KPTJ
KENYANS FOR PEACE TRUTH & JUSTICE

The Post-Election Violence in Kenya: Seeking Justice for Victims

EXECUTIVE SUMMARY

Kenya's flawed December 2007 presidential election provoked a two-month orgy of violence, which has been described as the country's most severe human rights crisis. About 1,133 Kenyans were killed and 600,000 more displaced from their homes. Almost three years later, the Kenyan government is yet to take firm action against perpetrators of the post-election violence (PEV).

On October 15-16, 2009, Kenyans for Peace with Truth and Justice (KPTJ), with the support of its members, the International Centre for Transitional Justice (ICTJ) and the Kenya Human Rights Commission (KHRC), convened the *Options for Justice Meeting* to critically examine the government's apparent stalling; and to survey the different options for justice that may be available to PEV survivors. The meeting generated new ideas on how to use existing local, regional and international legal mechanisms to achieve this end.

This brief finds that even though the ICC has officially trained its sights on Kenya, it is unlikely that the Kenyan government will follow through on its commitment to facilitate the arrest and transfer of high-level planners of the 2007/8 PEV to the court. The brief argues that the proposed Special Tribunal for Kenya has the potential to act as an engine for the reform of Kenya's judicial system. So far, the Special Tribunal Bill contemplates a relationship with the ICC but there is no framework to link it with other justice mechanisms, including the regular courts, or the Truth, Justice and Reconciliation Commission (TJRC). Above all, the Special Tribunal Bill, as it is currently drafted, appears to provide for retroactive criminal offences, which raises important constitutional questions that might complicate its passage through parliament.[1]

Also considered in this brief is whether the Kenya National Commission on Human Rights (KNCHR) and other Kenyan human rights groups are in possession of sufficient evidence that could be useful in launching universal jurisdiction cases against specific senior state officials in appropriate foreign jurisdictions. Kenyan human rights groups are also interested in learning about the potential for universal jurisdiction actions through liaisons with their counterparts in different countries where such cases have been initiated. The ongoing universal jurisdiction actions in Senegal and complaints filed in South Africa provide critical guidance.

The brief asks whether private prosecutions are viable for seeking justice for the victims. This question is pertinent given the current political climate and the apparent lack of independence of the Attorney General (AG), who is known to terminate politically sensitive cases. The option of class action suits, lodged in the Kenyan courts, also receives some attention even though the brief concludes that it is a relatively weak approach for pursuing justice for PEV survivors. In addition, this brief argues that, because constitutional references do not provide for criminal culpability, there is the risk they may be viewed by

[1] This was the third attempt to introduce a Bill to establish a Special Tribunal for Kenya. The Bill was initiated by a Private Member of Parliament, and was unsuccessful due to lack of parliamentary quorum three times in 2009. See for example, http://www.parliament.go.ke/parliament/downloads/tenth_forth_sess/11.11.09A.pdf p.14

CONTENTS

Executive Summary 1
Acronyms 4
Acknowledgements 4
1.0 Introduction 3
2.0 International Criminal Justice Approaches 4
3.0 Local Options for Justice 15
4.0 Regional and International Mechanisms 19
5.0 UN Human Rights Treaty Monitoring Bodies and Universal Periodic Review 2 21
Bibliography 26
Annex 1 26
Critical Resources and Suggested Reading 26
Annex 2 27
Comparative Table on Universal Jurisdiction in Europe

some PEV survivors as a weak option for pursuing retributive justice.

Formal complaints bodies are also addressed as potential justice options. Among them are the KNCHR, the Public Complaints Standing Committee (PCSC) and the Media Council of Kenya (MCK). Additionally, the brief points out that the Kenya Police Standing Orders could be invoked to deal with the numerous complaints against individual police officers for crimes and human rights violations allegedly committed during the PEV.

Also reviewed is the possible use of regional and international human rights mechanisms. Of interest is how these options could be activated to bring pressure to bear on the Kenyan state, which is fundamentally responsible for the PEV. In particular, Kenyan human rights groups should consider working with African Union (AU) institutions. The AU Executive Assembly, the African Court on Human and People Rights (ACHPR) and the Pan-African Parliament (PAP) are among the regional institutions discussed in this regard.

While it is relatively new terrain for human rights groups, the Treaty of the East African Community (EAC) could also provide fresh opportunities for human rights action. The East African Legislative Assembly (EALA), the EAC Summit and East African Court of Justice (EACJ) are some of the sub-regional institutions that are considered. Additionally, thought is given to the possibility of Kenyan human rights groups activating the United Nations (UN) human rights treaty monitoring bodies, as well as the Universal Periodic Review (UPR) mechanism.

A comparative analysis of the different local and international justice options is presented in the brief. It points out that the ICC, the proposed Special Tribunal, universal jurisdiction actions and private prosecutions are unlikely to satisfy some survivors' need to see low-level offenders brought to justice. All the same, the approaches have strong potential in providing for retributive, or punitive, justice in relation to the crimes of high and middle level perpetrators.[2]

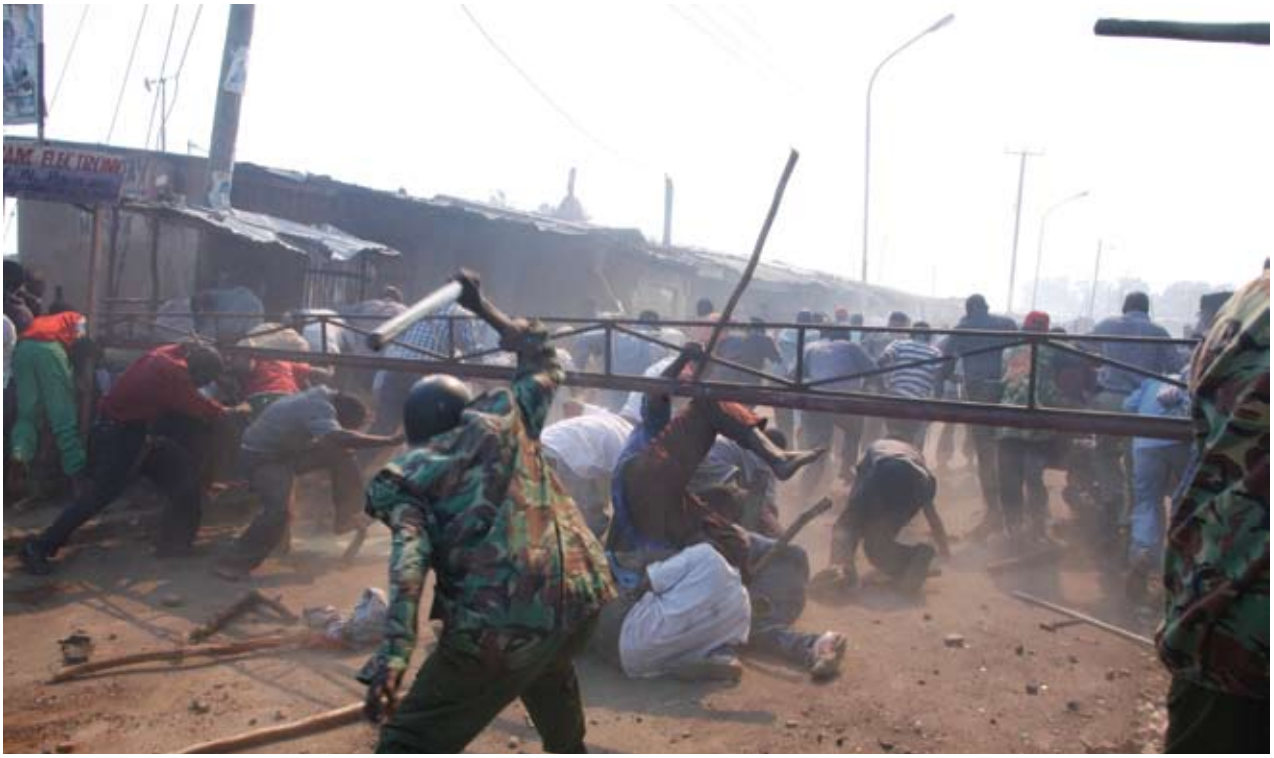
Even though constitutional cases, class actions suits and actions undertaken by local formal complaints bodies may not deliver accountability for PEV offences, cases brought under either of these options could result in judicial and quasi-judicial rulings that call for reparations to be made to PEV survivors. Similarly, the Special Tribunal Bill's reparations provisions could provide restorative, or reconciliatory, justice to the survivors.[3]

This brief concludes that regional and international human rights mechanisms can initiate investigative and judicial processes that may ultimately yield retributive and restorative justice for PEV survivors. However, recommendations made by these bodies are not legally binding on states. In addition state parties enjoy much leeway to enter reservations, understandings or declarations that effectively shield them from the reach of some international human rights law provisions.

On the one hand, the international justice options — the ICC and universal jurisdiction —face challenges that may hinder their efficacy as options for bringing justice to PEV survivors. The potential for low levels of state cooperation and questions of ICC Statute threshold requirements are just a few of the problems that lie ahead. On the other, local justice options —the Special Tribunal, private prosecutions, constitutional references, class action suits and formal complaints bodies — appear to be burdened by a restrictive legal framework as well as the risk of political interference.

[2] Retributive justice is a systematic infliction of punishment justified on grounds that the wrongdoing committed by a criminal has created an imbalance in the social order that must be addressed by action against the criminal.

[3] Restorative justice is a systematic response to wrongdoing that emphasises healing the wounds of victims, offenders and communities caused or revealed by the criminal behaviour.



1.0 INTRODUCTION

Kenya's flawed December 2007 presidential elections provoked a two-month period of violence which has been described as the country's most severe human rights crisis. In October 2008, the Commission of Inquiry into Post-Election Violence (CIPEV) concluded in its report that 1,133 Kenyans had been killed and 600,000 more displaced from their homes in the violence. Security personnel killed many of the victims, while hundreds of women and some men were subjected to sexual violence.

Almost two years later, the Kenyan state is yet to take action against perpetrators of the post-election violence (PEV). The government's affinity to impunity is further evidenced by the Cabinet's July 31, 2009 decision to pursue justice in respect of the post-election atrocities through Kenya's largely dysfunctional and corrupt criminal justice system as well as through the Truth, Justice and Reconciliation Commission (TJRC). This was a setback for many Kenyans who expected that the government would set up a special tribunal to try lower and mid-level perpetrators and refer those believed to bear command responsibility to the International Criminal Court (ICC).

To explore the avenues of justice available to PEV survivors, Kenyans for Peace, Truth and Justice (KPTJ) and its members, the International Centre for Transitional Justice (ICTJ) and the Kenya Human Rights Commission (KHRC) convened a meeting on October 15-16, 2009. This meeting brought together a diverse group of 30 human rights and governance experts to survey and critique different options for justice. It generated new understanding on how to use existing local, regional and international legal mechanisms to achieve this end.

This brief synthesises the presentations made during the two-day meeting and the ensuing discussions. The first set of presentations focused on international criminal justice approaches, including the ICC, the proposed Special Tribunal for Kenya and the principle of universal jurisdiction. The second series dealt with local judicial and quasi-judicial options, including private prosecutions, class action suits, constitutional references and formal complaints bodies such as the Kenya National Commission on Human Rights (KNCHR). The final set focused on regional and international mechanisms: the East African Community (EAC) Treaty, the African Union (AU) and United Nations (UN) human rights systems.

Questions addressed in the brief include:

- What are the objectives of the options for justice and what would it entail to pursue each of them?
- How effective are they and what unique opportunities for impact do they offer?
- What are the potential challenges involved in using these options?
- How relevant are the approaches to the Kenyan context and needs of stakeholders?

This brief explores these and other questions by

ACRONYMS

ACHPR	African Commission on Human and People's Rights
AG	Attorney General
AU	African Union
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of Discrimination against Women
CERD	Convention on Elimination of Racial Discrimination
CRC	Convention on Rights of the Child
CIPEV	Commission of Inquiry into the Post-Elections Violence
DDR	Demobilisation, Disarmament and Reintegration
DRC	Democratic Republic of Congo
EAC	East African Community
EACJ	East African Court of Justice
EU	European Union
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal on Rwanda
ICTY	International Criminal Tribunal on the former Yugoslavia
KNCHR	Kenya National Commission on Human Rights
LRA	Lord's Resistance Army
MCK	Media Council of Kenya
PCSC	Public Complaints Standing Committee
PEV	Post-Election Violence
PSC	Public Service Commission
SALW	Small Arms and Light Weapons
SCSL	Special Court for Sierra Leone
SGBV	Sexual and Gender-Based Violence
TJRC	Truth, Justice and Reconciliation Commission
UN	United Nations
UN HRC	United Nations Human Rights Council
UN OHCHR	United Nations Office of the High Commissioner for Human Rights
UPR	Universal Periodic Review
USD	United States Dollar

synthesising the discussions that arose at the meeting. It compares and contrasts different arguments and positions; poses pressing questions; offers alternative viewpoints; and makes various recommendations. It is hoped that this detailed analysis will shed light on what Kenyan and other human rights groups could do to support PEV survivors.

