

SECURING JUSTICE

Establishing a domestic mechanism for the 2007/8 post-election violence in Kenya



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EXECUTIVE SUMMARY

This Report examines the prospects for a complementary accountability process to deal with the post-election violence (PEV) that took place in Kenya following the disputed presidential election in December 2007. Although government officials have long claimed that an accountability process is underway, more than four years after the violence took place, little effort has been made at the national level to address criminal accountability. This Report is an attempt to create a framework for constructing a legitimate and credible accountability mechanism – complementary to the ongoing International Criminal Court (ICC) cases, not a means to “bring the ICC cases home.”

The Report thus examines a number of legal and socio-legal issues necessary to take into account in creating a complementary accountability process. It analyses the background to the current debates about accountability in Kenya, including a description of earlier attempts at criminal justice at the national level and an assessment of the current status of the PEV cases. The Report also analyses the current political climate and its implications for accountability as well as how the ongoing reform process could potentially influence an accountability mechanism. The Report also briefly examines victims’ perceptions of justice.

Next, the Report analyses legal issues pertaining to the creation and operation of an accountability mechanism for the PEV. Deciding the applicable legal framework for criminal prosecutions of the PEV is central to this assessment. For various reasons, the Report argues that it is preferable to prosecute international crimes as well as crimes under national law. The legality of prosecuting international crimes that, when committed, were not recognised in Kenyan law requires that attention be paid to various factors, including the duty in international law for states to prosecute international crimes, the relationship between domestic law and international law, and the nature and scope of the principles of legality and the prohibition of retroactive application of the law. Based on these considerations, it is concluded that legislation which makes the International Crimes

Act applicable to the events in 2007/8 presents the most feasible and credible way of creating the necessary framework for prosecuting international crimes (unless a Special Tribunal is established by an international instrument, in which case national law becomes irrelevant).

Further, the Report analyses what, in legal terms, is required to set up a Special Division of the High Court and a Special Tribunal as well as associated bodies, including specialised investigatory and prosecutorial units, and whether and how international staff could be included in these bodies. The Report concludes that a Special Division of the High Court can be created administratively but, unless the Constitution is amended, international staff can only sit on the Bench if they are appointed through normal procedures. In contrast, creating a Special Tribunal which works outside and independently of existing structures requires a constitutional amendment.

The Report also examines whether special procedures, for example with regard to victims’ participation, reparations and security, can be utilised in an accountability mechanism for the PEV. It is concluded that new legislation is needed to allow victims to participate in the process and create an enhanced framework for reparations.

To further lay the ground for the desired framework for an accountability process, the Report analyses experiences from other countries that have pursued criminal justice domestically or in a hybrid or internationalised justice mechanism in the context of dealing with armed conflict or serious human rights violations. This includes a discussion of the International Crimes Division of the Ugandan High Court; the war crimes trials in the Democratic Republic of the Congo (DRC); a special war crimes chamber created in Bosnia and Herzegovina to deal with violations committed during the conflict in the 1990s; the Special Panels for Serious Crimes in Timor Leste; and the internationalised Special Court for Sierra Leone and Special Tribunal for Lebanon.

Based on all the above, the Report moves on to compare the advantages and disadvantages of the Special Division and Special Tribunal.

In terms of legitimacy and credibility, it is concluded that some factors seem to favour a Special Tribunal (respect for human rights, including fair trial standards; independence and impartiality; not being biased; ability to prosecute those who bear the greatest responsibility for the PEV; and competence to prosecute international crimes) whereas other factors appear to favour a Special Division (local ownership and relevance to victims and other key audiences; the ability to convict a fair number of the perpetrators; and authority to enforce its decisions). However, the scope of these relative advantages depends more on the detailed set-up of the mechanism than whether the mechanism operates inside existing structures of the Kenyan legal system (the Special Division option) or outside these structures (the Special Tribunal option).

Analysing the two major options for an accountability process to deal with criminal justice for the PEV does not favour one over the other. The preference depends on what goals of criminal justice are perceived most important. Arguably, attention should be paid to deterrence, not least with an eye to the forthcoming General Elections, which would result in a preference for a Special Division.

In terms of feasibility, it is concluded that the option of the Special Division is in all aspects – including the political will to establish it in a timely manner, the ability

to operationalise it in a timely manner and the likelihood of obtaining the necessary funding – more feasible than the Special Tribunal.

This comparison leads the Report to recommend that Kenyans for Peace with Truth and Justice (KPTJ)'s advocacy focuses on the establishment of a Special Division, which, in combination with other efforts, could promote the establishment of a legitimate and credible accountability process. Besides advocating for the establishment of a Special Division as the adjudicating body, the Report recommends that KPTJ advocates for the establishment of a Special Prosecutor for PEV cases, created under Article 157(12) of the Constitution and working independently of the Director of Public Prosecutions (DPP) to investigate and prosecute PEV cases. As for the composition of these bodies, it is recommended that KPTJ advocates for the inclusion of international expertise, both in the Special Division and in the Office of the Special Prosecutor.

To facilitate enhanced participation of victims, promote reparations and safeguard their security, the Report recommends that KPTJ advocates for the adoption of legislation which creates special procedures for PEV cases, and that a special agency or unit, which works independently of the existing Witness Protection Agency (and involves international expertise) is established.

Furthermore, the Report recommends that advocacy be undertaken to facilitate that a clear legal framework be put in place for prosecuting international crimes, in addition to crimes under domestic law.

LIST OF ACRONYMS

AFRC	Armed Forces Revolutionary Council (Sierra Leone)
AG	Attorney General (Kenya)
CDF	Civil Defence Forces (Sierra Leone)
CIPEV	Commission Investigating the Post-Election Violence (Kenya)
CJ	Chief Justice (Kenya)
DPP	Director of Public Prosecutions (Kenya)
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICD	International Crimes Division (Uganda)
ICJ	International Commission of Jurists
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JLOS	Justice, Law and Order Sector (Uganda)
JSC	Judicial Service Commission (Kenya)
KPTJ	Kenyans for Peace with Truth and Justice
LRA	Lord's Resistance Army (Uganda)
OHR	Office of the High Representative in Bosnia and Herzegovina
OSJI	Open Society Justice Initiative
PEV	Post-election violence (Kenya)
RUF	Revolutionary United Front (Sierra Leone)
SCSL	Special Court for Sierra Leone
SCU	Serious Crimes Unit (Timor Leste)
SDWC	Special Department for War Crimes (Bosnia)
SPSC	Special Panels for Serious Crimes (Timor Leste)
STL	Special Tribunal for Lebanon
TJRC	Truth, Justice and Reconciliation Commission (Kenya)
ToR	Terms of Reference
UN	United Nations
UNTAET	United Nations Transitional Administration in East Timor

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1. INTRODUCTION

This Report examines the prospects for a complementary accountability process to deal with the post-election violence (PEV) that took place in Kenya following the disputed presidential election in December 2007. Although government officials have long claimed that an accountability process is underway, more than four years after the violence took place, little effort has been made at the national level to address criminal accountability. This Report attempts to create a framework for constructing a legitimate and credible accountability mechanism.

It should be emphasised that ambitions to create a national/hybrid accountability process are disconnected from the ongoing International Criminal Court (ICC) cases. Contrary to mainstream debates in Kenya, a local accountability process should be seen as complementing the ongoing ICC cases, not as a means to “bring the ICC cases home,” as has been suggested by government officials and others.

Having examined the background to current debates about accountability in Kenya – including earlier attempts at providing for criminal justice at the national level and the current status of PEV cases – the Report examines the feasibility of the two options deemed most relevant by Kenyans for Peace with Truth and Justice (KPTJ), namely a Special Division of the High Court and a Special Tribunal. The current political climate is analysed, as are obstacles this is likely to cause for criminal prosecutions of the PEV cases. The ongoing reform process in the legal sector is also assessed with respect to whether it could promote or hamper the creation of a specialised mechanism to deal with the PEV. Finally, victims’ perceptions of justice are examined.

The Report next analyses legal issues pertaining to the creation and operation of an accountability mechanism for the PEV. Deciding the applicable legal framework for criminal prosecutions of the PEV is central – should the perpetrators of the violence be prosecuted for offences under domestic law and/or international law? Including international crimes in the applicable legal framework may be preferable, but the legality of prosecuting crimes that, when committed, were not recognised in

Kenyan law requires that attention be paid to various factors, including a possible duty in international law for states to prosecute international crimes, the relationship between domestic law and international law, and the nature and scope of the principle of legality and the prohibition of retroactive application of the law. Further, the Report analyses what, in legal terms, is required to set up either a Special Division of the High Court or a Special Tribunal as well as associated bodies, including specialised investigatory and prosecutorial units, and whether and how international staff could be included in these bodies. The Report also examines whether special procedures, for example with regard to victims’ participation, reparations and security, can be utilised in an accountability mechanism for the PEV.

To further lay the ground for the desired framework for a complementary accountability process, the Report analyses experiences from various other countries that have pursued criminal justice domestically or in a hybrid or internationalised justice mechanism in the context of dealing with an armed conflict or serious human rights violations. This includes a discussion of the International Crimes Division of the Ugandan High Court; the war crimes trials in the Democratic Republic of the Congo (DRC); the special war crimes chamber created in Bosnia and Herzegovina to deal with violations committed during the conflict of the 1990s; the Special Panels for Serious Crimes in Timor Leste; and the internationalised Special Court for Sierra Leone and Special Tribunal for Lebanon.

