyril Ramaphosa and Archbishop Emeritus Desmond Tutu. In short, while CCP implicitly recognised the need for a political settlement, its motivation was first and foremost to end the violence.<sup>42</sup>

Meanwhile, the governance, human rights and legal sectors of civil society had grouped under Kenyans for Peace with Truth and Justice (KPTJ), which included leadership under Maina Kiai, then chair of the Kenya National Commission on Human Rights (KNCHR).<sup>43</sup> KPTJ considered the so-called presidential elections as the trigger for the violence and demanded truth and justice about both the elections and the ensuing violence. With respect to the former, in particular, information was sought on the discrepancies between the civic and parliamentary results on the one hand, and the presidential results on the other. As far as the violence was concerned, analysis of incidents revealed a number of patterns, namely that

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## The AU appointed a Panel of Eminent African Personalities to oversee a mediation process to end the electoral and political stalemate between ODM and PNU

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attacks resulted from protests, increasingly organised violence in the north Rift Valley, retaliatory violence in the south Rift Valley, violence committed by state security services, and violence against women.<sup>44</sup> This analysis was used for targeted diplomacy in Nairobi with the Kenyan government, as well as advocacy in important regional and international capitals and with key multilateral institutions, including the AU, European Union (EU) and UN. A political settlement, which would require that both the militias and state security forces desist from attacks,<sup>45</sup> was regarded by KPTJ as key to ending the violence.<sup>46</sup>

The women's movement had – like the humanitarian sectors of civil society – been involved in service provision

to survivors of the violence from the start.<sup>47</sup> Galvanised by Machel, a member of the AU Panel, the movement then presented a common platform of demands once the mediation process had begun. Its position was in line with that of KPTJ, except for its focus on women's political participation during and following the mediation, as well as on the needs of female survivors of the violence, including female internally displaced persons.<sup>48</sup>

The private sector's position became more aligned with KPTJ's over time. Initially, its focus was on the economic consequences of the violence and the need to re-open transit routes. With time, however, all the main private sector lobby groups, led by the Kenya Association of Manufacturing, were calling for a full and comprehensive political settlement.<sup>49</sup>

The Kenyan media played a significant part also, not least by countering much of the international media's portrayal of Kenya as a country degenerating into disorder. The local media provided far more nuanced coverage of both the destruction wrought and the economic and political interests at play. In a marked retreat from their pre-election belligerence, bigotry and political partisanship, the Media Owners Association and the Editors' Guild met and issued guidelines on how to cover the violence, in particular sensitive issues of ethnicity. Key Kenyan broadcasters began radio and television series aimed at creating calm and re-establishing order, including by urging the mediation process to make positive steps forward.<sup>50</sup> More quietly and much later, the role of the media in the electoral fiasco was also addressed.<sup>51</sup>

The final key entities involved in these reconciliation efforts were the Western diplomatic corps and relevant UN agencies – including those now supporting the humanitarian effort, led by the Kenyan Red Cross – which threw their collective weight behind these domestic pressures and the AU-based mediation. Various bilateral offers and threats were made when necessary to keep recalcitrant parties at the negotiating table, including the threat or actual use of individual sanctions.<sup>52</sup>

In many senses, the KNDR then was unique. Not only did it involve domestic and international governmental and non-governmental entities, but also individuals skilled at mediation and experienced in Kenyan matters who played an instrumental role in shaping and concretising the AU Panel's loose mandate into a meaningful tool. The process was also able to draw on domestic demands from a range of sources to define and leverage the direction of the mediation process. For example, the AU Panel used civil society and private sector demands to counter incorrect or intransigent positions of ODM and PNU negotiators. Furthermore, the KNDR had the full and unqualified support of not just the AU but the rest of the international

community, including at the end the US, which actively assisted the AU Panel's work.

### *Ending the violence and disarming all armed groups*

As part of KNDR, the AU Panel and its eight-member negotiating team (four from ODM and four from PNU) developed a four-item agenda:

- Ending the violence and disarming all armed groups
- Ending the humanitarian crisis and restoring fundamental freedoms
- Reaching a political settlement
- Long-term issues (including constitutional, legal, policy and institutional reforms, transitional justice, equality, and youth employment)<sup>53</sup>

Agreement was quickly reached on items one, two and four. Three took much more time, involving as it did a political settlement that recognised the problem of the so-called presidential results. But, eventually, as a result of ever-increasing domestic, regional and international pressure and the skilled mediation by the AU Panel, PNU succumbed and a Grand Coalition Government was established with President Kibaki (PNU) retaining his position, but being obliged to consult with his new prime minister – a position which went to Odinga (ODM). A cabinet comprising both ODM and PNU representatives was established. When the agreement was signed in public in the presence of the AU Panel and neighbouring Tanzanian President Jakaya Kikwete, the country again erupted. However, this time, on 28 February 2008, it was with cheers of *Mwaka mpya* ('happy new year').

### *Commission of Inquiry into Post-Elections Violence*<sup>54</sup>

Although the political stand-off and violence were over, questions about how to deal with the consequences of the violence and how to prevent its re-occurrence then surfaced. The KNDR agreement, under agenda item one on ending the violence, aimed to establish a Commission of Inquiry into Post-Elections Violence (CIPEV). Commissions of inquiry, answerable to the president, are common (and often ineffective) in Kenya. Consequently, this one was not only to be led by regional and international personalities who were acceptable to both principals (Kibaki and Odinga) and their parties, but was also to be answerable to the AU Panel. Justice Philip Waki of the Kenyan judiciary was appointed as the head of the CIPEV, together with Australian security service expert, Gavin MacFayden, and Congolese human rights expert, Pascale Kambale. George Kegoro, executive director of the Kenyan

Section of the International Commission of Jurists, was appointed as the CIPEV's secretary.

The CIPEV was sworn in on 3 June 2008, with the mandate to 'investigate the facts and circumstances related to the violence following the 2007 Presidential election, between December 28, 2007 and February 28, 2008'.<sup>55</sup> Working under a tight timeline (three months with the possibility of a month's extension), it appointed investigative staff as well as other experts, such as those with competence on gender-based and sexual violence. The violence had been extremely well documented – by local and international non-governmental organisations, by the KNCHR, and by the UN Office of the High Commission for Human Rights (OHCHR).<sup>56</sup> A body of academic work already existed with precedents of violence in the Rift Valley, as well as political violence in Kenya more generally, by both local and international academics.<sup>57</sup> New academic research was already underway. In addition, survivors of the violence were readily accessible and willing to share their experiences and understanding thereof – in the internally displaced persons camps that now dotted the Kenyan landscape, not only in the Rift Valley, but also in Central, Nairobi, Nyanza and Western provinces.

The CIPEV made good use of the documentation and analysis already available to lay the ground for its own comprehensive fieldwork. It also drew upon as many sources as was possible in the capacity of expert or secondary witnesses during both open and closed hearings across the country, as well as those providing services of any kind, including medical and psychosocial, to the survivors. Open and closed hearings were used to hear from survivors – paying particular attention to female survivors given the lack of attention publicly paid to gender-based and sexual violence to date. One of the CIPEV's primary aims was to identify possible witnesses – as distinct from victims – who were willing to give evidence on issues relating to whether, and if so how, the violence was organised.

On 15 October 2008, the CIPEV publicly released its report. Its key findings and recommendations are summarised below:

... the violence that shook Kenya after the 2007 general elections was unprecedented. It was by far the most deadly and the most destructive violence ever experienced in Kenya. Also, unlike previous cycles of election related violence, much of it followed, rather than preceded elections. The 2007-2008 post-election violence was also more widespread than in the past. It affected all but 2 provinces and was felt in both urban and rural parts of the country ...

As regards the conduct of state security agencies, they failed institutionally to anticipate,

prepare for, and contain the violence. Often individual members of the state security agencies were also guilty of acts of violence and gross violations of the human rights of the citizens.

In some ways the post-election violence resembled the ethnic clashes of the 1990s and was but an episode in a trend of institutionalization of violence in Kenya over the years. The fact that armed militias, most of whom developed as a result of the 1990s ethnic clashes, were never de-mobilized led to the ease with which political and business leaders reactivated them for the 2007 post-election violence. Secondly, the increasing personalization of power around the presidency continues to be a factor in facilitating election related violence. The widespread belief that the presidency brings advantages for the President's ethnic group makes communities willing to exert violence to attain and keep power. Inequalities and economic marginalization, often viewed in ethnogeographic terms, were also very

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## The Waki Commission recommended creating a Special Tribunal to prosecute crimes committed as a result of the post-elections violence

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much at play in the post-election violence in places like the slum areas of Nairobi.

One of the main findings of the Commission's investigations is that the post-election violence was spontaneous in some geographic areas and a result of planning and organization in other areas, often with the involvement of politicians and business leaders. Some areas witnessed a combination of the two forms of violence, where what started as a spontaneous violent reaction to the perceived rigging of elections later evolved into well organized and coordinated attacks on members of ethnic groups associated with the incumbent President or the PNU party. This happened where there was an expectation that violence was inevitable whatever the results of the elections.

The report concludes that the post-election violence was more than a mere juxtaposition of citizens-to-citizens opportunistic assaults. These were systematic attacks on Kenyans based on their ethnicity and their political leanings. Attackers organized along ethnic lines, assembled considerable logistical means and travelled long distances to burn houses, maim, kill

and sexually assault their occupants because these were of particular ethnic groups and political persuasion. Guilty by association was the guiding force behind deadly 'revenge' attacks, with victims being identified not for what they did but for their ethnic association to other perpetrators. This free-for-all was made possible by the lawlessness stemming from an apparent collapse of state institutions and security forces.

In general, the police were overwhelmed by the massive numbers of the attackers and the relatively effective coordination of the attacks. However, in most parts of the country affected by the violence, failure on the part of the Kenya Police and the Provincial Administration to act on intelligence and other early warning signs contributed to the escalation of the violence. The post-election violence is also the story of lack of preparedness of, and poor coordination among, different state security agencies. While the National Security Intelligence Service seemed to possess actionable intelligence on the likelihood of violence in many parts of the country, it was not clear whether and through which channel such intelligence was shared with operational security agencies. The effectiveness of the Kenya Police Service and the Administration Police was also negatively affected by the lack of clear policing operational procedures and by political expediency's adverse impact on their policing priorities.

The report recommends concrete measures to improve performance and accountability of state security agencies and coordination within the state security mechanism, including strengthening joint operational preparedness arrangements; developing comprehensive operational review processes; merging the two police agencies; and establishing an Independent Police Complaints Authority.

To break the cycle of impunity which is at the heart of the post-election violence, the report recommends the creation of a Special Tribunal with the mandate to prosecute crimes committed as a result of post-election violence. The tribunal will have an international component in the form of the presence of non-Kenyans on the senior investigations and prosecution staff.<sup>58</sup>

In short, the CIPEV largely confirmed both the findings of the documentation and the analysis already done with respect to the violence, the most comprehensive of which had been the KNCHR's.<sup>59</sup> It also provided a guarantee that its recommendations would not be shelved but rather would be implemented by providing that – should the

government not establish the Special Tribunal as recommended – the report and its confidential findings would be handed over to the ICC. This was to be in contrast with the recommendations of previous commissions of inquiry, which had been only partially implemented, if at all, often preferring to focus on more straightforward legal, policy or institutional reforms rather than on more contentious and pressing matters of legal and political accountability.

