

RUN UP TO KENYA'S 2013 GENERAL ELECTIONS

WHERE DOES JUSTICE STAND FOR VICTIMS OF 2007/2008 POST ELECTION VIOLENCE?

QUESTIONS AND ANSWERS

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,

NO JUSTICE
NO PEACE
TUMECHOKA NA TEAR GAS



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Run up to the 4th March 2013 General Elections

Supporters of The National Alliance hold a poster of Kenya's Deputy Prime Minister and Jubilee Alliance Presidential candidate in the upcoming Presidential elections, Uhuru Kenyatta (L) and running mate William Ruto , during a political rally in the capital Nairobi on February 13, 2013.

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On March 4th 2013, 14.3 million Kenyans are expected to vote for their next President, Members of Parliament, Senators, County Governors and Women County Representatives. This awaited test for Kenya's ability to embrace long-lasting peace, stability and good governance, is regarded as one of the most significant event in the history of this country.

Significant, because these General elections will be the very first to be held since the 2007/2008 post election violence, where, within the seven weeks following the polls, and as a direct consequence of the contested results, thousands of civilians were victims of serious crimes, including killings, sexual and gender based violence, forced internal displacements, destruction of properties. Significant also

because these elections will be the very first to be organised under Kenya's 2010 Constitution, which provides for safeguards against unfair, insecure, corrupted, non transparent or inefficiently administrated elections (art.81).

Beyond being historical, these elections are also quite unique: one of the presidential candidates, Uhuru Kenyatta, and his running-mate, William Ruto, are both facing charges, by the International Criminal Court (ICC), of crimes against humanity in relation to the 2007/2008 post election violence. This element has singularly shaped the nature of the pre-electoral context which is to a large extent dominated by the political, institutional, legal, diplomatic or even economic implications of the ICC proceedings, leading some to describe the upcoming elections as a "referendum against or for the ICC".

While Kenya had experienced election-related violence since the introduction of multi-party politics in 1992, the 2007/2008 violence was unprecedented considering the extent and nature of the crimes committed. Against this backdrop, the March 2013 elections will be held in a context where, over the past five years, national and international efforts – or pressure – have been combined to make sure that not only history of violence does not repeat itself but also that the provisions of the new Constitution are duly respected and implemented.

The current pre-electoral context, however raises concerns over voters' effective ability to exercise their right freely and without fear of intimidation or violence. Concerns include political parties and alliances' mobilisation of the population along ethnic lines, the re-activation or creation, in particular in areas severely affected by the 2007/2008 post election violence, of illegal gangs and militia groups (among which the *China Squad* and *American Marine* in Kisumu, the *Siafu and 12 disciples* in Kibra, the *Mungiki*, in Central province and parts of Nairobi), the circulation of arms among civilians as a preventive measure in case of an outbreak of violence, the use of hate speech or inflammatory coded language by politicians, vernacular radio stations as well as through social media, the poor level of police's preparedness to effectively preempt and respond to violence. In other words, all the ingredients that led to the 2007/2008 violences.

These worrying signals arise while, following the last post election violence, judicial, legal and institutional reforms have been instituted to curtail them. The Judiciary has for instance entered into a vetting process aimed at improving the administration of justice. Laws have been enacted in compliance with the Constitution, including the Elections Act (2011) and the Political Parties Act (2011), both of them providing for the conduct of free and fair elections and for the prohibition of use of violence. New Institutions have been set up among which the Independent Electoral and Boundaries Commission (IEBC), the National Cohesion and Integration Commission (NCIC), the Truth, Justice and Reconciliation Commission (TJRC), the Independent Policing Oversight Authority (IPOA) and the National Police Service Commission (NPSC).

However legitimate and commendable, most of these reforms and newly established institutions are yet to come to fruition and prove efficiency. And this apparent willingness to pave the way for an entrenched democracy and the strengthening of the Rule of Law in Kenya will remain unsuccessful if other outstanding historical issues are not adequately addressed by the forthcoming authorities. Along with remaining challenges related to an effective police reform, appropriate land reform, reduced inequalities or youth employment, priority is still to be given to accountability for victims of the 2007/2008 post election violence.

At national level, these crimes have to a large extent remained unpunished, Kenya having failed to bring those responsible to account. This rampant impunity is of serious concerns ahead of the forthcoming elections. Within the course of their respective campaigns, all political aspirants, from Presidential to County Governors candidates, must publicly call on their supporters to refrain from committing any act of violence during elections and remind them that such violence could lead to prosecutions. Besides, instead of only using the ICC proceedings as a campaign argument against or in favour of Uhuru Kenyatta and William Ruto, all political aspirants must show their public support to all victims of the 2007/2008 post election violence and commitment to bring those responsible to account. Worryingly, these commitments does not appear in any of the main coalitions manifestos.

This Questions & Answers focuses on the way justice for victims of 2007/2008 post-election violence has so far been dealt with at national and international levels, and addresses the legal implications of the ICC proceedings against Uhuru Kenyatta and William Ruto. This Q&A further addresses specific recommendations to all relevant actors, including political aspirants, calling on them to take all necessary measures to prevent the next general elections from being the scene of serious crimes, and to ensure that non repetition, long-lasting peace, stability and reconciliation are guaranteed.

The Quest for Justice for Victims of 2007/2008 Post Election Violence

Following a challenged electoral result, Kenya erupted into violence in December 2007. In the ensuing period, Kenya witnessed unprecedented violence that resulted in 1133 deaths, 900 Sexual and Gender based violations, over 350,000 displaced persons, numerous victims of grievous harm and destruction of property.

The violence threatened to launch Kenya into civil war leading to the intervention of the international community and particularly the African Union (AU). Under the AU initiated panel of eminent persons, led by former United Nations Secretary General H. E. Kofi Annan, the two warring parties led by President Mwai Kibaki (of Party of National Unity – PNU) and Hon. Raila Odinga (of Orange Democratic Movement – ODM) signed a comprehensive peace accord on the 28th February 2008 to stop the violence and share power.

The agreement was to be implemented under the Kenya National Dialogue and Reconciliation (KNDR) framework. Part of the agreement, now the National Accord and Reconciliation Act 2008 to end the political crisis, required the establishment of inquiries into both the Conduct of the election 2007 that led to the violence and the violence itself. Two commissions were formed to this end namely the Independent Review Commission (IREC) unofficially referred to as the Kriegler Commission and the Commission of Inquiry into the Post-Election Violence (CIPEV) unofficially referred to as the Waki Commission.

