



Kenya: Impact of the Rome Statute and the International Criminal Court

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Executive Summary

Kenya plunged into a dark episode of violence following the controversial presidential election of 2007. This paper analyzes the impact of the International Criminal Court's (ICC) recently announced investigation into issues of complementarity, peace, justice, victims, and affected communities in the country. It discusses the government's failure to set up a Special Tribunal for Kenya or to initiate any effective proceedings for international post-election crimes at the domestic level. While the Truth, Justice, and Reconciliation Commission (TJRC) established to investigate past human rights violations could provide a platform to unearth the truth and identify potential cases for prosecutions, it is unlikely to have the capacity to ensure comprehensive, genuine investigations of alleged perpetrators of post-election violence.

Victims and communities affected by the violence have continuously expressed their strong support for the ICC investigations. They say they hope that the ICC's potential to prosecute could avert violence during the next elections in 2012. This may not be realistic. However, threats to potential witnesses remain a critical concern and necessitate the prompt establishment of an effective protection mechanism for witnesses and victims. Moreover, timely action by the ICC as well as commitment by the Kenyan government not only to cooperate with the Court but also to establish mechanisms to address all perpetrators locally is imperative to curb entrenched impunity and redress the harm victims have suffered.

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Introduction

While Kenya has a history of election-related violence since the restoration of multiparty politics in 1991, the violence following the 2007 election was unprecedented in scope. Although arguably not as grave as some of the other situations before the ICC, it was the most destructive, deadly, and widespread violence ever experienced in Kenya, characterized by sexual violence, maiming, and killing that caused the deaths of 1,133 people, displacement of more than 350,000 people, and the burning and destruction of property.¹

On February 5, 2008, the ICC Prosecutor said that his office would carefully consider all information regarding alleged crimes within the Court's jurisdiction, effectively launching a preliminary examination into the situation in Kenya. On February 28 presidential candidates Raila Odinga of the Orange Democratic Movement (ODM) and Mwai Kibaki of the Party of National Unity (PNU) signed an agreement to establish a coalition government.² This marked the beginning of the Kenya National Dialogue and Reconciliation initiative, mediated by the Panel of Eminent African Personalities, headed by former United Nations (UN) secretary-general Kofi Annan. Under this process, the parties agreed

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Kenya: Impact of the Rome Statute and the International Criminal Court**About the Authors**

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to establish a Commission of Inquiry Into Post Election Violence (CIPEV), which had a mandate to investigate the facts and circumstances surrounding the post-election violence and the conduct of state security in handling the violence, and to make recommendations on these matters.

They also agreed to establish a Truth, Justice, and Reconciliation Commission (TJRC), mandated to establish an accurate, complete, and historical record of gross human rights violations and economic crimes committed between December 12, 1963, the date of Kenya's independence, and February 28, 2008. The TJRC is charged with making recommendations on how best to redress victims and provide reparation.³

In CIPEV's final report, issued on October 15, 2008, the commissioners said the post-election violence was "more than a mere juxtaposition of citizen-to-citizen opportunistic assaults. These were systematic attacks on Kenyans based on their ethnicity and political leanings." The commission found that, while in some parts of the country the violence was a spontaneous reaction to the perceived rigging of elections, in other parts there was planning and organization with the involvement of business leaders and politicians, who in turn solicited the assistance of armed militias. The report also criticized state security agencies for their failure to anticipate, prepare for, and contain the violence, as well as for actively committing acts of violence and gross human rights violations. CIPEV recommended establishing a Special Tribunal for Kenya (STK), a court of mixed composition to be located in Kenya, which would pursue accountability for those bearing greatest responsibility for the post-election violence, especially crimes against humanity.⁴

The STK was intended to break the cycle of impunity that the commission identified as being at the heart of the post-election violence. CIPEV also presented the Panel of Eminent African Personalities with a sealed envelope containing names of those suspected to bear the greatest responsibility for the post-election violence as well as supporting evidence. CIPEV said that if the STK was not set up within three and a half months, the sealed envelope should be forwarded to the ICC Prosecutor.

