

## A BREAKTHROUGH IN JUSTICE? ACCOUNTABILITY FOR POST-ELECTION VIOLENCE IN KENYA

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### Executive summary

- The International Criminal Court (ICC) provides the most promising, and potentially only, venue for accountability for those most responsible for serious post-election violence in Kenya.
- International scrutiny, specifically the involvement of Kofi Annan and diplomatic pressure, sought to promote a resolution to violence and gave weight to the recommendations of a domestic commission of inquiry, but were unable to ensure domestic or hybrid accountability proceedings.
- The ICC is expected by many in Kenya and beyond to pursue positive complementarity—that is, to have a significant impact on domestic accountability and the fight against impunity in the country.
- The approval of the investigation into the situation in Kenya turned on a determination that crimes likely to be tried were not being investigated or tried in Kenya, and that they were of sufficient gravity to merit ICC scrutiny.
- It will be difficult to ensure that ICC proceedings are accessible to the population, but potential for impact of the trials in Kenya depends on this.
- Both case selection and the approach to timing and publicity of arrest warrants are sensitive politically.
- Though the new Kenyan constitution, approved in a referendum in August 2010, might help prevent political violence in the future, serious and sustained efforts will be required to avoid tragic scenarios around the 2012 elections and beyond.



Photos by Chandra Lekha Sriram, 2010. Top to bottom: Parliament of Kenya, Nairobi; The Judiciary, Nairobi; International Criminal Court, The Hague.

## Overview

Following contested elections in Kenya in December 2007, unrest and violence shook the country in January and February 2008, prompting diplomatic intervention by the international community, most notably by the former United Nations Secretary-General, Kofi Annan. A negotiated solution put in place a power-sharing deal between the two main parties contesting the presidential election: the Orange Democratic Movement (ODM) and the Party of National Unity (PNU).

As part of the National Dialogue and Reconciliation process, the government appointed a Commission of Inquiry into Post-Election Violence, known as the Waki Commission (after its chair, Justice Philip Waki). A key recommendation of the commission's report was the establishment of a Special Tribunal to try those responsible for the worst abuses. Two of the three judges and the prosecutor of the proposed tribunal would be non-Kenyan, which would give the tribunal the credibility and independence that Kenyan courts lack. The commission also compiled a confidential list naming those with significant responsibility for the violence (believed to be mainly very high-level politicians), which Justice Waki gave to Annan in a sealed envelope, to be handed over to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) should a domestic tribunal not be established.

The Kenyan parliament failed to approve a bill creating a Special Tribunal, and despite the government's suggestion that a reformed local judiciary could hear cases, it took no serious steps towards legal reform either—though the new constitution contains provisions that should strengthen the judiciary's independence. Following the passage of several deadlines set by the ICC prosecutor for Kenya to establish such a body, the OTP sought the opening of an investigation, which the judges of Pre-Trial Chamber II approved on 31 March 2010.

While the engagement of the ICC with Kenya is in its early stages, the time is ripe for an initial assessment of its efficacy in promoting accountability in Kenya, and implications for future engagements. The authors undertook research and interviews in Nairobi, Kenya in January 2010 and in The Hague, Netherlands (the seat of the ICC) in July 2010 to draw out the views of experts and key actors on the ground.<sup>1</sup> Debates over accountability for post-election violence in Kenya raise a number of critical questions, both legal and political.

## Can international scrutiny and pressure help promote domestic accountability processes?

The response to election-related violence in Kenya illustrates both the potential for and limits to international pressure in promoting accountability for abuses.

### International pressure

International scrutiny of the situation in Kenya was sustained and intense, at least during the violence itself and in the wake of the report by the Waki Commission. The African Union's appointment of former United Nations Secretary-General Kofi Annan to lead the mediation efforts highlighted the importance of resolving the situation in Kenya peacefully. Similarly, Annan was able to wield the Waki Commission's envelope relatively effectively. His threats to turn it over to the International Criminal Court undoubtedly helped prompt the drafting of legislation to create a hybrid tribunal. However, despite several attempts, parliament never passed the legislation, and the government's attempts to forestall international prosecutions with the promise of domestic reform and trials suggest that while top officials were sensitive to diplomatic pressure, they also hoped to resist or evade it.

### Pressure from foreign aid donors

The many Western countries that provide Kenya with foreign aid strongly supported the AU mediation team that ended the 2007-08 crisis. This included pressuring both sides to reach a negotiated agreement that would restore order to the country. Donors also committed themselves to supporting the long-term processes that would reform Kenyan institutions and practices in order to prevent future violence. They considered the implementation of the Waki Commission's recommendations to be a high priority and a concrete demonstration that the government of national unity was truly committed to seeking accountability for past atrocities and preventing election violence from recurring.