### *Accountability eluded: the fate of the proposed Special Tribunal*

Among its key findings, the CIPEV compiled a list of those persons at the highest possible levels of government and those outside government that it believed were responsible for various acts of post-elections violence. This list was not disclosed but rather kept private and confidential, being turned over to the KNDR for safekeeping. In order to effectively bring those on the list to justice through criminal proceedings, the CIPEV recommended the establishment of a Special Tribunal comprising joint Kenyan and regional/international participation at every level of its activities – from investigations to prosecutions, to adjudication and appeals. The recommended Special Tribunal was to be set up by statute, implying that Parliament would have to both develop and pass the requisite legislation. To ensure that such measures were adopted and implemented, the CIPEV further recommended referral of the post-elections violence matters to the ICC in the event of a failure to establish a Special Tribunal, hoping this would leverage domestic criminal prosecutions through the Special Tribunal.<sup>60</sup>

The full CIPEV report, including the infamous ‘envelope’ containing names of those believed to be most responsible for the violence, was submitted to the AU Panel, represented in Nairobi by the permanent Country Liaison Office, reporting directly to the lead mediator. It was also submitted, minus the ‘envelope’, to both Kenya’s president and prime minister. Following acceptance of the report’s findings and recommendations by both the president and prime minister, it was released to the public and formally presented to Parliament. Parliament then adopted all of its findings and recommendations, without amendment, including the recommendation to establish the Special Tribunal.

Work on drafting the statute necessary to establish the Special Tribunal then began, with the Minister for Justice, National Cohesion and Constitutional Affairs taking the lead, together with the support of the Attorney General’s office, as legal advisor to the government, and the Law Reform Commission, the body responsible for any amendments to Kenyan legislation.

A draft bill to establish the Special Tribunal was first made public in early 2009 when stakeholders, notably from the governance, human rights and legal sectors of civil society, immediately began working on it in order to ensure that it adequately reflected regional and international criminal justice standards, particularly those of the Rome Statute establishing the ICC.

One of the principal motivating factors for such a focus on the Rome Statute was the awareness among these civil society sectors of controversy regarding the Statute’s applicability in Kenya. Although Kenya had signed and ratified the Rome Statute prior to the violence in 2007, it had not domesticated the Statute until mid-2008, some time after the violence had occurred.<sup>61</sup> Thus, while it could be argued that Kenya’s international obligations under the Statute already existed at the time of the violence, it could equally be argued that any reliance on domestic implementing legislation would be retroactive and therefore unlawful.<sup>62</sup> In addition, these civil society sectors had already considered whether and, if so, what provision(s) of the Rome Statute might apply to the post-elections violence, noting especially the various legal thresholds to be crossed for the two most likely crimes arising in a peacetime context, namely genocide and crimes against humanity. They had agreed – despite ethnic/political positioning to the contrary – that the threshold for genocide had not been met, but that possible crimes against humanity had been committed.<sup>63</sup>

The fact that there was debate points to another important consideration, namely that these civil society sectors had themselves investigated, documented and analysed the violence, and that they were clear on the need to seek legal accountability of those involved. But their views differed in important ways from those of the general public – as became increasingly clear as time went by. While relevant opinion polls consistently showed, for example, majority (albeit declining over time) public support for the ICC, they also showed different understandings of the violence – and, significantly, who was responsible for it. These interpretations were not homogenous or uniform. Although these civil society sectors had early on identified the distinct patterns of violence, it was clear that some of the public had reached their own opinions as to what pattern(s) of violence were acceptable or not, and what constituted adequate levels of provocation and justification for these patterns. In short, the public tended to follow ODM’s and PNU’s approaches to interpreting the violence along party lines, depending on which side of the ethnic/political divide they lay. And thus two distinct and often incompatible narratives of the violence emerged.

From ODM’s perspective, the violence resulted, however unfortunately, from legitimate protests in respect of the elections. It was not organised and the source of



provocation was the election itself. The perpetrators were primarily the state security agencies who had wreaked havoc in perceived ODM electoral strongholds in both Nairobi and Nyanza.<sup>64</sup>

As far as PNU was concerned, the violence was attributable to conscious, deliberate and organised attempts to ethnically cleanse the Rift Valley of Gikuyus (even though other ethnic communities had also been targeted and affected). The violence, however unfortunate, was committed in self-defence given the history of politically-instigated ethnic cleansing in the Rift Valley. Regarding the perpetrators, PNU argued that these were aggrieved Gikuyu, defending themselves against Kalenjin mobilised in the Rift, or otherwise reacting to insecurity as was the case in Central and Western provinces.<sup>65</sup>

Meanwhile, a third narrative was circulating in respect of violence committed by state security services. It suggested that the state security services were merely overrun by the scale and speed of the violence. In the absence of authorisation being given to the Kenyan Armed Forces to assist, the state security services had done the best they could to halt the violence. Where officials were accused of having committed crimes such as assault, rape and sexual assault, theft and so on, the narrative either denied that such acts had occurred or else attributed them to individual renegade officials acting criminally on their own terms rather than as part of any predetermined policy on the part of the state security services. The narrative emphasised that such agencies had in no way aided or abetted any initial organised or retaliatory violence. Instead, their only failing was being unable to prevent the violence.<sup>66</sup>

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## In early 2009 parliamentarians from across the ODM–PNU divide united to defeat the Special Tribunal bill

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The fact that the data generated by the CIPEV did not support these three narratives made little difference. Individuals tended to interpret the facts before them through the lenses of their particular ethnic/political positions. That there was overwhelming support for legal accountability obscures the different reasons for which legal accountability was demanded by both ODM and PNU – as well as, importantly, their supporters and much of the general public.<sup>67</sup>

In response to the CIPEV's findings and condemnation of the behaviour of the state security agencies, particularly with respect to allegations of gender-based and sexual

violence, the police commissioner set up an ad hoc investigative group, with input from Kenyan women's organisations, to investigate. Within weeks, however, the Kenyan women's organisations had withdrawn because they claimed they were being used by the police to help identify potential witnesses – not for the purpose of assisting the police to seek justice but to effectively silence them.<sup>68</sup>

In the interim too, the KNCHR's own confidential list of suspects had been leaked, together with important sources for its report's findings from its database. As a consequence, victims and potential witnesses were allegedly intimidated by community leaders associated with either ODM or PNU as well as state security officials, as were human rights defenders who had worked on collecting the evidence to generate the report.<sup>69</sup> Some went into protective custody within and outside of the country under the ad hoc system for the protection of human rights defenders.<sup>70</sup> The leaked KNCHR list of suspects generated immediate public debate led by the politicians whose names appeared on the list. On both sides of the ODM–PNU divide, these politicians found their first common post-elections cause – namely justifying the violence as explained above and denying their individual involvement. For example, the KNCHR was taken to court by Uhuru Kenyatta of PNU, with orders being sought to expunge his name from the list on the basis of libel. The case was finally decided in mid-2010 in favour of the KNCHR.<sup>71</sup>

It was during this prevailing atmosphere of tension, suspicion and debate that the Special Tribunal bill was first introduced to Parliament early in 2009. Although the necessary technical assistance was available to strengthen the draft bill, including from a variety of local, regional and international sources, parliamentarians from across the ODM–PNU divide united to defeat it – under the slogan: 'Don't be vague; go to the Hague.' The ostensible argument was that no Special Tribunal in Kenya could be trusted to deal independently and impartially with the question of legal accountability for the post-elections violence. This was, of course, disingenuous, as further parliamentary actions illustrated. The public statements made by various ODM and PNU politicians involved – particularly in response to the leaked list of KNCHR suspects – revealed their true agenda, namely to seek legal accountability of the other party, but to evade it for their own.<sup>72</sup>

With the defeat in Parliament of the government-sponsored bill to establish the Special Tribunal, some parliamentarians then tried to bring forward a private members' bill to establish the Special Tribunal.<sup>73</sup> As an alternative approach, the Minister for Justice, National Cohesion and Constitutional Affairs spoke half-heartedly

about perhaps establishing a special division of the High Court to try suspects. The governance, human rights and legal sectors of civil society vigorously opposed this. They argued that the investigative and prosecutorial arms of the judiciary had been compromised – with state security agencies accused of involvement in the violence, and the Director of Public Prosecutions (DPP) having failed to make any credible attempt even to try suspects of ordinary crimes committed during the violence – such that no credible criminal justice proceedings and access to justice for victims were possible. These sentiments still hold,<sup>74</sup> as noted by a December 2011 report from Human Rights Watch:

A report prepared by the Department of Public Prosecutions in March 2011 claimed that 94 post-election cases had resulted in convictions. But [...] only a small percentage of those convictions were for serious crimes that were actually related to the election violence, including two for murder, three for ‘robbery with violence’ (one of the most serious crimes under Kenya’s penal code, which can encompass robberies resulting in the death of the victim), one for assault, and one for grievous harm.

The limited success of cases in the ordinary courts shows that Kenyan authorities have been unwilling or unable to effectively prosecute post-election violence. In Uasin Gishu district, for instance, an epicentre of turbulence, no one has been convicted for at least 230 killings. The fact that not a single police officer has been convicted for shootings or rapes directly related to the post-election violence, despite an estimated 962 police shootings, 405 of them fatal, and dozens of reported rapes by police, also demonstrates the extent of impunity for certain groups that appear to be protected.

Lack of political will to address post-election violence is further demonstrated by government failure to adequately compensate victims—including at least 21 victims of police gunshots who filed, and won, civil suits claiming damages. When courts awarded them compensation, the government failed to pay up.<sup>75</sup>

The debate continued, inconclusively. It was clear that both the executive branch of government and Parliament were not keen on criminal proceedings for the post-elections violence. At the community level, suspects of ordinary crimes had support of local ODM and PNU leaders in the interest of ‘reconciliation’. At the national level, fear of individual legal and political accountability was rife within ODM and PNU. Finally, given the lack of movement on the

CIPEV’s recommendations, on 9 July 2009, the lead mediator handed over the CIPEV’s by now infamous ‘envelope’ (containing the list of names of those it had found most responsible for the post-elections violence) to the Office of the Prosecutor (OTP) of the ICC.

## FROM FAILED ATTEMPTS AT DOMESTIC JUSTICE TO THE ICC<sup>76</sup>

### *Preliminary examination*

The OTP had followed the violence in Kenya since its inception, proactively inviting input from relevant civil society organisations, public institutions, bilateral and multilateral diplomatic missions and development agencies, as the violence had progressed. It followed the media, statements by various civil society organisations and other institutions, in addition to both asking for and receiving many of the reports documenting and analysing the violence as they were released.

That said, it is clear that the OTP had not initially expected to become actively involved in matters relating to the post-elections violence. Both the lead mediator and the OTP had expected that Kenya – having adopted the recommendations of the KNDR, and later the CIPEV – would eventually establish the Special Tribunal. Even at that late date, one probable motivating factor for the lead mediator handing over the ‘envelope’ to the OTP was to encourage the national process of establishing a Special Tribunal.

After receipt of the ‘envelope’, however, the OTP became more actively engaged, meeting with a bi-partisan Kenyan government delegation sent to The Hague in July 2009, and later with the president and prime minister in December 2009. The OTP issued public statements following both meetings, confirming what had been discussed and what commitments had been made to pursue criminal accountability and to fully cooperate with the ICC.<sup>77</sup> Meanwhile, the OTP declared the Kenyan situation to be under ‘preliminary examination’ and began to more closely analyse the materials in its possession – largely those secondary sources in the public domain, together with primary sources who approached the OTP of their own volition – with a view to establishing whether or not there was sufficient evidence to go before the ICC judges of the PTC II to request authorisation to initiate a formal investigation.