Complementarity**The Failure to Establish a Special Tribunal for Kenya**

From the outset, the Special Tribunal's promoters, including the commission, saw the tribunal as one way to strengthen domestic justice in Kenya. Including a reference to the ICC in the report was clearly meant to encourage the government to establish this tribunal; ultimately the aim was that justice would be done in compliance with the principle of complementarity. The presumption was that Kenya had or could swiftly secure the judicial capacity sufficient to investigate and prosecute international crimes, and that any lack of political will could be overcome by realizing that the ICC would step in if the government failed to act. Nevertheless, CIPEV and other promoters of judicial accountability feared that the Kenyan judiciary could be pressured through corruption and political interference.⁵ Significantly, the draft STK statute proposed placing internationals in key positions to alleviate concerns of potential political interference with the independence of the process or with witnesses. In December 2008, Kenya implemented the Rome Statute through the International Crimes Act, which grants local courts jurisdiction over international crimes. While this lifted a legal impediment to investigating and prosecuting international crimes, the constitutional bar against retroactive prosecution meant that the Act could not be used to investigate and prosecute crimes committed during the post-election period as such.

A first attempt to establish the STK failed on February 12, 2009, when the legislation did not get the support of the requisite two-thirds majority in Parliament. Subsequently,

MP Gitobu Imanyara initiated a second constitutional amendment bill. Debate on that stalled in November, following four consecutive attempts to convene an adequate quorum in Parliament.

Several additional constitutional hurdles are likely to hinder the passage of Imanyara's bill in Parliament, or, if passed, may open it up to subsequent legal challenge. These include the proposal to curtail the jurisdiction of ordinary criminal courts over these crimes by creating a special tribunal with exclusive jurisdiction over matters relating to post-election crimes. Another is the retroactive application of the International Crimes Act (ICA), which may be held to violate Section 77 (4) of the Constitution on the principle of non-retroactivity, holding that no one shall be prosecuted for acts that, at the time of their commission, were not criminal offenses under the law. The ICA criminalizes crimes against humanity, war crimes, and genocide, but came into force at the end of January 2009, almost a year after Kenya's post-election violence.

On July 3, 2009, a government delegation led by Mutula Kilonzo, the Minister for Justice, National Cohesion, and Constitutional Affairs, and composed of several other ministers from the ODM and PNU parties met with the ICC Prosecutor in The Hague. They agreed to provide the Prosecutor by the end of September with (a) a report of the status of investigations and prosecutions related to post-election violence; (b) information on measures undertaken to ensure the protection of witnesses and victims in such cases; and (c) information on modalities for conducting national investigations and prosecutions, whether through the STK or other judicial mechanisms, with clear benchmarks showing how the investigations and prosecutions would be undertaken over a 12-month period. The government undertook to refer the situation to the ICC if it failed to meet the September deadline.⁶

However, seemingly in a bid to thwart momentum for accountability for post-election violence crimes, on July 30, the Kenyan government resolved to abandon attempts to establish the Special Tribunal and to rely on ordinary criminal courts as well as grant enhanced powers to consider post-election violence to the TJRC. The government stated that it had extensively considered five options, not all of which would have promoted accountability.⁷ It stated "while it will not stand for impunity in the pursuit of justice, the country should equally pursue national healing and reconciliation" and "with proper healing and reconciliation, Kenya won't face the events of last year's post-election violence." The public and the minister of justice strongly opposed this decision in light of the local judiciary's poor record of efficiency and independence, as well as the lack of clarity on how the TJRC would hold perpetrators accountable in the absence of prosecutorial powers.

Kenya's failure to establish the STK, in combination with the lack of investigations or prosecutions of post-election violence within the ordinary criminal justice system highlight the government's lack of commitment to bring the higher-ranking perpetrators to justice. Only a handful of cases have been brought before the local courts to date, with few positive results. For instance, four people charged with arson in relation to the Kenya Assemblies of God church in Kiambaa, Eldoret—in which between 17 and 35 people burned to death—were acquitted for lack of evidence because of a poor police investigation.⁸ In addition, the government withdrew charges against Jackson Kibor, a high-profile individual and wealthy farmer and businessman, who blatantly admitted in a BBC interview to inciting people in the Rift Valley to use violence against President Mwai Kibaki's supporters. An internal report to the attorney general prepared by a team reviewing cases of post-election violence indicated that in February 2009 the state had opened investigations into 156 cases, but they related to only minor offenses, such as malicious damage to property, theft, house-breaking, publishing false rumors, criminal possession

of offensive weapons, robbery with violence, assaulting police officers, and breach of the peace.⁹ There has been no public report on the status of these cases.