Upon completion of its work, the Waki commission recommended the establishment of a special tribunal to prosecute perpetrators of the 2007-2008 post election violence since they had preliminarily established that the offences committed amounted to crimes against humanity. The proposed Special Tribunal would comprise both local and foreign staff given that many Kenyans lacked confidence in the local judicial system which had been cited as inefficient, partisan and rife with corruption. It is worth noting that the ODM side, in 2007, cited their lack of confidence in the Kenyan judiciary to fairly adjudicate the electoral disputes. Secondly, not only had CIPEV preliminary investigations implicated the Police in some of the violations but also the Police had been altogether lax in initiating any investigations immediately following the violence.

The recommendation of a tribunal was also in line with Kenya's international obligations since Kenya had ratified the Rome Statute. Under the Rome Statute where crimes against humanity, genocide or war crimes have been perpetrated in a member State, the State has the obligation to investigate and prosecute these heinous offences. Should the State be unwilling or unable to prosecute these violations then owing to the heinous nature of the violations, the International Criminal Court (ICC) would have jurisdiction over the perpetrators to ensure no impunity.

In October 2008, when the Waki Commission Report was released, the report was categorical in instructing President Mwai Kibaki and Prime Minister Raila Odinga to initiate the establishment of a special tribunal within 60 days.

However three years after the report as well as the sealed list of names of persons allegedly implicated in the violence were submitted to H.E. Koffi Annan, the government had not initiated comprehensive investigations of prosecutions into the violations. No mechanism had been put in place to investigate or prosecute the perpetrators of the international crimes.

Further, the few cases that had been investigated and prosecuted had had poor 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 were burned to death - were acquitted for lack of evidence because of a poor police investigation¹. 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 all related to relatively minor offenses.² There was no State feedback about the initiation of the cases forwarded for prosecution.³

Even worse, efforts to establish a special tribunal through legislation in parliament first by the Ministry of Justice and subsequently through a private members bill were thwarted. This was either through an artificially created lack of quorum as members of parliament walked out in order to ensure the law would not pass or through politicking with the infamous slogan “lets not be vague lets go to The Hague”.⁴

1. 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

2. The report shows that in Rift Valley Province, the team forwarded 504 cases to the Attorney General who ordered 42 of them be tried to logical conclusion. There is no information on the 42 proposed for prosecution. In Western Province, 23 files involving 51 accused persons were forwarded to the Attorney General who decided 16 should proceed to trial and seven files be closed for lack of evidence. In Nyanza, 21 files were forwarded to the Attorney General. 18 were closed for lack of evidence.; In Central Province, only two files were made available to the team to peruse. The Attorney General ordered that the cases be investigated and submitted to him afresh.; Eastern Province had no case of post-election violence reported.; In Nairobi the police and Criminal Investigation Division curiously failed to submit any files. ;In the Coast province 6 files were perused involving 79 people.

3. *Ibid.*

4. On the 28th January, 2009 the government through the Ministry of Justice, National Cohesion and Constitutional Affairs, published a Constitutional Amendment which sought to entrench a Special Tribunal in the Constitution. On the same day, the Special Tribunal for Kenya Bill was published. Members of Parliament voted against both bills were defeated on the floor of the House.

Prosecuting those Responsible for the 2007-2008 Post Election Violence at National Level

What is the status of the investigations being conducted nationally in relation to the 2007/2008 post-election violence?

The government gazetted a multi-agency task force on 20th April 2012. Its mandate was retrospective to begin on 6th February 2012. The Task Force was comprised of members drawn from the Office of the Director of Public Prosecutions (DPP), the State Law Office, the Ministry of Justice, National Cohesion and Constitutional Affairs, the Witness Protection Unit and the Police Service.

The task force's mandate was to review the 6000 cases arising out of the 2007/2008 Post Election Violence that had been arbitrarily shelved by the office of the Attorney General.⁵ The Attorney General's office after an internal audit in 2009 had indicated that only 156 of these cases had been investigated and they all related to relatively minor offenses, such as theft, house-breaking, malicious damage to property, publishing false rumors, criminal possession of offensive weapons, and robbery with violence, assaulting police officers, and breach of the peace.⁶

The Task force has reportedly reviewed all 6000 cases. They have 1716 suspects, 420 potential witnesses, 4 murder cases already being prosecuted, 150 on sexual and gender based violence.

How many people have been prosecuted and convicted in relation to the 2007/2008 post-election violence?

The State has not issued its official report concerning the prosecution however various presentations made by the Office of the DPP place the number of prosecutions below 30, majority of which have ended up in acquittals.

What steps have been taken to establish credible local mechanisms to try the perpetrators of the post election violence?

Efforts to establish a **Special Tribunal** through legislation in parliament first by the Ministry of Justice and subsequently through a parliament members bill were thwarted. This was either

5. 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

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through an artificially created back of quorum as members of parliament walked out in order to ensure the law would not pass or through politicking with the infamous slogan “lets not be vague lets go to The Hague”.⁷

The option of Special Tribunal was not immediately viable. This was because it requires a possible constitutional amendment as well as enabling legislation both of which require parliamentary endorsement. Parliament presently is subject to political influence especially in light of the forthcoming Elections.⁸

The Judicial Service Commission in 2012 mandated a research into the viability of the development of an **International Crime Division of the High Court**. The Sub-Committee of the Judicial Service Commission developed a report recommending the establishment of such a division but one whose mandate would include transnational crimes as well. The Jurisdiction of the Division would cover the 2007-2008 Post Election Violence Offences, other international Crimes that may be perpetrated in Kenya as well as Transnational offences including piracy.

The committee indicated that both the substantive and procedural laws to be applied by such division to be Kenya’s Penal Code as well as the International Crimes Act (2008). It was proposed that the division would surmount the retrospectivity challenge through Article 50 (n) of the Constitution which recognizes that one can be prosecuted on account of international law. Such division would have its own special prosecutor distinct from the Director of Public Prosecution and would liaise with the Witness Protection Agency. With regards to reparations the committee recommended that this was within the ambit of the Truth Justice and Reconciliation Commission (TJRC).

The committee however failed to address key role of investigation and prosecution especially bearing in mind police officer were implicated in the commission of some of the offences in 2007-2008 post election violence. The Courts are common Law and therefore rely solely on the investigator and prosecutor to present evidence. The police service in Kenya falls under the executive and therefore can be subject to political influence.

Appeals from the division also lay with the Court of Appeal and subsequently Supreme Court. The implications of this are that Judges not trained in International Criminal Justice may make decisions on these cases or overturn decisions made by the division.

What has been or is the role of the Truth, Justice and Reconciliation Commission in the process of fighting impunity at national level?

Although the Truth Justice and Reconciliation Commission (TJRC), established in 2008, is statutorily mandated to fight impunity through initiating a truth telling process of human rights violations that have gone unresolved, memorialisation of these violations, reconciliation between victims and perpetrators as well as estranged communities and recommending the establishment of a comprehensive reparations scheme for victims of human rights violations, the commission has failed to fulfill its mandate.