Following the meeting on October 2009 and the publication of this report, there has been a new significant development: Pre-Trial Chamber II of the International Criminal Court authorised the Prosecutor of the court to commence formal investigations in Kenya in relation to crimes against humanity allegedly committed during the PEV. However, to the extent that it is still a long way before clarity can emerge as to whether there will be actual prosecutions after the ICC investigations, the answers that have emerged may only be provisional. To the greatest extent possible, this report has been updated to reflect this new development.

2.0 INTERNATIONAL CRIMINAL JUSTICE APPROACHES

2.1 The International Criminal Court

The ICC and the 'Kenyan situation'

Currently, there are five situation countries under the ambit of the ICC, including Kenya.[4] Having considered the authorisation request made by the Prosecutor on 26 November, 2009 Pre-Trial Chamber II of the ICC granted authorisation to the prosecutor on 31 March, 2010 to open formal investigations in Kenya. The Commission of Inquiry into Post-Election Violence (CIPEV) had recommended in its report that the ICC's jurisdiction should be activated in respect of key perpetrators, should the government fail to establish the Special Tribunal that the Commission recommended.[5] By dangling the threat of the ICC in front of Kenya's decision-makers, the aim of the Waki Commission was to provide an impetus for local action.

When Justice Waki presented the report to the President and Prime Minister in October 2008, he noted that the evidence collected by the Commission was probably insufficient to reach the standard of proof required to conclusively make a determination as to the guilt or innocence of alleged perpetrators. This emphasised the need for more thorough, focussed and targeted investigations against certain people the Commission identified as key perpetrators.

[4] The other four situations relate to crimes committed in Northern Uganda, the Democratic Republic of Congo (DRC), the Central African Republic (CAR) and Darfur, Sudan.

[5] It should be pointed out that while a United Nations-assisted justice process was considered by CIPEV, the UN was reluctant to engage as a parallel process to the ICC option. There were of course also questions of resources.

Acknowledgements

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Special thanks go to the panellists and participants who attended the joint KPTJ-ICTJ, KHRC *Options for Justice Meeting* on October 15-16, 2009. Their critical insights and valuable contributions on the ongoing debate on justice for the survivors of Kenya's 2008 post-election crisis formed the basis of this brief.

Thanks to the staff of Africa Centre for Open Governance (AfriCOG) which serves as KPTJ's Secretariat, ICTJ and KHRC. Their dedicated organisational expertise was indispensable to the convening of the *Options for Justice Meeting* and the production of this brief.

A wait-and-see approach?

The prospect of an ICC intervention is viewed as having created panic among some of the perceived planners and financiers of the violence. When the violence first flared, following the announcement of the results of the disputed Presidential election, the spectre was raised of the ICC taking jurisdiction over prosecution of the crimes that were being committed. This was enough to spur the Kenyan Government into action, which announced its intention to investigate and prosecute those crimes itself. For advocates of the ICC and international justice, it seemed to be an excellent outcome – an example of ICC complementarity in action, with the court's very existence acting as a spur for national mobilisation. But there was the real possibility that suspected violators would call this bluff by adopting a wait-and-see approach to determine if at all the court would act. The other potential problem highlighted with the ICC option was that it might tempt powerful political actors to conveniently shun the country's judicial system even though it could marshal – subject to some safeguards – the essential infrastructure required to deal with the violence more comprehensively.

Cooperation from the Government

While the Kenyan government had pledged in July 2009 that it would refer the country's situation to the ICC, it soon emerged that there was insufficient political will to follow through on this commitment.[6] This in itself presented a crucial element of leverage for civil society advocacy for ICC intervention. There are two other options to trigger the court's involvement: investigations initiated by the Prosecutor on his own initiative (*proprio motu*); and referral by the Security Council of the UN. Ultimately, the Prosecutor, convinced that the relevant political actors were unlikely to act, proceeded to ask permission from Pre-Trial Chamber II to initiate investigations.

The decision granting authority to the ICC Prosecutor to launch investigations into the Kenyan situation raises many questions and concerns. One of these is whether there will be co-operation by the Kenyan state – as required by the Rome Statute – during the investigations and beyond.[7] While cooperation relates to a range of issues, including access to evidence and persons, witness protection and security for ICC staff while in Kenya, there is already doubt that the state will cooperate in effecting the arrest of persons whom the Court may indict. According to media reports, the government has sent signals that it might not assist the ICC in carrying out any arrests.[8]

How effective would an ICC investigation be, without cooperation from the Government of Kenya? Of the other four situation countries – DRC, CAR, Uganda and Darfur (Sudan) – the ICC has only made progress in investigations and prosecutions in respect of the DRC which can be regarded as a 'model' country in terms of cooperation.[9] The work of the ICC has literally ground to a halt in Uganda and Darfur where arrest warrants have been pending for years with no evidence that the situation will change in the near future.[10] In Uganda, the suggestion by the Prosecutor that his investigations would target government related crimes appears to have triggered withdrawal of cooperation. With respect to Darfur, although the government of Sudan has refused to subject itself to ICC jurisdiction from the start, the indictment of President Omar Al Bashir closes all possibility of cooperation.

It is thus evident that the ICC will not succeed in Kenya without credible commitment from the government to provide reliable and sustainable cooperation.

The Kenyan situation and ICC statute threshold requirements

While there is convincing evidence gathered by various bodies tending to show that that the PEV was not spontaneous, but was probably planned, instigated, directed and financed by key leaders, one of the points of contestation since the publication of the CIPEV report was whether the crimes committed amounted to crimes against humanity**.** This is a pre-requisite for ICC involvement in Kenya. In terms of article 7 (1) of the ICC Statute, crimes against humanity have been defined as certain listed acts including murder, rape and sexual violence, deportation when committed 'as a part of a widespread or systematic attack directed against civilian population with knowledge of the attack'.

When read with article 7(2) (a) of the Statute, the following criteria must be shown to exist to prove a crime against humanity:

(i) an attack directed against any civilian population
(ii) a State or organisational policy
(iii) the widespread or systematic nature of the attack
(iv) a nexus between the individual act and the attack and
(v) knowledge of the attack

[6] The Rome Statute entered into force on the 1 July 2002. Kenya ratified the Rome Statute on 15 March 2005. Kenya has also enacted laws domesticating the Geneva Conventions and is a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide as well as the Convention on the Non-Applicability of Statutory Limitations on War Crimes and Crimes against Humanity. See generally Kenya Human Rights Institute, *Special Brief: Clarifying Human Rights Violations in the Kenyan Post-election Crisis* 02/2008.

[7] See articles 86-93 of the Rome Statute.

[8] 'Kenya may back out of arrest deal with ICC' *Daily Nation* 8 November 2009.

[9] For more on the work of the ICC on the DRC see Godfrey Musila *Between rhetoric and action: the Politics, process and practice of the ICC's work in the Democratic Republic of Congo* (2009).

[10] On the 12 July, 2010, the Pre-Trial Chamber I of the International Criminal Court issued a second warrant of arrest against Omar Al Bashir for counts of genocide. This second arrest warrant does not replace or revoke in any respect the first warrant of arrest issued against Mr Al Bashir on 4 March, 2009, which remains in effect.

Standards applied at the ICC

In order for the Pre-Trial Chamber II to authorise the Prosecutor to open formal investigations in Kenya, he had to demonstrate that there was *reasonable basis for believing* that crimes against humanity were committed**.** In other words, the judges were to be satisfied that on the basis of evidence presented by the Prosecutor, the criteria outlined above were met.

On a majority of two to one, Pre-Trial chamber II found that this was indeed the case. It is worth noting, however, that 'reasonable basis to believe' is the lowest evidentiary standard applied at the ICC when weighing evidence of commission of an international crime. The other three tests/standards which escalate in that order are: 'reasonable grounds' for believing (applied at the stage of issuing an arrest warrant or summons); 'substantial grounds' for believing (applied at the stage of confirming charges against an individual) and; 'beyond reasonable doubt' (applied when convicting a defendant). This means that as the process unfolds from one stage to the next, the Prosecutor will need evidence of higher cogency apart from fulfilling other tests, including the requirements for command responsibility (in view of those being charged). The question as to whether there is enough evidence to sustain a case against specific individuals can only be answered following the investigation, since the authorisation relates to the general context, with only a non-binding indicative list of potential defendants prepared by the Office of the Prosecutor.

What is clear is that the strong dissent entered by Judge Hans-Peter Kaul suggests that the Prosecutor has an uphill task as he prepares to indict specific individuals and to request for arrest warrants for the Pre-Trial Chamber.

The relevance of the ICC to the Kenyan context

Certainly, there is no question that a preferable outcome to the situation in Kenya would have been for Kenya to investigate and prosecute those responsible for the violence. Indeed, prosecutions in Kenya of those who bear the greatest responsibility for the murder and displacement of thousands of Kenyan citizens best fulfils the ICC Statute's complementarity principle – ensuring that crimes against humanity are prosecuted closest to the victims, and in communities where the effects of these crimes have been felt.

There are a number of issues concerning the relevance of the ICC's intervention in Kenya's unique context as well as the needs of various stakeholders. While some observers argue that ICC intervention might trigger much-needed reforms in Kenya's criminal justice system, others believe that pursuing national prosecutions of PEV suspects is more beneficial. In their view, this approach stands to implant reliable seeds for the respect of the rule of law in addition to a strong sense of justice and accountability among survivors. They argue that Kenya is not a failed state requiring international intervention and has relatively stable criminal justice institutions to dispense justice.

Defenders of local approaches to justice also point to the limits of the ICC, which prosecutes only those who bear the greatest responsibility. They rightly argue that national courts have the potential of dispensing justice more widely. Furthermore, they assert that national prosecutions are the most suitable option because the Kenyan legal system can adequately punish many of the atrocities. Furthermore, while the International Crimes Act 2008 may not be the best regime to apply to PEV in view of retroactivity constraints (it has a commencement date of 1 January 2009), most of the PEV crimes are penal code offences and could be punished as such.[11]

Nonetheless, some observers point out that Kenyans do not feel that retributive justice - sought either through national prosecutions or the ICC - will enable people to reconcile and live in harmony. On the contrary, there are fears that suspected post-election offenders are regrouping and are willing to use violent means to keep themselves away from the reach of the law. It is this particular context that partly informs the drive in some communities for forgiveness as the basis for

[11] See Godfrey Musila 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions', *International Journal for Transitional Justice*, 2009, p10. Because the International Crimes Act 2008 was passed after the end of the PEV, parliament would have to amend the constitution to make it apply retroactively.

peace-building and conflict-prevention. In this regard, the retaliatory attacks launched by the Lord's Resistance Army against women and children once arrest warrants were issued by the ICC against five highest ranking members of the group in October 2005 was cited with approval.[12] Indeed, because communities in Kenya's Rift Valley province continue to be deeply polarised along ethnic lines after the PEV, some question the wisdom of seeking retributive justice, as doing so may re-kindle the embers of violence.

Opportunities for impact

Legal strategy

To maximise the impact of the ICC option, human rights actors need to evaluate the legal opportunities and challenges that they are likely to encounter at the different stages of a potential ICC intervention. The ICC system combines both adversarial (common law tradition) and inquisitorial processes (civil law tradition). Thus, human rights actors could capitalise on this hybrid as it is theoretically easier to have relevant evidence, including hearsay, adduced using the ICC process than under the Kenyan national system.

Kenya's Attorney General (AG) has often terminated, through *nolle prosequi,* cases against the state or well-connected individuals and officials. From the perspective of the ICC, a *nolle prosequi*, entered in respect to an act that may be classified as an international crime, would open the doors for the court's intervention because it constitutes evidence of unwillingness on the part of the Kenyan state to act as required by the ICC statute.[13]

During his recent visit to Kenya, the Prosecutor affirmed that he would open cases against a total of four to six individuals from both ODM and PNU.[14] Therefore it is imperative for Kenya to establish a credible domestic mechanism to focus on a broader range of offenders that includes members of state security agencies, counter-attacks and perpetrators of sexual and other gender-based crimes. Focusing on only a small set of perpetrators might be perceived as singling out only one community and this might worsen ethnic tensions, in part because of the likely perception that the ICC is only interested in the leaders of certain communities. Human rights groups must not relent in making demands on the Government to focus its attention on as many cases as possible through independent and credible domestic mechanisms to complement the handful of trials that the ICC would be able to mount.

Witness protection

This is a related issue that requires critical reflection on the part of human rights groups. Some vital questions to consider are:

- What role can human rights groups play in organising the protection of individuals who may be prepared to adduce evidence against high-ranking perpetrators and sponsors of violence?
- What kind of protection would they require?
- Which state institution should be charged with administering a witness protection programme?
- Can the police be involved even though they stand accused of committing some of the atrocities?
- Can a witness protection programme be implemented effectively by the AG's office given its general reluctance to address the PEV?
- Is there a need to consider community-based witness protection measures?
- Is it possible for human rights groups to galvanise communities in order to ensure the long-term protection of their members?
- How can various provisions of international humanitarian law and refugee law inform a witness protection strategy?