At that initial stage, only three elements needed to be established: whether or not the ICC had jurisdiction over the Kenyan situation; the admissibility of the situation before the ICC; and whether the Kenyan government was willing and able to deal with the situation in its own courts (the ‘complementarity test’). The PTC II was convened to

hear the OTP's submissions with respect to these elements in March 2010.

Regarding the first element, the ICC clearly had jurisdiction: Kenya is a state party to the Rome Statute which it had ratified prior to the violence. In addition, the meetings that the OTP had had with the Kenyan government since its receipt of the 'envelope' had confirmed, if incidentally, the ICC's jurisdiction. Furthermore, although the ICC prosecutor was relying on the OTP's powers to initiate an investigation, he had received clear commitments from all relevant parts of the Kenyan government (the Attorney General, the Minister for Justice, National Cohesion and Constitutional Affairs, as well as the president and prime minister) for each step the OTP had taken.<sup>78</sup>

The second element, admissibility, had to do with whether or not the scale and scope of the crimes alleged (in this case, crimes against humanity) would reach the thresholds required under article 7 of the Rome Statute.<sup>79</sup> Admissibility was accepted by a majority vote with one of the three PTC II's judges dissenting. The dissent was not with regard to the elements of the crimes but rather on the issue of the level of 'organisation' or 'organisational policy' required by the Rome Statute.<sup>80</sup>

On the final element of complementarity, the Rome Statute intends for the ICC to be a court of last resort. For the ICC to exercise jurisdiction, a state party with national jurisdiction over a particular matter must be either unable or unwilling to conduct a bona fide investigation or prosecution of the crimes alleged.<sup>81</sup>

It is evident that the capacity of the Kenyan criminal justice system to proceed with these cases may have been constrained by the widespread nature of the post-elections violence and the many ordinary crimes committed during the period. However, it was equally evident that capacity was less of an issue than political will. For example, an estimated 2 000 persons suspected of having committed ordinary crimes who were initially held by the Kenyan Police Force immediately after the post-elections violence were released within six months. This followed pressure on the government, first by ODM (which stated that many of these detainees were its supporters who were being wrongly targeted),<sup>82</sup> and then by human rights and legal sectors of civil society (who argued that it was unconstitutional for suspects to be held in detention indefinitely without being charged and brought to trial). While the figures released for those suspected of ordinary crimes by the Attorney General (under whom the Department of Public Prosecutions fell) and by the Kenya Police Force differed slightly, they were consistent in terms of demonstrating that only a few cases had been taken forward for possible prosecution.<sup>83</sup> These included cases relating to the burning of the Kiambaa church, the

extrajudicial execution taped by the British Broadcasting Corporation in Kisumu, and the murder of a state security serviceman. All except the latter were dismissed by the courts on the basis of shoddy investigations and half-hearted prosecutions.<sup>84</sup>

The failure of the Kenyan government to establish a Special Tribunal in the time given by the CIPEV's report was also noted in the PTC II's consideration of complementarity. In response, the executive branch of government protested that this failure was attributable to Parliament, which it does not control. This explanation was, however, unconvincing given that almost half of the parliamentarians were also members of the Grand Coalition Government. Similarly, the government's suggestion that it intended to perhaps establish a special division of the High Court to try post-elections violence cases was dismissed. Unsurprisingly, the PTC II found that

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## The ICC's Pre-Trial Chamber II found that the Kenyan government was unwilling to assure legal accountability to the victims of post-elections violence

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the Kenyan government's will to assure legal accountability to the victims of post-elections violence did not exist.

The OTP was not alone in having considered these three elements and the potential for these crimes to fall within the ICC's jurisdiction. Independently, the Victims' Participation and Reparations Service (VPRS), which falls within the ICC's Registry, had also been quietly establishing contact with victims, victims' groups, and other intermediaries in order to seek their views regarding possible criminal proceedings at the ICC.<sup>85</sup> The VPRS's findings and recommendations were submitted directly to the PTC II. Many intermediaries – including the governance, human rights and legal organisations under KPTJ – made their own submissions as well, whether through the OTP, the VPRS or the legal counsel to the PTC II. Their position was that although a Special Tribunal would have been the desired and preferable option for seeking accountability for victims, it was clear that the necessary domestic legislation to establish such a tribunal was unlikely to be passed by Parliament.

Significantly too, concerns for the safety of victims, intermediaries (such as human rights defenders), and potential witnesses were mounting.<sup>86</sup> Even though the Kenyan government had enacted amendments to the

Witness Protection (Amendment) Act later in 2010, this achieved little in terms of addressing legitimate concerns for the safety of such persons, in particular those who were publicly known to have contributed to the KNCHR's report or participated in the CIPEV's hearings.

For all of these reasons, on 31 March 2010 the PTC II authorised the OTP to commence formal investigations into the Kenyan situation.<sup>87</sup>

### *Formal investigations by the OTP*

Following the decision of the PTC II, the OTP proceeded with its investigations. These took the form of both formal and public engagements with relevant parts of the Kenyan government, as well as informal and discrete interviews with victims who might provide testimony as to what had happened to them, could describe the longer-term consequences of the violence, and potentially assist in establishing links between direct perpetrators and higher level financiers, instigators and planners.

During both formal and informal parts of its investigations, the OTP further consulted with intermediaries. Initially, this relationship was characterised by scepticism on both sides. The OTP had made it clear that it was thinking of bringing only two cases, roughly corresponding with the ethnic/political divide that had prevailed at the time of the post-elections violence. Intermediaries, on the other hand, were strongly of the opinion that it was crucial to also investigate those crimes committed by state security agencies. A bold stance was believed to be essential for sending a strong message to those in public service that would deter the commission of such crimes in future. In addition, such crimes could represent 'low-hanging fruit' for the OTP, because they would be more straightforward when seeking to establish key elements of the crimes being prosecuted, such as chain of command and the requisite level of 'organisation'.

Initially, the OTP was hesitant to embrace these suggestions, believing that some of the intermediaries were themselves characterised by ethnic/political or urban/rural divides. However, unlike other sectors of Kenyan society, these intermediaries – who largely belonged to the governance, human rights and legal sectors of civil society – had achieved a degree of cohesion through the solid work done collectively during the crisis. Although some tensions remained, any dissonance still being experienced was due to different understandings of how best to manage the sensitive security situation, particularly the needs of victims and potential witnesses.

Over time, the mutual scepticism between the OTP and the intermediaries diminished. Intermediaries understood that the OTP had to conduct entirely independent investigations in order to convince the PTC II that charges should be confirmed against suspects believed to hold the

greatest responsibility for the violence. The OTP also understood that intermediaries had a critical role to play in not only helping it to manage the politics surrounding the OTP's work in Kenya, but also in continuing other key aspects of their work, particularly seeking other forms of redress for victims.

Once the investigation had been authorised by the PTC II, other sections of the ICC were also able to formally and openly engage with the Kenyan government, victims and intermediaries. As previously mentioned, the VPRS – the innovative arm of the ICC responsible for ensuring victims' participation in all aspects of the proceedings – had already commissioned an initial mapping of victims' groups as they were emerging. It was consulting with intermediaries and representatives of these groups on such important issues as how best (and most safely) to get victims registered in respect of any cases the OTP might finally put forward, as well as matters of common legal representation.

Once again disagreements surrounding these matters emerged between intermediaries, largely about how best to manage the security situation. One point of view was that security was best achieved by making their involvement with various arms of the ICC as public as possible. Another prevailing concern was for the safety of some intermediaries, in particular for human rights defenders considered to be especially at risk due to their role in documenting the violence and their presumed knowledge of not just victims but potential witnesses.<sup>88</sup> An ad hoc system existed to try to protect them. A corresponding system of protection, however, did not exist for victims. While those responsible for the ad hoc human rights defenders protection system had been forced to handle some pressing cases involving victims and potential witnesses, they were unable to cope with large intakes of people on a longer-term basis.

Recognition of this significant problem led to engagement with the ICC's Witness and Victims' Protection Unit (WVPU).<sup>89</sup> Obviously, the OTP referred any persons it had definitively identified as witnesses to the WVPU. The situation was, however, more complicated for victims and those believed to be the OTP's witnesses (as opposed to those witnesses the OTP definitely intended to use). Victims could only be referred to the WVPU through their legal counsel – who, at that stage, had not yet been appointed by the ICC. Those perceived to be witnesses also fell through the protection gap. Many intermediaries were aware of these problems and had been working towards ensuring a strong Witness Protection Act for Kenya by lobbying key Kenyan officials, in particular the Attorney General's office, the Law Reform Commission, the Ministry of Justice, National Cohesion and Constitutional Affairs as well as relevant parliamentary

committees and parliamentarians. They had also raised their concerns with the UN Office for Drugs and Crime (UNODC), which was providing technical support to the Kenyan government to develop a strong witness protection system.

Despite the efforts of all concerned, it was known that the required protective system would not be up and running in time to cover those victims and perceived witnesses already facing threats to their security. Even when established, there would still be gaps in the witness protection system that would not be able to fully protect victims of violence committed by state security services. No victim or potential witness of such crimes was likely to trust the Kenyan government to protect him or her due to the complicity of some state security officers in the commission of these crimes.

These lacunae were discussed frequently by intermediaries together with the OTP, VPRS and the WVPU. Despite such engagement, no satisfactory solution was found. At one point the option was mooted of having

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## Despite the efforts of all concerned, the systems to protect witnesses would not be up and running in time to protect those already under threat

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the KNCHR, as the public human rights institution, work with UNODC and the Office of the High Commissioner on Human Rights (OHCHR), whose mandates only allow them to work formally with public bodies.<sup>90</sup>

Meanwhile, the ICC Registry was also engaging with the Kenyan government, mainly on matters of complementarity. A politely accommodating yet uneasy relationship pertained until December 2010.

Then, around the time of the second review conference of implementation of the KNDR agreements,<sup>91</sup> on 15 December 2010, the ICC prosecutor announced his intention, having concluded investigations, to bring charges against six Kenyans in two cases for crimes against humanity, and asked the PTC II to issue summons to appear to these six Kenyans.<sup>92</sup> Case one comprised Henry Kosgey and William Ruto of ODM, both of whom were from the Rift Valley, were ministers in the Grand Coalition Government and, in Ruto's case, a known presidential aspirant. It further included Joshua Sang, a radio broadcaster with Kass FM, a private station broadcasting in Kalenjin that was accused of hate speech during the

violence. Case two included Major General Hussein Ali, former police commissioner; Uhuru Kenyatta of PNU, former Minister of Finance and also a known presidential aspirant; and Francis Muthaura, Head of the Civil Service and a known long-term confidant of President Kibaki.

In response, the Kenyan government, or at least the PNU section of it, swung into battle, all erstwhile politesse aside. As discussed in more detail below, its legal challenge to the decisions of the PTC II dealt with admissibility and complementarity. Politically, the Kenyan government embarked on a diplomatic offensive – known as its 'shuttle diplomacy' – against the ICC's engagement with Kenya, securing the support of the AU and then the East African Community and attempting (but failing) to also secure a deferral of the ICC situation in Kenya by the UN Security Council.