When the government failed to implement the key accountability-related recommendation of the Waki Commission, described in the next section, donors shifted their attention to the constitutional reform process and the re-establishment of institutions, such as the independent electoral commission, that helped ensure that the August 2010 constitutional referendum was free and fair and that the 2012 general elections would be so too. By accepting the ICC alone would hold perpetrators accountable, without any trials in Kenya, donors acquiesced de facto to impunity for all but a handful of perpetrators.

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### Domestic inaction

The Waki Commission report highlighted the limitations of the Kenyan justice system, noting the endemic corruption that causes most Kenyans to mistrust it. For this reason, it advocated a hybrid model for the Special Tribunal for Kenya (STK), with sufficient numbers of international judges and other actors to limit the possibility of biased or politicized trials. However, the very prospect of independent trials may have doomed them, as some of the very parliamentarians and ministers whose votes were required for passage of an STK bill had reason to fear that institution could be used to prosecute them.

At the same time, the prospects for serious domestic trials are very limited, especially for high-level alleged perpetrators. To date, only a few low-level prosecutions have proceeded and, in part due to poor handling of evidence by the police, only one has led to a conviction, a case in which the victims were two police officers. No high-ranking person has been charged with any responsibility, despite the reported availability of a significant amount of evidence. This would seem to suggest the limits to international pressure for rule of law and accountability, particularly in states with entrenched patterns of corruption and impunity such as Kenya.

## Can the prospect of International Criminal Court investigations promote accountability?

Advocates for the ICC, and the prosecutor himself, Luis Moreno-Ocampo, have argued that the shadow of the ICC—scrutiny not only by diplomats but also by an international prosecutor able to launch investigations and prosecution—can compel changes in domestic behaviour. They often cite ICC scrutiny of the situation in Colombia, and of the Justice and Peace Law there, as demonstrating that the ICC can help promote domestic criminal accountability or foster rule of law reform.

Similar arguments have been made with respect to Kenya, and indeed the prosecutor's "three-pronged strategy" expressly envisioned domestic proceedings—the three prongs being trials in The Hague for those deemed most responsible, trials in Kenya for one hundred or more alleged perpetrators, and a truth commission to produce a historical record of abuses and promote reconciliation. The impact on the ground, however, is questionable. The government never created the proposed the Special Tribunal; its promises to reform the judiciary and hold domestic trials appear to have been designed solely to evade ICC prosecutions; the Truth, Justice, and Reconciliation Commission that

was created has been dogged by controversy; and as noted above there have been very limited domestic proceedings.

However, the ICC may have had some impact on the discourse surrounding accountability in Kenya. In a country where recommendations of numerous commissions of inquiry dealing with corruption and serious violations of law have not been implemented, the prospect of ICC involvement may have opened up political space for civil society to press for accountability. Thus many NGOs rallied around the cry of "don't be vague: let's go to The Hague". Whether there is a lasting legacy remains to be seen. Some civil society activists have argued that the prospect of seeing even one senior politician face accountability could constitute a very important step in ending the culture of impunity that has characterized Kenya for so long.

Nonetheless, the Office of the Prosecutor has been clear that while it promotes the concept of complementarity—the encouragement by that office of domestic accountability—it is not a development actor. That is to say, the OTP itself will not expressly engage in training and technical support for a domestic judiciary. This will prove disappointing to those in Kenyan civil society who clearly hope that the court will provide such assistance not only to the Kenyan judiciary, but also to civil society organizations themselves. Nonetheless, other organs of the court, including the registry, may undertake more direct engagement. Many expect that the activities of the ICC's witness protection and victims units could provide a positive model for the Kenyan judiciary.

## When should the ICC prosecutor pursue the opening of investigations?

The pursuit by the prosecutor of investigations in Kenya generates insights into how the prosecutor engages recalcitrant states. Similarly, it presents a novel situation: in comparison to most of the other situations under investigation by the court, it involves a short period of political violence rather than a longer-term internal armed conflict.

### Inability, unwillingness, and delay

The principle of complementarity articulated in the Rome Statute—which established the ICC—dictates that cases should not proceed unless a state is unable or unwilling to genuinely pursue investigations or prosecutions. Because the Kenya situation is the first one in which the prosecutor sought to open an investigation of his own volition (*proprio motu*), rather than via state or United Nations Security Council referral, the complementarity threshold was particularly salient at an early stage. This was made more complicated

by the fact that at least notionally, the government put forward various forms of domestic accountability, albeit in apparent efforts to delay or halt ICC involvement altogether.