"CAN A WITNESS PROTECTION PROGRAMME BE IMPLEMENTED EFFECTIVELY BY THE AG'S OFFICE GIVEN ITS GENERAL RELUCTANCE TO ADDRESS THE PEV?"

Advocacy-outreach strategy

Keeping the ICC threat credible as a way of building pressure for a national process should be a priority for human rights groups**.** Human rights groups ought to undertake public information campaigns related to the ICC: its potential role; its capabilities; and the impact it might have on the rule of law and human rights generally in Kenya. The ICC itself needs also to reflect on its outreach strategy for the country. Outreach by the ICC is yet to take shape in Kenya.[15] The ICC should be encouraged to maintain constant staffing levels for outreach activities, by establishing field offices in Kenya, especially now that formal investigations have been launched. Furthermore, the timing of outreach is as important as the content of outreach messages.

As human rights groups weigh their options, they should also be aware of the need to develop strategies for managing the high expectations of the public as well as the threats or risks that might be associated with an ICC investigation. Appropriate information and awareness strategies are a necessary response.

[12] See H. Cobban, 'International Courts' *Foreign Policy* March-April 2006, p 24.

[13] Although PTC II has authorised investigations into Kenya, admissibility may still be challenged under Article 19 of the Rome Statute, in the case where there is a prosecution at the national level against the same person for the same crimes as any ICC indictment.

[14] This is according to an article in the Daily Nation, published 3 October 2009, available at http://www.nation.co.ke/News/politics/-/1064/667504/-/xu9iruz/-/index.html

[15] The ICC has an Outreach Unit whose objective is to sensitize victims in situation countries on the idea of the court and its relevance in meeting their needs and providing justice. In Northern Uganda for instance, the Outreach Unit works closely with victims, in particular, affected women from the Acholi and Langi areas. In the DRC on the other hand, the Outreach Unit has been training judges, lawyers and legal scholars on judicial practice as it relates to the ICC and international criminal law generally.

Political strategy

The signing of the *Agreement on the Principles of Partnership of the Coalition Government* demonstrated that Kenya's political leadership was ostensibly ready to deal with the post-election crisis in accordance with the recommendations of the mechanisms they pledged to set up. Therefore, human rights groups should reflect on how they might use this particular event and its significance as a pillar of leverage in their advocacy for ICC intervention. Moreover, it will be important to show that the Kenyan authorities had ample time and opportunity to refer the country's situation to the ICC yet they failed to do so.

Limitations and weaknesses

As with any approach to seeking justice for international crimes, there are some limitations and weaknesses associated with the ICC option. One of the limitations is that the intended scope of the ICC's work encompasses situations from all over the world yet it has finite resources**.** The question is raised as to whether a single court can really investigate and prosecute the numerous acts of international crimes committed in different countries around the world. Can the ICC convince both its supporters and critics that it can effectively address the five highly complex situations under its jurisdiction with an infrastructure that is generally equivalent to that of the ICTY or ICTR? Furthermore, the budget of the ICC for 2008-2009 was reduced.[16] In any case, it is advisable that Kenyan human rights actors collaborate with the court to stretch its financial resources as much as possible.[17]

Patterns of intervention

Another perceived weakness revolves around the criticism that the ICC is created by the strong for the weak to obey**.** Some observers have argued that the court's focus so far has been on developing countries, Africa in particular, and that it has tended to be lenient towards powerful states, a number of which continue to commit war crimes and crimes against humanity with impunity.

The ICC is a treaty-based Court; as a result, not all countries are members. States have a choice whether to join it or not and no State can be forced to be a member. But the fact remains that some of the most serious crimes have been committed during the numerous conflicts in Africa. The argument on biased patterns of ICC intervention so far reflect the imbalances of power relations within the international community, and underlines its contradictions.

However, one wonders whether this could be an adequate justification for the developing world to ignore what seems to be a partial international criminal law edifice. Does the fact that egregious human rights violations have occurred change because the mechanisms that call them out appear to be biased? Would this argument make sense to the survivors of human rights violations? In any case, human rights groups ought to remain alert to the fact that the ICC operates within an international political context and the reality of big power politics may constrain as much as it facilitates the court's actions.[18]

An unlikely challenge is the possibility of conflict between the role of the ICC and that of regional bodies which may intervene to address PEV. There is no reason for any conflicts to arise because regional bodies such as the African Court of Human and Peoples' Rights deal with state responsibility while the ICC focuses on individual criminal responsibility. In fact, the two categories can therefore be complementary.

In conclusion, as human rights groups contemplate ICC investigation and trials, they ought to ask themselves some difficult questions. The ICC has been used as a threat to end violence but there have been few cases where the violence has actually ended. The continuing violence and atrocities in the DRC, despite active ICC involvement is a case in point. Some issues worth considering are as follows:

- What role might the court play in ending impunity for violence in Kenya?
- How will the ICC address the structural features in societies that have given rise to violence and human rights atrocities?
- What does the use of international judicial mechanisms portend for the strengthening of Kenya's judiciary?
- What are the politics of international justice and what do they tell us about the effectiveness of international judicial mechanisms, including the ICC, in addressing the problems of widespread human rights violations and conflicts?

[16] Sixty or so per cent of the 2009 budget goes to the Registry (60,222,700€) while the shares of the budget going to Chambers (10,332,100€) and the Office of the Prosecutor (25,528,910€) represent respectively about 10% and 25% of the budget. The Assembly of State parties, in total approved a total budget of €101,229,900 for 2009. See: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP7-Res-04-ENG.pdf. The budget approved for 2010 was €103,623,300, See http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.7-ENG.pdf

[17] See Human Rights Watch, *Human Rights Watch Memorandum for the Eighth Session of the International Criminal Court Assembly of States Parties November 2009*, p 27-29. The Assembly of States reduced the ICC budget by 5 million euro and HRW has called for an urgent review of the envisioned budgetary shortfall.

[18] For an incisive discussion of the effect of politics on the ICC, see presentation by lawyer Betty Murungi in *Interventionism and Human Rights in Somalia: Report of an Exploratory Forum on the Somalia Crisis*, Kenya Human Rights Institute, 2007.

2.2 THE PROPOSED SPECIAL TRIBUNAL FOR KENYA[19]

The Special Tribunal for Kenya was recommended by the CIPEV as a preferred option for justice in relation to the Post-Election Violence. The ICC option was only to be invoked in default of establishing a credible domestic mechanism. As proposed, the Special Tribunal sought to hold accountable those responsible for grave crimes committed during the 2008 post-election crisis. The main rationale for establishing this mechanism, which would be partly staffed by judicial officials drawn from other jurisdictions, is the widespread concern that the national courts were likely to be susceptible to political interference. Because of the possibility that the tribunal would try large numbers of suspects, the Special Tribunal Bill provided for a multiplicity of chambers, including specialised ones to focus on issues such as sexual and gender-based violence (SGBV).

Without a doubt, the tribunal would be a unique judicial mechanism. While similar tribunals have been few and far between, they do have the potential to act as engines for reforming national judicial systems. For one, their creators have tended to confer upon them high levels of judicial integrity, professional and technical competence, which can impact positively on national judicial systems to which they are linked.

Even though the Special Tribunal Bill contemplated a relationship with the ICC, the need to develop a broader policy or legislative framework that would link it to other justice mechanisms was acknowledged. These included mechanisms such as the TJRC and the regular courts. For example, it might be desirable to prosecute a specific individual for grave crimes committed in the context of the post-election crisis yet later it might emerge that there is greater value in bringing that particular individual before the TJRC to testify about historical injustices. In other words, this proposed policy or legislative framework would have to synchronise the objectives and work of the Special Tribunal, other prosecutorial mechanisms as well as non-prosecutorial mechanisms such as the TJRC.

Concerns were raised about the Special Tribunal as conceived, in terms of whether it was capable of establishing a credible and effective framework for the pursuit of justice for the post-election violence. Other concerns that were raised included the legitimacy of the tribunal.

- In the event the tribunal was established but lacked sufficient popular support, is there a chance that human rights groups could collaborate with victims to generate *ex post facto* legitimacy for the body?

- Is this a reasonable and realistic strategy for achieving the establishment of a Special Tribunal?

Potential constitutional controversy

It was noted that the Special Tribunal Bill[20] as drafted may not pass in parliament on constitutional grounds. Even if it did pass, there was the risk that its constitutionality would be challenged in court. The problems cited in the bill included its attempt to oust the High Court's jurisdiction in respect of post-election crimes and to completely shunt aside key criminal justice agencies such as the Attorney General and the police from the tribunal's operations.[21] Additionally, if passed into law, the Bill would provide for retroactive criminal offences, yet there is a constitutional prohibition against charging individuals with acts which at the time of their commission were not recognised as crimes in Kenya.[22] This would violate due process rights and specifically the principle of legality or *nullum crimen* that is contained in Section 77(4) of the Constitution of Kenya.[23]

Some observers argue that the discussion about constitutional changes is unnecessary. There is precedent in Commonwealth jurisprudence allowing for prosecution of conduct that at the time it was committed was criminalised under international law but not national law.[24] Kenyan law also includes customary international law, which covers most of the atrocities that occurred during the post-election crisis, in particular, crimes against humanity. In theory therefore, these crimes exist in Kenyan law, and as such, should not be thought of as retroactive criminal offences.

"TRIBUNALS HAVE THE POTENTIAL TO ACT AS ENGINES FOR REFORMING NATIONAL JUDICIAL SYSTEMS."

This situation however raises the classical monist-dualist dilemma in international law regarding differing requirements for domesticating legislation to give effect to international agreements.[25]
Since Kenya is a dualist state; it has adopted the *legislative*

[19] The draft legislation proposing to establish the Special Tribunal is formally known as the Constitution of Kenya (Amendment) Bill, 2009. As mentioned elsewhere the Bill was the subject of a parliamentary boycott in the latter half of 2009.

[20] These comments are limited to the third attempt to establish a Special Tribunal, initiated by a Private Member of Parliament and popularly dubbed the 'Imanyara Bill'.

[21] In any event, privileging the ICC over the High Court runs counter to Article 17 of the ICC statute which extols the primacy of national judicial systems.

[22] According to the bill's drafters, it does not seek to amend section 77 of the constitution. Yet while section 5 of the bill states that no part of it should be "deemed" to be inconsistent with the constitution, an objective assessment of the bill shows that it contains provisions that are actually inconsistent with the constitution.

[23] Section 77(4) of the Constitution of Kenya provides that "No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

[24] See the Yukovich case, Australia.

[25] Essentially countries that follow a monist tradition (usually civil law countries) do not require domesticating legislation to implement international treaties that it has ratified. The act of ratifying the international law immediately incorporates the law into national law. In contrast, in countries that follow a dualist tradition (usually common law countries such as Kenya), there is a difference between national and international law. This means that international treaties that have been ratified by the state require the explicit creation of national laws in order for their implementation. Therefore, Judges can not apply

incorporation approach. Consequently violations of international customary law may only be prosecuted in national courts if implementing legislation is enacted to give international law the force of domestic law. Criminal law in particular would require the existence of specific legislation as there needs to be a high degree of certainty about the nature of the crimes in question and the corresponding punishment. In fact, recent jurisprudence shows that as far as criminal law is concerned, even countries that follow the monist tradition (civil law countries) require domestic law to operationalise international law obligations relating to the punishment of crimes. This partly explains why Senegal passed a torture law and amended its constitution to enable it to try former Chadian dictator, Hissène Habré, for torture he allegedly committed in Chad during the 1980s despite the fact that Senegal was party to the Torture Convention of 1984 and would have been expected – as human rights groups had argued – to prosecute even without domestic legislation.[26]

Some participants suggested that human rights groups are becoming too conservative in their interpretation of the constitutional rights of suspected perpetrators of human rights abuses. For instance, if they are clear that they seek to advance the right to life, should they not therefore promote an interpretation of the constitution that enables them to achieve this purpose? Whilst this perspective raises different moral and jurisprudential issues, human rights groups should remain conscious of beneficiaries of unjust constitutional orders who tend to hide their excesses under the constitutional cloak. Opponents of this viewpoint assert however that such a radical interpretation of the constitution invites legal discrimination. It opens the possibility that certain criminal suspects could be sucked into a legal black hole where due process protections are denied.
One may therefore query the wisdom of pushing for passage of the Special Tribunal Bill when there is the expectation that it will be challenged on constitutional grounds.[27]

- How practical would it be for human rights groups to push for this legislation?
- What might they do differently?

Perhaps human rights organisations could work with parliamentarians to make the necessary changes to the bill.

Alternatively, and in addition, they would need to develop a lobbying strategy to build political support to allow for safe passage of the Bill through Parliament.

