

# The International Criminal Court and Kenya

## Foreword

On 31 March 2010, Pre-Trial Chamber II authorised investigations into the 2007-2008 Post-Election violence in Kenya. It is KPTJ's hope that the investigations will lead to the prosecution of those bearing the greatest responsibility for the post-election violence. Indeed, KPTJ supports the International Criminal Court's involvement in Kenya, as a step towards ending the culture of impunity, and creating accountability for politically instigated violence.

KPTJ is a coalition of over 30 Kenyan and East African legal, human rights, and governance organisations, together with ordinary Kenyans and friends of Kenya, convened in the immediate aftermath of 2007's presidential election debacle. KPTJ maintains that there can be no peace without justice - political, economic, and social - for all Kenyans. Justice requires that we face the truth of our history, and of the 2007 election, to address the deep chasms and inequities in Kenyan society.

The aim of this bulletin is to provide readers with an informative view of the ICC process and functions as it applies to Kenya. Given its mandate to obtain justice for the post-election violence, KPTJ has a duty to educate the public about the ICC, as in recent times there has been an accumulation of misinformation, which has led to unrealistic expectations.

## Background

In the past 50 years, there have been many crimes against humanity and appalling war crimes for which no individuals have been held accountable. Historically, although states have prosecuted people from other countries for crimes against humanity, they have generally been less willing or able to put their own nationals on trial. One recent solution has been temporary international criminal tribunals established by the United Nations. These have tried people for war crimes and other serious international crimes following, for instance, the Rwanda genocide in the 1990s (The Rwandan Civil War) and the conflict in the former Yugoslavia (The Bosnian War). However, because they were established to try crimes



committed only within a specific time frame and during a specific conflict, there was general agreement that an independent, permanent criminal court was necessary. On 17 July 1998, the international community reached a historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court (ICC). Effective since 2002, the ICC is a permanent international institution established for the purpose of investigating and prosecuting individuals who commit the most serious crimes of international concern, namely, genocide, crimes against humanity, and war crimes.

## The International Criminal Court and Kenya



### Background to the ICC Intervention in Kenya

On December 27 2007, Kenya held its general elections, the fourth since independence. The Presidential contest was a closely run race between the incumbent Mwai Kibaki of the Party of National Unity (PNU) and Raila Odinga, the candidate for the Orange Democratic Movement (ODM). The announcement of the results was delayed and tension was rife across the country. President Mwai Kibaki was declared the winner and was hastily sworn in as President amongst allegations of electoral manipulation by the ODM. This series of events lead to widespread protests across the country, especially by ODM supporters who felt that they had been robbed of victory. The protests degenerated into violence across various parts of the country, and took on an ethnic dimension.

### Power Sharing Stops Violence

The violence, which left more 1,300 people dead and forced over 300,000 from their homes, ended when President Mwai Kibaki and Raila Odinga agreed to share power. The power sharing deal, which was brokered by the former UN Secretary General Kofi Annan, also stipulated that a local tribunal should be set up to prosecute those behind the violence. Leaders of both parties agreed to set up a Commission to investigate the Post-Election Violence (the Waki commission, after its chairman, Justice Philip Waki) in

May 23 2008. They also established an independent review committee to look at the flaws in the election (the Kriegler committee), and a Truth, Justice, and Reconciliation Commission to help heal historical grievances dating from well before the 2007 general elections. Subsequently, the Waki commission recommended wide-ranging reforms of the police as well as the creation of a special tribunal for Kenya, independent of the judiciary, anchored in a constitutional amendment and staffed by both Kenyan and international judges and prosecutors. In the event that no special tribunal was established, the Waki commission recommended that Mr. Annan hand over a sealed envelope containing the names of suspects to the ICC.

### ICC Jurisdiction Invoked

After more than a year of inaction and missed deadlines by Kenya's authorities to prosecute the post election violence perpetrators, on July 9 2009 Mr. Annan handed over the envelope and other materials from the Waki commission to the ICC Prosecutor. Following an analysis of the situation, Prosecutor Luis Moreno-Ocampo decided that there was a reasonable basis to proceed with an investigation. Accordingly, in November 2009 Mr. Moreno-Ocampo announced that he would request ICC judges to allow him permission to proceed with an investigation in Kenya's election violence.

The International Criminal Court  
and Kenya

## Timeline

**17th OCT  
2008**

The Commission of Inquiry into the Post-election Violence, headed by Mr Justice Philip Waki, submitted its 529-page report to President Kibaki and Prime Minister Raila Odinga.

**3rd JULY  
2009**

A high level delegation from the Government of Kenya met with Prosecutor Louis Moreno-Ocampo in The Hague and expressed Kenyan government's commitment to ending impunity for the crimes committed.

**31st MARCH  
2010**

The Pre-Trial Chamber II issued its decision authorising the Prosecutor to conduct investigations into the 2007-2008 post-election violence in Kenya. The decision was not unanimous, with Judge Hans-Peter Kaul dissenting

**9th JULY  
2009**

Former United Nations Secretary General Kofi Annan hands over the envelope containing the names of Kenya post-election violence suspects to The Hague.

**18th FEB  
2010**

In the process of assessing the Prosecutor's request for authorisation to investigate these alleged crimes in Kenya, the ICC judges of Pre-Trial Chamber II requested the Prosecutor to provide clarification and additional information. The judges requested additional information and clarification with respect to (1) the State and/or organisational policy under article 7(2) (a) of the Rome Statute and (2) the admissibility within the context of the situation in Kenya, to be provided no later than 3 March 2010.

**5th NOV  
2009**

The Presidency of the ICC received a letter from Mr. Moreno-Ocampo, indicating the Prosecutor's intention to submit a request for the authorisation of an investigation into Kenya's post-election violence. In his letter, Mr. Moreno-Ocampo stated that "there is a reasonable basis to proceed with an investigation into the Situation in the Republic of Kenya in relation to the post-election violence of 2007-2008".

**26th NOV  
2009**

The Prosecutor sought authorisation from Pre-Trial Chamber II to commence an investigation of the alleged crimes committed within the context of the 2007-2008 post-election violence. The Prosecutor asserted that the alleged crimes appear to constitute crimes against humanity.

**6th NOV  
2009**

The Presidency issued a decision assigning the situation in Kenya to Pre-Trial Chamber II composed of Judges Ekaterina Trendafilova (presiding judge), Hans-Peter Kaul and Cuno Tarfusser.

## The International Criminal Court and Kenya

### The Rome Statute

In this section, the Rome Statute, which governs the operation of the Court and its interactions with State Parties, is discussed.

The Rome Statute, the treaty that established the ICC, entered into force in July 2002, on the eve of the 50<sup>th</sup> Anniversary of the Universal Declaration of Human Rights (1948-1998).