The ICC prosecutor engaged extensively with the Kenyan government, pushing first for the STK envisioned in the Waki report, and then for the three-pronged strategy. He sought to elicit a referral directly from the Kenyan government. However, when this was not forthcoming, following about one year of discussions and delays, he requested the opening of the investigation himself. This suggests that while states may have some leeway for evasion, it is limited. Similarly, the pre-trial chamber judges, in approving the opening of the investigation, did not consider there to be any relevant prosecutions in Kenya, by which was meant that the persons likely to be prosecuted before the court were not the same individuals as the few who had been or are being tried in Kenya.

#### Gravity of crimes

The threshold of gravity dictates that cases should not be pursued if they are not of sufficient gravity. However, precisely what this means has not always been clear: as the prosecutor himself has noted, all of the crimes enumerated in the statute are by definition grave. There can be no question that the crimes committed in Kenya were very serious. However, in comparison to the sheer scale and protracted nature of abuses in, for example, the Democratic Republic of Congo, the abuses might seem relatively small.

In an earlier decision not to pursue investigations into abuses committed by British soldiers in Iraq, the Office of the Prosecutor seemed to suggest that gravity was determined by numbers. If this were the case, then perhaps Kenya, with some 1300 deaths (a relatively low number of deaths compared to other situations), should not have been the subject of ICC investigations. However, using the broader criteria now promoted by the OTP, which include not just scale but also manner of commission, the nature of the crimes, and their effect on victims, the pre-trial chamber judges determined that crimes committed in Kenya were sufficiently grave. Nonetheless, among some observers, questions remain, and the issue of gravity may arise again when individual cases are pursued.

## How can involvement by the International Criminal Court be made relevant to the victims and affected population?

International tribunals regularly face the criticism that they are too distant to have any genuine impact on societies riven by violence or war, and that they seldom have much relevance for specific victims. This criticism has engendered two innovations in international criminal accountability: the establishment of hybrid tribunals and outreach sections. Hybrid tribunals, generally including national and international staff and held on the territory of the affected country, are somewhat more accessible than those based in foreign countries. However, the STK seems unlikely to be created.

Thus the outreach section is potentially yet more important. In general, the role of outreach offices is to provide information about what a court's mandate is, what it can and will do, and equally importantly, what it cannot do. Indeed, at the review conference of the Rome Statute held in May-June 2010, states parties and experts lauded outreach as essential to the work of the court. Yet, while outreach is required to convey the work of the court to affected populations, the efforts of outreach offices are often undermined by the inaccessibility, because of poor infrastructure or violence, of remote and often violence-affected populations. Low levels of literacy limit the impact of printed information, and limited electricity in many conflict-affected countries may make dissemination by radio, television, or the internet difficult as well. All of these challenges are present in Kenya, and made more difficult by the size of the country.

The ICC's outreach office has sought to engage with Kenyan civil society from the beginning, initiating visits alongside the office within the registry tasked with enabling victim participation as the prosecutor sought the opening of an investigation in late 2009. The presence of outreach activities from the earliest stages is a first for the ICC, or for any international criminal tribunal, and is a positive development.

Nonetheless, its impact for the moment will be limited. There is currently no actual outreach office in Kenya, and security and budgetary concerns mean that an office might not be opened in the future. At the moment, it is the outreach office in Kampala, Uganda, officially tasked with work on the situation in northern Uganda, which is engaged with Kenya. Its work is hampered by distance, and by very limited funds. Some NGO officials have argued for holding trials, or at least some proceedings, in Kenya, to increase accessibility, but the



prospects of this are limited, given the security concerns that have thus far prevented even the opening of a standing outreach office.

## Which cases to select? How to pursue indictments and arrests?

### Case and perpetrator selection

The selection of incidents to be examined and individual perpetrators to be investigated is politically sensitive. Should the prosecutor appear to focus unduly on only one group of perpetrators, or on incidents affecting victims from only one community, he could be accused of bias, undermining the legitimacy of the court. Thus the prosecutor has indicated that he intends to pursue two Kenyan cases, with two or three accused believed to bear significant responsibility from one political "side" in each case, to ensure balance. However, this may not suffice to ensure legitimacy, particularly as, according to the Waki report, the police caused more than one third of the 1,133 documented deaths during the post-election violence, and it is not clear that any high-level police officials will be targeted through this approach. Further, while efforts to pursue balanced indictments may address political and stability concerns, they may undermine broader claims that the prosecutor is simply following the evidence and is not swayed by political concerns.