Under the Truth Justice and Reconciliation Act Number 6 of 2008 the Commission’s mandate was to address all human rights violations that were perpetrated between the period of 1963 and 2008 within two years. Critiques of the Commission have stated that legislatively, the Commission was set to fail as it was required to address human rights violations from Kenya’s independence 1963 to 2008.

7. On the 28th January, 2009 the government through the Ministry of Justice, National Cohesion and Constitutional Affairs, published a Constitutional Amendment which sought to entrench a Special Tribunal in the Constitution. On the same day, the Special Tribunal for Kenya Bill was published. Members of Parliament voted against both bills were defeated on the floor of the House.

8. Report of the Reference group forum on domestic accountability 12-13th June 2011 Simba Lodge Naivasha.

The scope both geographically and thematically was too much to be addressed under a singular commission and in such a short time frame. To date, the Commission is yet to complete its work or to issue either a status or comprehensive report recording the various perpetrators of violations as well as victims of these violations. It therefore cannot be evaluated nor its role analyzed. Having run for five years now, the Commission has constantly been lobbying for additional time to complete its work. In August 2012, the Commission was given 9 more months to complete its report which is now due on May 2013 .

Secondly for the better part of the Commission's first year of their two year term, the Commission not only faced great opposition but also well as lack of civil society support following the appointment of a chairperson who lacked credibility. Ambassador Bethuel Kiplagat had been implicated in some gross human rights violations during the Moi regime including the Wagala massacre⁹ and therefore could not impartially head the institution that was to investigate these violations. The embattled chair refused to resign only stepping aside towards the end of the first year when yet another commission to look into his conduct was to be established and after one of the other commissioners resigning. The Commission as a whole suffered a credibility blow.¹⁰

The TJRC have also failed in their Truth seeking role which would be established through national dialogue and engagement with the truth seeking process. With the exception of their public hearings the TJRC process lack a public outlook and are altogether snubbed by the media.

There has been no clarity on the manner in which the TJRC intends to deliver on the mandate of promoting national healing and reconciliation. As a whole, the concept of reconciliation and healing is complex and even the South African Truth and Reconciliation is recorded as stating reconciliation to be a process not an event. However mechanisms and strategies towards this end need to be put in place. The TJRC has not clearly put in place mechanisms towards reconciliation.

Have there been steps taken to ensure that the justice chain (police, prosecution, judiciary) has been reformed to deter future occurrences as witnessed in 2007/2008 or to deal with the cases of 2007/2008?

While steps have been taken legislatively toward reform for the justice sector, the implementation of these reforms is the true test. The Judiciary has made the most comprehensive steps towards the reform process. Initiated and insulated under the Constitution, the changes within the Judiciary have been as follows. Firstly, several enabling laws have been enacted to implement the Constitutional provisions. These include the Judicial Service Act 2011; Supreme Court Act 2011; The Vetting of Judges and Magistrates Act 2011; the Industrial Court Act 2011 and the Land and Environment Act 2011. The implementation of these Acts has resulted in competitive and transparent appointment of a new Chief justice, Deputy Chief Justice, Attorney General and Director of Public Prosecutions ; the vetting, for purpose of suitability, of Judges and Magistrates who were in office at the time of the promulgation of the Constitution¹¹ ; increase in number of Judicial officers through open transparent and competitive processes and a bigger better representative and more professional Judicial Service Commission.¹²

In the perspective of the forthcoming General Elections, worth to be noted that Article 140 of the Constitution of Kenya, 2010, gives the Supreme Court the jurisdiction to hear and determine disputes arising from Presidential elections. Supreme Court now has exclusive jurisdiction over presidential election petitions. The Chief Justice has now published the Rules of the Court – Supreme Court (Presidential Election Petition) Rules, 2013 – according to which, a petition

9. Christine Alai, Truth Justice and Reconciliation, Right to Truth, Rule of Law Report 2010/2011 Transitional Justice in Kenya Looking forward reflecting on the past.

10. *Ibid.*

11. All Judges have been vetted and the process of vetting magistrates is now scheduled to begin.

12. The Kenya National Dialogue and Reconciliation Report 2011-2012; building a Progressive Kenya.

challenging the election of a President has to be filed within 7 days and the Supreme has to hear and determine it within 14 days.

Whereas the Judiciary seems to be on a clear path of reform, the other institutions within the justice chain, namely the investigations, prosecution and correction, seem to be lagging behind.

The Constitution provides a framework for major security sector reforms that reflect the recommendations of the Commission of inquiry into the Post Election Violence and Task Force on Police Reforms.¹³ The Ministry of State for internal Security constituted the Police reform Implementation Oversight Committee to oversee implementation of Police Reforms.¹⁴ The following Acts have been enacted by Parliament with regards to Police reform : the National Police Service Commission Act 2011; the Police Oversight Authority Act 2011 and the National Police Service Act 2011. These Acts and documentation are supposed to go hand in hand with a police vetting process, institutional and administrative reforms and reforms with regard to police recruitment and training.

Challenges to the Security sector have been numerous. Firstly, there has been a lack of an overarching policy framework to shape the reforms in the sector. Secondly, there has been a reticence and reluctance to change especially amongst senior police officers who gain from the status quo. This was largely envisaged during the vetting process for police officers as well as the public police opposition to the appointment of a police general who is not from within the Police ranks.¹⁵ Police form part of the prosecutorial team. Whilst the Constitution transfers the docket of prosecution to the Director of Public Prosecution, it does not all together abolish this practice or proscribe it. Police prosecutors are no match for their Advocate counterparts.¹⁶ Despite additional funds being allocated to the DPP office there is need to actively replace police prosecutor with trained advocates in order to ensure efficiency and professionalism.

Further police reforms are paramount before the elections. *“For reforms to be effective, KPF must be transformed to a democratic police service. Kenya must democratize our security, not just to securitize our democracy. The former is about ensuring that there is accountability of the security agents”*.¹⁷

13. The Kenya National Dialogue and Reconciliation Report 2011-2012Ibid at Pg 11.

14. The Kenya National Dialogue and Reconciliation Report pg 11.

15. Police Spokesman was publicly reported as having indicated Police would not accept an ‘outsider’.

16. Report of the Reference group forum on domestic accountability 12-13th June 2011 Simba Lodge Naivasha.

17. Report of the Annual Jurist Conference Kenya’s Next Election: A balance between Justice and Democracy August 14th-18th 2012.

Prosecuting those responsible for the 2007-2008 post-election violence at international level: the cases pending before the International Criminal Court (ICC)

How did Kenya become a situation country before the ICC? How did the ICC process start in Kenya? When was the ICC investigation opened on the situation in Kenya?

On 11 February 2009 the International Criminal Court Prosecutor publicly reaffirmed that the situation in Kenya was being monitored by his office.