The Report proceeds to compare the two models perceived as most relevant in the Kenyan context – the Special Division of the High Court and the Special Tribunal. This involves a discussion of three major factors, namely: legitimacy and credibility; the ability to promote desired goals of criminal justice; and the feasibility of establishing each of these models.

Finally, the Report presents observations concerning how the desired accountability mechanism could be structured and operationalised and discusses the type of advocacy needed to promote the creation of a legitimate and credible accountability mechanism for Kenya’s PEV.

2. BACKGROUND TO THE REPORT

The adoption of a new Constitution in Kenya in 2010 was a significant milestone in Kenya's quest to strengthen the rule of law, democracy, human rights and accountable governance. But it is also critical to address the impunity gap. While the country is preoccupied with the cases at the ICC, criminal accountability for the majority of the perpetrators remains elusive.

The failure to effectively prosecute the PEV is symptomatic of a wider problem. Since 2009, various meetings involving civil society and other stakeholders have been held on domestic accountability for the PEV crimes. These discussions pointed to an array of challenges in Kenya's past and current efforts at achieving domestic accountability for crimes, but

did not identify an action plan towards a local justice mechanism for perpetrators of PEV crimes.

It is against this backdrop that on April 30, 2012 the KPTJ-ICC working group held a one-day workshop to discuss options for justice for the PEV. The meeting discussed the options of a Special Division of the High Court and a Special Tribunal. The meeting resulted in the development of an action plan to foster domestic criminal accountability in a manner consistent with Kenya's domestic and international legal obligations. The meeting also resulted in a consultant being tasked to review issues raised with regard to setting up an accountability mechanism and research best practices from other post-conflict states. This Report is an outcome of that process.

3. OBJECTIVES, TERMS OF REFERENCE (TOR) AND METHODOLOGY OF THE REPORT

The overall purpose of the Report is to examine what route is preferable for the establishment of a complementary accountability mechanism to deal with cases relating to the PEV. It covers two options, namely a Special Division of the High Court and a Special Tribunal.

According to the Terms of Reference (ToR), the Report must address the following:

Explore the factors likely to influence or impede a decision to set up a Special Division by:

- Assessing the feasibility of setting up a Special Division of the High Court within the current constitutional framework;
- Detailing the level of cooperation and involvement necessary from the Director of Public Prosecutions (DPP), the Chief Justice, the National Police Service, and the Witness Protection Agency to set up an independent and credible Special Division of the High Court to deal with the crimes associated with the 2007/8 PEV;

- Presenting findings on best practices on creating independent investigative and prosecutorial units in post-conflict countries with limited resources and little political will;
- Presenting a comparative analysis of judicial mechanisms set up by other post-conflict countries necessary to advise the structure, rules, practice and sustainability of an independent Special Division of the High Court (examples suggested are; the Uganda War Crimes Tribunal; the Special Court for Sierra Leone; and the Special Court for Lebanon);
- Presenting research on the legality of establishing specialised and independent investigative and prosecutorial units within a Special Division of the High Court;
- Developing, from best practice in international law and precedent, the special rules, practices and procedures necessary to prosecute perpetrators of the PEV within a Special Division of the High Court;

- Research the legality of establishing special rules of practice, procedure and evidence under the current judicial system (including the Judicature Act).

The report must also answer the following questions regarding the development of a Special Tribunal to deal with the 2007/8 PEV:

- Is it more feasible, considering the current political environment, to set up a Special Tribunal independent of the Judiciary with an Act of Parliament or a subordinate court if set up under Article 169(1) (d) read together with Article 169(2) of the Constitution?
- If set up as a subordinate court, what is required to ensure that the Tribunal shall be a self-contained process not subject to the appellate and revisionary powers of the superior courts?
- If a Special Tribunal is established as a subordinate court, how will the same contain independent investigative and prosecutorial units to ensure credibility? Can this be dealt with in an Act of Parliament or specialised rules of practice?
- Can a Special Tribunal handle matters exclusively handled by superior courts in practice? For instance, if a Special Tribunal is formed as a subordinate court, would it be able to handle matters such as murder which can only be handled by the High Court?
- How can the ongoing reform processes assist or hamper advocacy for a local judicial mechanism? Can these processes be utilised to the advantage of the working group? How can 'we' secure coherence with some of these ongoing processes (for example, the "5000 cases" currently being handled by the DPP)?
- Is it possible to secure international staffing for the Bench in a local judicial mechanism? Recruitment of judicial officers is spelt out in the Constitution of Kenya: can this process be ignored or amended to allow international judges and experts to form part of the local justice mechanism without these persons being subject to processes such as vetting by the Judicial Service Commission (JSC)?
- Since it is desired that the local justice mechanism shall have jurisdiction to prosecute both international and nationally crimes, can this be achieved by advocating

for two separate divisions within one mechanism? What is required?

- Can the application of international customary law to argue for prosecution of international crimes already recognised during the 2007/08 PEV period be challenged under Kenyan law?

This author of this Report assumes that KPTJ distinguishes between a Special Division of the High Court and a Special Tribunal on the basis that the first will operate *within* the Kenyan legal system while the latter is "special" in that it will be established and operate outside of the same. Accepting that the inside/outside distinction is important, it is not, however, clear precisely what it entails because measures can be taken to ensure a level of externalisation even if opting for the Special Division. Further, there are other factors to consider when establishing a hybrid accountability solution and the term "hybrid court" is far less generic than many suppose.¹ For example, the nature of a Special Tribunal depends on factors other than its externalisation from the Kenyan legal system, including whether it is set up by Kenyan law or by treaty. Additional factors include: what legal framework is utilised when prosecuting serious crimes (crimes under national law and/or crimes under international law); the level of international involvement and the question of ownership; and the question of how the Special Tribunal is funded.

While this Report is framed around the perception there are two different options for an accountability process to supplement the ongoing ICC cases, it also investigates the questions mentioned above.

The Report examines the legality of each of these solutions under the Kenyan Constitution, other legal issues pertaining to the set-up of a local accountability process as well as the feasibility of the two options to deal with the PEV, in light of the current political climate in Kenya. The Report then makes recommendations for advocacy on the same; including recommendations on how best an accountability mechanism could be put into place to supplement the ICC process and its set-up, operation and relationship to other judicial mechanisms.

¹ See further Neha Jain, "Conceptualising Internationalisation in Hybrid Criminal Courts," *Singapore Yearbook of International Law*, 2008, Vol 12, p 82-95.

Because the legal and socio-legal issues examined with regard to the two options – the Special Division and the Special Tribunal – are often similar, the Report discusses these issues in general, but with an eye to their impact on the feasibility and legality of the two options. Rather than following the order of questions raised in the ToR, it was deemed more appropriate to undertake a topic-based analysis, which integrates a discussion of the implications for the two options.

The Report therefore assesses the following questions of relevance to the task at hand:

- **Feasibility of a domestic/hybrid accountability process:** how does the current political environment affect the possibility of dealing domestically with PEV cases and the two suggested options for complementary accountability in particular?
- **Relationship to ongoing reform processes:** how could ongoing reform processes assist or hamper advocacy for a judicial mechanism to deal with the PEV, and how can coherence with ongoing processes, including the PEV cases currently under examination by the DPP, best be ensured?
- **Applicable legal framework:** can and should a domestic/ hybrid accountability process deal with international crimes, though these were not explicitly criminalised in Kenyan law at the time the crimes were committed?
- **Legality of creating a specialised mechanism for PEV cases:** what, if any, legal change is required to create an accountability mechanism to deal with PEV cases, including a Special Division of the High Court and a Special Tribunal (as well as the legal bodies associated with these two options)?
- **Internationalisation:** can and should internationals be involved in bodies associated with an accountability mechanism for PEV cases?
- **Special procedures:** can and should an accountability mechanism for the PEV utilise special procedures, for example with regard to victims’ participation, reparation and protection?

To contribute to an understanding of how a complementary accountability process in Kenya could best be set up, the Report offers a comparative analysis as to how other countries have created and operationalised accountability mechanisms to deal

with international crimes and/or serious human rights violations in:

- Uganda (International Crimes Division of the High Court)
- DRC (war crimes trials in different mechanisms)
- Bosnia and Herzegovina (War Crimes Chamber)
- Timor Leste (Special Panels for Serious Crimes)
- Sierra Leone (Special Court for Sierra Leone)
- Lebanon (Special Tribunal for Lebanon)

Based on the above, the Report undertakes comparative analysis of the two accountability mechanisms under consideration. It discusses pertinent legal and socio-legal issues including:

- Legitimacy and credibility, understood to depend on:
 - Respect for human rights, including fair trial standards;
 - Independence and impartiality;
 - Not being biased;
 - Local ownership and relevance to victims and other key audiences;
 - The ability to convict a fair number of the perpetrators of the crimes (both actual perpetrators and organisers and planners of the crimes); and
 - Competence and authority.
- Ability to promote desired goals of criminal justice, understood to involve:
 - Deterrence;
 - Retribution;
 - Expressivism;
 - Restorative justifications.
- Feasibility, with regard to:
 - Political will to enact necessary legislation
 - Challenges to operationalising the process
 - Funding opportunities.

The Report relies on various methodologies, including a desk review of relevant legal literature, legislation and consultations with (a limited number) of stakeholders with expertise on matters discussed in the Report.

The Report is the outcome of a ten-day consultancy. Research was undertaken from June 4-22, 2012. The limited timeframe meant that not all issues were given the level of detail which could be useful. Hence, the Report provides more of an initial framework for

continued discussion on how best a local accountability mechanism could be shaped, than a final and detailed solution to accountability for the PEV.