**The object and purpose of the Rome Statute:** As stated in the Preamble of the Statute, the primary reason for the establishment of the permanent International Criminal Court was to create a jurisdiction and ensure that most serious crimes of international concern do not go unpunished in order to put an end to the impunity for the perpetrators of these serious crimes and thus contribute to their prevention. As listed under article 5 of the Rome Statute, the Court has jurisdiction over individuals that are responsible for the crime of genocide, crimes against humanity, war crimes and the crime of aggression<sup>1</sup>. The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole.

**Complementarity:** Essentially, the principle of complementarity holds that the ICC will not substitute national courts and it will only intervene in cases where the Prosecutor is able to prove that national courts have neither the desire nor the means to initiate and conduct proceedings. In other words, States retain the primary role in punishing crimes over which even the Court has jurisdiction and thus by its complementary role, the ICC is a court of last resort.

**Jurisdiction:** The Court has jurisdiction over all crimes committed in the territory of a State that has ratified the Statute, or that has expressed its agreement to the jurisdiction of the Court. In addition, the Court has jurisdiction on all crimes committed by nationals of States that have ratified the Statute or that have expressed agreement to the jurisdiction of the Court. If the Perpetrator is a national of a ratifying State, the Court has jurisdiction, even if the territorial State (i.e. where the crime was committed) has not accepted the jurisdiction of the Court. Where the perpetrator is a national of a State that has not accepted the jurisdiction of the Court, as long as the territorial State has done so, the Court is enabled to proceed.

**The Role of the Security Council:** The Statute attributes two important functions to the Security Council. Its main function, which it derives from Chapter VII of the

<sup>1</sup> Rome Statute for the International Criminal Court, Doc No. A/Conf U.N Doc No. 183/10 (July 17 1998) found at <http://www.un.org/law/icc/statute/rome.htm>



United Nations Charter, allows it to mandate the Court to investigate and prosecute offences in the absence of ratification or consent on the part of the State in whose territory the offence has been committed or of the State whose nationals are under suspicion. Secondly, the Security Council can suspend the activity of the Court for a limited period and in exceptional cases.

**An Independent Prosecutor:** The Prosecutor has a right to take action without having to wait for a State to denounce a particular crime. He can initiate proceedings on the basis of reports from intergovernmental or non-governmental organisations, or other reliable sources. However, the *ex-officio* action of the Prosecutor is to be performed under very close judicial supervision by the Pre-Trial Chamber of the Court, which will judge its appropriateness and legal foundation, before giving authorisation to the Prosecutor to proceed.

**Universality:** In principle, the Court is a creation of States and must represent all cultures. On a practical level, universality is necessary in order to be able to combat impunity and to engender support of member States for the investigation and prosecution of alleged crimes. Similarly, by requirement of the Statute, the membership of judges of the Court needs to reflect an equitable geographical spread and the representation of the principal legal systems' of the world. Geographic and legal systems representations are thus key factors in the working structure and staffing of the Court. As a counter to the much publicised concern that the court could be "politicised", there are a range of safeguards under the regime of the Statute which are the admissibility and jurisdictional regimes of the Court, a qualified and independent Prosecutor and qualified and independent judges.

**The Duty of Cooperation under Article 86 of the Rome**

**Statute:** The International Criminal Court requires the cooperation and participation of States as it cannot act alone. The ICC has neither police nor any other enforcement machinery at its disposal and its task is even more difficult as it may have to consider evidence from all over the world. As such, the Court can only rely on States in order to carry out its mandate. The court's function is thus entirely dependent on effective and rapid cooperation of all States parties.

Furthermore, as the Rome Statute is not self-executing, States parties have to pass domestic implementing legislation in order to meet their obligations to the Court as far as cooperation is concerned. A State becoming party to the Statute must from the very beginning permit the Court to exercise its jurisdiction and power in its territory, within the crimes it is empowered to investigate and prosecute.

**Overview of Part IX of the Rome Statute; the cooperation of States with the Court:** The Rome Statute imposes among others, the following obligations on State parties:

- To cooperate fully with the Court in its investigations and prosecutions
- To comply with any request for cooperation and to keep it confidential
- To ensure that there are procedures available under its national law for all forms of cooperation
- To cooperate in the arrest and surrender of persons found in its territory and authorise transportation through its territory of such persons
- To give priority to a request from the Court in case of competing requests
- To provide for any type of assistance in relation to investigation or prosecutions not prohibited by national law
- To execute requests for assistance in accordance with relevant procedure under the law of the requested State and in the manner specified in the request
- To permit the Prosecutor to execute a request directly on the territory of a State Party, when the crime is alleged to have been committed in its territory or, in other cases, after consultations with the requested State
- To bear the ordinary costs for execution of requests in its own territory (except for the costs specified to be borne by the Court)
- Not to punish the person for any conduct committed prior to the surrender to the Court

**The ICC Today**

The Court has now been a reality for almost eight years with 114 countries being state parties. Since 1<sup>st</sup> July 2002 when the Rome Statute of the International Criminal Court entered into force, much progress has been achieved in the physical establishment of the Court in The Hague. Since 2002, the Prosecutor has received over one thousand communications containing allegations of crimes. Most of these crimes are however not admissible before the ICC due to various reasons.

**Situations before the ICC**

Nevertheless, there are five situations which are now formally before the ICC;