On 9 July 2009, the African Union Panel of Eminent African Personalities, chaired by Kofi Annan, announced its submission to the Prosecutor of a sealed envelope containing a list of persons allegedly implicated and supporting materials previously entrusted to Mr. Annan by the Waki Commission on the post-election violence.

On 27 October 2009, the Prosecutor sent a letter to Kenyan authorities explaining that the preliminary examination of the post-election violence confirmed that acts constituting crimes against humanity might have been committed, that there were no relevant national judicial inquiries and that the gravity threshold required by the Rome Statute to intervene had been fulfilled.

On 26 November 2009, the Prosecutor of the International Criminal Court, pursuant to article 15(3) of the Rome Statute, requested the Pre-Trial Chamber an authorisation for the opening of an investigation in relation to the post electoral violence of 2007 – 2008.

The Pre-Trial Chamber II, in a decision of 31 March 2010, authorised the ICC Prosecutor to proceed with the investigation on the alleged commission of crimes. The investigation in Kenya has been, therefore, opened, *proprio motu*, by the Prosecutor, meaning at his own initiative, but with the authorisation of the judges and under their judicial oversight.

A newspaper vendor sells the day's papers carrying in the headlines photos of four Kenyans to face charges of crimes against humanity before the International Criminal Court, in the Kenyan capital Nairobi on January 24, 2012 .
© AFP



The ICC Pretrial Chamber II authorized the investigation considering that the information presented by the Prosecutor provided “a reasonable basis to believe” that crimes against humanity had been committed in Kenya during the post-election violence and that these crimes fell under the temporal, territorial and subject-matter jurisdiction of the ICC. In addition,

the Judges considered that the national authorities did not genuinely investigate or prosecute the commission of these crimes (principle of complementarity) and that the crimes were so grave as to justify the interference of the ICC. Finally, the judges considered that there were no substantial reasons to believe that an ICC investigation would not serve the interests of justice.

It should be noted, that at this stage, the standard of proof is lower than the one required for an arrest warrant or the opening of a trial. The Chamber decided to allow the Prosecutor to start an investigation covering the alleged commission of crimes against humanity committed during the events that took place between 1 June 2005 (i.e., the date of the Statute's entry into force for the Republic of Kenya) and 26 November 2009 (i.e., the date of the filing of the Prosecutor's Request).

On 8 March 2011, the Court summoned six persons to appear before the Court in relation to alleged crimes committed in Kenya, in two separate cases (see below). The Kenyan authorities, however, challenged the admissibility of both cases claiming that their system was able to conduct investigations into the post-electoral violence but, mainly, that changes in its judicial system would allow it to investigate the events. However, both the Pre-Trial Chamber and the Appeals Chamber rejected the appeals. The key element was that the Kenyan authorities could not demonstrate that the same persons were being investigated for the same conduct at the national level, which is the key test used by the ICC for its complementarity analysis.

Who are those being prosecuted by the International Criminal Court ? What are the charges pressed against them ?

The persons being prosecuted are persons found to be most responsible for the 2007-2008 post Poll violence. On 15 December 2010, the Prosecutor, after conducting his investigations, submitted to Pre-Trial Chamber II two applications under article 58 of the Rome Statute requesting the issuance of summonses to appear for **William Samoei Ruto** (at the time, a member of ODM and member of Parliament for Eldoret North), **Henry Kiprono Kosgey** (at the time, a member of ODM and member of Parliament for Tinderet), **Joshua Arap Sang** (radio presenter) (case one) and **Francis Kirimi Muthaura** (at the time, head of public service), **Uhuru Muigai Kenyatta** (at the time a member of PNU and member of Parliament for Gatundu and Kenya Deputy Prime Minister) and **Mohamed Hussein Ali** (at the time of the violence, Police Commissioner) (case two) for their alleged responsibility in the commission of crimes against humanity.¹⁸

These suspects were summoned to voluntarily appear before the ICC on 8 March 2011 and they attended the initial appearance on 7 and 8 April 2011. Thus, no arrest warrants were required and they are not held in custody.

Following confirmation hearings, the pretrial confirmed charges against William Samoei Ruto, and Joshua Arap Sang (case one) and Francis Kirimi Muthaura and Uhuru Muigai Kenyatta (case two) on 23 January 2012. The Pre-Trial Chamber II declined to confirm the charges against Henry Kiprono Kosgey and Mohammed Hussein Ali.

Ruto is accused of being **criminally responsible as an indirect co-perpetrator** for the **crimes against humanity** of murder, deportation or forcible transfer of population, and persecution.

Sang is accused of **having contributed to the commission** of the **crimes against humanity** of murder, deportation or forcible transfer of population, and persecution.

Muthaura and **Kenyatta** are accused of being **criminally responsible as indirect co-perpetrators** for the **crimes against humanity** of murder, deportation or forcible transfer, rape, persecution and other inhumane acts.

18. <http://www.icc-cpi.int>

It is to be noted that no one is exempt from prosecution before the ICC because of his or her current position, or because of the position he or she held at the time the crimes concerned were committed. Neither immunity nor amnesty can therefore be granted.

Why did the ICC not confirm charges against Henry Kosgey and Major General Hussein Ali? Can these two still be charged at the ICC?

On January 23, 2012 the ICC pre-trial chamber II declined to confirm all of the charges leveled against Kosgey, citing insufficient evidence from the prosecution to sustain a full trial. Kosgey's defence team had largely argued that the prosecutor with regards to him had largely relied on uncorroborated evidence.

On 23 January 2012, the ICC pre-trial chamber ruled that there was not enough evidence against Mr Ali on his role in authorizing the excessive use of force and facilitating attacks against supporters of the opposition Orange Democratic Movement during the period's post-election violence to sustain the charges.

The Prosecutor is free to conduct further investigations and bring charges against the two persons.

Are the accused persons required to appear in Court in The Hague during the trial? What would happen in the event that the accused do not voluntarily appear before the ICC for trial?

According to Article 63 of the Rome Statute the four accused persons will be required to be present during the proceedings. If the accused persons fail to attend their trial then the Chamber may issue arrest warrants in accordance with Article 58 (b) of the Rome Statute to ensure their attendance.

What are the rights and obligations of the accused persons?

The International Criminal Court aims to be a model of judicial administration. The Court ensures that the proceedings before it are in conformity with the highest legal standards and due process rights of suspects and accused persons.

The importance of safeguarding the rights of the defense is reflected in the Court's founding treaty, the Rome Statute, as well as other legal texts of the Court. Fundamental principles enshrined in the Statute include, amongst others, the grounds for excluding criminal responsibility and the presumption of innocence, the rights of the accused to a public, impartial and fair hearing, amongst other minimum guarantees that are provided in Article 67 of the Statute (see below). These rights are effectively guaranteed by the overseeing judicial powers of the chambers.