### *Confirmation of charges*

On 8 March 2011, the PTC II issued summons to appear for the six Kenyans, to prepare for the confirmation of charges hearings.<sup>93</sup> The accused went before the PTC II on 7 and 8 April 2011 to hear the charges against them. Huge Kenyan governmental delegations, staged demonstrations and much uncertainty aside, the confirmation of charges hearings took place between September and October 2011. The PTC II confirmed the charges against four of the six suspects for both cases on 23 January 2012.<sup>94</sup> It is significant that charges were confirmed against presidential hopefuls from both the Gikuyu and the Kalenjin communities. Of equal importance was that charges were not confirmed against the former police commissioner. Both points are discussed in more detail below.

The preliminary examination by the OTP had taken eight months, and investigations by the OTP had taken nine months. It took a further nine months from the time of the ICC prosecutor's announcement of his intention to charge the six to the closure of the confirmation of charges hearings. The OTP, and the ICC as a whole, had moved far faster than anybody had expected, not least the Kenyan Parliament and the executive branch of government.

Now the true meaning and significance of the slogan: 'Don't be vague: go to The Hague' became glaringly evident. Parliament had already moved a motion seeking Kenya's withdrawal from the Rome Statute following the announcement by the ICC prosecutor of the decision to summon six Kenyans to appear.<sup>95</sup> As part of its 'shuttle diplomacy' referred to above, the executive branch of government overstepped itself when trying to gain the AU's support for its non-cooperation with the ICC. The AU had resolved in 2009 that its members would not cooperate with the ICC in the arrest and surrender of Sudanese President Omar al-Bashir, and that the UN Security Council should defer the ICC's Darfur case for one year. The

Kenyan government was hoping for a similar decision from the AU with regard to the ICC cases in respect of the four accused.<sup>96</sup> Having inserted a resolution to that effect into the agenda of the AU's January 2011 Assembly of Heads of State and Government through the Intergovernmental Authority on Development, in which Kenya plays a leading role, the summit voted positively in favour of this resolution – supporting Kenya's request to the UN Security Council for a deferral of the ICC process on the grounds of complementarity.<sup>97</sup> However, it did so on what turned out to be misleading grounds.

The Kenyan government explained to the AU that Kenya's new Constitution, effective as of August 2010, had demanded judicial reforms beyond those already underway as a result of the work of the Task Force on Judicial Reforms, itself boosted by agenda item four of the KNDR on judicial reforms.<sup>98</sup> Consequently, what had been required was a new Chief Justice, a new Attorney General, a new DPP (with their respective offices being separated for the first time, thereby ending the structural conflict of interest created by having the Attorney General serve both as legal advisor to the Kenyan government and, when necessary, as its chief prosecutor) and an independently vetted judiciary.<sup>99</sup> During December 2010 in the wake of the ICC prosecutor's announcement that summons to appear for the six suspects would be requested, the president's section of the government had determined names for the three new positions. When the names of the new appointees were announced – while the AU summit was underway – the prime minister's section of the Kenyan government denounced them. The prime minister recalled that consultation was required on matters of such gravity and stated that whatever discussions had been held were inconclusive.

Meanwhile, the Kenyan women's movement – through the Federation of Women Lawyers (FIDA)-Kenya – had gone to court seeking an annulment of the three names on the grounds of unconstitutionality with respect to both the selection and appointment process and, importantly, the 'no more than two-thirds of any one gender' constitutional provision. This provision meant that, in this case, no more than two of the three names should have been those of Kenyan men. Civil society in general supported their case and swung into action to oppose the process by lobbying, if post-facto, key AU member states on the true state of support for the ICC process and the challenges to the unilateral appointments by the president from within Kenya.

In short, both the Kenyan government and the AU ended up being politically embarrassed: the former for having promised that Kenya could handle legal accountability under the guise of reform yet to come; and the latter for having essentially accepted what was the position of only one side of the Kenyan government.

Such embarrassment did not assist the Kenyan government with the rest of its so-called 'shuttle diplomacy' during the first and second quarters of 2011 that sought an end to ICC proceedings. Much as KPTJ had done during the crisis, various government ministers were dispatched to a number of African and other important capitals. With the AU resolution in hand, they lobbied for a pronouncement from the UN Security Council confirming Kenya's capacity and willingness to assure legal accountability for the post-elections violence, and stating that the ICC should therefore essentially desist its work in Kenya. The UN Security Council failed to respond in the manner desired.<sup>100</sup>

The political damage caused by this AU fiasco – and by the government's backtracking on the three recent legal

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## In December 2010 Parliament had (unsuccessfully) moved a motion seeking Kenya's withdrawal from the Rome Statute

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and judicial appointments – was grave in its stark exposure of the resistance to legal accountability by the Kenyan government, or at least the PNU side of it. It became clear to the public – including victims of the post-elections violence and the governance, human rights and legal sectors of civil society – that the only option to achieve legal accountability for the post-elections violence was through the ICC. Despite this, the Kenyan government continued to contest this process, including through the filing of a motion at the PTC II seeking to have the Kenyan cases dismissed on the grounds of admissibility and complementarity.<sup>101</sup> The motion was, however, dismissed by the PTC II. This dented the executive branch of government's credibility and confirmed its support of the suspects rather than of the victims.

Later, in June 2011, after an open application process, and the most public and rigorous vetting procedure ever experienced in Kenya – followed avidly through the media by the Kenyan public – a new Chief Justice, Deputy Chief Justice and DPP were confirmed by Parliament, the president and prime minister. A new Attorney General was also appointed by the president and prime minister. Although the more public and transparent process was to be welcomed, questions remained especially regarding the appointment of the DPP.

Dr Willy Mutunga, an advocate and founding director of the KHRC and vice chair of the National Convention

Executive Council (the civil society constitutional reform platform of the 1990s) became Chief Justice despite the fact that he was not previously a sitting judge. Nancy Baraza, former chair of FIDA-Kenya, became his deputy, despite questions about her sexual orientation arising from her academic research on gender identity and sexual orientation in Kenya. Keriako Tobiko became DPP, despite allegations concerning his integrity that included accusations by the former chair of the Constitution of Kenya Review Commission (CKRC) that Tobiko politically compromised the CKRC by continually leaking information on its proceedings to the then Moi regime. Tobiko was also accused by numerous individuals, including a High Court judge, of selling prosecution favours.<sup>102</sup> Githu Muigai, a senior advocate, became Attorney General without having to submit to vetting but on agreement between the president and prime minister, given that the position is that of legal advisor to government and is served at the government's discretion.

Clearly some horse-trading had taken place within Parliament and the executive branch of government on these appointments since Mutunga and Baraza were seen as appointments acceptable to ODM and civil society (including the women's movement) while those of Tobiko and Muigai were acceptable to PNU. Although civil society continued to challenge the appointment of Tobiko as DPP, the general consensus was that these appointments were much better than the names put forward in January 2010 by the president – and that Mutunga and Baraza especially heralded a new, more positive era for the judiciary. Baraza was, however, suspended soon after assuming office and is currently undergoing a disciplinary hearing for allegedly assaulting a security officer who attempted to search her when she entered a public shopping centre.<sup>103</sup> Fortunately, this does not seem to have affected public support for Mutunga and his efforts.

Meanwhile, the date for the PTC II's confirmation of charges hearing was drawing nearer. Numerous applications were moved by advocates for the accused, most of which were thrown out.<sup>104</sup> The PTC II's quick handling of the applications were a novelty for most Kenyans, who were used to endless stalling in Kenyan courts by means of such defence applications. One analyst of the proceedings, a German advocate, has ascribed the frequent failures of the advocates for the Kenyan government and the accused before the PTC II, at least in part, to a difference in legal systems.<sup>105</sup> The Kenyan government and the accused have all assembled formidable legal teams – at the Kenyan taxpayers' expense in the cases of the government ministers and the Head of the Public Service – to the great irritation of Kenyans, who have asked why the government has not afforded victims the same courtesy. The teams comprise senior advocates

from both Kenya and elsewhere (mainly the United Kingdom), who have experience in international courts of this nature. Despite their combined expertise, the legal teams are almost all drawn from common law jurisdictions and are, it is argued, not used to the more inquisitorial and less adversarial style of the civil law judges (even though the ICC is an amalgamation of the two systems).<sup>106</sup>

The confirmation of charges hearings were broadcast live on several Kenyan television stations from The Hague. The Kenyan media covered them extensively too, primarily through reporting the facts of these events, but also with some commentary. The Kenyan public followed the media coverage avidly. While opinion was divided as to the performance of the different accused – and the performance too of the ICC prosecutor – the country waited patiently for the decisions that were almost five years in coming. On 23 January 2012, charges were confirmed against Ruto and Sang for case one, and against Kenyatta and Muthaura for case two. Under public pressure – and a narrow reading of the relevant KNDR agreement – immediately following the decision, Kenyatta resigned as Minister for Finance (while retaining his position as one of the two deputy prime ministers) and Muthaura resigned as Secretary to the Cabinet and Head of the Public Service.

## IMPACT OF THE ICC PROCESS IN KENYA

There are a number of different ways in which the ICC process has had an impact in Kenya – both positive and negative depending on one's perspective. The discussion here is limited to those which are central to criminal justice issues, in particular those of legal accountability and access to justice for victims, and more general observations regarding Kenya's political position on the world stage.

### *Justice, deterrence and complementarity*

The central questions considered here are whether the ICC's proceedings regarding the commission of alleged crimes against humanity during the post-elections violence have mattered. In other words, have these proceedings influenced issues of justice, deterrence and complementarity in Kenya and, if so, in what ways and with what consequences?

### *Criminal and retributive justice*

In terms of whether or not the ICC's processes have had any impact, the answer is clearly 'yes'. The opinion polls continue to show (what differences they obscure notwithstanding) that Kenyans want legal accountability for the post-elections violence, and that Kenyans continue to believe that the ICC is the best avenue for achieving it.<sup>107</sup>

Never before have Kenyans seen such senior public servants and senior politicians facing formal legal proceedings – that have not fizzled out or been thwarted – aimed at bringing them to account. This key development is, in and of itself, significant in Kenyans’ quest to end a culture of impunity that has crippled the country’s economic and political development for decades.

That said, public expectations of the ICC trials may be too high – at least in terms of the degree of justice that they may secure for the many victims of the post-elections violence, if not in terms of the positive consequences of these proceedings on Kenya’s domestic criminal justice system. Out of the many suspected instigators and perpetrators of the violence, only four people are currently the subject of international criminal proceedings. This is in stark contrast to the extensive lists compiled by the KNCHR and the CIPEV of many high-level politicians and public servants also requiring investigation as planners, instigators and/or financiers with a view to potential prosecution. Furthermore, when the ‘lower level’ perpetrators are taken into consideration as well, figures for suspected perpetrators number in the thousands, with little if any prospect of them ever facing criminal justice proceedings and of their victims ever accessing justice.<sup>108</sup>

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## Never before have Kenyans seen such senior public servants and politicians facing formal legal proceedings that have not fizzled out or been thwarted

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Nor are all victims of the violence recognised within existing ICC proceedings, not least because the cases are limited to those victims connected with crimes against humanity allegedly committed by the four defendants. Even if they were, while participation in such proceedings may afford victims some degree of retributive justice, it would be unlikely to achieve this at the level sought and hoped for by many of the victims – which is full restorative justice.<sup>109</sup> To add insult to injury, many of these victims have to live with and see their perpetrators on a day-to-day basis.<sup>110</sup>

### *Restorative justice*

Other issues and concerns relate to matters of restorative justice. Although the ICC is advanced in its provisions for victim participation in court proceedings and reparations, the ICC process in Kenya could have stimulated more

momentum and leverage for victims in this regard than has been the case to date. Indeed, more public attention has been given to the criminal proceedings against the six (now four) suspects than to the fact that they are directly or indirectly responsible for some of the adverse material conditions in which approximately half a million Kenyans now find themselves.<sup>111</sup>

The impact of the violence on victims remains profound to this day. The loss of family members (and sometimes their incomes) cannot be reversed. Of those victims that were subsistence farmers, not all have been able to return to their land, citing continued security concerns. Nor have they received compensation for this situation. Even those victims who were not subsistence farmers – such as small and medium size business owners – who were renting homes and business premises in areas affected by the violence now either cannot or are unwilling to return to them, resulting in a loss of livelihood for many of them also. Furthermore, many victims continue to suffer from on-going physical and/or psychological trauma.