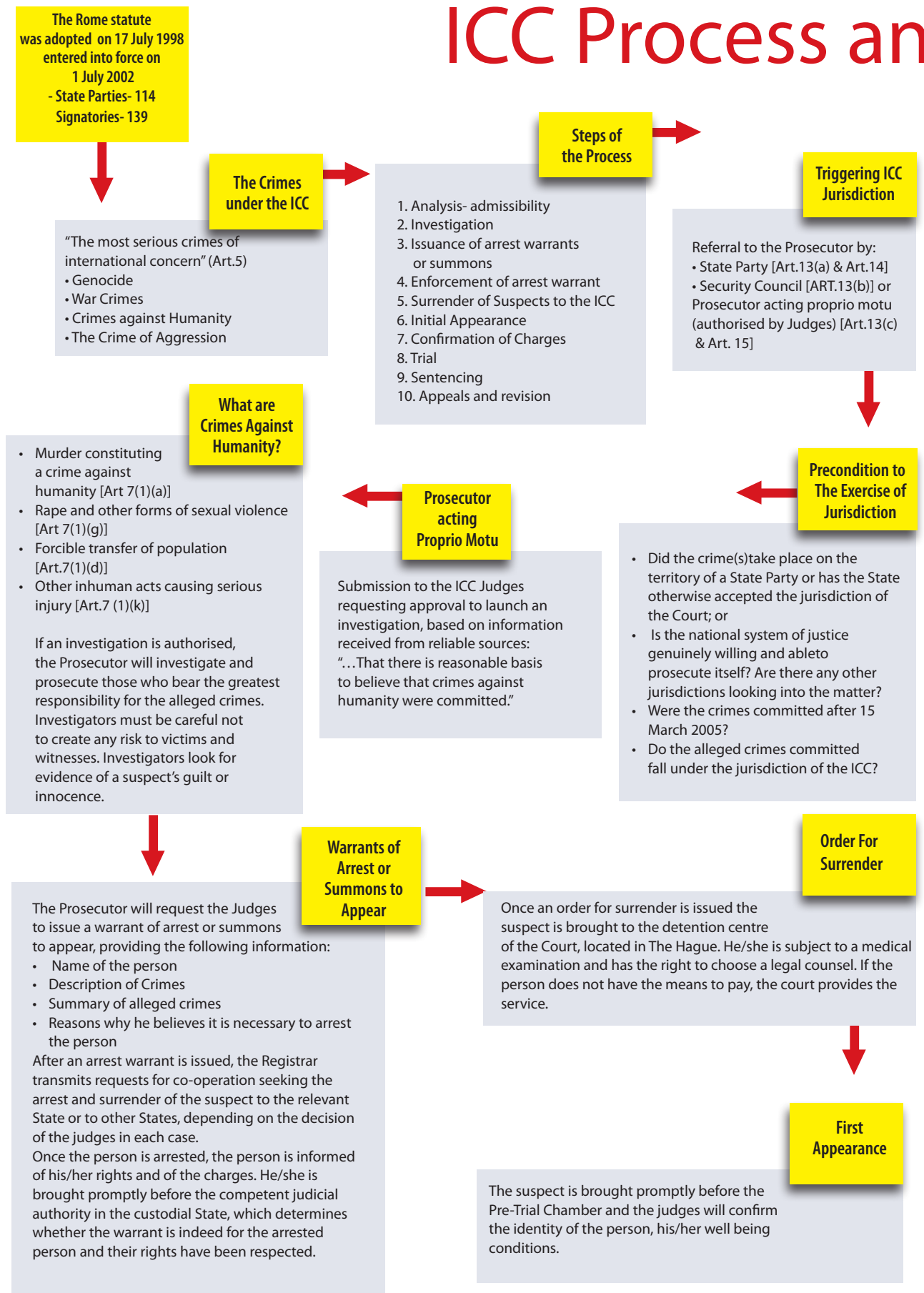
- a) The Government of Uganda's referral of the situation with the Lord's Resistance Army in the north of the country
- b) The situation in the Democratic Republic of Congo
- c) the UN Security Council referral of the situation in Darfur
- d) The investigations in the Central African Republic.
- e) Investigations authorized by the ICC Judges relating to crimes against humanity in Kenya in the period between June 1, 2005 and November 26, 2009

**Uganda:** The first situation to come before the ICC is that of Uganda involving the Lord's Resistance Army which waged a campaign of terror in Northern Uganda abducting over 20,000 children, using many as soldiers and sex slaves, and committing rape and murder. In as much as the LRA richly deserves prosecution, the crimes have not been committed by one side only, as the Ugandan Army has been accused of various abuses including killing and forced displacement of civilians.

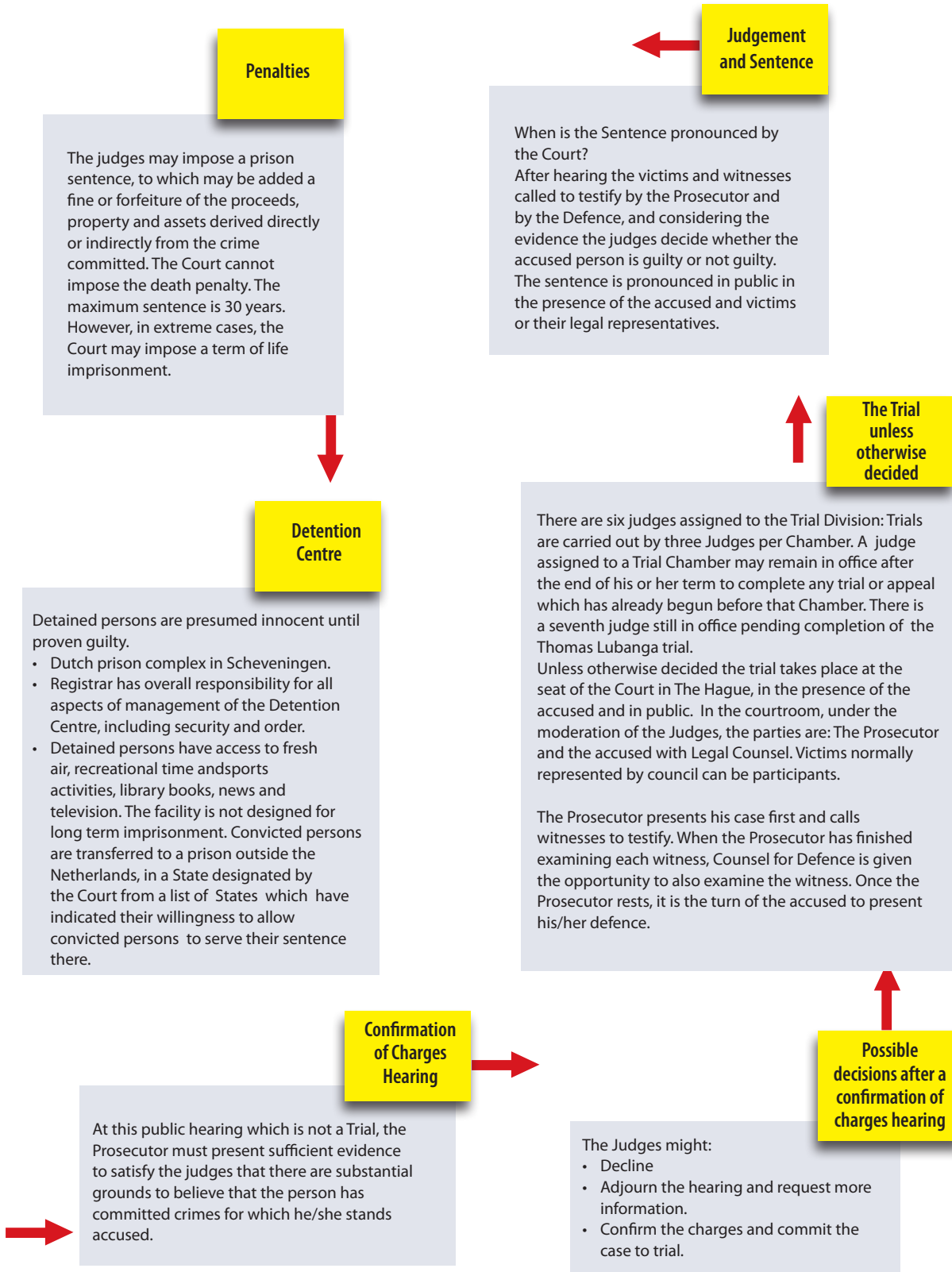
**The Ituri conflict in Eastern DRC:** This conflict involves the agriculturalist Lendu and pastoralist Hema ethnic groups in the Ituri region of northeastern Democratic Republic of Congo (DRC). Although the Prosecutor has concentrated on Ituri for the moment, he may extend his investigations to the entire territory of the DRC. While there have been many phases to the conflict, the most recent armed clashes ran from 1999 to 2003, with a low-level conflict continuing. The conflict had been vastly complicated by the presence of various armed groups who participated in the Second Congo War, the large amount of small arms in the region, a scramble for the area's abundant natural resources, and the ethnic tensions of the surrounding region. The first cases to commence at the ICC emanated from this conflict involving