Article 67 of the Rome Statute states that:

- I) The accused person has a right to be informed promptly and in detail about the nature and content of the charge in a language he or she fully understands
- II) The Right to be allocated adequate time and facilities for preparation of the defence and to communicate freely with his or her counsel of choice
- III) The right to be tried without undue delay
- IV) The right to be present at trial and conduct the hearing in person or through a legal representative of his choice. Where the accused person does not have legal representation he shall be informed of their right to have a counsel assigned by the court and without payment where the accused lacks the money to pay for legal services
- V) The right to examine witnesses of both parties and to raise defenses and adduce evidence
- VI) The right to an interpreter where evidence presented to the court is not in a language the accused understands
- VII) The right to remain silent and not be compelled to incriminate himself
The right to be presumed innocent
- VIII) The right to be presumed innocent

When will the trials start? Who would be the judges? How long will they last?

The confirmation of charges hearing was held from 21 September to 5 October 2011. A confirmation of charges hearing is not a trial. It is a public hearing during which the Pre-Trial Chamber decides whether or not to confirm all or any of the charges brought against the persons, on which basis the Prosecutor intends to prosecute the suspects.

On 9 July 2012, Trial Chamber V of the ICC issued scheduling orders setting the dates for the commencement of the trials in the two Kenyan cases, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, respectively on 10 and 11 April 2013, establishing a time table for the various procedural steps required to be undertaken before the opening of the trials to guarantee the fairness of the procedures.

Both trials are before the Trial Chamber V, composed of Judges Christine Van den Wyngaert (Belgium), Kuniko Ozaki (Japan) and Chile Eboe-Osuji (Nigeria).

As has been demonstrated by the other cases before the ICC, the trials might last several years.

What punishment could the accused face if they are found guilty of the charges against them?

After the hearing, should the accused persons be found guilty, the trial chamber determines an appropriate sentence to be imposed taking into account the evidence at its disposal and the submissions made during trial.¹⁹ The Court also takes into consideration the gravity of the crime.²⁰

According to the article 77 of the Rome Statute, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

19. Article 76 of the Rome Statute.

20. Article 78 of the Rome Statute.

- (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

In addition to imprisonment, the Court may order:

- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Can the ICC institute prosecutions against other individuals other than the 4 accused persons?

Yes. Nothing precludes the ICC from initiating investigations against persons other than the four person however the ICC is restricted statutorily as well as in capacity to prosecute only those with the highest level of responsibility in the commission of the most serious crimes under the jurisdiction of the Court.

Does the ICC offer immunity for international crimes?

Article 27 of the Rome Statute is clear that the ICC unequivocally does not grant immunity for international crimes. Thus the Statute shall apply equally to any person “without any distinction based on official capacity”. Whilst in national courts, Presidents and other Government officials may enjoy immunity from prosecution, the Rome Statute specifically refers that the official capacity of a Head of State or a member of a Government or parliament, elected officials do not exempt a person from facing investigations or prosecutions at the ICC.

That would mean that the election of a suspect as President or public official would not prevent the Court from continuing with its proceedings against them. However, this may impose challenges if the national authorities decide no longer cooperate with the ICC in its investigations and prosecutions.

How is the Kenyan Government cooperating with the ICC?

In accordance with the Rome Statute Article 86 as well as the Agreement on the Privileges and Immunities of the International Criminal Court, State parties, including Kenya, have an obligation to co-operate with the ICC in its investigations and prosecutions. When a State Party fails to comply with a request to cooperate, the Court may make a finding to that effect and refer the matter for further action to the Assembly of States Parties.

The Kenyan government contrary to its obligations to co-operate with the ICC is undermining the Court’s proceedings through attempting to either delay or transfer the cases from the ICC to a different forum.

The Office of the Prosecutor (OTP) has expressed its concerns regarding delays in the Government’s response to a number of OTP requests related to their investigations. The Prosecutor, Fatou Bensouda traveled to Kenya in October 2012 where she met with President Kibaki and Prime Minister Odinga. They assured her of their willingness to ensure timely and effective execution of the pending requests and instructed the Attorney-General and the Cabinet Sub-Committee to facilitate expeditious responses to the Office’s requests.

Under article 16 of the Rome statute, it is provided that the United Nations Security Council can ask the Court to defer investigation or prosecution for a period of 12 months through a resolution adopted

under its chapter VII²¹. The grounds for such a request are that the investigation or prosecution would be a threat to the peace and security. Such request may be renewed by the Council should the same conditions prevail. The test as to whether the conditions in a given country are a threat to the peace and security and subsequently warrant a deferral is determined purely by the Security Council.

That the Kenyan government attempted to differ the pretrial process of the cases, with the support of the African Union (AU), is indicative of lack of goodwill especially after undue delay in setting up any prosecutorial mechanism locally. Kenya did not meet the standard required of 'threat to international peace and security.

The subsequent attempt at transferring the ICC cases to the East African Court of Justice by conferring it International Criminal Law jurisdiction through a protocol is also indicative of lack of good will. Should the government be keen on delivering justice to victims of post election violence it can still do so by prosecuting the mid level and lower level perpetrators without undermining the ongoing cases before the ICC and therefore going against its international obligations.

What will be the next judicial stages after the trial? Who can appeal against a decision of the Court?

Once the trial is over, a judgment will be issued deciding on conviction or acquittal of the accused person. If the accused is convicted, a sentence will be given and reparation proceedings for victims will start.

The Rome Statute in Article 81(1) provide that both the Prosecutor and the convicted person have a right of appeal against a decision of acquittal, conviction, or against a sentence on the grounds of procedural error, error of fact or error of law. The appeal however can only be filed when the case is concluded.

Two of the accused persons, Uhuru Kenyatta and William Ruto are running for President/ Deputy President in the March 4th 2013 General Elections. Can they legally run? How will the results affect the ICC cases? What are the impacts of the ICC proceedings on the current electoral campaign?

Legality of their candidacy

While there is no direct proscription against them running, Article 145 of the Constitution provides that a President may be impeached where there are serious reasons to believe that he has committed an international crime. It is therefore possible either Uhuru Kenyatta or William Ruto could promptly be impeached upon election.

Secondly, Chapter six of the Constitution provides for the national values which include integrity and transparency which are in direct contradiction with indicted presidential candidate. A determination of this Chapter however inline with candidates will have to be given either by the Courts of Kenya or the Electoral Monitoring Body, the Independent Electoral and Boundaries Commission, if both these candidates are to withdraw from the presidential race.

Article 75 of the Constitution provides that a State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties. This same chapter 6 of the Constitution also provides that the officer must promotes public confidence in the integrity of the office. Contravention of this provision attract penalties including suspension from work:
"A person who contravenes clause (1), or Article 76, 77 or 78 (2)-

21. Chapter VII of the UN charter addresses the actions that the United Nations Security Council takes in response to threats to Peace .Breaches of the Peace and Acts of Aggression.