Case Study of the Special Court for Sierra Leone[30]

The Special Court for Sierra Leone (SCSL) was set up jointly by the Government of Sierra Leone and the UN.[31] It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.
So far, the SCSL has been successful in trying some of the country's political leaders yet there are still many criticisms levelled against it. So far, only 13 alleged war criminals have been indicted by the court, five of whom have been convicted.[32] Some victims are bitter with the fact that the court focuses solely on high level perpetrators who did not carry out specific crimes against them. Others are concerned about the punishment policy of the SCSL that prohibits use of the death sentence which is, however, seen as a popular form of punishment among Sierra Leoneans. While the court is a hybrid of the national and international justice systems, it appears that foreign staff have more leverage within it than their local counterparts. It is also argued that the court stole the limelight from the truth commission which was running concurrently.
Growing public disenchantment with the SCSL also stems from the fact that over USD 150 million has been spent to pursue 13 cases. Moreover, it is expected that the costs of running of the SCSL will soar to 212 million USD by 2010 - an enormous amount given that the UN ranks Sierra Leone as one of the least developed countries in the world. Many Sierra Leoneans feel that the money would have been better spent on social welfare, as well as the development of a more reliable national justice system, that would last beyond the SCSL's life, which ends in 2010.

international law, unless it has been translated into domestic legislation.

[26] On July 24 2009 Senegal amended its constitution to allow the trial of former Chadian dictator Hissène Habré for torture allegedly committed against Chadians in the period 1982-1990. Legislative enactment made at the same time allows Senegalese courts to try crimes committed outside Senegalese territory.

[27] It should also be recalled that passage of the bill would run counter to the 2004 High Court ruling that requires fundamental changes to the constitution to be subjected to referendum. See *Timothy Njoya and Others versus CKRC and the Attorney General and Others*, Misc. Civil Application No. 82 of 2004 (The Justice Ringera ruling).

2.3 THE PRINCIPLE OF UNIVERSAL JURISDICTION

2.3.1 What is universal jurisdiction?

The notion of 'jurisdiction' relates to the basis upon which courts have the ability to act – the limits of their competence to take up a particular matter. Typically, national courts have the jurisdiction to deal with events which occur within their territory i.e. to nationals of that state, or crimes that have had an impact on that state.

Universal jurisdiction is an additional basis for legal action. It recognises that the most serious crimes under international law are those that offend the sensibilities of the international community as a whole. In other words, states have the ability (and at times are under obligation) to investigate and prosecute individuals accused of certain categories of crimes recognised as the most serious; irrespective of where the offence took place or the nationality of the accused person.

The principle is not novel. It has long been recognised by customary international law that states may exercise universal jurisdiction over piracy, slavery, slave trading, war crimes and crimes against humanity, genocide, torture, enforced disappearances and extrajudicial executions. The principle of universal jurisdiction is also codified in a number of international treaties. In particular, the 1949 Geneva Conventions and the Convention against Torture (CAT) require states to investigate, prosecute and punish persons who commit 'grave breaches' and inflict torture irrespective of where they may be found.

2.3.2 Countries in which UJ cases have been initiated

Universal jurisdiction has been exercised in a number of countries and contexts. Many cases have been lodged in European Union countries. In Africa, the ongoing investigation in Senegal in relation to Hissène Habré is illustrative, although complaints have also been filed in South Africa.[28] Kenyan human rights groups could learn more about these actions by liaising with their counterparts in the different countries. This option or alternative approach ought to be informed by a nuanced understanding of how universal jurisdiction has been invoked in different contexts.

Universal jurisdiction has been used to commence investigations or hold trials for crimes committed in various countries, including:

- Europe: Bosnia-Herzegovina, Croatia, Serbia, Germany (in relation to Second World War cases)
- Asia: Afghanistan, Bahrain, Burma/Myanmar, Cambodia, China, India, Iran, Iraq, Sri Lanka
- Africa: Chad, Congo (Brazzaville), Central African Republic, DRC, Ivory Coast, Liberia, Mauritania, Morocco, Rwanda, Sudan
- Americas: Argentina, Chile, Cuba, Guatemala, Peru, United States of America.

These trials have led to convictions in relation to crimes perpetrated in, among other countries: Afghanistan, DRC, Germany (during World War II), Iraq, Mauritania, Rwanda, and Serbia.
The option of pursuing a case under universal jurisdiction first requires the identification of an appropriate state(s) in which there are reasonable chances of success.

- What states come to mind in relation to Kenya's post-election violence suspects?
- Are those states willing to prosecute for post-election violence?
- What factors might facilitate or impede their cooperation?
- Now that the ICC exists, certain states could decline to prosecute universal jurisdiction cases on that basis.

It may be that lodging cases in Europe against African leaders on the basis of universal jurisdiction is not a tenable option for political reasons. While Belgium, France and Spain have shown willingness in the past to allow universal jurisdiction cases against wanted Africans[29], developments in relation to indictments of Rwandan leaders in Spain and France have diminished this possibility. In these cases, Rwanda had approached the AU with a complaint that indictments by Spanish and French judges amounted to an abuse of universal jurisdiction for political ends. Agreeing with Rwanda, the AU adopted a series of resolutions condemning the 'abusive' use of universal jurisdiction commencing with the Sharm el Sheik resolution at its 2008 Summit.

[28] On 16, March 2008, A dossier was submitted to the National Prosecution Authority's Priority Crimes Unit by the Southern Africa Litigation Centre (SALC) urging the unit to initiate investigations with a view to prosecuting senior Zimbabwean police and other officials responsible for crimes against humanity.
See:http://www.news24.com/News24/Africa/Zimbabwe/0%2C%2C2-11-1662_2289137%2C00.html

[29] Sudan, Chad, the Democratic Republic of Congo, and Guinea are among the countries where the perpetrators of massive human rights violations have not been held to account. For a more detailed account see: http://guineaoye.wordpress.com/2010/05/29/human-rights-watch-press-release-on-france-africa-summit-531-61-in-nice/

2.3.3 Strengths and weaknesses of Universaljurisdiction

Strengths

Universal jurisdiction is an important jurisdictional base**.** It recognises that some crimes are so serious that the traditional jurisdictional bases of territoriality and nationality could operate in a manner that perverts justice. The principle is therefore important in promoting accountability for the worst crimes and ensuring that there are no 'safe havens'. In the modern world of speedy travel and migration, victims and alleged perpetrators alike may end up settling in other countries or continents, particularly at the end of a period of conflict.

Extradition will not always be an option. The country seeking extradition, if it is the country where the crimes occurred, may not be interested in seeing justice done. At times this may be because the state is involved. Other times it will simply be impossible due to protracted conflict, instability or the lack of effectiveness of the justice system. Moreover, the ICC, as a treaty-based court with a limited mandate for crimes which took place after 1 July 2002, will only ever be capable of pursuing a handful of cases.

"THE GREATEST WEAKNESS OF UNIVERSAL JURISDICTION CASES IS THAT THEY TAKE PLACE AWAY FROM THE SCENE OF THE CRIME AND THUS HAVE LESS RESONANCE WITH LOCAL COMMUNITIES."

Weaknesses

The greatest weakness of universal jurisdiction cases is that they take place away from the scene of the crime and thus have less resonance with local communities. A criminal trial serves a number of purposes – deterrence, punishment and strengthening of the rule of law. Universal jurisdiction prosecutions contribute to some of these objectives although they do not contribute as much to the restoration of the rule of law in the countries where the crimes occurred. However, they can serve as a catalyst for future domestic prosecutions. The Pinochet case, which triggered cases in Chile and beyond is a case in point.[30]

Other weaknesses that relate to the difficulties inherent to universal jurisdiction are investigations and prosecutions. It is difficult for foreign investigators to comprehend the local context of the crimes and to locate witnesses and ensure witness protection. It can also be difficult to get the cooperation of the territorial state to conduct investigations. Foreign judges and jurors are likely to have difficulty assessing foreign witnesses and appreciating the evidence.

Furthermore, the politics relating to investigation of sensitive cases have made them practically impossible to pursue. In some cases, the territorial state has simply refused to cooperate in which case the evidence to prove guilt has not been obtainable. In other cases, diplomatic pressure has been exerted to avoid cases getting to the trial stage. This has, in some instances, resulted in politically powerful countries managing to avoid universal jurisdiction prosecutions of their officials. Investigations opened in Spain, Belgium and the United Kingdom relating to Israeli and American nationals are a case in point. In the three countries, pressure has been brought to successfully change universal jurisdiction laws to narrow jurisdictional scope in a manner that blunts the effectiveness and narrows the reach of legislation.

The crimes covered

The main crimes over which universal jurisdiction may be exercised include genocide, crimes against humanity, war crimes, torture, enforced disappearances, slavery, and terrorist offences. This list is, however, not exhaustive. There are a range of treaty-based crimes, customary international crimes. Additionally, some countries have extended universal jurisdiction to cover a number of other serious criminal acts.

These crimes are not uniformly recognised because states have different approaches**.** In dualist states, for instance, international law requires domestication before it can be applied in domestic law. This is usually the case with common law countries. The states that have national implementing legislation typically recognise torture and grave breaches of the Geneva conventions.

Many states do not recognise genocide as a universal jurisdiction crime. This is because the Genocide Convention does not specifically provide for universal jurisdiction. Therefore few common law countries have taken the step to specifically include universal jurisdiction for genocide in their domestic legislation.

Those states that have implemented the ICC Statute by enabling legislation (such as South Africa, Kenya and Senegal), have incorporated a universal jurisdiction provision. Nevertheless, the majority have failed to insert any retroactive clauses, and can thus only prosecute crimes that took place after 1 July 2002.

Requirements for lodging a universal jurisdiction case:

Evidence of a crime over which a country has universal jurisdiction: There must be sufficient evidence to demonstrate that the crime has taken place. Legal systems utilise differing standards of proof, but at the

[30] See Naomi Roht-Arriaza 'The Pinochet precedent and universal jurisdiction' 35 *New England Law Review* 2000-2001, 311-319.

very least, there must be a *prima facie* case that each of the elements of the crime have been made out. These crimes include:

1. **Genocide**: Intent to destroy wholly or partly a group of people on grounds of nationality, ethnicity, race or religion; killing or causing serious bodily or mental harm, deliberately inflicting conditions of life to bring in part or whole physical destruction, installing measures to prevent births and forcible transfer of children fromone group to another.[31]

2. **Crimes against humanity:** Widespread or systematic attacks, usually are part either of a government policy or condoned by the Government or de facto authority, directed at any civilian population, resulting in murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or severe deprivation of physical liberty. Murder; extermination; torture; rape, political, racial, or religious persecution and other inhumane acts reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice[32].

3. **War Crimes**: Committed as part of a plan, policy or a large scale commission of such crimes and grave breaches of the Geneva Conventions 1949, namely the following acts against persons or property:

- Wilful killing
- Torture or inhuman treatment, including biological experiments
- Wilfully causing great suffering, or serious injury to body or health
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
- Compelling a prisoner of war or other protected person to serve in the forces of a hostile power
- Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial
- Unlawful deportation or transfer or unlawful confinement
- Taking of hostages.[33]

4. **Torture:** These are acts that cause severe pain or suffering that can be physical or mental, intentionally inflicted, for the purpose of obtaining information or a confession; as part of a punishment; to intimidate or coerce, with the consent or acquiescence of a public official or individual acting in an official capacity.[34]

In some universal jurisdiction cases, foreign prosecutors will have little access to and cooperation from the territorial state. They will therefore rely on first hand witness accounts, statements and other intelligence or related information. Certain evidence will be particularly difficult to obtain without the cooperation of the territorial state. For example:

- Evidence that an accused person held a particular position of authority at the relevant time, and proof of their functions and the overall command structure (essential for proving command responsibility)
- Intent to destroy in whole or in part a group – individual witnesses will not generally have access to such information.

5. **Presence of the suspect in the country where the universal jurisdiction action is undertaken:** This is not a formal requirement in all cases and it will depend on the national implementing law. The Geneva Conventions obliges all states to 'seek out and prosecute'. However, in practice, if the individual is not in the country where the universal jurisdiction action is to be undertaken, and not reasonably expected to travel there, prosecutors will have little incentive to carry out full investigation as the case will have little prospect of success. If the victim is not present and is not expected to be present, very few countries, other than those which allow civil parties to initiate a case directly (through the *partie civile* procedure in French civil law system) will allow such a case to be initiated. After its initiation, the case will be allowed to proceed to trial.

Note: Spain and Belgium had the practice of seeking extradition of suspects with no connection to its territory. (Such was the case in the Hissène Habré case). However, their laws have since changed. [4]France requires the suspect to be present when the case is initiated, though thereafter, it will continue the case even if the suspect flees the jurisdiction. Some countries such as Austria or the United Kingdom do not require the presence of suspects to commence an investigation, although their presence will require if the case is to proceed with the prosecution. There are reports that UK plans to change its law in 2010, after a diplomatic spat with Israel following a reported investigation which was initiated against Tzipi Livni, the Israeli former Vice Prime Minister.