The International Criminal Court and Kenya

# ICC Process and



# Functions



## The International Criminal Court and Kenya

the trial of warlords Thomas Lubanga, and Germaine Katanga and Mathew Ngudjolo "Chui" respectively

**Central African Republic:** The war in CAR began with the rebellion by the Union of Democratic Forces for Unity (UFDR) rebels after the current President of the Central African Republic François Bozizé, seized power in 2003 followed by more serious fighting in 2004. According to Human Rights Watch (HRW), hundreds of civilians were killed, more than 10,000 houses burned, and over 200,000 people fled their homes to live in desperate conditions deep in the bush in northern Central African Republic. The ICC's biggest catch so far has been the arrest for war crimes of Congo's exiled former Vice-President Jean-Pierre Bemba and alleged President and Commander in Chief of the "Mouvement de Libération du Congo" (MLC) in Belgium on May 24th 2008 in Brussels.

**Darfur:** The Darfur Conflict is an ongoing guerilla conflict centered in the Darfur region of Sudan. It began in February 2003 when the Sudan Liberation Movement/Army (SLM/A) and Justice and Equality Movement (JEM) groups in Darfur took up arms, accusing the Sudanese government of oppressing black Africans in favor of Arabs. There are various estimates on the number of human casualties, ranging from under twenty thousand to several hundred thousand dead, from either direct combat or starvation and disease engendered by the conflict. In March 2005, the Security Council formally referred the situation in Darfur to the Prosecutor of the International Criminal Court, taking into account the report of the International Commission of Inquiry on Darfur, authorized by UN Security Council Resolution 1564 of 2004. In April 2007, the Judges of the ICC issued arrest warrants against the former Minister of State for the Interior, Ahmed Haroun, and a Janjaweed leader, Ali Kushayb, for crimes against humanity and war crimes. On July 14 2008, the Prosecutor filed ten charges of war crimes against Sudan's incumbent President Omar al-Bashir, on three counts of Genocide, five of crimes against humanity and two of murder.

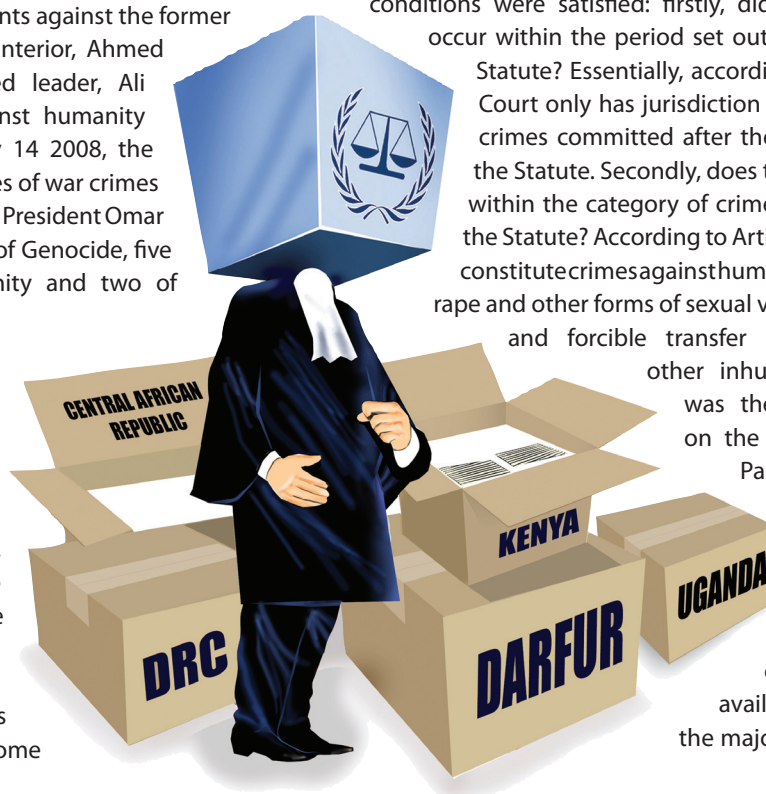
**Kenya:** Kenya is the latest situation to come before the ICC. The recent decision by pre-trial chamber, discussed at length elsewhere, underscores that the Prosecutor's investigative powers extend to crimes committed by any party in Kenya. While Kenya as a state party to the Rome

Statute is guaranteed the prerogative to repress crimes punishable under international law, the ICC has been forced to intervene due to the inability of decision-makers in Kenya to institute credible and effective mechanisms at the national level as recommended by Judge Waki. It is important to bear in mind that the ICC process will target only a select number of individuals, and therefore, it is imperative that Kenya establish a Special Tribunal to try lower-to mid-level perpetrators as a supplementary mechanism to the ICC process. This is critical to allow the vast majority of victims to access justice for the crimes that were committed against them.

### Summary of the PTC II Judgement

On 31 March, 2010, the Pre-Trial Chamber II issued its decision authorising the Prosecutor to commence his investigations into Kenya. Pre-Trial Chamber II assented to the Prosecutor's request by a two-one majority. The Chamber was mandated to review the conclusion of the Prosecutor by examining the available information, the supporting material as well as the victims' representations in order to determine whether there is "reasonable basis to believe that a crime within the jurisdiction of the Court has been committed or is being committed."

In their review the Chamber Judges considered three factors when making their decision: (i) the Court's jurisdiction; (ii) admissibility of the case; and (iii) interests of justice. With regards to the question of jurisdiction, the Judges considered whether the following three conditions were satisfied: firstly, did the alleged crime occur within the period set out in Article 11 of the Statute? Essentially, according to Article 11, the Court only has jurisdiction only with respect to crimes committed after the entry into force of the Statute. Secondly, does the alleged crime fall within the category of crimes under Article 5 of the Statute? According to Article 7 acts that would constitute crimes against humanity include murder, rape and other forms of sexual violence, deportation and forcible transfer of population and other inhumane acts. Thirdly, was the crime committed on the territory of a State Party to the Statute or did a national of any such state commit the crime? After a careful examination of the available information, the majority of the Chamber





## THE JUDGEMENT

The judges were not unanimous that crimes against humanity had been committed in Kenya.