*(a) shall be subject to the applicable disciplinary procedure for the relevant office; and
(b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.”*

In December 2012, various petitions were filed in the High Court of Kenya seeking a declaration that persons facing trial at the ICC were not fit to vie for the presidency or to hold state or public office, as this would be a violation of Chapter Six of the Constitution. On 15 February 2013, a panel of five High Court judges ruled that it did not have jurisdiction to determine the issues presented before it, arguing that the Supreme Court had exclusive jurisdiction on matters touching on presidential elections. They further argued that integrity issues cannot be divorced from the election process.

Impacts of the results on the ICC proceedings

As it has been said above, no one is exempt from prosecution because of his or her current functions or because of the position he or she held at the time the crimes concerned were committed. Acting as a Head of State or Government, minister or parliamentarian does not exempt anyone from criminal responsibility before the ICC. Therefore, even elected President or Deputy President, accused persons at the ICC have to comply with their obligations imposed by the Pre-Trial Chamber.

If ICC accused are elected, then one key issue will be how this would affect the cooperation with the ICC, and whether and how they will continue to participate in the proceedings, while effectively discharging their national duties. Should the accused persons fail to comply with the conditions set by the ICC, then the Court can issue warrants for their arrest.

It is worth noting that the ICC has issued arrest warrant against an acting Head of State, President Omar Al Bashir of Sudan, and is still requesting its implementation. This arrest warrant has been domesticated in Kenya, meaning that Kenya has an obligation and capacity to arrest President Bashir in Kenya.

Impacts of the ICC proceedings on the electoral campaign

The upcoming elections have resulted in politicization of the ICC process. Political players have presented the ICC as a tool used by their opponents to eliminate them from the scene or in the alternative as a tool used to scourge a community. The resultant effect has been balkanization of communities along ethnic lines as opposed to along issues. It has also shifted the focus from the implementation of the Constitution which would safeguard a peaceful election to one of winning election at any cost to prevent apprehension from the Court.

The role of victims and witnesses

What is the difference between a victim and a witness? Are all victims witnesses? Who is an intermediary?

A victim is one who has directly or indirectly suffered harm as a result of a crime, violation. A witness is one who gives evidence, testimony or vouches for something either as a result of having observed an act or experienced it.

Intermediaries are persons, institutions or organizations that work with the International Criminal Court acting as a link between the Court and victims or witnesses during investigations.



A camp of internally displaced people in Nakuru, Kenya.

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At the national level

What is the current situation of victims of the post-election violence?

Victims of Post Elections violence have broadly not obtained justice reprieve or reparations five years after the post election violence. With the government having failed to undertake a mapping exercise in order to classify victims into their specific categories of violations and therefore establish corresponding responses to their status, government response has been haphazard at best.

Some victims of Sexual and Gender based violence for example have died having not received anti-retroviral medication having been infected by HIV AIDS. Further, some victims of lost property other than land have been forgotten among the more visible Internally Displaced Persons (IDPs). The IDPs are only now being hurriedly resettled in light of the forthcoming elections and some of the resettlement areas are arid or semi arid with no accessibility to basic amenities such as food and water or social amenities such as hospitals or schools.

How are victims' voices being considered within the national processes?

Victim voices are largely lost first because of lack of recognition by the State. Since the

government has not registered victims acknowledging them as such, victims do not have a veritable status in society. Secondly there is no united victim platform from which victims can agitate for their rights. Victims groups and civil society have however established a National Victims and Survivors Network and a National IDP Network bringing together victims, victim groups and organizations that work on victim issues to articulate them in national processes. Civil society have also formed a Protection Working Group that highlights the plight of vulnerable victims.

What about the protection of victims and witnesses in national proceedings?

The government has established a Witness Protection Agency which has incorporated aspects put forward by civil society. The agency operates independently securing funds directly from the consolidated fund. The Agency is however answerable to a board which is largely comprised of members of the executive and therefore cannot assure witnesses against the State of protection. Victims are not protected by this system.

Can victims get reparations at national level?

Paragraph 42 of the Truth Justice and Reconciliation Act specifies that the Commission has power to receive applications for reparations, determine who the victims are and make recommendations for the implementation of the reparations. As such, the TJRC has the capacity to make a binding recommendation to the State to develop a comprehensive reparations mechanism. Victims can also litigate against the State in order to obtain compensation for violations committed. Where legislation provides for it such as the Sexual Offences Act, victims can apply for rehabilitation and treatment.

In the recent past, various groups and individuals have filed cases in the High Court seeking various remedies for the violations suffered in 2007/2008. One such case has been filed by 4 NGOs and 25 IDP representatives. It is currently being heard²².

Before the International Criminal Court

How can victims engage with the ICC? Who can participate individually or jointly ?

The Statute of the Court is innovative in several respects. One of the most significant points is that it grants victims unprecedented rights before an international criminal court. Victims may in particular be involved in proceedings, right from the investigations stage, by participating directly, either individually or jointly. This voluntary participation enables victims to express an opinion independently of the parties and offers them the opportunity to speak about their own concerns and interests. For example, they can tell their story and give more information on the crimes committed, the context in which they were committed, the role of the accused, etc. In addition the victim enjoys the right to examine witnesses of both parties and to raise defence as well as adduce evidence.

However, participation is subject to efficacy and respect for the rights of the accused. This has been made evident with the recent decision regarding the Kenyan cases. On 3 October 2012, the ICC judges issued 2 almost identical decisions which in effect overhauled the system of victims participation as seen in the Pre-Trial stage. Through the previous system rolled out at the Pre-Trial stage, victims who applied and were accepted to participate in each case were represented by a Common Legal Representative (CLR).²³ But the decision of the Court has restricted the

22. High Court Petition number 273 of 2011. FIDA Kenya and others v. the AG and others.

23. On the 5th and 26th August 2011 respectively the Pre-Trial Chamber presiding over the Kenyan cases granted 560 persons the status of victims authorised to participate in the proceedings. Has the 3 October 2012 decisions establish new procedures, the Judges have decided to appoint a new Common Legal Representative. On 23 November 2012, in the case one, Ms Suretta Chana has been replaced by Mr Wilfried Nderitu and in case two Mr. Morris Anyah has been replaced by Mr. Fergal Gaynor.

ability of the CLR to effectively and directly represent the victims during the trial. Indeed, it is now decided that the CLR will be based in Kenya and limiting their appearance during the trial to critical stages such as the opening and closing of the trial. The day to day trial appearances and representation in the Court should be handled by the Office of Public Counsel for Victims (OPCV); an office within the ICC structure.

Why has there been a change in the legal representation of victims in the court proceedings? What is likely to be the impact on the exercise of their right to participate?

The change in representation is said to facilitate efficacy and to ensure that Counsel is close to the victim communities and accessible. The Judges held that “it will allow the victims to benefit from the experience and expertise of the OPCV and thereby maximise the efficiency of their legal assistance.” The impact however will also be negative.