[31] Convention on the Prevention and Punishment of the Crime of Genocide, *adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.*

[32] As defined under Article 7 of the Rome Statute of the International Criminal Court

[33] As defined under Article 8 of the Rome Statute of the International Criminal Court

[34] As defined under Article 1 of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

6. **When did the offence occur:** The International Covenant on Civil and Political Rights (ICCPR) recognises in Article 15 that:

(i) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national *or international law,* at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby (emphasis added).

(ii) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, *at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations* (emphasis added).

The ICCPR suggests that even if a particular crime was not on the statute books at the time that the crime was committed, it can still be the subject of a prosecution in a national court provided that it constituted a crime under international law or according to the general principles of law recognised by the community of nations.

In the years before and after the adoption of the Rome Statute, many states have adopted universal jurisdiction legislation, well after the initial treaties such as the Convention against Torture and Geneva Conventions came into force. When states ratified these treaties, some did not insert retroactivity clauses (i.e. the UK) whereas others did (i.e. Canada). In the terms of Article 15 above, it would not fall foul of human rights obligations to prosecute an individual for a crime not in the statute books in circumstances when at the relevant time it was recognised as a crime internationally. However, states have been reluctant to read in retroactivity clauses.

"THE SUCCESS OF ANY CASE IS PREDICATED ON THE AVAILABILITY OF STRONG EVIDENCE."

In the UK, in the Pinochet case for instance, the only crimes which were considered by the House of Lords were those that related to torture that took place after September 1988 in section 134 of the Criminal Justice Act[35] (incorporating the Convention against Torture) which had came into effect. Similarly, the UK courts have not recognised their jurisdiction to try Rwandese genocide suspects (for acts committed in 1994). Yet the UK ICC Act [36]allows for universal jurisdiction over genocide and came into force after the 1994 genocide in Rwanda.

[35] Criminal Justice Act 1988

[36] International Criminal Court Act 2001

This section is currently before the government for amendment.

7. No possibility of domestic (territorial) prosecution: There is no international law obligation for states seeking to exercise universal jurisdiction to determine, before taking any action, that there is no possibility of the case proceeding before national courts**.** In practice however, this has occurred in a number of cases including Spain (regarding Peru and other cases) and Germany (regarding the United States). Some countries have incorporated a 'subsidiarity' principle into domestic legislation. This means that they will not assert jurisdiction until it can be shown that the territorial state (and in some cases the ICC) has no prior or better claim to prosecute.

In general, this is a valid principle which accords with the notion expressed at the outset that the most preferable location for justice is in the territorial state. However, a number of courts in Europe in particular, have dismissed universal jurisdiction investigations or prosecutions on the mere possibility that such cases would be taken up by the territorial state, unfortunately without concrete evidence to suggest that a territorial investigation or prosecution was underway or planned.

How cases are initiated

The success of any case is predicated on the availability of strong evidence: It is important therefore, for civil society groups and lawyers working with victims to closely liaise with the prosecutor's office from the outset. This would, for example, include the preparation of a dossier of evidence providing background factual information; liaising with victims where appropriate; and assisting prosecutors to contact victims. The success rate of such cases is greatly dependent on the aforementioned factors.

Issues to consider: The role of civil society groups is important but, at the same time, can also be problematic. For example, it is important that evidence is not 'tainted' by 'too many hands' or excessive witness coaching. This will undermine the evidence at trial. In the case of Kenya's post-election atrocities, the Kenya National Commission on Human Rights (KNCHR) may be in possession of sufficient and credible high quality evidence that could be used to put together universal jurisdiction cases against specific senior state officials.

Starting direct action on behalf of victims: In certain civil law countries, it is possible to initiate a criminal action directly. This then necessitates that a competent investigating judge evaluates the evidence. In certain common law countries, it is possible for victims' lawyers to directly request that a court issues an arrest warrant (on the basis of a sound dossier of evidence). Nonetheless, if a case is to proceed to trial, it is important that victims'

lawyers work closely with prosecution services to ensure they are fully on board. However, victims do not have to be physically present for universal jurisdiction cases to commence. What is required is a body of comprehensive evidence suggesting that there is a *prima facie* case that a grave crime has been committed.

Universal civil jurisdiction

Serious international crimes can also be considered as 'torts' or 'civil wrongs' which give rise to liability in damages for the harm suffered. In common law countries, an action in damages will typically take place separately from any criminal action. As a result, civil claims for damages have been filed in court independent of any criminal case. For example, in the United States, the Alien Tort Claims Act and the Torture Victim Protection Act both provide a cause of action for international crimes, enabling individuals to bring civil suits against their foreign abusers, with many successful judgments to date.[37] In the UK and Canada, in principle such cases can proceed, even without specific tortious acts, on the basis of the common law. Issues that have arisen include:

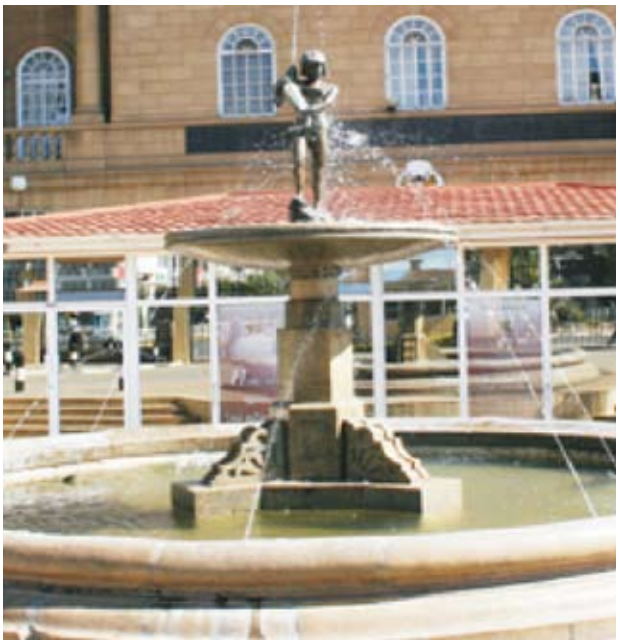
- Damage claims have considered questions such as immunities, statutes of limitations etc. differently than how they would have been considered before criminal courts. For example, it is recognised before numerous criminal courts that a government official, who is not acting on behalf of the head of state or foreign minister, may be subject to criminal universal jurisdiction. However, several courts considering damages claims (in the UK and Canada) have held that regular immunities apply.
- In civil law countries operating on the basis of the Napoleonic Code, civil claims for damages (*plainte avec constitution de partie civile*) are typically attached to criminal cases and are determined at the end of the trial. Several of the universal jurisdiction cases in civil law countries that have resulted in convictions have also resulted in civil awards for damages.[38]

3.0 LOCAL OPTIONS FOR JUSTICE

3.1 Private Prosecutions

The elements and rationale for private prosecutions

Private prosecutions refer to instituting criminal proceedings before a court of law against an individual



or body corporate by a private citizen as opposed to a public prosecutor. This power is conferred on individuals under Section 88 (1) of the Criminal Procedure Code (CPC) and by inference Section 26 (3) (b) & (c) of the current Constitution.

The police and the Attorney General are charged with the responsibility of conducting criminal proceedings in Kenya. The drafters of the Constitution of Kenya envisaged situations where both the police and the AG would choose not to institute criminal proceedings in certain circumstances or against certain individuals. The option of private prosecutions exists to remedy this potential problem.

Prerequisite conditions: Before a private prosecution can be instituted, certain requirements must be met. These include: a) failure of the police and the AG to take action in the matter, b) *locus standi* i.e. the 'private prosecutor' must have a legitimate interest in the matter.

These conditions were elucidated in the case of *Kimani v Kahara*[39] and *Floriculture International Limited & Others*[40] and adopted by the leading case of *Otieno Clifford Richard v Republic*. [41]
After the above conditions have been met the High Court may then grant permission for proceedings to be instituted either by:

(a) making a complaint under Section 89(1) of the CPC or

[37] The *Filartiga v. Pena* case, which was filed in the United States under the Aliens Torts Claims Act 1789, is instructive. In this case, a civil suit was brought in the US against Americo Peña-Irala, an official in the dictatorial Paraguayan regime of Alfredo Stroessner, whose agents tortured and killed a young man, Joelito Filartiga, in 1976. For information on this remarkable human rights story see R A White, *Breaking Silence: The Case that Changed the Face of Human Rights*. (Washington, DC: Georgetown University Press, 2004).

[38] As the European Commission demonstrated in its *amicus curiae* brief submitted to the United States Supreme Court in *Sosa v. Alvarez-Machain*, many states, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden, permit their courts to entertain civil claims in an *action civile* in criminal cases which are based on universal criminal jurisdiction

[39] *Kimani v Kahara* [1985] KLR 79

[40] *Floriculture International Limited & Others* (High Court Misc. Civil Application No. 114 of 1997)

[41] *Otieno Clifford Richard v Republic* [2006] EKLR.

(b) bringing before a magistrate a person who has been arrested without warrant under Section 89(1) of CPC or
(c) presenting a formal charge under Section 89(4) of the CPC.

From the foregoing, it is evident that the threshold for instituting private prosecutions is especially high but not insurmountable.

Why employ private prosecutions for victims of PEV?
The CIPEV report revealed that the perpetrators of post-election violence belonged to two categories:

(i) There were those who were personally involved in the commission of crimes and human rights violations.
(ii) There were others, highly placed individuals, who procured funding, devised strategies and incited sections of the masses to violence.

As matters currently stand, there have been limited investigations and prosecutions by the police. It is therefore a reasonable inference that high-ranking PEV perpetrators will probably not be brought to justice through the customary public prosecutions route.

Given the current political climate and the lack of independence in institutions such as the state law office, it is debatable whether the AG will allow the prosecution of certain high level individuals. There is also the danger that the authorities will have recourse to delaying tactics e.g. that police investigations into post-election atrocities have been halted pending the decision to use a local tribunal, the ICC or a special division of the High Court.

Possibility and practicability of the use of private prosecutions: To reiterate, the avenue of private prosecution ensures that a victim is able to obtain retributive justice irrespective of refusal by any relevant public authority to act. Furthermore, the use of private prosecutions is advantageous as it is not dependent on the police or the prosecutor's ability to unearth evidence, which in many instances is done incompetently either by mistake or by design.

Potential challenges involved with using or considering the approach: There are also several questions that remain unanswered by both the police and the AG. Are the police able to conduct investigations without interference from external forces? What of incidents or offences committed by police officers? CIPEV indicted the police for numerous extrajudicial killings and other human rights violations. Can the police therefore be reasonably expected to deal impartially with their own members?
Limitations of using private prosecutions: The provisions of Section 26 (3) (b) and (c) of the Constitution and Section 82 (1) of the Criminal Procedure Code have the potential to undermine the process of private

Legal Requirements for Instituting Private Proceedings

In *Floriculture International Limited & Others*, the High Court held that 'criminal proceedings at the instance of a private person shall be allowed to start or to be maintained to the end only where it is shown by the private prosecutor:

1. That a report of the alleged offence was made to the AG or the police or other appropriate public prosecutor, to accord either of them a reasonable opportunity to commence or take over the criminal process, or to raise objection (if any) against prosecuting; that is to say, the complainant must firstly exhaust the public machinery of prosecution before embarking on it himself and;
2. That the AG or other public prosecutor seized of the complaint has taken a decision on the report and declined to institute or conduct the criminal proceedings; or that he has maintained a more than usual and unreasonable reticence; and either the decision or reticence must be clearly demonstrated and;
3. That the failure or refusal by the state agencies to prosecute is culpable and, in the circumstances, without reasonable cause, and that there is no good reason why a prosecution should not be undertaken or pursued and;
4. That unless the suspect is prosecuted and this is done within a reasonable period of time, there is a clear likelihood of a failure of public and private justice and;
5. The basis for the *locus standi*, such as, that he has suffered special and exceptional and substantial injury or damage, peculiarly personal to him, and that he is not motivated by, malice, politics, or some ulterior considerations devoid of good faith and;
6. That demonstrable grounds exist for believing that a grave social evil is being allowed to flourish unchecked because of the inaction of a pusillanimous AG or police force guilty of a capricious, corrupt or biased failure to prosecute, and that the private prosecution is an initiative to counteract the culpable refusal or failure to prosecute or to neutralize the attempts of crooked people to stifle criminal justice.'

prosecutions by giving the AG powers to take over or terminate private prosecutions. The fact that Jackson Kibor[42], the only high-profile individual to have been charged with incitement to violence linked to PEV – in a case brought by public authorities – was discharged unconditionally suggests that a private prosecution is unlikely to be allowed to stand.