The present Report is accompanied by a policy brief highlighting the main findings and recommendations of the Report.

4. PAST ATTEMPTS AT PURSUING ACCOUNTABILITY FOR THE PEV AND THE CURRENT STATUS OF CASES

4.1. Earlier attempts at creating a domestic accountability mechanism

In the context of the African Union (AU)-led mediation process which ended the PEV through a power-sharing deal, the parties to the Kenyan National Dialogue and Reconciliation (KNDR) noted the importance of criminal justice to prevent political violence from recurring. The parties recognised their goal was the achievement of “sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.”² Reaching this goal, the parties stated, required “impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice.”³ The need to prosecute perpetrators of the PEV was further recognised in a public statement of the parties on February 14, 2008: to solve the political crisis surrounding the election violence, the parties agreed reconciliation and healing was imperative and required the “identification and prosecution of perpetrators of violence.”⁴

In this light, the parties to the KNDR created the Commission of Inquiry into the Post-Election Violence (CIPEV), mandated to investigate the PEV and make recommendations on how to prevent the recurrence of political violence, including recommendations with regard to prosecuting the organisers and perpetrators of the PEV.⁵ The CIPEV highlighted impunity as a cause of the election violence and recommended the establishment of a Special Tribunal with jurisdiction over the PEV and judicial staff made up of Kenyans as well as foreigners. The CIPEV envisaged that the main objective of the Special Tribunal would be to “seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the [PEV],” and suggested the Special Tribunal should apply Kenyan law as well as the “International Crimes Bill, once this is enacted.” The CIPEV’s Report requested the parties to agree on establishing a Special Tribunal and put forward a bill in Parliament. Failure to comply with this proposal within 60 days of the CIPEV’s report being made public would result in a list of names with high-profile Kenyans, which the CIPEV had found to be responsible for the violence, being handed over to the Prosecutor of the ICC.⁶

2 Kenya National Dialogue and Reconciliation, *Public statement*, Nairobi, February 1, 2008, <http://www.dialoguekenya.org/docs/Public%20Statement%20from%20Dialogue%20Feb%201%20FINAL.pdf>, preamble.

3 Kenya National Dialogue and Reconciliation, *Kenyan National Dialogue and Reconciliation: annotated agenda and timetable*, Nairobi, February 1, 2008, http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf, agenda 2.

4 Kenya National Dialogue and Reconciliation, *Agenda Item 3: how to solve the political crisis*, Nairobi, February 14, 2008, http://www.dialoguekenya.org/docs/14_Feb_08_TsavoAgreement.pdf, para 3.

5 Kenya National Dialogue and Reconciliation, *Commission of Inquiry on Post Election Violence, Agreement*, Nairobi, March 4, 2008, http://www.dialoguekenya.org/docs/Agreement_Commission_on_Post_Election_Violence.pdf.

6 Commission of Inquiry into the Post-Election Violence, *Report of the Commission of Inquiry into the Post-Election Violence*, 2008, p 472-475.

Since then, numerous attempts have been made to create a platform for domestic accountability, often half-hearted and, thus far, unsuccessful:

- In mid-2008, the newly appointed Minister of Internal Security, George Saitoti (now deceased), drew up a list of PEV cases to be treated with speed, and ordered the police to speed up investigations and prosecutions of remaining cases, particularly those related to capital and other serious offences, and directed the police to rank the cases according to their gravity so that suspects could be charged quickly. As of June 2008, 103 cases were described as "priority cases."⁷
- In June 2008, the Attorney General (AG) instructed the DPP to appoint a team of State Counsel to identify all PEV cases filed (their report has, however, never been acted on, according to Human Rights Watch).⁸
- In December 2008, Kenya enacted the International Crimes Act to domesticate the Rome Statute.⁹
- In December 2008, President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement stipulating that a Cabinet Committee would draft a bill on the Special Tribunal.¹⁰
- On February 12, 2009, the Constitution of Kenya amendment Bill, 2009, drafted by then Justice Minister Martha Karua in late January 2009,¹¹ was voted down by Parliament (101 voted in favour of the bill, while 93 voted against it, but the threshold of votes to amend the Constitution is two-thirds of the members of Parliament). Many parliamentarians who opposed the bill criticised it for failing to ensure the Special Tribunal's independence from

the Executive, some arguing that accountability for the PEV should instead be promoted through the ICC. Independent commentators criticised the Bill for being drafted with insufficient input from Kenyan civil society.¹²

- On July 30, 2009, the Cabinet rejected to table in Parliament a second bill on a Special Tribunal, drafted by then Justice Minister Mutula Kilonzo with input from civil society. The government issued a presidential statement saying that "the Cabinet on Thursday rejected a local Tribunal and instead settled on a Truth, Justice and Reconciliation Commission (TJRC) to deal with PEV perpetrators...this does not in any way reduce its desire to punish impunity."¹³
- On November 11, 2009, in another attempt to legislate a local Tribunal, the Constitutional Amendment bill, proposed by parliamentarian Gitobu Manyara, who had led opposition to the Karua bill, failed as quorum was not met in Parliament (only 18 out of 222 parliamentarians were present).¹⁴
- On December 15, 2010, immediately after the ICC Prosecutor announced the names of the six Kenyans he intended to prosecute for their alleged involvement in the PEV, President Kibaki stated that "the government is fully committed to the establishment of a local Tribunal to deal with those behind the PEV, in accordance with stipulations of the new Constitution."¹⁵ The statement was not followed by steps towards establishing a domestic accountability process. Instead, moves were made aimed at ending or postponing the ICC process.

7 Fred Mukinda, "Police Won't Free Suspects," *Daily Nation*, June 1, 2008, <http://allafrica.com/stories/200806010004.html>. See further Human Rights Watch, "Turning Pebbles: evading accountability for post-election violence in Kenya, December 2011, p 25-27.

8 Ibid, p 18.

9 The Act is available at http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf.

10 Government of Kenya, State House, "Special Tribunal to Be Set Up," Nairobi, December 17, 2008, <http://www.statehousekenya.go.ke/news/dec08/2008171202.htm>.

11 The Bill is available at [http://www.kenyalawreport.co.ke/Downloads/Bills/2009/The_Constitution_of_Kenya_\(Amendment\)_Act_2009.pdf](http://www.kenyalawreport.co.ke/Downloads/Bills/2009/The_Constitution_of_Kenya_(Amendment)_Act_2009.pdf).

12 See Human Rights Watch, *Kenya: Swiftly Enact Special Tribunal: International Criminal Court should be a last resort for justice*, March 25, 2009, <http://www.hrw.org/en/news/2009/03/24/kenya-swiftly-enact-special-tribunal>; Gitau Warigi, "Local tribunal or The Hague?" *Daily Nation*, January 31, 2009, <http://www.nation.co.ke/News/-/1056/522542/-/u1tuco/-/index.html>.

13 Government of Kenya, Office of Public Communications, "Cabinet Decides on TJRC," July 30, 2011, <http://www.communication.go.ke/media.asp?id=940> (accessed July 20, 2011).

14 The Bill is available at <http://gitobuimanyara.org/documents/newpage.html>. See also Human Rights Watch, "Turning Pebbles: evading accountability for post-election violence in Kenya, December 2011, p 24.

15 Republic of Kenya, Office of Public Communications, "Statement by His Excellency the President Hon Mwai Kibaki," December 15, 2011, <http://www.communication.go.ke/media.asp?id=1246>.

- On December 22, 2010, Parliament passed a motion requiring the government to take action to withdraw from the Rome Statute and repeal the International Crimes Act. In this context several parliamentarians called for the establishment of a domestic accountability process.¹⁶
- In mid-January 2011, the government announced that coalition partners had agreed to establish a Special Division of the High Court to try PEV cases.¹⁷ The announcement took place alongside diplomatic efforts to gather support for a United Nations (UN) Security Council deferral of the Kenyan ICC cases.
- On March 17, 2011 Police Spokesperson Eric Kiraithe said that PEV files had been prepared, implicating up to 6,000 individuals, and that the police was awaiting the establishment of a Special Tribunal or a Special Division of the High Court.¹⁸
- From February-May 2011 – in the run-up to the ICC suspects' first appearance in The Hague in April 2011 – several politicians again proposed that a local accountability mechanism should be created. Rather than viewing a local accountability solution as complementing the ICC process and necessary in its own right, most politicians debated domestic trials as being necessary to eliminate ICC intervention and "bring the cases home".¹⁹
- By July 2011, the police had stated that it had opened files and had been questioning (some of) the ICC suspects in connection with their alleged involvement in the PEV.²⁰
- Following the January 2012 confirmation of charges for four of the ICC suspects (Francis Muthaura, Uhuru Kenyatta, William Ruto and Joshua Sang), the government again stated it wished to "bring the cases home."The government argued it would prosecute the ICC suspects in national courts, the East African Court of Justice (EACJ) and the African Court of Justice and Human Rights. However, the Rome Statute does not provide for transferring cases to a regional criminal court and the government's admissibility challenge under Article 19(2) of the Rome Statute had already been rejected by the ICC's Pre-Trial Chamber II as well as the Appeals Chamber, which meant that only in "exceptional circumstances" could the ICC grant leave to the government to bring forward another admissibility challenge.²¹
- On February 6, 2012, the multi-agency taskforce established by the DPP (Gazette Notice of April 20, 2011) became operational. The taskforce, which has 20 staff members and a lifespan of six months, is mandated to review PEV cases and make recommendations to the DPP on how to deal with them.