The Opening of an Investigation at the ICC

This lack of progress on accountability led to heightened calls in civil society for an ICC intervention. On September 30, 2009, the ICC Prosecutor announced that he favored a three-pronged approach to addressing the post-election violence and to prevent recurrence of violence: the ICC would prosecute individuals bearing the greatest responsibility for crimes committed after the election; national proceedings would seek accountability for other perpetrators; and other reforms and mechanisms, such as the TJRC, would be enacted to address the underlying causes of the violence. On November 26, the Prosecutor requested the Pre-Trial Chamber's (PTC) authorization to institute investigations into the Kenyan situation on his own motion, or *proprio motu*, pursuant to Article 15 of the Rome Statute.¹⁰ In his application, he indicated that, based on the information received from several sources including CIPEV's final report and the Kenya National Commission on Human Rights' report on the post-election violence, there was a reasonable basis to believe that crimes against humanity were committed in Kenya.

On February 18, 2010, the PTC issued a decision requesting clarification in relation to the Prosecutor's request.¹¹ The PTC required additional information on key aspects of the case, including the link between the acts of violence and a state or organizational policy, and the identity of those bearing the greatest responsibility, including whether there had been domestic investigations with respect to these potential cases.

On March 3, the Prosecutor responded by providing a list of 20 people believed to have been directly involved in the organization, enticement, and/or financing of the widespread, systematic attacks against civilians in order to further state or organizational policies. The confidential list included senior politicians and business leaders affiliated with the ODM and PNU parties. The Prosecutor argued that the simultaneous, organized, and widespread nature of the attacks pointed to the existence of a state and/or organizational policy. He also specifically cited the security forces' failure to intervene in an impartial manner and their excessive use of firearms to quell the violence through an unofficial "shoot to kill" policy. According to the Prosecutor, there had been no national investigation or prosecution in relation to the identified suspects and the most serious crimes.¹²

In a landmark ruling on March 31, 2010, the PTC found by a majority of two to one that there is a reasonable basis to believe that crimes against humanity were committed in Kenya during the post-election violence and that their gravity warranted the ICC's intervention. The PTC authorized the Prosecutor to start investigating crimes that may have been committed from June 1, 2005, when the Rome Statute came into force in Kenya, to November 26, 2009, the date of his request.¹³

Soon after the decision, the Minister for Justice affirmed the government's commitment to cooperate with the investigation, reiterating that as State Party to the Rome Statute, Kenya had an obligation to do so. Internally displaced people still residing in transit camps and makeshift homes were particularly excited about the prospect of the investigations because they had been frustrated with the government's failure to prosecute perpetrators of the post-election violence.¹⁴

While many Kenyans strongly support the ICC, there is a risk that they may anticipate that the ICC will work more swiftly and act more broadly than is possible. To avoid disappointing them too much, the ICC and its partners must quickly design and implement outreach activities to fully inform the Kenyan public in general, and victims in particular, of its

mandate, its limitations, and what it is able to do. Nonetheless, concerns remain about the government's willingness to cooperate with the ICC's requests for information and arrest warrants if it comes to pursuing those with high levels of responsibility.

Complications may also be anticipated on the issue of the TJRC. Some practitioners have argued that the TJRC could provide an avenue for investigations that may trigger prosecuting perpetrators of international crimes committed during the post-election violence. However, while the TJRC may have the ability to unearth evidence and leads for subsequent prosecutions and to make recommendations for prosecution, it should not be viewed as an alternative to domestic courts.¹⁵

Another question that remains is whether the national courts can form a meaningful "second prong" of the Prosecutor's strategy. It would be unfortunate if, with the opening of the ICC investigation, Kenya's needs for justice reform are neglected. The Prosecutor's continued emphasis on the need for domestic courts to play a role is welcomed in this regard, but should be followed up by concrete initiatives by justice actors, both national and international.

Peace and Justice

Some of the politicians who were involved in the Kenya National Dialogue and Reconciliation Process and the National Accord argue that criminal accountability for the post-election violence will ignite further violence, and that it is important to focus on forgiveness and reconciliation.¹⁶ These statements however appear self-interested, because some of these politicians could be implicated in the violence.

Their idea is opposed by calls for justice from members of the wider public and to some extent the international community.¹⁷ The ICC's role is perceived as particularly crucial in regard to balancing peace and justice, since many hope that accountability for those responsible for past violence will deter future violence during the next election, scheduled for 2012. It is widely hoped that criminal accountability will end this cycle of violence—keeping politicians from establishing and using militias for their own political gain and manipulating ethnic divides, which creates long-term grievances for short-term political gains.

Impact of the ICC on Victims and Affected Communities

The fact that the Prosecutor has for the first time exercised his *proprio motu* powers to open a case in Kenya remains highly significant and demonstrates the Court's ability to come to the aid of victims of international crimes. The lack of effective measures on behalf of the government to address post-election violence further points to the need for ICC involvement in Kenya.