There are concerns that the scheme adopted by the Trial Chamber V may lead to serious problems of implementation. The Registry would have to ensure that the common legal representative has the resources, capacity and support in the field to maintain constant communication with the group of victims she or he represents, bearing in mind the security situation in Kenya in relation to these cases. Furthermore there is no clarity on how the transition to this new form of participation will take place, bearing in mind that legal teams had previously been appointed to represent the victims. The decision also raises questions as to how these victims will receive a change in the way their interests are being represented in Court.

Besides, on 4 April 2011, OPCV was appointed to represent all the victims for the purposes of Article 19 “admissibility challenge” observations from Kenyan victims.²⁴ On 7 April 2011 the OPCV responded to the Chamber’s decision by asserting that they would implement a Chinese wall within the office in order to prevent a conflict of interest given the diverse interests of the victims in the two cases.²⁵ In this filing, the OPCV stated that the teams within the office would be “two separate and autonomous legal teams”, one for each case and “confidential information would not be shared between teams”. The OPCV managed expectations by asserting that “separate legal teams may ultimately file similar submissions, depending on the views of their respective clients”. Eventually when the OPCV did file their observations in both cases on 13 June 2011²⁶, they admitted that they were unable to contact the victims and filed almost identical filings in both the cases. The concerning conclusions that can be drawn from these observations are that the OPCV appears unable to consult directly with victims and to distinguish the distinctions between the two classes of victims.

OPCV does not have sufficient capacity to aptly represent Kenyan victims. The enhanced role of OPCV as laid out in the decision is a steep learning curve and given the proximity of the upcoming trials, it is an experiment the Court ought not to risk taking with the victims.

Do victims, witnesses and intermediaries have the right to protection?

The ICC recognizes that victims and witnesses have not only survived traumatic hardships, but that many of them also testify despite the threat of retaliation. Thus ICC Statute and Rules provide for explicit protections for “the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” Victims, witnesses have the right to be protected through the proceedings (with acronym for example), during the trial (alteration of voice or pictures, use of audio-visual technology, video-conference), and after the trial including thought resettlement. Relocation is a measure of last resort and thus very exceptional.

24. ICC-01/09-01/11-31, 4 April 2011.

25. ICC-01/09-01/11-45.

26. ICC-01/09-01/11-126.

Intermediaries, working with different organs of the Court, should also be protected if under risk, but their position is yet to be properly defined and the rules that apply to them are different and are not encompassed in the ICC Statute. The ICC did not always implement them in the most coherent way, but should now follow specific guidelines.

Over the past years, persons who are perceived to be victims, witnesses and intermediaries have been subjected to incidences of harassment, intimidation and other threats. For instance, in 2012, various human rights defenders perceived to be intermediaries were questioned by a parliamentary committee on their involvement with the ICC.

Will victims have the right to reparation before the ICC ? What kind of reparation can they be awarded?

Yes. Victims have the right to request and receive reparation. For the first time in the history of international justice, victims are entitled to a full right of reparation, and the relevant Chambers should define the principles of reparation.

If the accused person is convicted, the Judges may order reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Judges may order that the award for reparations be made through the Trust Fund for Victims.

What is the Trust Fund for Victims (TFV)? Has the Trust Fund for Victims started its activities in Kenya? How can victims benefit from its programme? Do they have to wait for the trials to be concluded before they can benefit from the TFV?

The Trust Fund for Victims is an independent institution within the Court's system.

The TFV fulfills two mandates for victims of crimes under jurisdiction of the ICC:

- a) Reparations: the TFV implements reparations awards ordered by the Court against a convicted person when directed by the Court to do so.
- b) General Assistance: the TFV develops projects of physical rehabilitation, material support, and/or psychological rehabilitation for victims and their families in situations where the Court is active, using voluntary contributions.

The TFV has not yet started its activities in Kenya. The TFV, is not however obliged to wait for the conclusion of the case to start its activities, as can be evidenced in Uganda and Democratic Republic of Congo where the Fund proceeded to act before the cases were complete.

Conclusion and Recommendations

Election-related violence has been recurrent in Kenya since 1992 and has been perpetuated by numerous factors including impunity. Ahead of the March 4th 2013 General Elections, and considering the already worrying signals casting doubt on voters' ability to exercise their right without fear of intimidation and violence, there is an urgent need for Kenyan authorities and political aspirants to ensure that peace and security are guaranteed. In particular, they must urgently and publicly commit to take all necessary measures to ensure that victims of the heinous crimes committed during the 2007/2008 post-election violence get justice and reparation.

More than five years after the violence, there has been little efforts by the Kenyan government to ensure accountability of the perpetrators and secure justice and reparation for the victims. While a lot of efforts has been given to addressing the plight of victims of internal displacement, victims of the other crimes have not benefited from government interventions. While the majority of the victims have a lot of confidence in the International Criminal Court, the limited scope of the Court, which only focuses on those bearing the greatest responsibility, oblige national authorities to investigate and prosecute the crimes committed by middle and lower level perpetrators. The 2013 General Elections represent an important opportunity to finally address impunity and guarantee long-lasting peace, stability and reconciliation in Kenya.

FIDH and KHRC call on the Kenyan Authorities to :

- Undertake a comprehensive mapping exercise of victims of post election violence in order to respond appropriately to their violations including through reparations ;
- Enact a comprehensive reparations policy to repair victims of gross human rights violations ;
- Cooperate with the ICC by providing relevant assistance for an incomplete prosecution processes in order to ensure a fair trial process where victims and witnesses are not intimidated ;
- Support the proposal for the development of an International Crimes Division through establishing an independent impartial investigative and prosecutorial team ;
- Support security sector reforms and insulate them from political interference ;
- Continue with on-going judicial reforms especially in the vetting of Judges and Magistrates.

In view of the forthcoming 4 March General Elections

- Take all necessary measures to guarantee security before, during and after the elections period. In particular, the authorities should address the incidences of insecurity that have been experienced in the last couple of months, including in Baragoi, Tana River, Garissa, Mathare and Eastleigh ; dismantle the illegal gangs and militias groups ; investigate the allegations of civilians arming, disarm and prosecute them ;
- Comply with the provisions of the 2010 Constitution, the Elections Act, the Political Parties Act, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights related to the organisation of free, fair, transparent and secure elections ; proceed, without further delay, to the ratification of the African Charter on Democracy, Elections and Governance ;
- Take all necessary measures to allow citizens to participate freely in the polls, without fear of any kind of violence or act of intimidation, including through public messages

warning that human rights violations committed in the course of the electoral process will not remain unpunished.