16 Kenya National Assembly, Motions 2010, Motion No 144, adopted on December 22, 2012. The Motion reads: "THAT, aware that Kenya promulgated a new Constitution on 27th August, 2010 which has had fundamental changes in circumstances upon which several statutes had been enacted in the past including the International Crimes Act which domesticates the Rome Statute, this House resolves that the Government takes immediate action to have the International Crimes Act repealed and further that the Government takes appropriate action to withdraw from the Rome Statute pursuant to Articles 127, 19, and 17 of the Rome Statute as read together with the principle of complementarity emphasised at Paragraph 10 of the Preamble to the Rome Statute and further that any criminal investigations or prosecutions arising out of the post election violence of 2007/2008 be undertaken under the framework of the new Constitution."

17 Bernard Namunane, "Kenya seeks Africa support over Hague," *Daily Nation*, January 12, 2011, <http://www.nation.co.ke/News/politics/Kenya%20seeks%20Africa%20support%20over%20Hague%20-/-1064/1088748/-/lwq8dgz/-/index.html>.

18 Fred Mukinda, "6,000 could be charged over Kenya Poll Chaos," *Daily Nation*, March 17, 2011, <http://www.nation.co.ke/News/politics/6000+could+be+charged+over+poll+chaos+/-/1064/1128278/-/91n68/-/index.html>.

19 In late March, 2011, for example, Justice Minister Kilonzo noted: "I wish to reiterate my long held position that the best way to avoid the ICC is to establish as quickly as possible credible institutions as envisaged by the Rome Statutes to handle the suspects," See Peter Leftie, "Kilonzo: Time running out for Ocampo Six," *Daily Nation*, March 24, 2011, <http://www.nation.co.ke/News/politics/-/1064/1132246/-/7q6s8n/-/index.html>. Further in April, 2011, Attorney-General Amos Wako wrote to Police Commissioner Matthew Iteere directing him to include the suspects in the investigations (the letter is forwarded to the ICC in the context of Kenya's admissibility challenge). See Bernard Namunane, "Wako Orders the Police to Probe the Ocampo Six," *Daily Nation*, April 26, 2011, <http://www.nation.co.ke/News/politics/Wako+orders+police+to+probe+the+Ocampo+Six+/-/1064/1151428/-/jkl0ym/-/index.html>.

20 Oliver Mathienge, "Police quiz Ocampo Six in violence probe," *Daily Nation*, July 24, 2011, <http://www.nation.co.ke/News/politics/Police+quiz+Ocampo+Six+in+violence+probe+/-/1064/1207044/-/cwahfbz/-/index.html>.

21 See further Thomas Obel Hansen, "Masters of Manipulation: how the Kenyan government is paving the way for non-cooperation with the ICC," *OpenDemocracy*, May 2012, <http://www.opendemocracy.net/opensecurity/thomas-obel-hansen/masters-of-manipulation-how-kenyan-government-is-paving-way-for-non->.

In sum, the government has continually argued that a domestic accountability process is underway, but no judicial mechanism with a special mandate to try PEV cases has yet been established. And, as shown below in Section 4.2, the criminal justice system has had limited success prosecuting and convicting perpetrators of PEV crimes.

4.2. Current status of PEV cases

Despite numerous claims made by various government officials that a domestic accountability process is in progress, there has been almost no accountability for PEV crimes and steps taken by legal sector bodies to promote prosecution of PEV cases have tended to be flawed and half-hearted. At present, there appears to be no feasible and credible plan on dealing with the files and cases relating to the PEV.

In its admissibility challenge of the ICC cases of March 31, 2011, the government argued that ongoing judicial reforms meant that “national courts will now be capable of trying crimes from the PEV, including the ICC cases, without the need for legislation to create a Special Tribunal, thus overcoming a hurdle previously a major stumbling block.”²² At the same time, the government argued that national proceedings were already ongoing. The government stated that “in Kenya to date there have been investigations and prosecutions mostly of low level offenders involved in the 2007/8 violence,” and proceedings would soon “reach up to those at the highest levels who may have been responsible.”²³

In its appeal of the ICC’s Pre-Trial Chamber II’s decision to reject the admissibility challenge, the government

seemed to change its position, arguing that national proceedings with regard to high-level perpetrators, including the six ICC suspects, were already ongoing. To support this claim, the government submitted information indicating the investigatory steps made. As noted by dissenting Appeals Chamber Judge Anita Ušacka, the material that Kenya submitted “contained specific information as to the investigations that were carried out by Kenya,” including information that indicated that a case file had been opened on one of the ICC suspects, Ruto.²⁴ Specifically, the information provided by Kenya “referred to him as ‘suspect’, indicated his case file number, and stated where the case was pending.”²⁵ It also contained information indicating “the scope of the investigations and the allegations against Mr Ruto, including the location and time of the alleged criminal conduct.”²⁶ As further noted by the dissenting judge, the government provided information indicating that “orders had been given, apparently by the authorities in charge, to start investigations against the other five persons under investigation by the Court.”²⁷

However, investigatory steps taken against the ICC suspects appear to have been formalistic and apparently ended once the ICC Appeals Chamber ruled that Pre-Trial Chamber II had not erred in rejecting the government’s admissibility challenge. The police stated in July 2011 (before the Appeals Chamber delivered its ruling in August 2011) that it had opened files and been questioning (some of) the ICC suspects in connection to PEV,²⁸ but there are no indications that national proceedings against the ICC suspects are ongoing.

With regard to other perpetrators of the PEV, the police have consistently claimed a large number of cases are being prepared for prosecution. In March 2011, Kirai the

22 ICC, Pre-Trial Chamber II, Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute, ICC-01/09-01/11, March 31, 2011, para 2.

23 Ibid, para 71.

24 ICC, Pre-Trial Chamber II, Dissenting Opinion of Judge Anita Ušacka to AC Decision of 30 August, PNU Case, para 8 (and similarly Dissenting Opinion of Judge Anita Ušacka to AC Decision of 30 August, ODM Case, para 8).

25 Ibid.

26 Ibid.

27 Ibid.

28 Oliver Mathienge, “Police quiz Ocampo Six in Violence Probe,” *Daily Nation*, July 24, 2011, <http://www.nation.co.ke/News/politics/Police+quiz+Ocampo+Six+in+violence+probe+/-/1064/1207044/-/cwhafbz/-/index.html>.

stated that: “we’ve a lot of evidence and it has always been updated. The cases have been pending because the prosecutions are supposed be done by a Special Tribunal, as recommended in the Waki report”. The Police Spokesperson also indicated that, since January 2011, there had been increased police activity in areas worst-affected by the PEV, with the aim of reviving cases that otherwise had “become cold” and that detectives were reconstructing files relating to murder, rape and arson and other serious offences, involving around 6,000 suspects, originally opened at individual police stations.²⁹

Furthermore, in a March 2011 progress report, forwarded to the ICC in connection with the admissibility challenge, the DPP stated that almost 3,400 cases were “pending under investigation,” the majority of them in the Rift Valley.³⁰ The DPP also claimed that there had been 94 convictions for PEV related crimes, while 57 cases had led to acquittals, 179 had been withdrawn, 21 were pending arrest of known persons and 62 were pending before the Courts.³¹ However, a Human Rights Watch report of December 2011 on progress of domestic accountability concluded the DPP’s report appeared to have been “compiled hastily, with little concern for accuracy,” noting that “a number of cases included in the report have nothing to do with the election violence” and “[t]he actual number of known PEV convictions is significantly lower than the report indicated.”³² Human Rights Watch showed that many of the claimed convictions for PEV were in fact acquittals, unrelated to

the PEV or for minor offences, such as “taking part in a riot” or “handling stolen property.”³³

Of the 47 cases related to the PEV that Human Rights Watch found to have reached the courts – many of them high-profile cases and cases involving serious crimes – only eight had resulted in convictions.³⁴

Human Rights Watch also observed that, of the PEV cases brought to court, none involved local politicians who allegedly incited the violence, and none related to the police violence that took place during 2007/8.³⁵ Concerning priority cases created in 2008, Human Rights Watch found that they had not usually resulted in convictions, though there was been one minor assault conviction linked to the killing of Hassan Omar Dado, a suspect convicted of manslaughter in the killing of David Too and a number of convictions for the murder of police officers in Bureti.³⁶

Human Rights Watch further observed that a few PEV cases were pending before court in 2011, including two murder cases and one rape case (although there may be other pending cases in areas Human Rights Watch did not conduct research).³⁷

Progress has since been made with some of these cases. For example, Peter Kepkemboi was recently convicted for murder before the Nakuru High Court (for shooting Kamau Kimani Thiongo, a Gikuyu, in the head with an arrow) and sentenced to life.³⁸

29 Fred Mukinda, “6,000 could be charged over Kenya Poll Chaos,” *Daily Nation*, March 17, 2011, <http://www.nation.co.ke/News/politics/6000+could+be+charged+over+poll+chaos+/-/1064/1128278/-/91n68/-/index.html>.

30 Government of Kenya, “A Progress Report to the Hon Attorney General 2011,” March 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1062628.pdf>, pp. 70-72. See further Human Rights Watch, *Kenya: Swiftly enact Special Tribunal: International Criminal Courts should be a last resort for justice*, March 25, 2009, <http://www.hrw.org/en/news/2009/03/24/kenya-swiftly-enact-special-tribunal>, p 25-27.