While case law shows that the High Court may question the manner in which the AG exercised his power to enter a *nolle prosequi*,[43] lower courts do not enjoy the discretion to question the AG's decisions in respect of taking over or terminating private prosecutions. This means therefore that if a private citizen successfully instituted a suit against another individual in a subordinate court and a *nolle prosequi* were entered by the AG, that citizen would have to refer the matter to the High Court for it to make a determination on the AG's decision. Another disadvantage of private prosecutions is the fact that the private prosecutor is fully responsible for gathering evidence. The costs and dangers entailed in this exercise may be too high to bear and thus prohibitive.

Strategies for impact

The KNCHR report, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, details 215 names of alleged perpetrators of violence along with brief descriptions of their alleged offences. There is the possibility that 215 separate communications could be sent to the AG with the request that his office facilitate their investigation by the Commissioner of Police. In the event that he fails to act, human rights groups could then consider instituting a large number of private prosecutions. Perhaps this might bring publicity to the heinous crimes that were documented by the KNCHR and other organisations.

So far, the Chief Justice, Evans Gicheru, has shown a willingness to make the necessary rules to ease the process of instituting private prosecutions. Therefore, human rights groups need to act quickly to take advantage of this good will.

The Option of Judicial Inquests

Another option worth considering is instituting judicial inquests into some of the offences that occurred during the post-election crisis. A private citizen may approach the High Court to request that it directs a particular magistrates' court to open and conduct a judicial inquest into a death of an individual which has occurred in suspicious circumstances at the hands of the police.[5]

Once an inquest is underway, a magistrate may summon witnesses to adduce evidence. In cases where sufficient evidence emerges to sustain criminal charges of murder against a particular suspect(s), the court's ruling may order for such formal charges to be brought against the suspect(s).

Opening inquests into the cases of the individuals who were shot by police during the post-election crisis is a viable option. To be sure, only 18 cases have been instituted into the 1133 homicides that are recorded in the CIPEV report. Human rights groups therefore have an opportunity to work with the families of the deceased PEV victims to open additional inquests.

3.2 Class Action Suits

Class action' is a peculiar term in Kenya. It is a more common phenomenon in the US than it is in Commonwealth jurisdictions. In theory, one may file what may be termed a class action suit using the names of a few people to represent the interests or claims of many more. This is better known as a *representative suit* in the Kenyan or Commonwealth context.

Class action suits are typically tort-based claims which aim to obtain compensation in one form or another. However, as an option for pursing justice for the victims of post-election violence, class action suits are not particularly promising. There are several reasons for this. Firstly, under Kenyan law, tort claims that concern the events of the post-election crisis are now time-barred as two years have elapsed. Secondly, the judiciary is itself an institution that is badly in need of fundamental reforms. It is therefore questionable whether it can maintain its independence in matters relating to the highly politicised and polarising memory of the post-election crisis.

The foregoing points show the futility of this particular approach as an option for seeking justice for the victims of post-election violence. The approach may be considered, however, if the aim of the action is to expose and publicise the human rights violations that occurred.

[42] See '*Political Gangsters' on list of suspects over poll violence*, by Tristan McConnell, The Times, (UK), available at http://www.timesonline.co.uk/tol/news/world/africa/article7120148.ece

[43] This has been confirmed as the position in several cases, notably *Crispus Njogu v. The Attorney General.*

In that case, it ought only to be considered as part of a broader, multilayered, legal, political and advocacy strategy.

3.3 Constitutional References

A constitutional reference is available to an individual who has suffered violations of his/her fundamental rights and civil liberties.[44] In such circumstances, that individual has a right to either move from a lower court to the High Court for a constitutional interpretation under Section 67 of the constitution; a lower court may also refer a question on individual liberties and civil rights to the High Court for interpretation.

The nature of redress sought could be against an individual but the target is usually the state because it has a greater capacity to violate rights. Section 84 of the Constitution empowers the High Court to, '*. . . make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing and securing the enforcement*' of an individual's personal liberties and civil rights. Consequently, the High Court may award a variety of remedies including damages, *mandamus*[45], *certiorari*[46], injunctions and declarations.

"CONSTITUTIONAL REFERENCES DO NOT PROVIDE FOR CRIMINAL CULPABILITY. THIS MAY BE VIEWED BY SOME AS A WEAK OPTION"

It is unclear however if the High Court can go beyond these 'conventional remedies and their limitations.'[47] Complainants seeking redress before the courts for injuries to their individual liberties and civil rights face two key challenges. First, the onus of demonstrating that the injuries they suffered are attributable to the state rests with the complainant. Second, where rights are restricted on public safety and/or security grounds, the facts needed to prove a complainant's case may not be disclosed to him or her by the government. However, it is the responsibility of the state to demonstrate in such cases that such limitations are justifiable in an open and democratic society.

Rulings of the High Court related to the constitutional interpretation of questions on individual liberties and civil rights are conclusive and not subject to appeal. However, Section 84(7) provides that, '*A person aggrieved by the determination of the High Court under this Section 84 may appeal to the Court of Appeal as of right*' for redress. While access to courts in cases of alleged violations of individual rights and civil liberties exists in theory, its practical realisation in Kenya's judicial context is a much more complex matter.

In 2006, the Chief Justice brought into effect an extensive set of rules and procedures for the enforcement of the Bill of Rights. The rules have since been revised once.[48] The set of 36 rules applies to all applicants seeking redress from the High Court for violations of their individual liberties and civil rights in addition to references to the High Court on questions of rights that are made by subordinate courts. By their appearance, these rules seem to provide for orderly, comprehensive procedures of accessing justice where rights may have been violated.

A closer examination however, reveals that the rules prescribe an overly bureaucratic process involving the use of up to seven different application forms. For instance, an applicant must first originate a notice of motion before they may invoke the jurisdiction of the High Court under Section 65 of the constitution. The enforcement jurisdiction of the High Court may then be invoked through filing a petition form which is supported by an affidavit. Moreover, the technical and highly legalistic nature of the rules and application forms seems to be inspired by the presumption that all applicants will have access to legal counsel. Consequently, it is likely that this complex process will limit access to justice by ordinary citizens such as those affected by PEV.

Above all, constitutional references may not be used to challenge violations of economic, social and cultural rights because they are not enshrined in the current constitution**.** This means that, even though there were massive violations of these rights during the post-election crisis, there can be no redress for the victims under the Kenyan judicial system, rendering this category of rights non-justiciable in the Kenyan context. Additionally, constitutional references do not provide for criminal culpability. Consequently, there is the risk that this particular approach may be viewed by some victims as a weak option for pursuing justice.

If despite this, constitutional petitions become the preferred route for pursuing justice in respect of the post-election crisis, their target would tend to be individual agents of the state, thereby taking away the possibility of addressing institutional-level impunity. This said, one of the advantages of the constitutional route is the fact that rights claims are not time-barred.

[44] The following six paragraphs have been taken from the paper 'Democracy, Rule of Law and Development: A Case Study of Kenya' which was written by Mikewa Ogada and Mutuma Ruteere in 2008. The paper, which is not published in English, was commissioned by Konrad Adenauer Stiftung. The published version is translated into German and may be found at http://www.kas.de/upload/Publikationen/2009/.../voelkerrecht.pdf.

[45] Essentially a *mandamus* is a writ which commands an individual, organisation (eg. government), administrative tribunal or court to perform a certain action, usually to correct a prior illegal action or a failure to act in the first place

[46] A writ of certiorari may be defined as a formal request to a court challenging a legal decision of an administrative tribunal, judicial office or organisation (eg. government) alleging that the decision has been irregular or incomplete or if there has been an error of law.

[47] Y P Ghai and J P W B McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present.* (Nairobi: Oxford University Press, 1970), p 428.

[48] See The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. These are popularly known as the 'Gicheru Rules'.

3.4 Formal Complaints Bodies

The Kenya National Commission on Human Rights (KNCHR), the Public Complaints Standing Committee (PCSC) and the Media Council of Kenya (MCK) are examples of public bodies that can be used to channel complaints.

The KNCHR's functions, for instance, include receiving complaints about human rights violations which it is then mandated to investigate.[49] KNCHR received many such reports during the post-election crisis and investigated them before recommending different types of action for redress. With respect to human rights violations that occurred in the context of PEV, KNCHR is empowered to investigate and make recommendations for redress. Nonetheless, it does not have the powers to initiate prosecutions, but would typically recommend this to the AG and the police.

On the other hand, the **PCSC's** mandate is to receive citizens' complaints about public bodies or public servants. Again, like the KNCHR, the PCSC investigates such complaints and makes appropriate recommendations for redress to specific state institutions. The Public Service Commission (PSC) could also be approached to discipline errant public servants including the police and provincial administrators who may have participated in the post-election atrocities. While none of these bodies have provisions for imprisonment, each one can take punitive administrative actions against errant public servants.

The numerous specific complaints of abuse against individual police officers during the post-election crisis creates opportunities for human rights groups to use the Kenya Police Standing Orders or the Orderly Proceedings to launch actions against rogue police officers. A similar case could apply to other professions:-

1. In some parts of the country school teachers could have been involved in planning and executing violence during the post-election crisis. Could an internal Teachers' Service Commission (TSC) mechanism be used to investigate and punish errant teachers?
2. Can the Media Council of Kenya formally consider complaints about media organisations that, in one way or another, incited hatred and violence during the post-election crisis?
3. Can private bodies explore the possibility of using their internal disciplinary structures to address crimes or abuses that were committed by their members?
4. Could complaints be lodged with a religious organisation about one of its members who is suspected to have fanned violence through incitement?

One general limit to the avenue of complaints bodies is that they do not offer retributive justice, unless one considers *lustration,* or exclusion from employment[50], where this is an option. Furthermore, implementation of their recommendation – especially as it relates to prosecutions – depends on others, in particular, the State Law Office and the police. Lack of coercive powers also means that even where they recommend compensation or restitution, the actual outcome depends on the willingness of target entities, or individuals, to comply.

4.0 REGIONAL AND INTERNATIONAL MECHANISMS

4.1 Treaty of the East African Community

The East African Community (EAC) Treaty seeks to promote governmental accountability and human rights, among other values, within the community. In spite of it being relatively new terrain for human rights groups, the EAC Treaty might open up new opportunities for human rights action in relation to Kenya's post-election atrocities.

The East African Legislative Assembly (EALA): The regional legislature was the first African institution to openly condemn PEV in Kenya.[51] Building on this particular distinction, human rights groups may want to consider how to balance their historical reliance on domestic and regional courts and executive agencies with collaboration with the EALA.

- Are EALA legislators willing to ask parliamentary questions on Kenya's post-election crisis to the Kenyan EAC minister?
- Could human rights groups lobby EALA legislators to direct the issue to the EAC Summit?
- Other options that human rights groups could consider include lobbying EALA to send a fact-finding mission or convene a public hearing on Kenya that might enable the body to develop its own position and strategy with respect to the PEV.

[49] In 2008, the High Court ruled that some of the subsidiary legislation for the KNCHR Act 2003 that gives the KNCHR quasi-judicial powers contradicted the substantive Act. The KNCHR has since then had to suspend its quasi-judicial functions pending a ruling on its appeal.

[50] The main goal of lustration is to prevent continuation of abuses that had occurred under a former regime by excluding its (leading) personnel from the successor regime. *Encyclopedia Britannica* (11th ed.). 1911. Lustration in Poland refers to the policy of limiting the participation of former communists, and especially informants of the communist secret police (from the years 1944–90), in the successor governments or even in civil service positions.

[51] See *Report of the East African Community Observer Mission: Kenya General Elections December 2007* of January 2008. The Mission, which consisted of EALA parliamentarians, condemned the post-election violence. Report is available at: <http://www.parliament.go.tz/bunge/docs/ealanews.pdf>.

EAC Summit: The executive organ of the EAC exists to promote and monitor peace, security and good governance within the community**.**

- Could human rights groups establish a formal working relationship with the Summit's upcoming conflict early warning platform as well as its Small Arms and Light Weapons (SALW) Programme?
- How could human rights groups position themselves to be influential in the development of the planned EAC Demobilization, Disarmament and Reintegration (DDR) unit?

All these mechanisms have critical potential in the resolution of conflict and for peace building in Kenya. Accordingly, human rights groups should plan to benefit from them in order to improve the impact of their interventions against political violence.

East African Court of Justice (EACJ)*:* In the future, Kenyans may have a new, regional human rights court operating close to home**.** So far, the East African Court of Justice (EACJ) does not have specific human rights jurisdiction because the Draft Protocol developed to extend its jurisdiction is yet to come into force.[52] However, articles 6 and 7 of the EAC Treaty explicitly link the EACJ to the African Charter on Human and People's Rights.[53] Debate over whether the EACJ should have international criminal jurisdiction for the East African region has however been met with resistance from the court.