Many victims have registered for participation and possible reparations in respect of both cases before the ICC. If awarded – and this depends on whether the accused are convicted – any compensation or other form of reparations may take many years in coming, and even then, the ICC Victims’ Reparations Fund may not have sufficient funds to bring the relief that victims need. To date, neither the OTP nor the legal counsel for the victims have sought orders for the four accused to declare and have their assets frozen for the purpose of reparations. Presumably this will happen now that it is clear which charges have been confirmed in respect of which accused.

In light of the above, it may be concluded that while the ICC proceedings are fundamentally important, from a restorative justice perspective they are unlikely to impact significantly if at all on the material needs of many victims.

### *Deterrence*

The deterrent benefits of effective criminal justice proceedings have been regularly noted by the ICC as well as states parties to the Rome Statute and intermediaries that engage with the court. The ICC’s primary value is thus its potential deterrent effect. Whether the ICC will achieve this in the Kenyan situation, however, remains to be seen. It is true that underlying all the frantic moves by the Kenyan government, in particular its executive branch and Parliament, has been a sense of outrage and shock at the determined efforts to hold some of its members legally accountable for the commission of such serious crimes. Such efforts are certainly a novelty in Kenya. Judging by the public statements of the Kenyan government, including its different justifications for the post-elections violence, the prospect of deterrence – whether or not attributable to the



ICC proceedings – is unclear, though only time and the next elections will tell.

It is worth noting another, more fundamental critique of the ICC process.<sup>112</sup> What is it that renders communities more susceptible to political mobilisation on grounds of their ethnicity? If the answer is not just a lack of criminal justice but also political and social justice, then in order to have a truly deterrent effect, the ICC would have to deliver on all three types of justice. Clearly the ICC has done so with respect to political justice in Kenya as reflected in the constitutional, legal and institutional reforms referred to above. In contrast, little tangible progress has been made with respect to social justice, particularly matters concerning equality and anti-discrimination on ethnic grounds, as well as land tenure and reform in the Rift Valley, despite the constitutional provisions on these issues and the land policy that is now in place.<sup>113</sup>

Whether or not it is realistic to expect the ICC proceedings to assist in delivery on these counts, the point about whether criminal justice proceedings alone can serve as a deterrent, remains. It is true that the conditions on the four ICC suspects have helped restrain the instigation of political violence. Nevertheless, the material conditions which allow such instigation to take root – inequality, discrimination and contested land claims from the colonial period to date – have yet to fundamentally shift. Until they do, political contestation and the mobilisation of ethnicity for political gain remain triggers for political violence.

### *Complementarity and the criminal justice system*

The Rome Statute specifies that the ICC serves as a court of last resort and as such is expected to have a positive impact on domestic criminal justice systems by complementing rather than replacing these systems. This is the principle of 'complementarity'.

With respect to Kenya's criminal justice system, it is clear that the ICC's engagement with Kenya has helped bring about some positive changes which strengthen the rule of law, most notably in the judiciary at the level of adjudication. The recent judicial appointments, for example (discussed earlier in this paper), are significant. They have added fresh momentum to the on-going process of judicial reform, much of which arises from recommendations of the Task Force on Judicial Reforms that was established before the post-elections violence but which concluded its work in the aftermath of the violence.<sup>114</sup> Although some of these developments have been underpinned by questionable motivations – notably attempts by the Kenyan government to evade ICC proceedings rather than to strengthen the rule of law in Kenya for its own sake – this does not detract from the positive steps made. It does,

however, forewarn that the battle for full reform is far from over and that many challenges lie ahead, not least once the vetted judiciary is in place – a process which will take a couple of years to conclude.<sup>115</sup>

On this latter point, the reaction of the executive branch of government to the decision of the High Court in response to an application brought by the Kenyan Section of the International Commission of Jurists (ICJ-Kenya) is telling.<sup>116</sup> The High Court ruled, relying on the new Constitution, that because international law is part of Kenyan law, Kenya is obliged to respect the arrest warrant issued by the ICC against al-Bashir. Consequently, the High Court issued an arrest warrant for al-Bashir and directed the Attorney General and the Minister of Internal Security to effect the warrant should al-Bashir visit Kenya again. This was a significant finding and a victory for the rule of law in Kenya. The Minister for Foreign Affairs, however, promptly condemned it on the grounds that it would jeopardise Kenya's relations with Sudan as well as impact adversely upon regional peace and security. Subsequently, the Attorney General has sought leave to appeal against the decision on the grounds that international law also recognises the immunity of sitting presidents.<sup>117</sup> Furthermore, the President has now appointed a panel – which includes external (foreign) advocates who led Kenya's initial admissibility challenge before the ICC – to determine the potential consequences of the recent High Court decisions.

Similar positive consequences of the ICC process have yet to be felt in respect of other elements of Kenya's criminal justice system. As noted above, while the new Constitution finally separated the offices of the Attorney General and DPP, the commitment of the DPP to exercise the new independence of his office has been questioned given the matters raised during his vetting process. He has, however, established a task force to investigate how to proceed with prosecutions of 'ordinary' crimes committed during the post-elections violence. An interim report is ready but has not yet been made public. In the meantime, some prosecutions of 'ordinary' crimes have proceeded with two cases being concluded by mid-2012. At the level of prosecutions, however, it remains unclear that the ICC has had a positive impact given that, to date, the interim report has not been released and the DPP has not revealed a strategy, if any, for also prosecuting those responsible for acts of post-elections violence.

At the level of investigations, which are the responsibility of the police, it is clear that the new Constitution has provided for necessary structural changes to policing in Kenya.<sup>118</sup> The Administration Police and the Kenya Police Force are now to fall under a joint command. There are also provisions for a Police Service Commission and an independent oversight mechanism, both of which will

include members of the public to open up accountability proceedings beyond the security services. In this regard, several bills have either just been passed or are about to be passed by Parliament.<sup>119</sup> Even the security services have moved with unusual alacrity on aspects of police reform relating to capacity and efficiency – as well as ethnic and political representation – on recruitment and training matters.

While such progress is long overdue, fierce resistance to questions of accountability from the Ministry of Internal Security and the security services remains. Complaints about disappearances and extrajudicial executions committed by the security services persist, as do complaints about both petty and high-level corruption within the security services.<sup>120</sup> In addition, structural reforms in this sector are probably more attributable to the momentum provided by the KNDR in its comprehensive proposals for constitutional, legal, policy and institutional reform than to the ICC's involvement in Kenya. Indeed, it was the CIPEV's report – arising from the KNDR – that first recommended the structural changes later included in the Constitution. At the level of policing then, there is little evidence that the ICC has had any significant impact, although it must be acknowledged that the ICC's engagement probably did add weight to the Task Force on Police Reforms and the Police Reforms Implementation Commission, which will oversee the implementation of the Task Force's recommendations. In its efforts to prove its willingness and capacity to effect credible criminal prosecutions (in line with ICC complementarity), the government needed to demonstrate that it was moving to close accountability and capacity gaps within the security services.

Concerning investigations into the two cases currently before the ICC, it is beyond the scope of this paper to make any assessment as to how closely the OTP's investigators worked with their Kenyan counterparts on compiling their evidence. Much of the evidence presented by the OTP to date has been documentary in nature, but will be increasingly dependent on testimonial evidence as the cases progress to trial. Historically, Kenyan investigations have tended to rely on testimonial evidence, in part because of capacity challenges especially relating to forensic capacity, as well as the difficulty of using electronic methods to support their testimonial evidence.<sup>121</sup> Whether or not the ICC cases have added value to the Kenyan police's ability to conduct investigations may be a subject worthy of further research.

Given the reliance of the Kenya Police Force on testimony, however, it should be noted that the ICC's engagement with Kenya did certainly foster positive momentum and help strengthen provisions for witness protection in Kenya. As part of the Kenyan government's

effort to demonstrate the capacity and will to assure legal accountability for victims in a credible manner, the Witness Protection Act was amended and finally passed. As a consequence, persons directly responsible for the body that will undertake witness protection have now been appointed. Less encouraging is the fact that the provisions for public participation at the governance level have not yet been effected and nor has the body received the necessary funding or other resources, such as personnel, to begin its work. That said, the fact that the mandate of the body was extended at all is further evidence of the positive influence of the ICC in Kenya.

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## The ICC's engagement with Kenya did certainly foster positive momentum and help strengthen provisions for witness protection in the country

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An additional matter, which would also be a worthy subject for further research, relates to the impact that the ICC Victims' Participation and Reparations Service (VPRS) has had on the practice of criminal justice in Kenya. As in most jurisdictions – with the ICC being innovative in respect of providing for victims' participation throughout its proceedings – in Kenya victims of crime are almost incidental to the prosecution of crimes, even though the state conducts such prosecutions on behalf of both itself and affected victims. Although much of the VPRS' work has, of necessity, been done discretely, it has aided and encouraged the formation of victims' groups – a strategy previously used primarily by the governance, human rights and legal sectors of civil society in Kenya to address gross and systemic human rights violations of the past. Some of these victims' groups, present in areas affected by the post-elections violence, have worked closely with the VPRS. Whether or not such developments portend an expansion of this practice, including in relation to criminal trials more generally in Kenya, and an expansion of the role played by victims in such trials, remains to be seen.

### *Kenya in the region and the world*

One unanticipated impact – of both the KNDR and the ICC – has been Kenya's increased engagement with and use of regional and international multilateral bodies. Kenya has always seen itself (and been seen by external diplomatic missions and multinational companies active in Africa) as

an important lynchpin in eastern Africa, in particular as a regional transport hub and, at least until the post-elections violence, as a regional stabiliser. For example, it has played important conflict mediation roles, notably and most recently in Somalia and South Sudan.

That said, prior to 2007 Kenya had taken this view of its own importance for granted. This is illustrated by the fact that the country did not concern itself with trying to be a political force within the efforts at regional integration on the continent, except with respect to the East African Community and the Intergovernmental Authority on Development (IGAD). Nor did Kenya become actively engaged in the transition process from the Organisation of African Unity (OAU) to the AU – even though it could arguably have played a leadership role within the emerging AU. Nor has Kenya ever sought to maximise its potential within other multilateral institutions – notably the UN – with the possible exception of sometimes lobbying for Kenyan appointments within UN agencies.