31 Ibid.

32 Human Rights Watch, *Kenya: Swiftly enact Special Tribunal: International Criminal Courts should be a last resort for justice*, March 25, 2009, <http://www.hrw.org/en/news/2009/03/24/kenya-swiftly-enact-special-tribunal>, p 25-27.

33 Ibid.

34 Human Rights Watch, *Kenya: Swiftly enact Special Tribunal: International Criminal Courts should be a last resort for justice*, March 25, 2009, <http://www.hrw.org/en/news/2009/03/24/kenya-swiftly-enact-special-tribunal>, p 29-42; 45-46.

35 Ibid, p 4, 29.

36 Ibid, p 18.

37 Human Rights Watch, *Kenya: Swiftly enact Special Tribunal: International Criminal Courts should be a last resort for justice*, March 25, 2009, <http://www.hrw.org/en/news/2009/03/24/kenya-swiftly-enact-special-tribunal>, p 42.

38 Phone interview with Nyakundi of the State Counsel’s office in Nakuru, June 18, 2012.

Despite what appeared to be compelling evidence, there have been acquittals in several prominent cases. In an April 2011 monitoring report by South Consulting, it was noted:

*Suspects charged with the infamous arson attack on the Kiambaa church in Eldoret were acquitted in April 2009 for lack of evidence. A police officer caught on camera shooting protesters to death was also acquitted in June 2010 for want of proper investigation and prosecution. The fate of the cases that have gone to court, and the numerous others that have not, is a sufficient pointer to lack of political will and adequate capacity to conduct investigations to support successful prosecutions.*³⁹

The report further stated:

*Out of the hundreds of homicides committed during the post-election period, only a few headline cases have gone to court and all of them been dismissed because the investigations were poor or insufficient and the prosecution unconvincing. Three years since the Commission made its recommendations; no concrete action has been taken to effect its recommendations to overhaul the police service, set up an independent prosecutorial service, and bring those officers within its ranks who were responsible for specific crimes during the post-election violence to justice.*⁴⁰

Currently, a multi-agency taskforce has been set up by the DPP to review PEV files. At a meeting in Naivasha on June 12, 2012 hosted by the International Commission of Jurists (ICJ)-Kenya, members of the task-force made a presentation, offering an update on progress made. According to the members, the taskforce – which consists of 20 staff members from the DPP, the State Law Office, the Ministry of Justice, the National Police Service and the Witness Protection Unit – has reviewed the first of three batches of PEV cases, amounting to around 1,400 files, and made recommendations to the DPP on how to process these files. The remaining files, approximately 4,500, are either still with relevant police stations, or have been handed over to the taskforce, awaiting its review. According to the presenters, crimes mentioned in the files involve, among others, murder, arson, housebreaking, burglary, theft and sexual offences. When asked whether the files pointed to the

commission of international crimes, the presenters explained they would not rule out the possibility that such a conclusion could eventually be made, but at present the focus was on domestic offences. The presenters mentioned locations covered by the files, but it was not clear whether all police stations were cooperating with the taskforce. The presenters noted that many of the files were of poor quality, some still pending investigation, and implied that in many cases it would prove difficult to obtain convictions. When asked what types of perpetrators were likely to be prosecuted, the presenters noted that “the kind of perpetrators [to be prosecuted] depends on the files,” which would imply that only perpetrators of crimes, and not those who planned or organised the crimes would be prosecuted should progress be made on the basis of the work of the taskforce. The presenters further explained that the taskforce had not (yet) established a mechanism for offering feedback to the complainants.

The picture that emerged from the presentation, and the participants’ interactions with the presenters, was that efforts of the taskforce will, at best, lead to a limited number of trials of perpetrators of ordinary crimes under Kenyan law (but not, in all probability, planners and organisers of the violence).

4.3. Relevance

Although a few cases relating to the PEV have led to convictions, the majority of offences committed in 2007/8 are yet to be prosecuted. A large number of files have, according to the police and the DPP, been prepared but it seems unlikely that current efforts under the DPP taskforce will lead to systematic and credible processing of these cases, especially with regard to high-level perpetrators and police violence.

The existence of a large number of files relating to the PEV is, in principle, positive for pursuing accountability either within a Special Division or a Special Tribunal. But there are problems with relying on these files to pursue accountability.

³⁹ South Consulting, *The Kenya National Dialogue and Reconciliation Monitoring Project (draft Review Report)*, April 2011, p 21.

⁴⁰ *Ibid*, p 24.

Past attempts at relying on these files reveal that investigations carried out tended to be of such poor quality that it would not make sense to bring charges against suspects, or they would lead to acquittals. In addition, limited, or no, investigations were carried out in 2008 after suspects had been arrested.⁴¹ It is likely to be complicated and, in many cases, impossible to gather new evidence at present, more than four years after the PEV: many witnesses relocated in 2008; those witnesses that can be identified and located may, for various reasons, be unwilling to testify at present; and

other forms of evidence, such as weapons used in the attacks, will likely have disappeared.

Despite these challenges, existing files must be used as a starting point for accountability. There seems to be no alternative. As a first step, an assessment and evaluation of current files, according to their level of evidence, could be carried out under the auspices of the DPP's taskforce. This could offer the foundation for additional investigations to be carried out later by experienced and well-trained investigators.

5. GENERAL FACTORS RELEVANT TO CREATING A COMPLEMENTARY ACCOUNTABILITY MECHANISM

5.1. Victims' perceptions of accountability

The Report benefits from a brief analysis of victims' perceptions of accountability.

While the level of popular support for the ongoing ICC process has consistently been monitored, only a limited number of studies assess victims' preferences for types and modalities of justice, including preferences with regard to a domestic accountability process. However, in July 2011, the International Centre for Transitional Justice (ICTJ) published a report, entitled "To Live as Other Kenyans Do: a study of the reparative demands of Kenyan victims of human rights violations," which makes observations concerning victims' attitudes towards accountability and transitional justice, in particular, reparations. The study, based on interviews and consultations with 376 victims of a range of human

rights violations (not limited to the PEV) across the country, notes that victims tend to prioritise economic compensation for violations.

Asked what action they sought from the authorities in light of the violation they experienced, 56 per cent of those consulted by ICTJ indicated they prioritise "compensation/economic support"; 34 per cent prioritise "resettlement/housing"; 33 per cent prioritise "access to land"; 20 per cent prioritise a "judicial process"; 19 per cent prioritise "recognition/acknowledgement"; 15 per cent prioritise "livelihood"; eight per cent prioritise "peace/security"; and five per cent prioritise "medical support."⁴²

However, asked what they understood by "justice," victims interviewed emphasised criminal justice: 49 per cent stated "prosecution"; 21 per cent "compensation"; 13 per cent "return of land and property; and 11 per cent "livelihood."⁴³

41 Human Rights Watch, "Turning Pebbles: evading accountability for post-election violence in Kenya, December 2011, p 45.

42 International Centre for Transitional Justice, "To Live as Other Kenyans Do": a study of the reparative demands of Kenyan victims of human rights violations, July 2011, p 21.

43 Ibid., p 51.

When asked whether anyone should be prosecuted for the violations they had suffered, 82 per cent of victims consulted by ICTJ supported criminal prosecutions.⁴⁴ When asked who should be prosecuted, 25 per cent mentioned direct perpetrators, 30 per cent mentioned ringleaders, while 27 per cent wanted both perpetrators and planners or organisers prosecuted.⁴⁵ Victims who stated they oppose criminal justice typically made reference to religious motivations for forgiveness or said that “punishing the most senior perpetrators is simply not possible,” that prosecutions will “propagate further hatred and encourage revenge,” and that “even when someone is punished, this fails to aid victims.”⁴⁶

The study concluded that internally displaced persons (IDPs) and victims of the PEV “were highly aware that violence is cyclic and made a direct link between the level of security they feel they will enjoy in their communities in the run-up to the 2012 election and the prosecution of the perpetrators, most importantly the ringleaders, of the 2007/8 violence.”⁴⁷ The study also concluded many “victims saw prosecutions as a reparative measure, because they are perceived to have a direct impact on the potential for repetition of violations, improving security, and the possibility of living in peace.”⁴⁸

Importantly, while most victims of the PEV supported the ongoing ICC process, the majority of the victims did not believe that criminal trials for the PEV would ever take place in Kenya or thought that such a process would be flawed (82 per cent of victims consulted did not trust a Kenyan judicial process to deal with the PEV).⁴⁹

However, victims’ stated support for the ICC process and reluctance about a domestic accountability process is likely influenced by dominant discourse in Kenya, driven by politicians, under which local trials have tended to be portrayed as an alternative, rather than complementary, to the ICC trials. The results of the survey with regard to a domestic accountability process may have been

different had victims not been influenced by a debate that presupposes that local trials are a means of eliminating ICC trials.

5.2. Political environment and other factors likely to impact the pursuit of accountability

Political environment

How does the current political environment affect the possibility of dealing domestically (or in a hybrid form) with the PEV cases?

Several factors in Kenya’s political environment complicate the pursuit of accountability at the national level (or in an internationalised/ hybrid mechanism).

The country is in the run-up to the General Elections. It is unlikely that politicians – even those who might otherwise support accountability for the PEV – will show dedication to accountability before next year’s General Election, for example, by passing required legislation. The election date is presently set for March 2013, but it is not impossible that this date could change. Uncertainty about the election date could further complicate pursuit of accountability, for example, because advocacy to create the necessary framework could be interrupted.