Several public opinion polls undertaken since the CIPEV recommendations illustrate overwhelming public support for the ICC, which has been summarized in a well-known chant: "Don't be vague, go to The Hague!" In November 2009, an annual survey by Infotrack Research concluded that 62 percent of Kenyans would like those who committed crimes in the post-election violence to be tried at the ICC, while only 2 percent supported a local tribunal.¹⁸ It is clear that the national judicial system lacks public confidence to effectively prosecute and convict alleged perpetrators, especially senior political leaders. The main reason why affected populations support the ICC in Kenya is because they presume it will be free from political interference.

There are significant and grave concerns about witness protection in Kenya, especially considering the alleged direct role of the police in the post-election violence.¹⁹ This prompted

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the Prosecutor to urge the government to do more to provide protection to potential witnesses, as the ICC will be dependent on Kenya for such cooperation. To this end, a witness protection bill to amend the Witness Protection Act of 2006 passed in Parliament on April 7, 2010, and is currently awaiting presidential assent. The amendment would establish an independent, autonomous Witness Protection Agency and a Victims' Trust Fund to provide restitution to victims and their families in case of death. However, the bill is still fundamentally flawed in several key respects.²⁰ The Witness Protection Act therefore requires additional amendments to ensure effective witness protection in Kenya and will need to be effectively implemented.

Moreover, the question of the ICC's ability to provide reparations for the post-election violence is still a key concern, especially with the high expectations the public has vested in the Court. The TJRC is mandated to make recommendations for reparations for victims of human rights violations and may well also consider the plight of some of the victims of the post-election violence. As such, the overlap between its mandate and that of the ICC Trust Fund for Victims will need additional consideration.

Conclusion

Kenya's judicial system appears to have a level of capacity (as demonstrated by CIPEV's initial recommendation to establish a special tribunal and the wide support it received). Some of the legal impediments to prosecutions for international crimes have been removed with the adoption of the International Crimes Act. However, serious concerns exist pertaining to the lack of political will and the risks of corruption and political interference in the judicial processes. The lack of political will to allow senior politicians and other high-ranking individuals, notably among the security sector, to be prosecuted will undoubtedly present particular challenges for the ICC in terms of the cooperation that it can expect from the Kenyan authorities, particularly considering that the Prosecutor has acted *proprio motu*.

The strong call for criminal accountability in Kenya and the support expressed by victims and civil society for ICC involvement are rooted in the belief that holding those responsible for the post-election violence accountable will deter the commission of future crimes. But this belief carries many risks for the ICC. Its success should be judged on delivering justice itself rather than on being able to deter further crimes. Even if criminal justice could be said to have a deterrent effect, can the ICC realistically be expected to deter future crimes in Kenya? What would be needed in terms of the timing of the process and the span of its investigations and prosecutions to have such a deterrent effect? More importantly, will the ICC receive the cooperation it needs from the Kenyan authorities and security sector to investigate swiftly and broadly? Will it be able to sufficiently protect the victims and witnesses?

All this points to the need for the ICC to swiftly develop an outreach program to address what may be unrealistic expectations on behalf of the public in general and of the victims in particular. To prevent future violence, the Court's involvement in Kenya needs to be supplemented by other reforms, including political, constitutional, and security sector reforms.

It is also vitally important that in a volatile and polarized political context, ICC investigations be perceived as fair, independent, neutral, and impartial and that they concern all those alleged to bear the greatest criminal responsibility, without respect to ethnic background or political affiliation. Kenya will certainly pose challenges in this regard. If the Prosecutor is perceived to be balancing the number of people investigated from each

group, or conversely if he is perceived as putting the blame on one group over the other, further tensions may emerge. These should be anticipated and addressed through the prosecutorial strategy and outreach.