It is likely that the events of 2007–8 and their aftermath have changed that. Examples include the Kenyan government's determined lobbying of other African states with respect to non-cooperation with the ICC, and its reliance on Kenya's position within IGAD to leverage the AU. The post-elections violence also led to increased engagement through diplomacy at the UN on ICC issues in an unprecedented manner.

This shift results, in part, from the fact that constituencies within Kenya have become adept at leveraging the interplay between developments at the domestic, regional and international levels, as was evident from the negotiations over the KNDR. But this shift is also due to the fact that, for a change, Kenya has found itself directly and uncomfortably in the regional and international spotlight.

Regardless of the reasons, this shift signifies a different way of managing politics in Kenya. This process is no longer just about managing internal perceptions (including those of the diplomatic corps resident in Kenya). It is now also about managing regional and international perceptions – within key capitals externally as well as within key intergovernmental organisations. Kenya does care, in this sense, about its image and the option of taking its image for granted no longer pertains.

This bodes well, perhaps, for the ICC process in Kenya. It is unlikely that Kenya will see itself as able to simply ignore regional and international opinion in its reactions to the decisions from the ICC pre-trial chambers. Thus, for example, despite the government's attempts to lobby regional and international opinion on the ICC process in Kenya, it has also engaged legally with the court (even though its admissibility challenge ultimately failed).

## CONCLUSION

This paper traces the origins of the ICC process in Kenya – and the violence that provoked it – to the unfulfilled promise of transition in 2002 and the failure of the NARC government to address past corruption and gross and systemic human rights violations. The collapse of the NARC government over a failed memorandum of understanding meant that political contestation going into the 2007 general elections was heightened to fever pitch, including through the mobilisation of ethnicity.

How has the ICC process impacted on Kenya considering that background? This paper argues for a modest assessment of the ICC's impact based on the fact that the court addresses just one aspect of the four-pronged KNDR – which also covers the root causes of the post-elections violence and comprehensive constitutional, legal, policy and institutional reforms. The CIPEV, its recommendation for a Special Tribunal and, ultimately, the ICC process was only intended to address criminal responsibility for the post-elections violence and, in so doing, to help deter future electoral violence.

So how has the ICC process fared in that limited scope of assessment?

With respect to complementarity, the ICC process has arguably helped leverage improvements to Kenya's criminal justice system. With respect to adjudication, judicial reforms are underway, assisted by positive appointments to key judicial positions. With respect to prosecutions, the advent of the new Constitution separated out the positions of Attorney General and DPP to promote independence of the office of DPP. While the appointment of the new DPP raised questions, he has since established a task force to determine how to proceed with the thousands of 'ordinary' criminal prosecutions in respect of the post-elections violence. Some of those 'ordinary' criminal prosecutions have been successfully concluded.

However, with respect to investigations, police reforms have recently stalled on the question of appointment of an overall head of the now combined Administration Police and Kenya Police Force and appointments to a new Police Service Commission. While an Independent Police Oversight Authority is now in place, it has yet to establish physical premises or mode of operations. As noted earlier, it is not yet possible to say what impact the ICC process has had on the conduct of criminal investigations in Kenya.

The question of witness protection remains a complicated one, with the safety and security of witnesses in the ICC cases continuing to be of concern. Victims' participation is still not a component of Kenyan criminal justice proceedings. While victims are now registered and represented in the ICC process, the question of reparations for them is dependent on the ultimate outcomes of the ICC cases. Criminal justice for all victims of the post-elections

violence is dependent on the outcomes of the DPP's task force. Restorative justice for all victims of the post-elections violence has yet to receive the attention it deserves from the Kenyan authorities – despite on-going efforts at resettlement of internally displaced persons.

As concerns deterrence, Kenya is meant to go to the polls in 2012-3, notwithstanding debate about the exact date of the elections or the recent High Court ruling on the matter.<sup>122</sup> Two of the ICC accused are known presidential aspirants – both representing significant ethnic and political blocs (although no supposed ethnic bloc is politically homogenous). The Rift Valley has always been the epicentre of elections-related violence. This is because it has served, from colonial times to the present, as the safety valve that releases land pressure from those either forcibly displaced from Central province and elsewhere under colonialism, or those who have moved since in search of viable land due to land fragmentation in Central province and elsewhere. Ruto is a Kalenjin presidential aspirant; Kenyatta a Gikuyu presidential aspirant, and election-related violence in the Rift Valley has tended to be between these two ethnicities.

This is obviously a simplification of a much more complex situation. Neither Ruto nor Kenyatta is the sole presidential aspirant within the Kalenjin and the Gikuyu

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## Restorative justice for victims of the post-elections violence has yet to receive the attention it deserves from the Kenyan authorities

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respectively. Neither the Kalenjin nor the Gikuyu vote homogeneously en masse. Other ethnicities live in and have always been affected by election-related violence in the Rift Valley.

That said, however, it is clear that much depended on whether the charges were confirmed against either or both of the presidential aspirants. That the ICC was aware of this fact is evident from the PTC II's release of the decisions pertaining to both cases on the same day and at the same time. Should the charges against only Ruto have been confirmed, there were fears that violent reactions in the Rift Valley would target non-Kalenjins, including the Gikuyu. Should the charges against only Kenyatta have been confirmed, some Central politicians had already threatened 'no Uhuru, no elections'. As the charges against both have been confirmed, it is unclear what sort of joint response they and their followers may now pursue. Anger has

already been expressed towards Odinga's Luo people given the perception that Odinga was behind the violence in the north Rift, and that he has somehow evaded responsibility for this violence, and in fact, is utilising the ICC against his erstwhile ODM colleague Ruto. In this sense, the political mobilisation of ethnicity may play out differently in the next general elections – with the Gikuyu and the Kalenjin being urged to now find common cause against the Luo.

Equally important here is the ICC PTC II's decision not to confirm the charges against the former police commissioner. This decision was due to the OTP's failure to present sufficiently convincing evidence implicating the former police head. However, if the Kenya Police Force interpret this decision as a vindication of the police's behaviour in 2007-8, this will undermine state agencies' ability to avoid being used to commit political violence or their ability to better respond to violence within the boundaries of the Constitution and the law.

The governance, human rights and legal sectors of civil society have publicly urged the Kenyan government – as well as relevant bilateral and multilateral organisations – to prepare scenarios along the above lines. These civil society actors also hope to pressurise all relevant agencies, departments and government ministries to prepare to mitigate any potential violence. The role of the state in managing the aftermath of the ICC's decisions is critical – as is the role of statesmen and stateswomen. The president and prime minister, together with all senior Kenyan personalities, must make clear that the Kenyan government intends to respect the law. Voices of reason will be important as campaigns for the next general elections continue. This includes voices of reason within the region and internationally.

The next general elections will provide yet another watershed for Kenya's path down the KNDR – and away from the brink. The ICC was never intended to address all the causes of the violence, and neither could it. All the other public institutions put into place as a result of the KNDR as well as all of the now reformed public institutions have a role to play. Will we see the fire next time? Or will Kenyans prove – as so many have demanded – that justice is, in fact, necessary for peace.

## RECOMMENDATIONS

### *Executive branch of the Kenyan government*

- Continue cooperation with the ICC process, including through demonstrating cooperation by seeking the resignation of the deputy prime minister (or his suspension) pending confirmation of guilt or innocence by trial.

- Support the development of a comprehensive programme of restorative justice for all victims of the post-elections violence, including through:
  - The renewal of all identity documents
  - The restoration of any land and property still in the hands of others
  - Compensation for lost properties
  - A medical and psycho-social programme for those with on-going medical and psycho-social injuries as a result of the post-elections violence
  - A credit, business, employment and livelihoods programme
- Intensify equality, anti-discrimination and land programmes, particularly in the Rift Valley.
- Establish a process to monitor the possible incitement of political violence along ethnic lines in the lead up to the next general elections, with credible and independent complaints, investigations and enforcement processes for breaches of relevant constitutional provisions and laws.

### *Kenyan Parliament and all political parties*

- Abide by its adoption of the CIPEV report.
- Pass legislation to establish a Special Tribunal to investigate and charge all suspected financiers, instigators, planners and perpetrators of the post-elections violence.

### *The Kenyan criminal justice system*

- Conclude police reforms including through the appointment of an Inspector-General, appointments to the Police Service Commission and building the capacity of the Independent Police Oversight Authority.
- Capacitate the Kenya Police Force's detectives to investigate the post-elections violence.
- Research the added value of the ICC process with respect to the capacity of the Kenya Police Force to conduct both forensic and testimonial criminal investigations.
- Investigate and prosecute all suspected financiers, instigators, planners and perpetrators of the post-elections violence.
- Capacitate state prosecutors to prosecute cases relating to the post-elections violence.
- Make public and follow-up on recommendations of the DPP's task force into the prosecution of 'ordinary' crimes arising from the post-elections violence.
- Ensure such prosecutions are conducted within a well-thought out strategy to investigate and prosecute not just perpetrators of incidents but also financiers, instigators and planners of the post-elections violence.
- Establish a credible and independent complaints and

investigation process into the actions of state security agents during the post-elections violence.

- Ensure the removal from office of all state security agents suspected of or charged with crimes relating to the post-elections violence.
- Build the capacity (financially and in terms of human resources) of the Witness Protection Agency.
- Guarantee the safety of all victims, intermediaries (human rights defenders) and potential witnesses through an alternative mechanism acceptable to all parties.

### *ICC's Office of the Prosecutor*

- Continue investigations into the role of the Kenya Police Force in respect of the post-elections violence.

### *ICC's Victims' Participation and Reparations Service*

- Assist with the registration of remaining victims for participation in the ICC cases and to receive reparations in the two cases.
- Apply for the freezing of assets of the four suspects.
- Research the impact of the ICC process on victims' participation, protection and reparations within the Kenyan criminal justice system.

### **NOTES**

1. See court records from the PTC II pertaining to the Kenyan situation at <http://www.icc-cpi.int> for the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ICC-01/09-01/11-373 and the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute ICC-01/09-02/11-382.
2. With respect to Case ICC-01/09-01/11, *The Prosecutor vs William Samoei Ruto and Joshua Arap Sang*, charges of crimes against humanity (including murder, deportation or forcible transfer of population, and persecution) were confirmed against Ruto and Sang and not confirmed against their initial co-accused, Henry Kiprono Kosgey. With respect to Case ICC-01/90-02/11, *The Prosecutor versus Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, charges of crimes against humanity (including murder, deportation or forcible transfer, rape, persecution, and other inhumane acts) were confirmed against Muthaura and Kenyatta and not confirmed against their initial co-accused, Mohammed Hussein Ali. Ruto, Muthaura and Kenyatta are accused of being criminally responsible, as indirect co-perpetrators for the crimes outlined in their respective cases. Sang is accused of having otherwise contributed to the crimes outlined in his case.
3. See court records from the ICC Appeals Chamber pertaining to the Kenyan situation for the decision on the appeals of William Samoei Ruto and Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled: Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-414 and the decision on the appeal of Francis Kirimi Muthaura and Uhuru Muigai Kenyatta against

the decision of Pre-Trial Chamber II of 23 January 2012 entitled Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-425.