Besides a reluctance to focus on major national issues, including accountability, attention to succession politics also means the political climate has become more unstable: coalitions are being formed and abandoned with an intensification and ethnicisation of political debate. Usually this is for the worse: there is a focus on winning the elections, rather than substantial politics; politicians make serious, sometimes unfounded, accusations against each other; and ethnicity is at play, if not at a level comparable to the 2007 General Elections. The latter poses a risk to peaceful elections, but also

44 Ibid.

45 Ibid., p 52.

46 Ibid., p 53.

47 Ibid., p 52.

48 Ibid.

49 Ibid., p 53.

means that, even if a political debate about domestic accountability could be promoted, it could end up being framed within narrow succession discourse and manipulated as if criminal accountability is about targeting ethnic communities.⁵⁰

At the same time, resistance in the political leadership to accountability for the PEV is increasing. There are indications that the government will not cooperate with ICC and arrest and transfer the suspects to The Hague should they fail to appear voluntarily.⁵¹

In late March 2012, Justice Minister Kilonzo was transferred to the Ministry of Education, in what President Kibaki labelled a cabinet reshuffle. Kilonzo is arguably the only cabinet member who has openly and consistently supported the ICC process and in other ways showed commitment to accountability, for example, by calling for the removal of ICC suspects from their government posts. He was replaced by Eugene Wamalwa, a Sabaoti parliamentarian who is a member of the so-called G-7 coalition, formed by Kenyatta and Ruto as an alternative to Prime Minister Odinga's presidential bid and to work against the ICC. Combined with other ministerial removals and appointments, commentators agree the reshuffle favoured Kenyatta, who still serves as Deputy Prime Minister despite being suspected of committing crimes against humanity.⁵² This could be interpreted as if President Kibaki is laying the ground for a transfer of power to Kenyatta and creating a bulwark against cooperation with the ICC.

Further, some politicians have argued that the United Kingdom (UK) is plotting to have President Kibaki indicted by the ICC once he steps down following

the end of his second term. The claim, first made by parliamentarians Charles Kilonzo and Aden Duale, concerns an alleged leaked dossier that describes a plan to have the ICC indict President Kibaki and detain Kenyatta and Ruto in an effort to promote Prime Minister Odinga's political career. The British government has dismissed the claims, with the Interim High Commissioner noting that the "documents are not genuine. They are forgeries. The views expressed in them are light-years removed from the policy of the British Government. They do not in any way represent the views of the British Government."⁵³ Though the document's origin has not been established with certainty, the conclusion is that the incident is yet another attempt to portray the ICC as being a tool of foreign powers to control Kenya's political process. Such allegations aim to create resistance in the electorate to international justice and thus a popular basis for any future decision not to cooperate with the ICC.

Political manipulation of the ICC process also takes the form of misinformation about the Rome Statute and attempts to "ethnicise" the accountability process. Most recently, during a Rift Valley meeting in April 2012 in which about 20 MPs endorsed Ruto's presidential bid, a statement issued on behalf of the group by the then Kalenjin Council of Elders Chairman John Seii claimed "there is a clause [in the Rome Statute] that provides for deferral of ICC cases and we will marshal three million signatures to compel ICC to do so."⁵⁴ But this is wrong: the Rome Statute does not include such a provision. The call for a deferral was made alongside claims that more Kalenjins will be targeted by the ICC. Such statements could be interpreted as another attempt to build public support for a future decision on non-cooperation with the ICC.⁵⁵

50 See generally Thomas Obel Hansen, "Transitional Justice in Kenya? An assessment of the accountability process in light of domestic politics and security concerns," *California Western International Law Journal*, Vol 42, No 1, 2011, p 1-35.

51 See Thomas Obel Hansen, "Masters of Manipulation: how the Kenyan government is paving the way for non-cooperation with the ICC," *OpenDemocracy*, May 2012, <http://www.opendemocracy.net/opensecurity/thomas-obel-hansen/masters-of-manipulation-how-kenyan-government-is-paving-way-for-non->

52 Njeri Eugene and Emeka-Mayaka Gekara, "Kilonzo Transfer Linked to his Stand on Ocampo Four Cases," *Daily Nation*, March 27, 2012, <http://www.nation.co.ke/News/politics/Kilonzo+transfer+linked+to+his+stand+on+Ocampo+Four+cases+/-/1064/1375050/-/11gxvad/-/index.html>.

53 As cited in the *Daily Nation*, "UK Diplomat in Kenya over "Leaked" ICC Dossier," March 26, 2012, <http://www.nation.co.ke/News/politics/UK+Minister+in+Kenya+over++leaked++ICC+dossier/-/1064/1373832/-/t8ntcpz/-/index.html>.

54 Jonathan Komen, "ICC tops agenda at Rift leaders' meeting," *Daily Nation*, April 3, 2012, <http://www.nation.co.ke/News/politics/ICC+tops+agenda+at+Rift+leaders+meeting+/-/1064/1379642/-/1377fkq/-/index.html>.

55 Ibid.

It is also a matter of concern that the government, or segments therein, is seemingly committed to manipulating the debate about complementarity. Ideally, complementarity is about creating positive interactions between national and international accountability efforts. But the Kenyan leadership has instead tended to perceive in the principle a tool to undermine *any* form of accountability. Following the conformation of charges against the four suspects in late January this year, the government argued that the ICC cases will be simultaneously prosecuted in national courts, a modified version of the EACJ and the African Court.⁵⁶ However, the Rome Statute does not provide for the transfer or ongoing ICC cases to (sub)-regional criminal courts. Further, the government's admissibility challenge under Article 19(2) of the Rome Statute had already been rejected by the Pre-Trial Chamber II as well as the Appeals Chamber of the ICC. Thus, only in "exceptional circumstances" could the ICC grant leave for the government to bring another admissibility challenge.⁵⁷

Besides indicating that the government could be paving the way for non-cooperation with the ICC, these developments highlight how the accountability debate has been captured by the political leadership, the majority of whom are apparently opposed to any form of criminal justice for the PEV. This makes the pursuit of a credible accountability mechanism, complementary to the ICC process, difficult. Political support for such a mechanism is unlikely to emerge in the near future, and, if it does, the support is likely to be based on the perception the mechanism could be useful for undermining the ICC process, possibly taking the form of non-cooperation with the ICC.

Achieving political support for a constitutional amendment, necessary to establish a Special Tribunal (as discussed below in Section 6.2), will be near impossible prior to the General Elections. Though it is difficult to

predict political goodwill after the General Elections, chances may also be small that political support for a constitutional amendment will materialise then. Politicians have made it clear they are willing to amend the Constitution, but, perhaps unsurprisingly, questions related to a constitutional amendment tend to arise in contexts where the aim is to undermine the rule of law and strengthen the position of those in power, not to support accountability. Obtaining two-thirds of the votes in Parliament to create a Special Tribunal that would potentially prosecute some of those in power therefore seems almost impossible in the near future.

Achieving political will for a Special Division is, for several reasons, easier, albeit still challenging and requiring advocacy. As will be discussed in Section 6.2, creating a Special Division does not require an Act of Parliament, but to enhance its credibility, new legislation would be necessary. Some factors indicate this is a feasible objective in the current political environment. Importantly, the AG's working committee on the ICC proposed the government pursues accountability for the PEV within existing judicial structures. Although the committee did not explicitly propose the creation of a Special Division of the High Court (but rather noted the "existing court system under the new Constitution is able to try such cases although its capacity needs to be enhanced to try such cases"),⁵⁸ the committee's commitment to prosecuting the PEV cases within existing judicial structures could possibly enable the necessary political and/or institutional support for the same. Further, some government officials and political leaders have recently restated their commitment to establishing a domestic accountability process. Notwithstanding that the objectives of such statements may be to undermine the ICC process, they are nonetheless useful for advocating for a Special Division and adoption of the necessary legal framework to make this a credible accountability solution.

⁵⁶ See further Thomas Obel Hansen, "Masters of Manipulation: how the Kenyan government is paving the way for non-cooperation with the ICC," *OpenDemocracy*, May 2012, <http://www.opendemocracy.net/opensecurity/thomas-obel-hansen/masters-of-manipulation-how-kenyan-government-is-paving-way-for-non->

⁵⁷ *Ibid.*

⁵⁸ Government of Kenya (AG), Committee on the International Criminal Court, March 16, 2012 (on file with author), para 82.

Should a domestic/hybrid accountability mechanism be put in place, the most obvious danger posed by the present political environment is that government officials will take steps to undermine its credibility and/or that it will be used as a justification for non-cooperation with the ICC. To forestall this, safeguards discussed elsewhere in this Report must be put in place, though it cannot be guaranteed that these will be sufficient to counter political pressure. Further, it should be emphasised that a domestic/hybrid accountability mechanism does not aim at ending ICC intervention, but rather to complement the ongoing ICC process to avoid becoming complicit in the effort to end the ICC's intervention.

The reform process

How do the ongoing reform processes assist or hamper advocacy for a local judicial mechanism and how can these processes be utilised to best advantage?

With the passing of the Judicial Service Act, the Vetting of Judges and Magistrates Act, the Supreme Court Act and other judicial reforms in 2011, the institutional framework for a reformed judiciary is now largely in place.⁵⁹ There are a number of positive signs these institutional changes will create a Judiciary that takes its task seriously and acts independently from the other branches of government.⁶⁰

Nonetheless, there are also indications that judicial independence may remain constrained. In particular, there is still a perception among some politicians and government officials that the Judiciary is subordinate to the Executive. For example, in December 2011, government officials indicated they have no intention of complying with a landmark decision by the High Court, according to which the government of Kenya is obliged to arrest Sudan's President Omar al-Bashir, against whom the ICC has issued an arrest warrant, should he again set foot in Kenya.⁶¹ On a positive note, some parliamentarians spoke out against such interference with the Judiciary's independence⁶² and the Court of Appeal resisted political pressure when it confirmed the High Court's ruling.⁶³ It is also positive that a vetting panel has been set up to determine the integrity of judges and decide whether they should continue to hold office.⁶⁴

The institutional strengthening of the Judiciary and the vetting process should be seen as pre-conditions for pursuing accountability for the PEV within existing structures. However, true judicial independence is not achieved overnight in a context such as Kenya's, where parts of the political leadership and some government officials have an interest in maintaining impunity.