Judge Tarfusser and Judge Trendafilova agreed that crimes against humanity had been committed in Kenya. They gave the prosecutor permission to investigate events that took place from 1st June 2005 till 26th November 2008. Judge Kaul did not agree.



concluded that the requirements regarding jurisdiction were fulfilled and the request was within the jurisdiction of the Court and a crime against humanity had been committed in Kenya.

Secondly, the Judges considered whether the case is or would be admissible under Article 17 of the Statute. However, bearing in mind the particular and early stage of the proceedings, the Judges construed this requirement to be within the parameters of an "entire situation" rather than in relation to a specific case. Thus, the Judges' assessment of admissibility at this stage involved the admissibility of one or more potential cases within the context of a situation. However, those cases are only potential cases and the list transmitted by the Prosecutor to the Judges is not binding on the Prosecutor for the purposes of future proceedings before the ICC. According to Article 17 of the Rome Statute a case is admissible based on two criteria: complementarity and gravity. The complementarity clause (article 17 (1) (a)-(c)) asks whether there have been national proceedings or if there are prosecutions taking place presently and if there have been investigations in the past. On the other hand, as stated in Article 17(1) a case is admissible if there is a sufficient gravity to justify further action by the Court. An assessment of gravity entails a generic examination of whether the persons or groups of persons that are the object of an investigation include those that may bear the

greatest responsibility for the alleged crimes; and that the crimes were allegedly committed within the incidents, which are the object of an investigation.

In this case, noting the lack of progress by the Kenyan government to establish a Special Tribunal to conduct national proceedings; noting the Kenyan authorities' inadequacies to address the election violence; and given the brutality of the alleged crimes (for example, burning victims alive, attacking places sheltering IDPs, beheadings and hacking people to death) the majority of the Judges concluded that the case would be admissible under Article 17 of the Statute.

Finally, interests of justice: under Article 53(1)(c) the judges had to assess whether given the gravity of the crime "and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". According to the judges, the prosecutor does not have to establish in a positive sense that an investigation is actually in the interests of justice. It is only if the Prosecutor decided that an investigation would not be in the interests of justice that this decision would fall under judicial scrutiny. Thus a consideration of this requirement was unwarranted, as the Prosecutor had not decided that an investigation "would not serve the interests of justice".

## The International Criminal Court and Kenya



### Crimes Against Humanity?

The majority of Judges observed that the following elements of crimes against humanity can be distinguished. In particular, that the civilian population must be the primary object of the attack in question and cannot merely be an incidental victim. The attack against a civilian population must be committed "pursuant to or in furtherance of a State or organisational policy to commit such an attack". (Such a policy need not to have been conceived at the highest level of the state machinery. In other words, organisations not linked directly to the State are capable of carrying out a policy and committing an attack against a civilian population.) The alleged acts must be either widespread or systematic to warrant classification as crimes against humanity. By widespread, the Court means the scale of the attack and the number of victims. By 'systematic' it refers to the "organised nature of the acts of violence and the improbability of their random occurrence". Finally, crimes against humanity have to be committed "as part of a widespread or systematic attack directed against any civilian population".

### Three categories of attacks

The majority of Judges agreed with the Prosecutor's proposition that the violence comprised a significant

number of incidents. While these incidents differed from one region to another, depending on the respective ethnical composition and other region-specific dynamics, the Judges were of the opinion that these incidents seem to relate to three general categories of attacks.

1. The first category would comprise the attacks initiated by groups associated with the ODM and directed against perceived PNU supporters
2. Retaliatory attacks conducted by members of the groups targeted by initial attacks and directed against members of those groups deemed to be responsible for the initial violence.
3. Violent acts committed by the police.

The majority of Judges considered that the temporal scope of the investigation in Kenya could not be limited to events which took place between December 2007 and February 2008, thus agreeing in part with the Prosecutor's assertion that the investigation should not be limited to this particular period. Accordingly, the majority of Judges considered it appropriate, especially in light of the victims' representations; to define the temporal scope of the authorised investigation of the events that took place as between 1 June 2005 (i.e. the state of the Statute's entry into force for the Republic of Kenya) and 26 November 2009 (i.e. the date of filing of the Prosecutor's request). Upon examination of the available information, bearing

## The International Criminal Court and Kenya

in mind the low threshold, as well as the object and purpose of the decision, the majority of Judges found that the information available provided a reasonable basis to believe that crimes against humanity had been committed on Kenyan territory. The Judges clarified that the investigation of the Prosecutor would be confined to allegations of commission of crimes against humanity, therefore excluding the possibility of an investigation on the commission of war crimes, unless the Prosecutor presents an additional request for authorisation of such an investigation.

### The Dissenting Opinion of Judge Hans Peter Kaul

The dissenting judge, Judge Kaul, was of the view that the Pre-Trial Chamber II should not authorise the commencement of the Prosecutor's investigation in the situation of Kenya. The two main reasons for the Judge's position were (1) his interpretation of article 7(2)(a) of the Statute, which sets out the legal definition of "attack directed against any civilian population" as a constitutive contextual element of crimes against humanity, and (2) his examination of the Prosecutor's request and supporting material, including the victims' representations, which led him to conclude that the acts which occurred in Kenya do not qualify as crimes against humanity falling under the jurisdiction of the Court.

### The Nature of the Crimes

In recognition of the fact that crimes have occurred on Kenyan territory, he nevertheless concluded that, on the basis of the entirety of the submitted information, there is no reasonable basis to believe that the crimes allegedly committed fell under the jurisdictional ambit of the Court. This would require that the acts such as murder, rape and other serious crimes were committed in an "attack against any civilian population" "pursuant to or in furtherance of a State or organizational policy to commit such attack" as required by article 7(2)(a) of the Statute. In his opinion, even at this early stage of the proceedings, he had to reach a full, genuine and substantive determination of the question whether the acts committed fall under the jurisdictional ambit of the Court. Furthermore, Judge Kaul asserted that there is a difference between crimes against humanity as defined in article 7 of the Statute and crimes under national systems and that the distinction between those crimes must not be blurred or marginalised.