4. As per article 15(1) of the Rome Statute, 'the Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court'.
5. The situations in the Central African Republic (CAR), the Democratic Republic of the Congo (DRC) and Uganda were, for example, state referrals. The situations in Libya and Darfur were, on the other hand, referrals by means of UN Security Council resolutions.
6. See [www.Parliament.go.ke](http://www.Parliament.go.ke) for the Constitution of Kenya, 2010.
7. See <http://www.dialoguekenya.org/agreements.aspx> for the full KNDR agreements. This is the official website of the AU's Panel of Eminent African Personalities which mediated the negotiation of the KNDR agreements.
8. See [www.dialoguekenya.org](http://www.dialoguekenya.org). In brief, the KNDR covered: a) ending the violence; b) addressing the humanitarian crisis and restoring fundamental freedoms; c) reaching a political settlement; and d) long-term issues, including Constitutional, legal and institutional reforms. The KNDR is covered more fully below.
9. Kenyatta had not before been involved in politics and the assumption that he was fit to rule by virtue of his descent was not appreciated by many.
10. See <http://www.eisa.org.za/WEP/ken2002results.htm> for the results of Kenya's 2002 general elections.
11. 'Grand' corruption refers, in Kenya, not to day-to-day, mundane corruption of minor public officers, but to the large-scale corruption of senior public officers.
12. Gallup International's annual End of Year survey, released at the start of January 2003.
13. See archives from the Constitution of Kenya Review Commission (CKRC) and the Katiba Institute: <http://www.katibainstitute.org> for more information. In brief, the CKRC, appointed by former President Daniel arap Moi, oversaw the proceedings of a constituent assembly at the Bomas of Kenya with the coming into power of the NARC. Those proceedings, intended to result in a new Constitution, became known as the 'Bomas process'.
14. See the NARC's 2002 elections manifesto as well as Kibaki's inauguration speech of 30 December 2002.
15. See, for example, stories in the *Daily Nation* from early 2003 available at <http://www.nation.co.ke>.
16. See <http://www.treasury.go.ke/> for recent budget information from the Ministry of Finance, Government of Kenya.
17. See <http://www.eisa.org.za/WEP/ken2005results.htm>.
18. The president's special advisor on ethics and governance had been recruited from his previous position as head of the Kenyan Chapter of Transparency International (TI) to symbolise NARC's zero-tolerance policy on corruption.
19. Promissory notes, like bearer bonds, can be redeemed or traded by whoever holds them. When presented with them, regardless of their links to real goods and services (or the companies originally contracted to provide such goods and services), the government is obliged to settle them. See [http://www.marsgroupkenya.org/pages/stories/Anglo\\_Leasing/](http://www.marsgroupkenya.org/pages/stories/Anglo_Leasing/), the website of the Media Analysis and Research (MARS) Group, a Kenyan transparency organisation set up by Mwalimu Mati, formerly of TI's Kenya chapter. Payments continue to be budgeted for and paid against some of the unrecovered promissory notes. The forensic and passport printing facilities have not yet been developed.
20. See the Kenya Bureau of Statistics (KEBS) and the annual Kenya Economic Survey Reports, Nairobi: Ministry of Planning, National Development and Vision 2030, Government of Kenya.
21. The 'orange' referring to the fruit that the Electoral Commission of Kenya (ECK) had designated for the symbol for a 'no' vote in the 2005 referendum.
22. The 'old guard' refers to the Gikuyu and Central Kenyan business and political families which had established themselves first under former President Jomo Kenyatta, been stifled under former President Daniel arap Moi and re-emerged under President Mwai Kibaki.
23. See various opinion polls prior to Kenya's general elections of 2007 from both local and international opinion polling companies, such as Gallup and Synovate. Further to the violence of 2007-8, concern was expressed about the possible political bias of opinion polling companies, their statistical methods and their possible heightening of elections-related tensions.
24. Much was made, for example, of the fact that Luo men are not traditionally circumcised. For communities in which men are circumcised, this supposedly meant that Luo men were not 'real men' and thus not fit to rule.
25. Many of the Gikuyu websites focused on whether Kenyans could elect a presidential candidate not deemed to be a 'man' because of not being circumcised. (Circumcision is traditionally a rite of passage to mark the movement from adolescence into adulthood.) That other rites of passage that apply within the Luo community were not mentioned. See *Violating the Vote: a report on the 2007 General Elections*, KHRC, Nairobi, 2008, which covered human rights violations committed in the lead-up, during and following Kenya's 2007 general elections, including a section on hate speech in campaigning.
26. See <http://www.eck.or.ke> for information on the former ECK.
27. No violence had preceded the 2002 general elections that brought NARC into power. As those elections marked the end of former President Daniel arap Moi's reign, there had been fears of violence. Having made it through the partial but significant transition, there was little expectation that violence would mark the 2007 elections, which was not deemed to be as significant in a transition sense.
28. See *Report from the Elections Monitoring and Response Centre (EMRC)*, KHRC, Nairobi, November 2007.
29. See, for example, reports in the *Daily Nation* from mid-2007 to the end of 2007 at <http://www.nation.co.ke>. The aim was for either political party to control civic, parliamentary and presidential levels to ensure that the nominally more independent Parliament would conform with the bidding of the executive level of government.
30. For example, voting registers missing surnames beginning with 'O,' as is the case for many Luo names in more ethnically/politically homogenous constituencies dominated by Gikuyu. See initial reports on the conduct of polling during Kenya's 2007 general elections, from both domestic and international observation groups.

31. See reports in the *Daily Nation* from the beginning of January 2008 at <http://www.nation.co.ke>.
32. See numerous reports on the violence by local and international media, NGOs including the KHRC, the International Crisis Group (ICG), Human Rights Watch (HRW), as well as the KNCHR, the UN OHCHR and the CIPEV.
33. See reports in the *Daily Nation*, from the beginning of January 2008, on statements by members of ODM's leadership as to why it would not resort to the courts at <http://www.nation.co.ke>.
34. See reports from the Kenya Human Rights Commission (KHRC)'s election monitors, included in its two reports on the elections of 2007, namely *Violating the Vote and The Violence of 2007/8* at <http://www.khrc.or.ke>.
35. See reports by the international media, especially the British Broadcasting Corporation (BBC), and the Kenyan media, especially the *Daily Nation* from January 2008, at <http://www.nation.co.ke>.
36. See the *Daily Nation* for January 2008 at <http://www.nation.co.ke>.
37. See the official website of the KNDR as well as the website for KPTJ at [http://www.africog.org/kptj\\_homepage](http://www.africog.org/kptj_homepage), hosted by the African Centre for Open Governance (AfriCOG), a transparency organisation set up by Gladwell Otieno, formerly of TI's Kenya chapter.
38. See statements by the same from early January 2008, publicised by the Kenyan media, including the *Daily Nation* at <http://www.nation.co.ke>.
39. See the *Daily Nation* for January 2008 at <http://www.nation.co.ke>.
40. PNU referred to the purpose of his visit as having been to 'have a cup of tea'. See reports of ministerial statements in the *Daily Nation* of January 2008 at <http://www.nation.co.ke>.
41. CCP was led by retired Ambassador Bethwell Kiplagat, who had played an important role in the Somali negotiations, General Lazarus Sumbweiyi, who had helped negotiate the Sudanese Comprehensive Peace Agreement and Dekha Ibrahim, a Kenyan active in the peace and women's movements in northern Kenya.
42. See George Wachira, *Citizens in Action: making peace in the post-elections crisis in Kenya—2008*, Nairobi: Nairobi Peace Initiative (NPI), 2011.
43. See KPTJ's website, hosted by the African Centre for Open Governance (AfriCOG) at <http://www.africog.org>.
44. See statements from KPTJ on the violence, as well as reports on the same from its members, including the Kenya National Human Rights Commission (KNCHR) and the KHRC.
45. See [http://www.africog.org/kptj\\_homepage](http://www.africog.org/kptj_homepage). See also L Muthoni Wanyeki, Kenyan Civil Society and the 2007/8 Political Crisis: towards and following the Kenya National Dialogue and Reconciliation (KNDR), in *Civil Society in Kenya after 2002: reflections of the leaders*, Nairobi: African Research and Resource Forum (ARRF), 2010.
46. KPTJ realised the futility and impossibility of either a re-tally, a re-count or a re-run (given that the integrity of the poll evidence was in question after the national tallying centre was broken into).
47. Many women's organisations had been involved in efforts to promote women's political participation as both voters and candidates through civic education and concrete electoral support. These, with others with contacts and networks on the ground, had been involved in channeling funding to those contacts and networks to assist in moving women at risk to safety in areas affected by the violence. They had also been involved in trying to ensure survivors of sexual violence got treatment and lodged complaints.
48. The women's movement sought active engagement in the KNDR's negotiations and, when that failed, they hoped to ensure that the AU Panel and the women on the ODM and PNU negotiating teams took up their concerns. They wanted any political settlement reached to specify representation by women and they wanted retributive and restorative justice for female survivors of the violence, including particular attention to female internal displaced persons. See L Muthoni Wanyeki, Lessons from Kenya: women and the post-elections violence, in *Feminist Africa: militarism, conflict and women's activism*, Issue 10, African Gender Institute, Cape Town: University of Cape Town, 2008 and Meredith Preston McGhie and E Njoki Wamai, *Beyond Numbers: women's participation in the Kenya National Dialogue and Reconciliation*, Nairobi: Centre for Humanitarian Dialogue, 2011.
49. This was evidenced by the unprecedented joint advertisements by the Federation of Kenyan Employers and the Central Organisation of Trade Unions demanding that President Kibaki essentially concede as the negotiations reached a critical point. See the *Daily Nation* for March 2008 at <http://www.nation.co.ke>.
50. The Nation Television (NTV) series, *Voices of Reason*, hosted by Julie Gichuru, was a key example in which prominent and ordinary Kenyans spoke about the violence, its causes and impacts and the need for the mediation to succeed.
51. The Nation Media Group (NMG) had 'lost' its electoral database as well as the backup for the database. This 'loss' was eventually the subject of an investigation ordered by its majority shareholder, the Aga Khan, the results of which were never made public. The Standard Media Group's electoral database was 'compromised' towards the end of the counting and tallying. The net effect, given that the ostensibly independent Kenyan Domestic Observation Forum (KEDOF) chose to 'harmonise' its results with the ECK, was that no complete and independent set of electoral results was available. See Jamal Abdi and James Deane, *The Kenyan 2007 and Their Aftermath: the role of media and communication*, London: the British Broadcasting Corporation World Trust, 2008. While the Kenyan media were quick to help address the violence, their partisan roles in the lead-up to the elections has been decried. Much attention has been given to the role of private, local language broadcasters in disseminating hate speech. Far less attention has been paid to the loss of the NMG's elections database and backup and the compromising of the Standard Group's elections database, both of which meant that no full set of elections results, broadcast from the constituency tallying centres, was available to compare against the ECK's revised results. While the Aga Khan, majority shareholder of the NMG, later ordered an investigation into the loss of their elections database and back-up, the results of that investigation were never made public.