59 The Judicial Service Act establishes the mandate and membership of the Judicial Service Commission, creates a Judiciary Fund, and regulates appointment and removal of judges, among other things. The Vetting of Judges and Magistrates Act requires that judges and magistrates be vetted to establish their suitability to continue serving in the judiciary on the basis of their academic qualifications, professional competence, integrity, and other criteria. The Supreme Court Act establishes the Supreme Court as the highest court in the country. These acts are available at: <http://www.kenyalaw.org/klr/index.php?id=7>.

60 Mutua, "Revelations from Mutunga's first 100 days," *Daily Nation*, October 8, 2011, <http://www.nation.co.ke/oped/Opinion/Revelations+from+Mutungas+first+100+days+/-/440808/1252024/-/rpxab/-/index.html>; Willy Mutunga, "Critical reforms taking root in the judiciary," *Daily Nation*, August 20, 2011, <http://www.nation.co.ke/oped/Opinion/Critical+reforms+taking+root+in+the+Judiciary+/-/440808/1222610/-/bxfnz/-/index.html>; Muindi, "Kenya Supreme Court finally gets down to work," *Daily Nation*, August 26, 2011, <http://www.nation.co.ke/News/politics/Kenya+finally+gets+Supreme+Court/-/1064/1225484/-/item/0/-/ldao25z/-/index.html>

61 Foreign minister Moses Wetang'ula stated that it was "a judgement incapable of obedience." See National Assembly, *Official Report*, December 6, 2011, https://docs.google.com/viewer?a=v&q=cache:pqn_dNiTgYJ:www.parliament.go.ke/index.php?option%3Dcom_docman%26task%3Ddoc_download%26gid%3D1555%26Itemid%3D+&hl=da&pid=bl&srcid=ADGEEShrRy8J_hysEKzrImK1P7XVpDO1VeUZqqCHduSNrGaEr6a-5_OZqHpM1omK61qYif8cmfDLLzvKyiMAexEh8n4HrtnP_ZImNK67H_asih_xM0PV-c8_w-Olyxi7OByQHt5jUzdx&sig=AHIEtbQVORCv_8gfaTRWv6MMxePM648dyw&pli=1, 15.

62 Ibid.

63 Chepkemei, "Court Declines to Suspend Bashir Warrant," *Daily Nation*, December 20, 2011, <http://www.nation.co.ke/News/politics/Court+declines+to+suspend+Bashir+warrant+/-/1064/1292740/-/jyx6t3/-/index.html>.

64 E Gekara, "Judges Restless Ahead of Vetting," *Daily Nation*, December 18, 2011. See also Paul Juma, "Why Judges Afraid of Vetting," *Daily Nation*, June 14, 2012, <http://www.nation.co.ke/News/Why+judges+are+afraid+of+vetting+/-/1056/1427010/-/1102elu/-/index.html>.

Though the new Constitution also subjects state actors, including the police, to different reforms little progress has been made. If other government institutions have not yet been reformed and remain reluctant or opposed to accountability for the PEV, the Judiciary would face a difficult task when dealing with PEV cases.

In conclusion, the reform process presents an opportunity to rely on Kenya's Judiciary in pursuing accountability for the PEV. If managed well, this could further contribute to judicial independence and

build trust in the Judiciary. However, institutional strengthening of the Judiciary is not sufficient to ensure that PEV cases are handled in a credible manner within existing judicial structures. The Judiciary remains dependent on the commitment and competence of other state actors, including a largely unreformed Police and the DPP. This would seem to favour a Special Tribunal solution, which operates outside structures of the current legal system. However, as discussed below, it may be possible to adopt measures which could safeguard a Special Division solution against problems associated with these other state actors.

6. LEGAL ISSUES PERTAINING TO THE CREATION AND OPERATION OF AN ACCOUNTABILITY MECHANISM

6.1. Can and should an accountability mechanism set up to deal with the PEV cases prosecute international crimes and/or crimes under Kenyan law?

Merits and challenges of prosecuting international crimes

Can international crimes, as recognised in customary international law, committed in 2007/8 be prosecuted in a local accountability process? It is desirable for a domestic accountability mechanism to prosecute both international and nationally-recognised crimes given that international crimes – more specifically, crimes against humanity – were committed in 2007/8.

There are several benefits of prosecuting crimes against humanity, as opposed to murder, rape and other equivalent crimes under domestic law. First, prosecuting only crimes recognised in national law is less likely to lead to trials of those who planned and organised the PEV. Though planning and organising violence is also an offence under domestic law, prosecuting international crimes, including crimes against humanity, would lead

to a focus on the systematic nature of the violence (due to the components of this crime, as discussed elsewhere in this Report) and thus high-level perpetrators. Secondly, prosecuting crimes under national law alone would likely exclude prosecution of deportation and other objective elements of crimes against humanity, which are not explicitly criminalised under domestic law. Finally, prosecuting international crimes would allow for a more thorough account of how PEV crimes were organised and planned, which is important from the perspective of creating a historical narrative of the PEV and deterrence.

However, prosecuting international crimes in domestic accountability mechanisms can also be controversial, especially to the extent these crimes were not recognised in national law at the point where they were committed. In Rwanda, for example, the first law adopted to deal with the 1994 Rwandan genocide – Organic Law Number 08/96 of August 30, 1996 as well as Organic Law Number 40/2000 of January 26, 2001, which established the Gacaca Courts – required the acts committed to be doubly prohibited, both by the Rwandan Penal Code and the Organic Law which made reference to international law. This was thought to avoid allegations of retroactivity and a violation of the principle of *nulla poena sine lege*. The reasoning stood

as follows: the 1977 Rwandan Penal Code incriminated acts equivalent to genocide or crimes against humanity, but under different appellations, and with no specific penalties spelt out. Thus, punishing such acts with sentences provided for in the Penal Code would suffice to counter retroactivity. Analysing this, Jacques Fierens has stated: “the argument’s weakness is immediately apparent. Applying penalties from the Penal Code to acts prohibited elsewhere than in the Code bears more resemblance to legalistic block-building than respect for the principle of non-retroactivity.⁶⁵ A genocide or crime against humanity does not contain the same acts as those laid out in the Penal Code.⁶⁶ Though these objections were not brought before a Rwandan court, this indicates how prosecuting international crimes at the national level can be controversial.

Definition of international crimes

The question of whether an accountability mechanism for the PEV can and should prosecute international crimes committed in 2007/8 must be examined in light of: 1) rules in international law concerning a possible duty to prosecute international crimes; 2) the principle of prohibition of retroactive application of the law, as stipulated for example Article 7(2) of the African Charter on Human and People’s Rights and Article 11(2) of the Universal Declaration of Human Rights as well as Kenyan law; and 3) rules in the Kenyan Constitution concerning the relationship between international and national law and other domestic law issues.

But it is first necessary to explain what is understood by international crimes. Antonio Cassese defines international crimes as “breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs).⁶⁷ Cassese further notes international crimes cumulatively

embrace: 1) violations of international customary rules (as well as treaty provisions, where such provisions exist and either codify or spell out customary law or have contributed to its formation); 2) rules intended to protect values considered important by the whole international community and consequently binding all states and individuals; 3) where there is a universal interest in repressing these crimes and they may thus, in principle, be prosecuted and punished by any state, regardless of any territorial or nationality link with the perpetrator or the victim; and 4) when the state on whose behalf the perpetrator may have acted is barred from claiming enjoyment of immunity from the civil or criminal jurisdiction of foreign states, although serving Heads of States, foreign ministers and diplomatic agents enjoy personal immunity under customary law.⁶⁸

According to this definition, international crimes encompass the following crimes: 1) war crimes; 2) crimes against humanity; 3) genocide; 4) torture; 5) aggression; and 6) some forms of terrorism.⁶⁹ In other words, international crimes under customary international law has a broader scope than the Rome Statute, which grants the ICC jurisdiction only over war crimes, crimes against humanity, genocide and (though not yet) the crime of aggression. Further, as discussed below, the definitions of international crimes in customary international law are not identical to the Rome Statute’s definitions.

Importantly, the rule proscribing crimes against humanity in customary international law is arguably different from the definition under the Rome Statute. Some scholars claim customary international law requires the existence of a *state policy* to commit the objective elements of the crimes, as opposed to the Rome Statute, which either requires the existence of a state or an organisational policy (Art. 7(2)(a)).⁷⁰ In contrast, based on an assessment of jurisprudence of ad hoc tribunals, the author of this Report has argued customary law,

65 Jacques, Fierens, “Gacaca Courts: between fantasy and reality,” *Journal of International Criminal Justice*, Vol 3, 2005, p 896-919.

66 Ibid

67 Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p 23.