### The existence of an organisation

While the Judge accepted that some of the violence appears to have been organised and planned in advance,

he failed to see the existence of an 'organisation' behind the attacks which may have established a policy to attack the civilian population within the meaning of article 7(2) (a) of the Statute. He did not see an 'organisation' meeting the prerequisites of structure, membership, duration, a policy level, including the capacity to impose the policy on the members of the organization and sanction them, and means to attack the civilian population. Judge Kaul held that the juxtaposition of the notions of "State" and "organisation" in the Statute warrant an interpretation according to which an "organization" would partake some of the characteristics of a State. *"Local politicians, civic candidates or aspirants, councillors and business people meeting and allegedly financing the violence do not form an 'organisation' with a certain degree of hierarchical structure acting over a prolonged period of time."* In sum, Judge Kaul did not find any information in the supporting material, including victims' representations, suggesting that an organizational or State policy existed pursuant to which the civilian population was attacked. *"In total, the overall picture is characterised by chaos, anarchy, a collapse of State authority in most parts of the country and almost a total failure of law enforcement agencies."* As a result, the Judge felt unable to authorise the commencement of an investigation in the situation in Kenya.

### Conclusion

Normally, the very nature of crimes against humanity involves violations against civilians on a mass scale and not merely sporadic, isolated events. However, an offence under this particular article may be committed against even one person, provided it is connected with a systematic or widespread attack against any civilian population. Crimes against humanity are generally carried out pursuant to some preconceived policy by the State or a (private) organisation, although the policy need not be formal or precise. A private group or organisation may well orchestrate policies amounting to crimes against humanity. Essentially the Judges disagreed as to whether or not crimes against humanity as defined under the ICC Statute were committed in Kenya. As there is sparse jurisprudence on this topic, the Judges were not unanimous as to whether crimes against humanity as defined under the ICC Statute had been committed in Kenya.

### Victim Participation at the Court

The Statute of the International Criminal Court (Rome Statute) recognised for the first time in history the rights of victims to participate and to reparation in international criminal proceedings. Kenya being a common law jurisdiction has no provisions for victim participation in even domestic litigation cases. This is in contrast to civil

## The International Criminal Court and Kenya

law jurisdictions, where such provisions do exist. Therefore, it is essential that the role of victims in the ICC process is highlighted sufficiently. The formal recognition of victims as participants can foster a sense of investment in ICC proceedings, making victim participation an end in itself and not just a means to an end. "By engaging victims in a more proactive role in proceedings, the ICC has the potential to provide a "link" between the proceedings in The Hague and the members of affected communities on the ground and, thus, to make the court's proceedings more relevant to them".<sup>2</sup> However, it is important to note at the outset that victims' participation is a distinct process from the reparations regime at the ICC.

### Definition of a Victim

The ICC recognises two types of victims, for the purpose of participation in ICC proceedings:

1. Individual people who have suffered harm as a result of one of the crimes under ICC jurisdiction
2. Organisations or institutions, when their property dedicated to certain purposes (religion, education, art, science or charitable and humanitarian purposes, or historic monuments or hospitals) is harmed as a result of one of the ICC crimes.

In accordance with international human rights law, harm must be understood to include physical, psychological and material harm. Victims can participate in ICC proceedings in three ways: firstly, victims can send information to the Prosecutor of the ICC, asking him to commence investigations; secondly they can participate by testifying before the Court if called as witnesses; and lastly victims have the right to participate in proceedings and to request reparations.

It is important to note that there is a difference between participating as a victim and testifying as a witness. Participation in proceedings as a victim is voluntary, the aim being to convey to the Judges the victims' own concerns and opinions. Furthermore, participation is possible at all stages of proceedings if and as agreed by the Judges and victims are entitled to a legal representative and need not appear in person.

In contrast, a witness is summoned by the prosecution, the defence, and the legal representative of victims or indeed, the Chamber. Therefore, the purpose of a witness is to give evidence and testify at a certain time; this usually is in person.

To assist victims the Court has established the Victims Participation and Reparations Section and the Victims and Witnesses Unit, both within the Registry. Essentially

<sup>2</sup> See "Courting History: the Landmark International Court's first years" by Human Rights Watch (2008), p. 177

the VPRS assists victims in relation to their applications for participation in the proceedings or for reparations, or both. It also assists victims in obtaining legal advice and organising their legal representation. The VWU provides protection and psychological support to witnesses, victims who appear before the Court and others who are at risk on account of testimony they have given.

### REPARATIONS AND TRUST FUND FOR VICTIMS

At the end of a trial if a person accused before the ICC is found guilty, ICC judges may decide to order that person to make reparations to victims for the harm they have suffered as a result of the crimes committed.

Victims can use their standard forms to make their request to the ICC Judges. It is important to note that the judges of the Court will decide whether an applicant is entitled to reparation or not, after careful review of the application, and such a process can take a long time.

The types of reparations will also be decided by the judges. Measures ordered as reparations can be individual or collective. They may include monetary compensation, the return of property, and symbolic measures such as public apology or commemoration or memorial.

To complement the Court's work on reparation, an independent Trust Fund for Victims was established. The ICC judges may ask the Trust Fund to carry out its orders of reparations against a convicted person. In addition, the Fund can use the contribution it receives to finance projects for the benefit of victims.<sup>3</sup>

Participation in proceedings means that victims have a legal right to forward their views and concerns directly to the Judges, normally through a legal representative. At the same time, it is important that the Chamber ensures that the rights of the accused and a fair and impartial trial are not prejudiced.

Victims can participate at any stage of the proceedings, however, this is determined by the Judges, and usually victims are allowed to participate where their personal interests are affected. Once a victim is granted permission to participate by the Judges, it is the responsibility of the Court to keep him/her informed about developments in the proceedings. It is also important to note that victims have the right to ask the Court to take all possible measures to respect their safety, well-being, dignity and privacy in the course of their participation in proceedings. Important to note is that participation is purely voluntary and there is no monetary gain attached to the process of participation.

Indeed, reparations can only be ordered by the Judges at the end of the trial and only in relation to crimes for which the accused is convicted. The official application form for participation includes a section for applying for reparations.

### Applying for participation

In order to be able to participate in proceedings, victims have to apply in writing and through the prescribed application forms, as developed by the VPRS. Once an application form has been completed, the form may be sent to the VPRS. Once submitted, the judges of the ICC will examine each application and decide whether or not the applicant is entitled to participate in ICC proceedings and at what stages.