4.2 African Union (AU) Human Rights System

The African Commission on Human and People's Rights (ACHPR) is a particularly important mechanism for human rights action on the continent. Human rights groups have the option of taking cases before the Commission for redress or getting advisory opinions on specific human rights concerns. Article 56 of the African Charter on Human and People's Rights (African Charter) spells out the seven requirements that govern the admissibility of communications brought before the Commission[54]:

- The communication should indicate the author(s) name(s) even if the latter requests anonymity
- The communication should invoke the provisions of the African Charter alleged to have been violated
- The communication should not be written in disparaging or insulting language directed against the state concerned, its institutions, officials or the AU
- The communication should not be based exclusively on information disseminated through the mass media. The author must be able to investigate and ascertain the truth of the facts before requesting the Commission's intervention
- The communication should be sent after all local remedies have been exhausted
- The communication should be submitted to the commission within a reasonable period from the time local remedies are exhausted
- The communication should not deal with cases which have been settled under the AU or UN systems.

The process used to take cases before the Commission is simple but rather lengthy. Where both victims and states cooperate, redress for human rights violations may be realised in about 18 months. A new rule is now in operation which reduces this period to 12 months. Regrettably, the decisions of the Commission are not binding on state parties.
Nonetheless, new rules allow the Commission to ask the AU Assembly to take specific actions in relation to states. This happened when Senegal was compelled by the AU to act against former Chadian dictator, Hissène Habré, an asylum seeker, who had been accused of perpetrating grave human rights violations in Chad in the 1980s. Perhaps the AU Assembly, on the Commission's urging, could recommend specific actions for the Kenyan state to consider in response to the post-election crisis.

Victims of human rights violations may be awarded reparations which are paid by the state found to be responsible for violating their rights. Because the Commission allows for the incorporation of international norms and principles on human rights, there is theoretically a wide range of options for reparations that can apply. During the post-election crisis, several human rights violations occurred and under international law the Kenyan government is obliged, at the very least, to make reparations to victims**.**

Strategies for advocacy

Human rights groups focusing on the Kenyan post-election crisis have much to reflect upon as they try to launch human rights actions through the AU institutions. One of the challenges revolves around the need to build continental coalitions that not only maximise advocacy impact but also help Kenyan human rights groups push the perspective that human rights are a priority in Kenya**.**

[52] It is instructive to point out that the Economic Community for West African States (ECOWAS) Court has specific human rights jurisdiction.

[53] For an incisive discussion of the potential human rights dimensions of the EACJ's mandate, see 'A Critique of the East African Court of Justice as a Human Rights Court' Paper presented by Honourable Lady Justice S B Bossa in Arusha, Tanzania on 26 October 2006.

[54] See African Commission on Human and People's Rights website: <http://www.achpr.org/english/_info/communications_procedure_en.html>.

AU Executive Assembly: Kofi Annan, who mediated the Kenyan crisis is a direct appointee of the AU Chairman and therefore works under the auspices of the AU Executive Assembly. Human rights groups should move to convince Kofi Annan of the need to make periodic reports about the Kenyan situation to the Assembly.

- Could human rights groups themselves take the situation before the Assembly at its next meeting?
- How might human rights groups leverage the AU peace and security architecture to their advantage, especially the conflict early warning platform?
- What about the personnel of the AU Secretariat in Addis Ababa? What role can they play in supporting the efforts of human rights groups to address Kenya's post-election atrocities?

African Court on Human and People Rights: There is the possibility of approaching the Court to obtain an advisory opinion that essentially interprets Kenya's National Accord. Such a course of action might shed light on the direction reforms need to take so that electoral violence is avoided come the 2012 polls.

Pan African Parliament:

- Are Pan African Parliament legislators willing to debate the Kenya post-election crisis?
- Could human rights groups lobby Pan African Parliament legislators to direct the issue to the AU Executive Assembly?
- It may be useful to consider urging the parliament to send a fact-finding mission or convene a public hearing with the ultimate aim of remedying the human rights violations that occurred during the crisis?

5.0 UN HUMAN RIGHTS TREATY MONITORING BODIES AND UNIVERSAL PERIODIC REVIEW

Treaty bodies in perspective

There are presently seven treaty monitoring bodies staffed by independent experts who are mandated to monitor different aspects of the human rights situation across the globe. A number of these treaty bodies, in particular, the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee against Torture (CAT), are relevant in relation to the human rights violations that took place during the post-election crisis in Kenya.

Human rights groups could consider using the elements of the international human rights systems to pressurise the Kenyan government to act against individuals who committed human rights violations during the post-election crisis. States parties to the various international human rights treaties are obliged to report regarding the status of implementation of the treaties. While it is expected that state parties will respect the decisions of the treaty bodies, these are however not legally binding. Therefore, human rights groups need to acquaint themselves better with the reporting process to engage with it more effectively.

Since 2002, Kenya has seriously taken up the challenge of preparing regular reports to various treaty monitoring bodies. Through the leadership of the Ministry of Justice, National Cohesion and Constitutional Affairs (MOJNCCA), reports have been submitted to the HRC, CAT, [55] CERD and Committee on the Rights of the Child (CRC).[56] Thus far concluding observations from the various treaty bodies on Kenya's human rights performance have been mixed. While there have been areas of improvement, for example the promotion of the right to education; challenges remain in other areas, in particular, police brutality, women's rights and health rights.

Besides government human rights status reports, treaty monitoring bodies do use in some cases *Shadow Reports* which may be developed by individuals and non-governmental human rights groups.[57] After analysing information from different sources, the treaty bodies generate non-legally binding 'concluding observations' which offer prescriptions on how a certain state could address a particular human rights concern. In one case, an Asian human rights group, which had provided a treaty monitoring body with information on human rights violations, pressurised it to push the relevant government to set up a commission of inquiry to address the pattern of violations. In fact, the government in question took up the recommendation and set up the desired commission.

[55] In its concluding observations, the CAT Committee acknowledged the findings in the CIPEV report. See CAT, 'Concluding observations of the Committee against Torture: KENYA' para 19.

[56] While the Office of the Attorney General ought to be primarily responsible for international human rights reporting, it has tended not to bother and this role has been taken up by the MOJNCCA. The expertise and assistance of the KNCHR has also been instrumental in improving the state's capacity to engage with the different treaty monitoring bodies.

[57] The purpose of Shadow Reports (also referred to as a 'parallel reports' or 'alternative reports') is to supplement or 'shadow' the report of the government of a particular nation either to a specific treaty monitoring body or to the Universal Periodic Review (UPR) as 'additional information'.

UN Treaty Bodies		
Treaty body	*Parent treaty*	*Entry into force*
Committee on the Elimination of Racial Discrimination	Convention on the Elimination of all forms of Racial Discrimination (CERD)	1969
Human Rights Committee	International Covenant on Civil and Political Rights (ICCPR)	1976
Committee on Economic, Social and Cultural Rights	International Covenant on Economic, Social and Cultural Rights (ICESCR)	1976
Committee on the Elimination of Discrimination Against Women	Convention on the Elimination of Discrimination Against Women (CEDAW)	1981
Committee Against Torture	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT)	1987
Committee on Rights of the Child	Convention on the Rights of the Child (CRC)	1990
Committee on the Rights of All Migrant Workers and Members of their Families	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	1993

In the case of Kenya, an interesting trend has emerged over the years. Each time the Kenyan government's human rights performance has been reviewed at the international level, it has tended to react sensitively**.** Obviously, this is something human rights groups could capitalise on to extract the right kind of behaviour and action from the government.

Of the eight treaty monitoring bodies, five are legally mandated to receive communications on human rights violations from victims as well as human rights groups. However, a state has to give its consent by way of signing an optional protocol to the treaty that authorises the monitoring body to receive such a communication in respect of that state. With the advent of the Internet, victims and human rights groups now have ready access to the official questionnaires that are used to make such communications to the different treaty monitoring bodies. For its part, Kenya has not accepted communications from individuals in relation to the CAT and CERD**.** In the long-term therefore, human rights groups should consider pressurising the Kenyan government to ratify the optional protocols to all the key human rights treaties to facilitate reporting by individuals.

When a treaty monitoring body receives a communication from a victims or a human rights group, it evaluates the communication and rules on the admissibility of the communication as a preliminary matter, before making a determination on what human right has been violated and making specific recommendations. Even though the decisions of treaty monitoring bodies are not binding on states, they sometimes have an impact at the international level.

Additionally, the UN 'charter based' human rights system boasts some three or so dozen Special Rapporteurs who monitor and make recommendations on thematic human rights issues and specific regions or countries. While there is no specific country mandate for Kenya, there are several thematic mandates that correspond to some of the more pressing human rights concerns in Kenya, including violence against women, torture, arbitrary detention, health and housing. Some of the Special Rapporteurs receive communications from individuals and NGOs, which they evaluate to determine if human rights violations have taken place**.** In recent times, Professor Alston, the Special Rapporteur on Extrajudicial Killings prepared a report that has been widely acclaimed.[58]

Universal Periodic Review

The recently created UN Human Rights Council (UN HRC) has developed the Universal Periodic Review (UPR) which is today the dominant mechanism used to evaluate the human rights performance of all 192 UN member states.[59] Broadly, UPR seeks to:

(a) Assess human rights implementation
(b) Highlight human rights successes
(c) Document human rights challenges and areas requiring capacity building.

For each state, the review is based on the specific international human rights treaties it has signed onto. So far, 80 states have been reviewed since 2008 and 16 more, including Kenya, are up for review this year.[60] By 2011, all 192 UN-member countries will have gone through the first cycle of the periodic review.

[58] The report was also cited by the Pre-Trial Chamber in the decision authorizing investigations into Kenya.

[59] Launched in 2006, the UN HRC is the successor to the defunct UN Human Rights Commission.

[60] Kenya's review took take place in May 2010. A coalition of human rights groups is now developing a joint state of human rights performance report, which must be condensed to no more than 10 pages.

Three different reports combine to make the assessment of each state's human rights performance. The first report is prepared by the state itself while the second one is developed by non-state actors such as human rights groups. The third report is a compilation of information on each state from all treaty monitoring bodies that is compiled by the UN Office of the High Commissioner for Human Rights (UNHCHR). Each state's human rights performance report is reviewed by UN HRC members and other states.[61]

An outcome report is then adopted in a subsequent session, during which a state is given the option of accepting or rejecting the conclusions on its human rights performance, which have been drawn by its peers and the UN HRC.

States are also allowed to query their counterparts' human rights records, which presents an opportunity for civil society advocacy. For example, a coalition of human rights groups can lobby other states to convince them to ask the right questions on Kenya's 2008 human rights crisis. Nevertheless, political interests do come into play and can block such probes. In certain cases, some repressive states have been protected by friendly counterparts. Instead, praise is heaped on their glaringly poor human rights records thus hindering substantive questions on human rights implementation.

5.0 CONCLUSION: COMPARING JUSTICE OPTIONS

How effectively do these different approaches meet the needs of PEV victims?

The best option for justice?

The International Criminal Court (ICC) is perhaps the best option available to victims and human rights groups to seek retributive justice in relation to the crimes of the planners and sponsors of PEV. In the short to medium-term, however, the ICC option may cause disillusionment among some victims because it will target only a handful of perpetrators and the cases brought before the court are not likely to get underway for two to three years from the time indictments are issued. Yet it is equally possible that there are some victims who will view ICC intervention as a reliable option for ending the impunity that has for so long been associated with political violence in Kenya. In any case, the ICC Outreach Unit is best placed to explain the relevance and operations of the court to victims. Therefore, human rights groups should push it to design and roll out, in a timely manner, appropriate activities that respond to the needs of Kenyan PEV victims**.** For its part, the Trust Fund for Victims that depends on voluntary contributions should be approached to begin mobilising funds that could be used to mount assistance programs in Kenya now that Kenya is formally a situation country.

Local options for justice

Like the ICC, the proposed Special Tribunal for Kenya would be another good option for seeking retributive justice. There is still room for innovation with the Special Tribunal Bill which could be carefully amended in a way that would enable the tribunal to prosecute low level perpetrators. Additionally, if the reparations provisions in the Special Tribunal Bill could be brought into effective operation, the tribunal would have a strong potential to provide reparative (or restorative) justice to PEV victims as a complement to other mechanisms.

Much like the Special Tribunal, private prosecutions initiated under Kenya's judicial system may also be effective in addressing the crimes of high and middle level perpetrators. Indeed, both the tribunal and the private prosecutions options bring the added advantage of being based in Kenya where PEV victims would have better opportunity to follow proceedings directly**.** The constraints to this mechanism discussed previously need to be addressed.

"LIKE THE ICC, THE PROPOSED SPECIAL TRIBUNAL FOR KENYA WOULD BE ANOTHER GOOD OPTION FOR SEEKING RETRIBUTIVE JUSTICE"

Retributive justice sought for the crimes committed by high-level human rights violators could also be achieved through universal jurisdiction actions.

The foregoing discussion suggests that the ICC; a Special Tribunal for Kenya; universal jurisdiction action and private prosecutions are possible approaches for seeking retributive justice in relation to the crimes of human rights violators. These however share limitations likely to affect PEV victims' desired form of justice as some would want to see the low level perpetrators - those with whom they had the most direct experience - prosecuted. While it is possible to bring cases against low level perpetrators before national courts, there is still a need to reform the judicial system to ensure the integrity of legal actions that are carried out in Kenya.[62]

Other options for justice

Unlike the foregoing options, constitutional references and class actions suits contemplated in the Kenyan courts are unlikely to deliver criminal culpability for PEV offences. Nonetheless, cases brought under either

[61] UN HRC members are the state parties elected on a periodic basis to oversee the body.