52. Key Western diplomatic missions, for example, began to compile lists of those believed to be blocking movement forward on the KNDR negotiations, and made public announcements to this effect, without publicly naming names. Some civil society organisations, involved in monitoring the elections and thus with first hand information on the violence, were consulted in the preparation of these lists.
53. See the official website of the KNDR at <http://www.kenyadialogue.org>.
54. See <http://www.dialoguekenya.org/docs/PEVReport1.pdf> for the full CIPEV report.
55. See the resolution on establishing the CIPEV and its mandate at the official website of the KNDR at <http://www.kenyadialogue.org>.
56. See numerous reports on the violence by local and international media, NGOs including the KHRC, the International Crisis Group (ICG), Human Rights Watch (HRW), as well as the KNCHR, the UN OHCHR and the CIPEV.
57. See, for example, work by Kenyan and other academics including Professor David Anderson; Dr Karuti Kanyinga; Dr Gabriel Lynch; Dr Godwin Murunga; Dr Mutuma Ruteere and others.
58. See the Executive Summary of the full CIPEV report.
59. See the official website of the KNCHR at <http://www.knchr.org> for its full report on the violence of 2007-8.
60. See the CIPEV's recommendations at the end of its report, available from the KNDR's official website at <http://www.kenyadialogue.org>.
61. See the International Crimes Act, 2008.
62. Such arguments would undoubtedly be raised and any related legal challenges have to be overcome if the Special Tribunal were established.
63. Mikewa Ogada, Special Brief: civil society responses to the Kenyan crisis, Nairobi: Kenya Human Rights Institute (KHRI), 2008.
64. See comments by ODM parliamentarians in debates concerning the violence from 2008 to the present in the Hansard at <http://www.Parliament.go.ke/index.php>.
65. See comments by PNU parliamentarians in debates concerning the violence from 2008 to the present in the Hansard at <http://www.Parliament.go.ke/index.php>.
66. See public statements by the police spokesperson concerning the violence from 2008 to the present.
67. See various monitoring reports of the KNDR, commissioned by the mediators from South Consulting at <http://www.dialoguekenya.org>. Several of these quarterly monitoring reports have focused on Kenyans' desire for justice, including support for the ICC. Data is available on how that support is differentiated regionally.
68. From the Centre for Research, Education and Awareness (CREAW) and FIDA-K.
69. See various briefings and reports from the National Coalition of Human Rights Defenders (NCHRDs), not in the public domain with a few exceptions, but data and analysis available upon request from the KHRC.
70. See various briefings and reports from the National Coalition of Human Rights Defenders (NCHRDs), not in the public domain with a few exceptions, but data and analysis available upon request from the KHRC.
71. See <http://www.kenyalaw.org/CaseSearch/> for the decision on the application by Uhuru Kenyatta.
72. See the decision by Parliament on the Special Tribunal in the Hansard at <http://www.Parliament.go.ke/index.php>.
73. See the so-called '[Gitobu] lmanyara bill'.
74. In mid-2012, the DPP appointed a task force to determine how best to proceed with prosecutions of 'ordinary' crimes during the post-elections violence. The task force has an interim report, which has not yet been made public.
75. See *Turning Pebbles: evading accountability for post-election violence in Kenya*, New York: HRW, 2011.
76. See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/>, the section of the ICC's official website dealing with the Kenyan situation for all documents from the OTP, the Defence and the PTC II relating to the stages of preliminary examination; investigations; and confirmation of charges hearings. See also <http://www.icckkenya.org/about-this-website/who-we-are/> for the Kenya Monitor, a website hosted by the Open Society's Justice Initiative on the Kenyan situation before the ICC. Finally, see [http://www.africog.org/kptj\\_homepage](http://www.africog.org/kptj_homepage), the KPTJ website hosted by AfriCOG for briefings, reports and statements by the governance, human rights and legal sectors of civil society in Kenya on the ICC.
77. See public statement on the agreement between the ICC's OTP and the two Principals under statements by the Office of the Prosecutor at <http://www.icc-cpi.int>.
78. See public statement on the agreement between the ICC's OTP and the president and prime minister under statements by the Office of the Prosecutor at <http://www.icc-cpi.int>.
79. Under article 7 of the Rome Statute, crimes against humanity are defined as including any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; deportation or forcible transfer of population; rape, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
80. See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Court+Records/Chambers/> for all decisions to date on the Kenyan situation.
81. Articles 17-20, Part 2, Rome Statute of the International Criminal Court.
82. See comments by ODM parliamentarians in debates on those detained in respect of the post-elections violence in the Hansard from 2008 at <http://www.Parliament.go.ke/index.php>.
83. See the AG's submission to the ICC in respect of criminal prosecutions for the post-elections violence. See also reports from the Kenya Police force on this issue.
84. See <http://kenyalaw.org/CaseSearch/> for the judgements in these cases.



85. See submissions by the Registry for the VPRS at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Court+Records/Registry>.
86. As mentioned above, see data and analysis on protection from the NCHRDs.
87. See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Court+Records/Chambers/> for all decisions to date on the Kenyan situation.
88. See various briefings and reports from the National Coalition of Human Rights Defenders (NCHRDs), not in the public domain with a few exceptions, but data and analysis available upon request from the KHRC.
89. Undocumented discussions between KPTJ and the ICC's WVPU.
90. Undocumented discussions between the NCHRDs and the HRDs Protection Group.
91. See reports from the KNDR review conferences at <http://www.dialoguekenya.org/index.php/reports/conference.html>.
92. See public statements by the ICC's OTP at <http://www.icc-cpi.int>.
93. See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Court+Records/Chambers/> for all decisions to date on the Kenyan situation.
94. See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Court+Records/Chambers/> for all decisions to date on the Kenyan situation.
95. The motion was moved as soon as the ICC prosecutor announced his intention to request summons to appear for the six accused in December 2010.
96. The AU took a decision on non-cooperation with the ICC in respect of its arrest warrant for the Sudanese President based on presidential immunity; the security situation in the Sudan; and the need to ensure the Sudanese president enabled the referendum on south Sudan's independence. See <http://www.au.int/en/decisions/assembly> for all decisions and declarations of the AU's Assembly of Heads of State and Government.
97. The AU took a decision on Kenya and the ICC based on blanket voting on IGAD resolutions forwarded to the AU's Assembly of Heads of State and Government for its references. See <http://www.au.int/en/decisions/assembly> for all decisions and declarations of the AU's Assembly of Heads of State and Government.
98. See <http://www.dialoguekenya.org/Agreements/> for the Statement of Principles on Long Term Issues and Solutions, updated with implementation matrix, for the KNDR commitments on judicial reforms.
99. Vetting here was intended to purge the judiciary of those who were proved to have compromised their independence for either political or economic reasons.
100. See the various stories on the Government of Kenya's 'shuttle diplomacy' in the Daily Nation through 2010/1.
101. See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Court+Records/Chambers/> for all submissions and decisions to date on the Kenyan situation.
102. In May 2012, the High Court dismissed a petition challenging the appointment of Keriako Tobiko to the position of DPP on the grounds that allegations against him had already been raised and dismissed by the vetting panel dealing with the judicial appointments. It did not consider the substantive allegations against him or the concerns with the manner in which the vetting panel handled the same.
103. In January 2012, the president appointed, by Gazette notice, a tribunal to investigate the allegations against Nancy Baraza.
104. See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Court+Records/Chambers/> for all submissions and decisions to date on the Kenyan situation.
105. See <http://www.princessprojectkenya.com/topics/legal/> for articles on the ICC and Kenya by Alexander Eichener.
106. Ibid.
107. See, for example, opinion polls conducted by South Consulting for the KNDR as well as by Synovate on Kenyan attitudes towards the ICC process.
108. As noted above, in mid-2012, the DPP appointed a task force to determine how best to proceed with prosecutions of 'ordinary' crimes during the post-elections violence. The task force has an interim report, which has not yet been made public.
109. See, for example, statements from the Kenya Transitional Justice Network (KTJN) and the National Network of Internally Displaced Persons (IDPs) for victims' demands for restorative and retributive justice. See also Simon Robins, *To Live as Other Kenyans Do: a study of the reparative demands of Kenyan victims of human rights violations*, Nairobi: International Centre for Transitional Justice (ICTJ)-Kenya, 2011.
110. See reports of experts' group meetings convened by KPTJ on justice for the victims using all national, regional and international remedies available. See also the complementarity project of the Open Society's Justice Initiative in Kenya.
111. See statistics in the CIPEV report at <http://www.dialoguekenya.org/docs/PEVReport1.pdf>. See also Simon Robins, *To Live as Other Kenyans Do: a study of the reparative demands of Kenyan victims of human rights violations*, Nairobi: International Centre for Transitional Justice (ICTJ)-Kenya, 2011.
112. See, for example, the work of Professor Mahmood Mamdani of the School of International and Public Affairs (SIPA) at Columbia University and the Makerere Institute for Social Research (MISR) at Makerere University on political violence in Africa.
113. See Chapter Five, Land and Environment, Constitution of Kenya, 2010 at <http://www.Parliament.go.ke/index.php>; the Land Act Number 6 of 2012 at <http://www.kenyalaw.org/klr/>; and Sessional Paper Number 3 of 2009 on Land Policy at <http://www.lands.go.ke/index.php>.
114. The Task Force on Judicial Reforms was appointed in May 2009. See its final report at <http://www.kenyalaw.org/Downloads/>.
115. The mandate of the independent vetting board, including external participation, expired mid-2012. Parliament declined to renew its mandate and tasked the Judicial

Service Commission (JSC) with concluding its work. This decision was contested by the governance, human rights and legal sectors of civil society, including the bar's professional body, the Law Society of Kenya (LSK).

116. See judgement of the High Court in favour of the application by the International Commission of Jurists (ICJ)-Kenya to issue an arrest warrant against the Sudanese President at <http://kenyalaw.org/CaseSearch/>.
117. In February 2012, the Court of Appeal allowed the AG to proceed with an appeal against the High Court's decision to issue an arrest warrant against the Sudanese President.
118. See Chapter Fourteen, National Security, Constitution of Kenya, 2010 at <http://www.Parliament.go.ke/index.php>.
119. See various Acts and pending bills on security sector reform in Kenya including the: National Police Service Act, 2011; National Police Service Commission Act, 2011; and Independent Policing Oversight Authority Act, 2011.
120. See recent reports from the KNCHR as well as the Kenya Anti-Corruption Commission (KACC) in Nairobi.
121. See the report of the Task Force on Police Reforms, Nairobi: Ministry of Internal Security, Government of Kenya.
122. See the High Court's January 2012 ruling on the elections date at <http://kenyalaw.org/CaseSearch/>.

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## ABOUT THIS PAPER

This paper examines the origins of the ICC's work in Kenya and the impact thereof to date as Kenya awaits the April 2013 trial of four Kenyans in the two cases before the ICC. The paper re-traces the background to the post-elections violence and situates the ICC within the mediation agreements of the Kenya National Dialogue and Reconciliation (KNDR). It describes how Kenya became an ICC situation and covers the engagement of the ICC's Office of the Prosecutor, Victims' Participation and Reparations Service, and Witness and Victims' Protection Unit in Kenya. The paper considers whether the ICC's work in Kenya has contributed to other legal, policy and institutional reforms arising from or inspired by the KNDR. It also explores whether the intended impact of the ICC – complementarity and deterrence – has yet been realised in Kenya.

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L. Muthoni Wanyeki is currently doing her graduate studies at L'Institut d'études politiques (Sciences Po) in Paris, France. She was previously the Executive Director of the Kenya Human Rights Commission, at which time she was active in the coalition Kenyans for Peace with Truth and Justice during and after the post-elections violence. Wanyeki is also a former Executive Director of the African Women's Development and Communication Network. She serves as an advisor and board member to several Kenyan and other organisations and also writes the Kenyan column for the *East African*.

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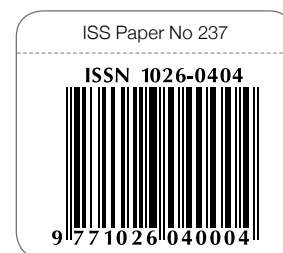
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