In order to make their decision, the ICC judges will go through two steps as to whether an applicant is a genuine victim. Firstly, the Judges will ascertain whether the applicant is a victim of a situation or case by considering whether that person suffered the requisite harm. Under the statute, victims are defined as individuals who have suffered harm as a result of a crime falling within the jurisdiction of the Court. Such harm includes physical harm; psychological harm or material harm. Secondly, the harm has to have resulted from the commission of one of the crimes the ICC has jurisdiction over. Lastly, there has to be a clear causal link between the alleged crime and the harm suffered. This means that it must be clear that the harm was caused by the crime in question. If the judges come to the conclusion that the applicant is a victim, then they will consider whether the victim is entitled to participate at the particular stage of the proceedings in question. When filling out the form, applicants are asked to specify in their application at which stage or stages of proceedings they would like to participate. The judges of the Court will decide at what stage(s) the applicant is entitled to participate in proceedings, starting from the Preliminary Examination Stage. The information in the application form will help the judges to make their decision. The following are the criteria the judges will consider when deciding whether a victim can participate at a particular stage in ICC proceedings:

- Is the person a victim of the situation or case that is being dealt with by the Chamber?
- Are the victim's personal interests affected at that point in the proceedings?
- Is it appropriate for the victim to present his or her views and concerns at that particular point in the proceedings?<sup>3</sup>

### Confidentiality and Protection of Victims

Participating in criminal proceedings by its very nature involves an element of risk.<sup>4</sup> Victims can therefore request the Prosecutor to keep all or some of the information they provide confidential. In order to do so, the communication should specify that such information is provided *"on the condition of confidentiality and solely for the purpose of generating new evidence"*.

If applicants are concerned about the implications for their security or well-being of others and they do not wish the part or all the information in the form to be communicated or made public, they can mention these concerns in their application. Furthermore, in accordance with its general obligation to consider the issue of protection of victims and witnesses, the Chamber is required to make necessary provisions for the protection of the applicants, including where necessary and consistent with the rights of the accused, concealing the victims' identities and locations.

<sup>3</sup> "Booklet- Victims Before the International Criminal Court- A Guide for the Participation of Victims in the Proceedings of the Court"

<sup>4</sup> Ibid

## The International Criminal Court and Kenya

### Managing Expectations

Following the decision of the Pre-Trial Chamber II to authorise investigations into the 2007-2008 election violence in Kenya, expectations on the ground are high. Many victim communities may be under the illusion that the Prosecutor, Loius Moreno Ocampo, will arrest all those who perpetrated crimes against them. Important factors such as the timeframe of a possible trial have to be considered, as well as the fact that the Prosecutor may decide that there insufficient evidence to bring cases to trial. It is important to ensure that the Kenyan public is aware of the realities of the ICC, as well as what it can and it cannot do.

#### Common Misconceptions

- The ICC process is swift and trials will take place promptly – The authorisation of investigations is only the first step in a lengthy process. As yet, no previous trials at the ICC have reached completion, and thus Kenyans can expect the process to take a few years.
- All those who committed crimes will be taken to the ICC - It is the policy of the Prosecutor to only bring a few individuals to trial; those who bear the greatest responsibility for the crimes that were committed. It is likely that the number of people who will be indicted will be few.
- The people whose names are on the list in the Waki envelope will be prosecuted - It is up to the Prosecutor to decide against whom he want to bring a case; he is not bound by the list in the Waki envelope. Furthermore, the Prosecutor may decide that he does not have sufficient evidence to bring a case forward. For example, the ICC declined to confirm charges against Sudanese rebel leader Bahar Idriss Abu Garda on 8 February, 2010, citing a lack of evidence. Abu Garda was accused of directing an attack that killed a dozen African Union peacekeepers in Sudan's strife-torn Darfur region in 2007. The court's pre-trial chamber refused to move the case forward to trial, saying it "was not satisfied that there was sufficient evidence to establish substantial grounds to believe that Bahar Idriss Abu Garda could be held criminally responsible either as a direct or as an indirect co-perpetrator for the commission of the crimes."
- A Special Tribunal is no longer necessary - On the contrary; the vast majority of perpetrators will escape prosecution unless there are national mechanisms, such as a Special Tribunal, to supplement the ICC process. Therefore, it is crucial for the Kenyan Government to renew its efforts to establish an accountability mechanism for the post-election violence.
- All victims will receive reparations - Only those who apply for reparations through the prescribed forms will be able to obtain reparations. However, reparations will only be given out once an alleged perpetrator is found guilty of such crimes. Furthermore, it is likely that reparations will be collective and may be more symbolic, as opposed to being high in monetary value.

### Frequently Asked Questions

#### 1 What is the International Court?

The ICC is an international permanent court of justice established to try perpetrators of the most serious crimes of international concern. It has been in operation since July 1, 2002 and has its seat in The Hague, The Netherlands. The ICC has jurisdiction over the following crimes: crimes against humanity, war crimes and genocide. It can only investigate crimes committed after entry into force of its Statute with respect to the relevant country. It has jurisdiction over crimes committed in the territory or by nationals of a State Party. Kenya ratified the ICC statute in March 2005, and therefore, the ICC has jurisdiction for the crimes committed in the country since 1 June 2005.

#### 2 What is the Principle of Complementarity?

The International Criminal Court (ICC) is a court of last resort. This means that the ICC can only investigate and prosecute core international crimes when national jurisdictions are unable or unwilling to do so genuinely. A State is considered unwilling to carry out investigations or prosecutions when national proceedings are undertaken with the purpose of shielding the persons concerned from criminal responsibility, or when there is an unjustified delay in the proceedings which is inconsistent with the intent to bring the person concerned to justice, or when the proceedings are not conducted independently or impartially.

#### 3 How many people will be prosecuted and tried at the Court?

ICC investigations focus on those bearing the greatest responsibility for the crimes that were committed, regardless of who they may be. Those persons will be identified following an investigation. It is important to note that the ICC Prosecutor is not bound by the list of perpetrators established by the Waki Commission. Normally the ICC tries a very small number of people. Therefore, other perpetrators whether high or low level perpetrators must be prosecuted by national mechanisms, such as a Special Tribunal.

#### 4 What are the next steps after an investigation has been authorised?

After the opening of an investigation, the Office of the Prosecutor will identify the most serious incidents falling under ICC jurisdiction, and secondly, the most responsible persons for such incidents. A request for arrest warrants would follow and once the person or persons are arrested the ICC trial would commence. It is also possible

The International Criminal Court  
and Kenya

that, after a thorough investigation, the Prosecutor comes to the conclusion that crimes committed in Kenya are not of sufficient gravity to warrant ICC intervention, and thus may decide to close the case without prosecution. In this scenario, victims of the crimes would have legal remedy against such a decision through an appeal mechanism.

### 5 Who can be prosecuted by the ICC?

The ICC only tries individuals. The ICC does not prosecute persons who were under the age of 18 at the time the crime was allegedly committed. The ICC will not try everybody that commits these crimes. It is the policy of the Prosecutor to focus on those who are the most responsible for crimes committed in any situation he is investigating. There are no provisions for amnesties, and even acting heads of state may be indicted.