To Political Aspirants

- Political aspirants should refrain from balkanizing communities along ethnic lines especially through hate speech which results in violence ;
- Political aspirants should abide by the national, regional and international instruments providing for the conduct of free, fair, transparent and secure elections. In particular, they must comply with provisions of the Kenyan Electoral Code of Conduct calling on them to publicly and repeatedly condemn violence and intimidation and to refrain from any action involving violence or intimidation ;
- Should electoral disputes arise, political aspirants should challenge the results through legal means, by filing petitions in the relevant Courts, in compliance with provisions of the electoral laws ;
- Political aspirants should refrain from politicizing the ICC trial processes or the proposed local process for the mid level and lower level perpetrators ;
- Political aspirants should publicly commit to cooperating with the International Criminal Court and other locally established judicial mechanisms to ensure justice for the victims of the 2007/2008 post election violence.

To Newly Established Institutions

- The **Independent Electoral and Boundaries Commission (IEBC)** should be clear in its implementation of electoral rules to prevent indicted persons from holding public office. It should conduct elections in a free, fair and transparent manner and take all necessary measures to prevent acrimonious dispute resolution ;
- The **National Cohesion and Integration Commission (NCIC)** should fully abide by its mandate by curbing the use of hate speech or inflammatory coded language by politicians, individuals, vernacular radio stations as well as through social media ;
- The **Truth Justice and Reconciliation Commission (TJRC)** should issue its report without further delay in order to allow for the development of a reparations policy and facilitate catharsis in Kenya as concerns human rights violations.

To the Media

- The media should abide by the provisions of national, regional and international instruments providing for the conduct of free, fair, transparent and secure elections ;
- The media should be responsible in their reporting and in particular be careful not to convey hate speech and ethnically slurred messaging to the public as this may result in violence.

To the International Criminal Court

- The ICC should conduct the Kenyan trial process in a fair and expedited manner to prevent disputes over local perception of an alleged politicization of the proceedings and with respect of the best interest for victims;
- The Court should further its engagement in a strong communication and outreach strategy to explain the sense and reality of the ICC proceedings in the actual and future political context, and to counteract messages of politicization of the proceedings;
- The legal aid system, managed by the Registrar, should provide the CLR teams with the necessary resources to adequately consult with victims and prepare the trial, before and during the trial;
- All efforts should be made to ensure that victims' participation is meaningful, and that their views and concerns are properly represented in Court. In this sense, the CLR

should gain the victims confidence, the OPCV delegate should comply with instructions from the CLR and have the same degree of experience and qualification as the counsel, and the Judges should ensure that the representation is adequate and consistent to the Statutory provisions and principles.

The African Union (AU) and the African Commission on Human and Peoples' Rights (ACHPR)

- AU and ACHPR should publicly call on Kenyan authorities, political aspirants, defense and security forces, media and other relevant actors involved in the forthcoming elections, to respect their regional and international obligation to guarantee the conduct of free, fair and peaceful elections. In doing so, AU and ACHPR should place a particular emphasis on the provisions set out in the AU Declaration of the Principles Governing Democratic Elections in Africa, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights. AU and ACHPR should urge Kenyan authorities to proceed, without further delay, to the ratification of the AU Charter on Democracy, Elections and Governance;
- AU should ensure that its long and short term observation missions to Kenya coordinate their actions with those of other national and international observers. Ensure that the missions are adequately organised to activate preventive and responsive measures in the event of the commission of violations before, during and after the elections. In compliance with its mandate, AU Peace and Security Council should activate adequate measures to prevent and react to any kind of dispute or conflict that may lead to the perpetration of serious crimes;
- AU and ACHPR should publicly call upon the fight against impunity of the perpetrators of the 2007/2008 post-election violence as an essential pre-condition to long-lasting peace and stability in Kenya and as a deterrent to further violence. In particular, AU and ACHPR should call on the Kenyan authorities to fully cooperate with the International Criminal Court and other locally established judicial mechanisms to ensure justice for the victims of the 2007/2008 post election violence;
- ACHPR should call on Kenyan authorities to provide for an open invitation for any protection mission the Commission may deem necessary and advisable to carry out in the country, in accordance with article 81 of the Commission's Rules of Procedure.

The United Nations

- The United Nations Human Rights Council must ensure that Kenya, as a member of the HRC, uphold the highest standards in the promotion and protection of human rights ;
- The OHCHR field presence should closely monitor the elections and provide analysis of the human rights situation ;
- Special procedures concerned should alert the HRC and international community about potential emerging electoral violence or human rights violations committed during this period to fulfil their mandate of early warning mechanism.

The European Union

- The EU, through its Delegation, Member States and High Representative for the Common Foreign and Security Policy, must openly call on all parties to refrain from violence and human rights violations and reiterate its call to fight impunity and bring perpetrators of human rights violations to justice. The EU institutions and Member States, in conjunction with the EU Election Observation Mission (EOM) and other actors like the African Union, should prepare for early warning reaction. Early warning should have a specific focus on the situation of human rights defenders which may be targeted during the election campaign ;

- The EU EOM should be coordinated with the African Union's mission and bear a special attention to early warning of possible campaign-related violence and human rights violations. The EOM should be able to urgently report to the EU institutions, the EU Delegation, Member States' Missions and other stakeholders like the ICC in order to allow appropriate urgent action if necessary. The EOM should regularly meet with the various stakeholders and include the civil society's contribution (inc. local observers) in the drafting of its recommendations ;
- The EU institutions must ensure that the EOM recommendations will be followed-up after election-day as one of the basis for its support to the next election cycle and in the aid programming for Kenya, including institutions capacity-building.

To Civil Society Organisations

- Civil society organizations should engage in active civic education to prevent the public from being taken advantage of by unscrupulous political players;
- Provide a platform for the victim community in Kenya to articulate their rights especially as concern reparations;
- Build capacity of victims to enable them access their rights;
- Monitor the Constitution implementation to ensure benefits accruing from it are realized.



This publication was supported with the support of the Mission Democratic Governance of the French Ministry of Foreign and European Affairs. The views expressed here reflect only the opinions of FIDH.

Establishing the facts

Investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

Supporting civil society

Training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level.

Mobilising the international community

Permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

Informing and reporting

Mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.



The Kenya Human Rights Commission (KHRC) was founded in 1992 and registered in Kenya in 1994 as a national level Non-Governmental Organisation (NGO). Throughout its existence, the core agenda of the Commission has been campaigning for the entrenchment of a human rights and democratic culture in Kenya through monitoring, documenting and publicising rights violations.

The KHRC also works at community level with 27 human rights networks (HURINETs) across Kenya. We link community, national and international human rights concerns. KHRC's strategic plan aims to 'Secure civic-driven, accountable and human

rights-centred governance. Its founders and staff are among the foremost leaders and activists in struggles for human rights and democratic reforms in Kenya.

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FIDH represents 164 human rights organisations on 5 continents



inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 164 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

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Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

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