Endnotes

1. Committee to Investigate Post Election Violence (CIPEV), Kenya: Final Report. October 16, 2008. Available at <http://www.communication.go.ke/media.asp?id=739>. The CIPEV was established in May 2007 and is also known as the “Waki” Commission, after the chairman, Justice Philip Waki.
2. The Agreement on Principles of Partnership of the Coalition Government, Feb. 28, 2008.
3. The TJRC was formed in early August 2009 after the Truth Justice and Reconciliation Act came into force on March 9, 2009. However, the nine-member commission has been unable to effectively commence its programs due to a serious credibility crisis caused by credible allegations that the chairperson had illegally acquired public land and property and made misrepresentations before a commission of inquiry; both of these cases would be subject of the TJRC’s mandate. See ICTJ’s press release, “New Calls for resignation of TJRC Chair,” Feb. 24, 2010 at www.ictj.org.
4. The STK would have an international component with representation from non-Kenyans and was to be established within three and a half months following the final report.
5. CIPEV, Chapter 11, 473.
6. In light of the government’s failed efforts to establish the STK, on July 9, 2009, Kofi Annan finally transmitted CIPEV’s confidential list of individuals suspected to bear the most responsibility for the post-election violence to the ICC Prosecutor.
7. These included establishing the proposed STK; referring the situation to the ICC under Article 14 of the Rome Statute; withdrawing from the ICC under Article 127 of the Rome Statute and repealing the International Crimes Act; trying the crimes in the Kenyan High Court in accordance with Section 8 of the ICA; and establishing a Special High Court Division akin to the War Crimes Division established in Uganda.
8. *Republic vs. Stephen Kiprotich Leting & 3 others*, eKLR, Cr. Case 34 of 2008, Judgment High Court of Kenya, at Nakuru, April 30, 2009.
9. *Report to the Attorney-General by the Team on the Review of Post-election related violence in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi provinces*, February 2009. Also cited in the *ICC Prosecutor’s Request for Authorization of an Investigation Pursuant to Article 15*, Nov. 26, 2009 at www.icc-cpi.int
10. Article 15(1) of the Rome Statute grants the Prosecutor the power to open investigations on his or her own initiative (*proprio motu* powers) on the basis of information indicating the commission of crimes within the Court’s jurisdiction. The Prosecutor made an application requesting for the Pre-Trial Chamber’s authorization of an investigation pursuant to Article 15.
11. Pre-Trial Chamber II Decision Requesting Clarification and Additional Information, Feb. 18, 2010, at www.icc-cpi.int/NR/exeres/1F5F8EA7-BA49-4041-B0E8-DE2336F15F1E.htm.
12. Prosecution’s Response to Decision Requesting Clarification and Additional Information, March 3, 2010, at www.icc-cpi.int/NR/exeres/95262F03-3528-43B8-B2C9-E6DEA165C659.htm.
13. *Pre-Trial Chamber II Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, March 31, 2010, at www.icc-cpi.int/NR/exeres/422F24A9-5A0F-4FD0-BC3E-9FFB24EC7436.htm.

**THE ROME STATUTE REVIEW
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The Review Conference of the Rome Statute provides a unique opportunity to evaluate the progress of the International Criminal Court and the challenges that it faces. ICTJ brings a wealth of expertise in situation countries to the discussions of complementarity, peace and justice, and the impact of the ICC on the status of victims. ICTJ has developed a briefing paper series for the conference available at www.ictj.org.

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14. "Mixed reactions among Kenyans following authorization," Nation Television, April 1, 2010, at www.ntv.co.ke.
15. The Commission's two-year mandate and the credibility crisis it faces over its leadership further restrict its ability to undertake comprehensive and conclusive investigations into the relevant cases.
16. See "Ruto urges clergy to back reconciliation", The Standard newspaper, online edition, Aug. 3 2009 (<http://www.standardmedia.co.ke/InsidePage.php?id=1144020630&cid=4&>).
17. *Situation Analysis of Post-election Violence Areas*, South Consulting, May 2009, 26-28. The analysis was conducted through a survey; which found 86 percent of those most affected by post-election violence favor prosecutions, 53 percent preferring prosecutions at the ICC, and 33 percent prefer the local courts. Only 9 percent felt that suspects should not be prosecuted; 4 percent did not know while one percent refused to answer.
18. See also the section on Kenya in the OTP Weekly Briefing, Jan. 12-18, 2010, Issue 20 (www.icc-cpi.int/NR/rdonlyres/BEDF7DF7-76FD-4116-8D08-A92E2454CC9A/281459/OTPWBJanuary_Issue20.pdf) and *Situation Analysis of Post-election Violence Areas*, 19, 26-28.
19. Several witnesses to the post-election violence have already faced threats and harassment, while two of the witnesses are reported to have been killed following the Prosecutor's request for authorization to institute an investigation.
20. The current act contains an unacceptably narrow definition of witnesses that does not encompass defense witnesses or individuals working with victims who may also be at risk. In addition, the Advisory Board still comprises of, among others, the National Security Intelligence Service (NSIS) and the police commissioner, which may not reassure witnesses in trials against state agents or politically connected criminals. See the International Commission of Jurists, Kenya (ICJ) critique of the Witness Protection (Amendment) Bill, February 2010 (unpublished).



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