### Indictments and arrests

Regardless of the composition of the cases and perpetrators, the issuance of indictments will also be politically sensitive. The widespread assumption in Kenya is that senior politicians from both ODM and PNU will be indicted. Given their positions in the current government and ethno-regional power bases, this could well be destabilizing, and further inflame the debate ignited by the indictment of Sudanese President Omar al-Bashir regarding the prosecution of heads of state, notwithstanding the fact that it is clearly within the court's mandate to do just that.

Observers are split as to whether indictments should be sealed and arrest warrants kept secret, which would potentially enable surprise arrests, or should be public, which might topple some accused from power or at least prevent them from standing for office in the 2012 general elections. Many are sceptical, regardless, of the willingness of the government generally, or the police specifically, to arrest those likely to be accused. Concerns range from the risk of destabilization to delegitimization of the ICC should arrests not take place.

One possible alternative is the issuance of a summons to appear, rather than an arrest warrant. In such a circumstance, the accused would present themselves voluntarily before the court to face charges, but remain free, and able to return to Kenya prior to any conviction. This device has been used to secure the appearance of three rebel leaders from Darfur, a point which the prosecutor has made when in Kenya. This could, according to some, be a useful face-saving device.

## Current prospects

In an August 2010 referendum, voters endorsed a new Kenyan constitution that contains many provisions that could help relieve grievances and potentially reduce the probability of future electoral violence. For instance, it reduces the concentration of power in the presidency and adds new checks and balances. This lessens the incentives for holding the presidency. The new constitution also includes measures to render the judiciary more independent and promises to redress historic injustices, especially with regards to land ownership, which could defuse some tensions.

One must not, however, place too much hope in the new constitution's capacity to prevent violence. Any form of change or redress creates winners and losers—and the latter may use violence in protest. Also, the application of constitutional provisions depends on the rule of law, which is currently very deficient in Kenya and unlike to change overnight, be it because of the promulgation of a new constitution or trials in The Hague.

Most of the political violence in Kenya since the early 1990s has been sponsored by senior officials, who usually pay local militias to carry out attack. Such actors continue to operate unimpeded and no efforts have been made to date to disband or disarm them or prosecute any of their members. Even if the ICC does imprison a handful of top-level perpetrators, actors at lower levels will continue to operate with complete impunity. They may conclude that in order to avoid accountability in the future, they need only make sure that they cannot be shown to be among the small number of people who bear the greatest responsibility for atrocities. Violence could well recur during the 2012 elections and beyond.

## Findings and recommendations

- International diplomatic and donor scrutiny and pressure can encourage recalcitrant states to address serious violations and abuses, but only up to a point: it remains difficult to convince politicians who might themselves be implicated to authorize prosecutions.
- The ICC can help catalyze domestic advocates of justice and may encourage some behaviour change in domestic politicians, but cannot compel domestic accountability measures.
- The prosecutor of the ICC will likely seek to encourage states to self-refer cases or take domestic measures, but will not permit indefinite delay and avoidance tactics by them. Where seeking to pursue the opening of an investigation proprio motu, the prosecutor will need to provide detailed evidence regarding the gravity of the alleged crimes and presence of domestic proceedings.
- The limited budget for outreach and the absence of an outreach office in-country will limit the effects of the proceedings for victims and the affected population. The ICC should consider setting up an office in Kenya at the earliest opportunity. It could also consider holding some trials or proceedings in-country, although security concerns, both for witnesses and the proceedings themselves, may dictate against doing so. The model of having the outreach office engage a country at the earliest stages of ICC scrutiny should be followed in future situations. Countries that finance the ICC's operations should ensure that sufficient resources are available for such activities.
- In choosing which situations to investigate and which individuals to pursue, political concerns have dictated that the prosecutor take a 'balanced' approach. However, the prosecutor should take care to avoid unintentional exclusion of other perpetrators (e.g., high-level police officials), or the appearance that political concerns supersede ordinary prosecutorial concerns.
- There are arguments in favour of and against issuance of public arrest warrants against senior officials. A third option is the summons to appear, which has been used, albeit not frequently.
- Though ICC trials and the adoption of a new constitution may help deter some political violence, there remains a significant risk that new atrocities could take place, notably in relation to the 2012 elections. The Kenyan government and its international partners should carefully monitor tensions and potential incitement across the country, especially in areas that have been "hot spots" in the past. The Kenyan government also should take additional steps to disarm militias.

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