[62] See Godfrey Musila *supra* note 9 p 11-12.

option could result in judicial rulings that call for reparations to be made to PEV victims. Above all, both approaches are effective for the purposes of publicising the plight of victims and maintaining pressure on the Kenyan state to address the PEV comprehensively. Similarly, recourse to formal complaints bodies at the national level such as the KNCHR and the PCSC may also result in quasi-judicial rulings and recommendations for reparations to be made to PEV victims. Again, actions launched before formal complaint bodies could be used to publicise the plight of the victims.

Regional and international mechanisms

Focusing on the regional and international mechanisms, the EAC treaty system has various organs and mechanisms that may be activated to pressurise the Kenyan state to deliver justice to PEV victims. Indeed, as mentioned earlier, the EALA was the first African institution to openly condemn PEV in Kenya. It seems therefore that there may be a window of opportunity for human rights groups to lobby EALA to pressurise the Kenyan state to initiate investigative and judicial processes which, may ultimately yield retributive and reparative justice for PEV victims.

"THE EAC TREATY BODIES AND THE AU INSTITUTIONS SHARE THE CHALLENGE OF ALSO HAVING RELATIVELY WEAK LEGAL FRAMEWORKS THAT GIVE STATES LATITUDE TO IGNORE RECOMMENDATIONS MADE WITH RESPECT TO HUMAN RIGHTS ISSUES."

Justice options at the AU level

At the AU level, the African Court and African Commission could possibly initiate similar processes. Regrettably however, the protocol establishing the African Court has not been ratified by Kenya and thus presents no possibilities for actors. In addition, other than the length of time communications would take before final determination, the recommendations of the African Commission are not legally binding on states. Likewise, the rulings of UN Human Rights System institutions are not legally binding on states even though they have the potential to pressurise the Kenyan government to act in the interests of PEV victims.

Pursuing reparative justice?

Some human rights groups suggest that pursuing reparative justice might be more beneficial because it is less likely to provoke a renewal of violence. Even though reparative justice may be linked to the guilt of offenders, there is the possibility of the state establishing a liability-free fund. Therefore, might human rights groups want to push for a National Fund for Reparations for the victims of the post-election crisis which would compensate them for the abuses and material losses they endured? The Truth, Justice and Reconciliation Commission Act does in fact provide for such a fund although the TJRC's mandate is broader than PEV as it focuses on human rights violations and economic crimes that have occurred since Kenya attained independence in 1963.

The challenges in perspective

There are two critical challenges that may complicate ICC intervention in the Kenyan situation. As noted earlier, the Kenyan government appears to be backtracking on its commitment to apprehend suspects. It is difficult to imagine how they will be arrested on Kenyan soil if the government refuses to cooperate. There is also the evidentiary challenge of meeting ICC Statute threshold requirements.

Challenges to universal jurisdiction

Universal jurisdiction actions face perhaps more challenges**.** Unlike in the case of ICC-initiated cases, universal jurisdiction actions rest on the assumption that suspected perpetrators will travel to the country(ies) where the action is launched. In this respect, universal jurisdiction actions can easily fail, if suspected perpetrators deliberately avoid travel to jurisdictions where they know such actions are pending or where they are likely to be arrested. Besides, activation of this option is very much dependent on the prevailing political interests of the state where action is contemplated.

Challenges to the Special Tribunal

Whilst ICC interventions and universal jurisdiction actions are unlikely to be interfered with by local political elites, the main challenge to the proposed Special Tribunal for Kenya relates to widespread perceptions among sections of Kenyans that it would almost certainly be susceptible to political interference and control. There is little doubt what this would portend for the legitimacy and effectiveness of the tribunal. Moreover, where they are not amended, provisions for retrospective criminal offences might either lead to the bill's defeat or later open the law establishing the tribunal to constitutional challenges.

Challenges to local options

In contrast to the Special Tribunal option - private prosecutions, constitutional references, class action suits and the efforts of formal complaints bodies at the national level are likely to be thwarted; not by the political interference but by the dysfunctional elements of Kenya's legal and judicial framework. For one, private prosecutions could be easily taken over by the AG and terminated as provided for under the current constitutional and legal framework. Depending on their sensitivity, constitutional references can be frustrated by the Chief Justice who enjoys wide discretion over the composition and timing of the appointment of a

constitutional court. Also, constitutional references must be filed in respect to only one individual, leaving out hundreds if not thousands of affected persons.

Challenges to regional options

The EAC treaty bodies and the AU institutions share the challenge of also having relatively weak legal frameworks that give states latitude to ignore recommendations made with respect to human rights issues.

Firstly, the EACJ, which would be a preferred justice option, lacks jurisdiction relating to human rights matters. Secondly, while the African Commission may be enthusiastic about addressing the Kenyan situation, regional politics may come into play and hinder states from taking firm action at the AU Assembly level. Thirdly, the whole idea of the African Court can be likened to a situation in which a poacher turns into a gamekeeper in view of the fact that the protocol establishing the court allows individuals and human rights groups to institute cases before it only if the concerned state declares its acceptance of the court's jurisdiction over such cases.[63]

Looking into the future

It should also be borne in mind that the justice debate - like many aspects relating to Agenda Item Four of the national Dialogue and Reconciliation Accord - is invariably linked to the politics of presidential succession. The question is whether a push for justice at this stage is advisable in view of the fairly limited prospects in the context of a high-stakes political game.

- Should human rights groups be thinking seriously about sequencing their interventions?
- Should the country hold elections in 2012 before it seeks justice for the previous post-election atrocities? Or should it work the other way round?
- Should the country reflect upon and implement the components of the reform agenda, such as constitutional reform, that promise to deflate ethnic tensions before it embarks on the quest for justice?

[63] See Dan Juma, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper,' *Essex Human Rights Review* Vol. 4 No. 2 September 2007.

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Annex 1

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Annex 2

Comparative Table on Universal Jurisdiction in Europe[64]

	Spain	Germany	NL	United Kingdom	Portugal
UJ allowed for crimes of torture	Yes (not within legislation but according to jurisprudence)	Yes (as 'serious bodily harm')	Yes	Yes	Yes
UJ allowed for genocide	Yes	Yes	Yes	No	Yes
UJ allowed for crimes against humanity	Yes (not within legislation but according to jurisprudence)	Yes	Yes	No (yes for slavery)	Yes for certain cases (slavery, traffic in human beings…)
UJ allowed for war crimes	Yes for grave breaches (not within legislation but according to jurisprudence)	Yes	Yes	Yes for certain grave breaches	Yes for certain grave breaches
Presence required for the opening of an investigation/ for the trial	No ; presence required for trial only.	No (not according to law, but prosecution obliged to investigate if suspect is present) ; presence required by law for process	Yes ; Presence required at all stages of the proceedings.	No ; presence required or anticipated for an arrest warrant to be issued and for the suspect to be charged ; trial in absentia possible at discretion of the judge	No
Existence of a special 'war crimes unit'	No	Yes (from April 2009)	Yes	Yes (within immigration authorities only)	No
Examples for sentences using UJ by nationals tribunals	Adolfo Scilingo convicted for crimes against humanity in 2005 (Argentina)	Maksim Sokolovic convicted for war crimes and genocide in 2001. 2 persons convicted for genocide : Djuradj Kusljic in 2001 and Nikola Jorgic in 2007 (former Yugoslavia)	2 convictions for war crimes: Heshamuddin Hesam in 2005 and Habibullah Jalalzoy in 2007 (Afghanistan) Joseph Mpambara convicted in 2009 for torture committed in Rwanda in 1994.	Faryadi Sarwar Zardad convicted in 2005for torture (Afghanistan)	

(Footnotes)

[1] See C Timberg, 'Well-funded but selective war crimes probe draws resentment of impoverished victims', *Washington Post* 25 March 2008.

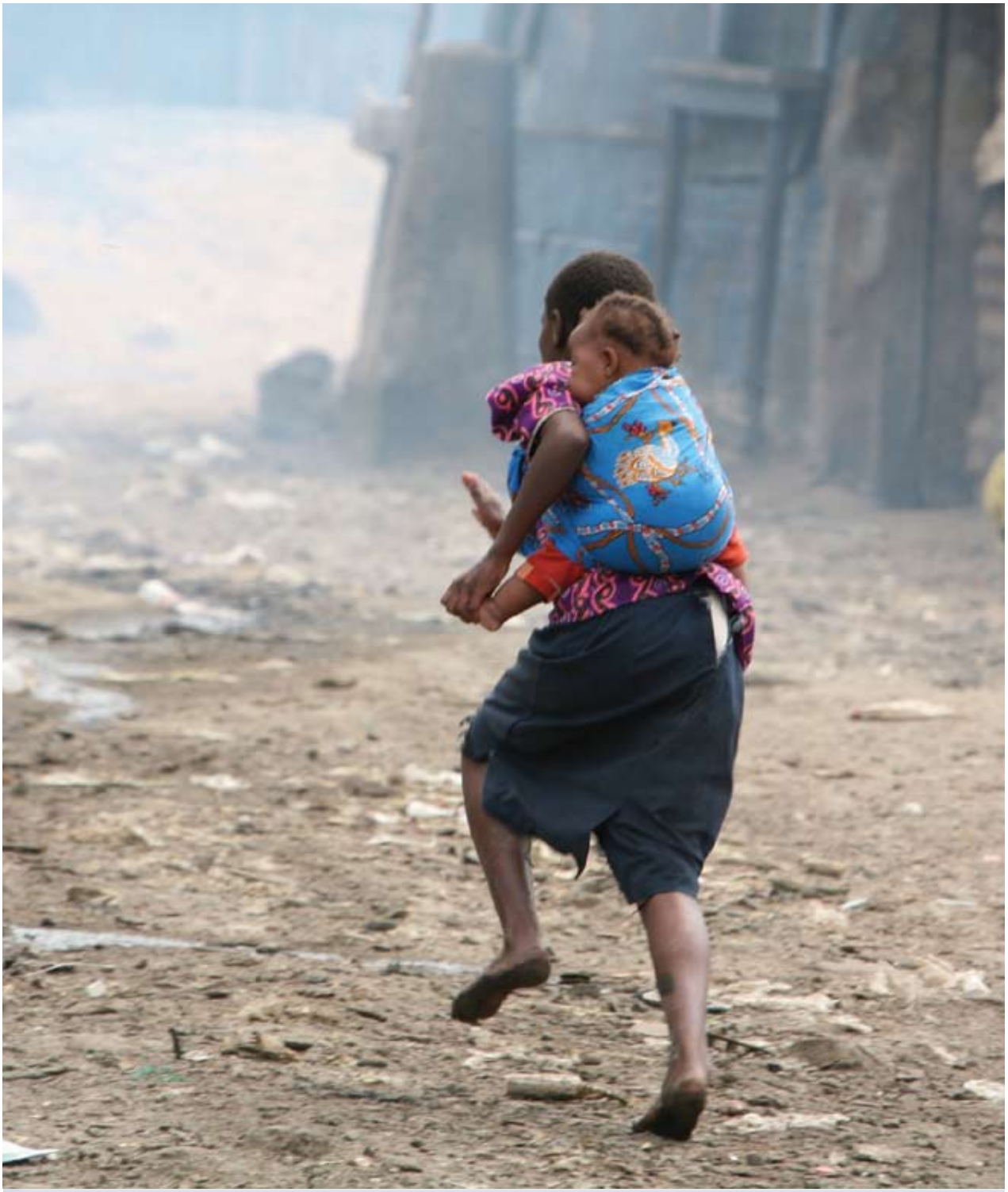
[2] The Special Court for Sierra Leone is established pursuant to Security Council Resolution 1315 of 14 August 2000. See Statute of the SCSL at: < http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=70>.

[3] It is instructive that on 16 June 2006 the UN Security Council passed Resolution 1688 authorizing the transfer of the trial of ex-Liberian president Charles Taylor to The Hague in The Netherlands, noting that his continued presence in West Africa was 'an impediment to stability and a threat to the peace of Liberia and Sierra Leone'. In spite of his transfer to The Hague, the SCSL retains exclusive jurisdiction over him and the cases against him.

[4] Spain changed its laws in 2009 after the indictment of Israeli generals caused political problems

[5] Section 385 of the CPC empowers magistrates' courts to open and conduct such inquests. The police may also approach the courts to open inquests into the deaths of individual which occur while they are in police custody. However, in practice they rarely do so.

[64] Annex 1 in *A Step by Step Approach to the Use of Universal Criminal Jurisdiction in Western European States* 2009 available at: http://www.fidh.org/IMG/pdf/ComUniv522a2009.pdf



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