### 6 Why does the Court only target Africa?

Many commentators have argued that the Court is a Court that only targets African countries, especially as all five situation countries have been in Africa, including The Central African Republic, The Democratic Republic of Congo, Darfur in Sudan, Northern Uganda and now Kenya. However it is important to note that in three of these five instances, the three States have themselves referred the situations to the ICC. In the case of Darfur, the situation was referred to the Court by the UN Security Council, given the grave atrocities that had been committed in Darfur. Furthermore, the Prosecutor has stated that cases or potential cases are not selected on the basis of attaining a regional balance.<sup>5</sup>

<sup>5</sup>OTP, "Annex to the Three Year Report on the Prosecutorial Strategy," <http://www.icc-cpi.int/library/organs/otp>

### 7 Can victims participate in ICC proceedings?

According to the ICC Statute, victims of crimes under ICC investigation have a right to participate in judicial proceedings related to the harm they have suffered. Victim participation allows victims' to have an independent voice in the proceedings and to make their own representations with a view to establish the truth of what happened.

### 8 What provisions are there for reparations?

Victims also have a right to receive reparations and to participate in proceedings related to reparations award. It is likely that many of the reparations awarded to victims of crimes under ICC investigation will be collective; some might also be symbolic. However, important to bear in mind is that reparations will only be given out once the accused is found guilty of the charges laid against him/her.

### 9 Does the ICC have its own police force?

As an ICC State party, Kenya is obliged to cooperate fully with the Court in its investigation and prosecutorial functions. Cooperation is particularly important in the case of arrest and surrender of persons as the ICC does not have its own police force. Should the ICC issue an arrest warrant for a person present on Kenyan territory, Kenya will be under an obligation to arrest and surrender the person to the ICC. The principle and details of such cooperation were set up in the International Crimes Act adopted by Kenya Parliament on December 2008.

## The International Criminal Court and Kenya

### 10 What are Kenya's responsibilities as a member of the ICC?

Kenya has been a party to the ICC Statute since March 2005, thus Kenya's obligations under International Law are such that it has a duty to exercise its criminal jurisdiction over those responsible for international crimes. If Kenya is unable to carry out domestic prosecutions and investigations, then, according to the principle of complementarity, under which the ICC operates, the ICC may then intervene.

### 11 Is a Local Tribunal for Kenya still necessary?

The investigation by the ICC will be limited in scope; the operation of the Court is such that it targets those who bear the greatest responsibility for the crimes that are committed. Thus, the Prosecutor will only bring cases against a few individuals who are most responsible for the crimes that were committed on the territory of Kenya. As a result there are hundreds of victims who will be unable to obtain redress for the crimes committed against them, therefore it is still very important for the Kenyan government to establish a Special Tribunal for Kenya in order to bring to bridge the impunity gap as it relates to small- to mid- level perpetrators of violence.

### 12 What types of crimes will the Court focus on in relation to Kenya?

According to the Prosecutor of the ICC, and the judgement of Pre-Trial Chamber II, crimes against humanity were committed during the 2007 -2008 post-election violence. Crimes against humanity are acts such as murder, torture, gender-based crimes, among others, committed as part of a widespread and systematic attack against the civilian population.

## Events and Activities

### Training and Exchange Session on the International Criminal Court, March 22-25 2010, The Hague

On March 22-25 2010, Kenyans for Peace with Truth and Justice (KPTJ) members, including from COVAW, ICJ-Kenya, AfriCOG and KHRC attended a training and exchange session sponsored and organised by International Federation for Human Rights (FIDH) in The Hague. Several experts from the Coalition for the International Criminal Court and Human Rights Watch were in attendance. Furthermore, the participants also had the opportunity to interact with members of the various organs of the ICC, including the Office of the Prosecutor and the Registry.

As part of its mission, the FIDH Permanent Delegation to the International Criminal Court based in The Hague, organises training sessions on the International Criminal Court (ICC) and facilitates access of victims, their representatives and non-governmental organisations to the ICC.

The training session was devoted to studying the functioning and the activities of the ICC, as well as the mechanisms available for victims to seek redress. The training and exchange session gave KPTJ members an opportunity to carry out in-depth discussions with experts as well as strategies for seeking justice for the post-election victims. Participants agreed that the action of the ICC in Kenya demands reinforcement and empowering of members of Kenya's civil society to be better informed and more proactive in local and international advocacy for the prosecution of the most serious crimes.

### KPTJ Training Session on Legal Representation at the ICC, June 11 2010, Nairobi.

The meeting was convened by KPTJ on June 11, 2010 as an opportunity for the legal community in Kenya to gain further insight into the operational mechanisms of the ICC, as well as an overview of the Court, the Kenya situation and relevant jurisprudence.

A Legal Advisor from the ICC was invited by KPTJ to explain the key aspects of the ICC as well as what being a legal representative at the ICC entails. More than 25 lawyers and civil society organisations attended the training session, many of whom were able to gain a firsthand look at the legal intricacies of the Court. Many in attendance were also potential legal representatives for victims.

The speaker explained the structure of the Court, as well as the legal principles to which the Court adheres. The crimes under the jurisdiction of the Court were explained. The speaker also highlighted the different stages of a possible trial, including the preliminary phase, the investigation phase and the trial phase. Victim participation at a potential trial was discussed in great detail. Given the success of this initial training session with the legal community, KPTJ intends to carry out further informative sessions in the coming months.

KENYANS FOR PEACE WITH TRUTH & JUSTICE (KPTJ) a coalition of citizens and organizations working in the human rights, governance and legal areas that came together after the crisis over the disputed results of the 2007 presidential election and the violence that followed it. Members include: Africa Centre for Open Governance (AfriCOG), Bunge la Mwananchi, Centre for the Development of Marginalised Communities (CEDMAC), Centre for Law and Research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The Cradle-the Children's Foundation, Constitution and Reform Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay And Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unit (IMLU), Innovative Lawyering, Institute for Education in Democracy (IED), International Commission of Jurists (ICJ-Kenya), International Centre for Policy and Conflict, Kenya Human Rights Commission (KHRC), Kenya Leadership Institute (KLI), Kenya National Commission on Human Rights (KNCHR), Kituo cha Sheria, Mazingira Institute, Muslim Human Rights Forum, The National Civil Society Congress, National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The 4 Cs, Urgent Action Fund (UAF)-Africa, Youth Agenda.

The material in the bulletin was reproduced with the permission of the International Criminal Court. The views expressed by KPTJ are not endorsed by the International Criminal Court (ICC). Redistribution of the material presented in this bulletin is encouraged, provided that the original text is not altered, that the original source is properly and fully acknowledged and the objective of the redistribution is not for commercial gain.

Editorial: KPTJ [www.africog.org](http://www.africog.org) Administration: Africa Centre for Open Governance (AfriCOG) P.O.Box 18157-00100 NAIROBI. This publication was produced with support from the Open Society Initiative for East Africa.