68 Ibid, p 23.

69 Ibid, p 24-25.

70 See further Thomas Obel Hansen, “The Policy Requirement in Crimes against Humanity: lessons from and for the case of Kenya,” *George Washington International Law Review*, Vol 43, No 1, 2011, p 1-42.

at present, does not appear to entail a policy requirement (whether created by the state or other entities), but only requires the existence of a widespread or systematic attack.⁷¹ Depending on the interpretation endorsed by a potential accountability mechanism in Kenya, it could prove difficult to prosecute actors for crimes against humanity to the extent they did not act in furtherance of a state policy, the existence of which has never been argued by the ICC prosecutor with regard to Kenyan cases.⁷² However, as noted below this problem could be remedied by relying on Kenya's International Crimes Act.

While all states in principle have the *right* to prosecute international crimes regardless of the nationality of the perpetrator and the victim and where the crimes were committed, it remains disputed whether, or under what conditions, states have a *duty* to prosecute these crimes. In other words, does international law lay down a requirement for states to prosecute international crimes, including crimes against humanity?

A duty to prosecute international crimes?

Human rights organisations, such as Amnesty International and Human Rights Watch, have long claimed that international law – treaty as well as customary – does entail a duty to prosecute international crimes.⁷³ Several scholars have also claimed international law obliges states to prosecute (certain) international crimes. In an influential study of 1991, Diane Orentlicher found states that had adhered to certain human rights treaties were generally required to ensure criminal proceedings were instituted against

those suspected of specified violations of human rights, such as genocide and torture. As for customary international law, Orentlicher held that states' general obligation to ensure the enjoyment of fundamental rights was incompatible with impunity for atrocious crimes but did not require prosecution of every offense. With regard to crimes against humanity, Orentlicher noted international customary law must be interpreted "to require, and not merely to authorise, states to punish crimes against humanity when committed in their own jurisdiction."⁷⁴

Other scholars, however, ascertain customary international law does not lay down an obligation to prosecute and punish international crimes. Cassese, for example, notes: "state practice shows that there are no international *customary* rules endowed with a *general scope* (that is, concerning all international crimes) that oblige states to exercise jurisdiction on any [grounds]."⁷⁵ Though Cassese observes that, with regard to the "most odious international crimes, such as genocide and crimes against humanity, there exists a general obligation of international co-operation for their prevention and punishment," he concludes this does not entail a duty to always prosecute and punish crimes against humanity.⁷⁶

In the view of this Report's author, the correct interpretation of customary international law is that states are under an obligation to ensure that crimes against humanity committed in their own jurisdiction do not go entirely unpunished. This does not mean every single perpetrator must be prosecuted and

71 The ICTY Appeals Chamber held in *Kunarac* as follows "[N]either the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes...[P]roof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime." See ICTY, Prosecutor v. Kunarac, Kovac and Vukovic, Case No IT-96-23-T & IT-96-23/1-T, *Judgement*, para 98, June 12, 2002. (The standards set in this case—that there is no legal requirement of a plan or a policy—represents a change in the practice of the ICTY.

72 See further Thomas Obel Hansen, "The Policy Requirement in Crimes against Humanity: lessons from and for the case of Kenya," *George Washington International Law Review*, Vol 43, No 1, 2011, p 1-42.

73 Amnesty International, *Universal Jurisdiction: the duty of states to enact and implement legislation*, Chapter Fourteen, <http://www.amnesty.org/en/library/asset/IOR53/017/2001/en/3098db44-d8ef-11dd-ad8c-f3d4445c118e/ior530172001en.pdf>, p. 34.

74 Diane F Orentlicher, "Settling Accounts: the duty to prosecute human rights violations of a prior regime," *The Yale Law Journal*, Vol 100, No 8, 1991, p 2537-2615, at 2593.

75 Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p 301.

76 *Ibid*, p 302-03.

punished, but rather that wholesale impunity for crimes against humanity is prohibited. As a minimum, the state must take action to ensure those who bear the greatest responsibility for these crimes are prosecuted and punished, if found guilty. This interpretation of customary international law is supported by the following:

First, a number of declarations adopted by the UN General Assembly imply that the international community has accepted there is a duty to prosecute crimes against humanity. For example, the 1973 “Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity” state that “crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they committed such crimes shall be subject to tracing, arrest, trial, and, if found guilty, to punishment.”⁷⁷ Similarly, the 2006 “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” state that: “in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecute the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.”⁷⁸

Second, the UN has made it clear it will not support measures whereby amnesty is endorsed for certain categories of international crimes: “United Nations endorsed peace agreements can never promise amnesties for genocide, crimes against humanity or

gross violations of human rights.”⁷⁹ This change in UN policy towards amnesties is considered to have taken place in 1999, when the UN signed the Lomé Peace Accord (concerning Sierra Leone’s civil war) with the reservation that it did not recognise the granting of amnesties for serious violations of human rights, as included in the agreement.⁸⁰ Partly in consequence of this policy change, recent state practice indicates that states rarely endorse wholesale impunity, at least officially, for international crimes, such as crimes against humanity, when creating transitional justice solutions such as tribunals, truth commissions and amnesty laws.⁸¹

Thirdly, certain treaties, including the Rome Statute, proscribe impunity for crimes against humanity. The Preamble to the Rome Statute affirms the “most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation” and recalls “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” This could be seen as if the Rome Statute lays down an obligation for state parties to prosecute and punish crimes against humanity in national courts. Given the large number of states that have ratified the Rome Statute, it could arguably also be seen as an indication that a rule in customary international law is evolving.

Accordingly, customary international law would seem to require that Kenya investigates, prosecutes and punishes crimes against humanity committed in 2007/8 (or at any other point). While this does not mean every single perpetrator of the PEV must be punished, certainly the very limited efforts undertaken so far, which have allowed impunity for those who organised and planned the violence, is not compatible with international law.

77 UN General Assembly, *International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons guilty of War Crimes and Crimes against Humanity* (Sub-Commission on Human Rights Resolution 2001/22), para 3.

78 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para 4.

79 UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies...*, 2004, para 10.

80 See for example Louise Mallinder, *Amnesty, Human Rights and Political Transitions: bridging the peace and justice divide*, Hart Publishing, 2008, p 122.

81 It is beyond the scope of this Report to offer a comprehensive account of state practice in this regard. A good discussion of state practice with regard to accepting amnesty for certain international crimes can be found in *Ibid*.

As a minimum, Kenya is required to put in place measures at the domestic level to ensure those who bear the greatest responsibility for the most serious violations, amounting to crimes against humanity, be prosecuted, and if found guilty, punished.

Having established that international law entails a duty to prosecute certain categories of the crimes committed in 2007/8, it is necessary to consider how from a *national law perspective* this duty must be treated. In other words, the existence of an international obligation cannot automatically be treated as if there is too an obligation in national law.

The relationship between Kenyan national law and international law

Currently, the constitutional order in Kenya relies on the so-called monist theory, whereby rules in international law accepted by Kenya (by means of ratification or otherwise) automatically form part of the domestic legal order. Article 2(5) of the 2010 Constitution stipulates “the general rules of international law shall form part of the law of Kenya” and Article 2(6) further states that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” The Constitution thus accepts that rules in international law, whether to be found in a treaty ratified by Kenya or customary international law, automatically becomes part of Kenyan law at the point where the government has accepted to be bound by these rules. Consequently, no implementation act is required, and Kenyan citizens obtain rights (and potentially responsibilities and duties) in accordance with provisions in these international law instruments.

However, because the 2010 Constitution does not apply retrospectively, it is the past constitutional order that offers the relevant starting point for understanding whether Kenyan law, at the time of the crimes committed during the 2007/8 crisis, accepted that international crimes, including crimes against humanity, were criminalised at the national level. The Constitution in place at the time did not deal explicitly with the relationship between national and international law.

Article 30 simply stated that “legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly.” Further, Section 3 established the Constitution is the supreme law of the land and provided that any law inconsistent therewith shall be considered void, to the extent of that inconsistency. Consequently, all laws, whether domestic or international, should be in conformity with the Constitution and, if there was conflict, the Constitution would prevail.

As noted by the International Committee of the Red Cross (ICRC), Kenya inherited from Britain a dualist concept, whereby international law was considered separate and distinct from domestic law, and only became part of the domestic legal order to the extent Parliament adopted an implementing act. The practice was that the AG screened all international treaties before domestic adoption, to uncover any provisions that contravened Kenyan law. If conflicts were found, either domestic law was changed or reservations were made to the international treaty.⁸²

Besides, the Constitution in force at the time explicitly prohibited retroactive application of the law. Article 77(4) stated: “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.”

Since Kenya had not adopted an international crimes act, or in other ways criminalised international crimes, including crimes against humanity, at the time of the PEV, the starting point must therefore be that crimes against humanity did not constitute a crime in Kenyan law in 2007/8 and hence the principle of prohibition of retroactive application of the law, as recognised in the Constitution in force at the time, would rule out that an accountability mechanism established at the national level could prosecute international crimes.

82 ICRC, *General Comment: Kenya*, <http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/94add0c0c00464254125678c00584f84!OpenDocument>.

The principle of legality, including the prohibition of retroactive law, from a national perspective

However, to understand the argument that perpetrators of the PEV may be prosecuted for crimes against humanity (and possibly other international crimes) though these crimes were not specifically criminalised in Kenyan law in 2007/8, it is necessary to explore the principle of prohibition of retroactivity application of the law (both in national law and international law) and its scope with respect to international crimes and related concepts.

First, from a national perspective, the past constitutional order's prohibition of retroactivity has partly been made up with. Article 50 (2)(n) of the 2010 Constitution states every accused person has the right to a fair trial, which includes the rights not to be convicted for an act or omission that at the time it was committed or omitted was not (i) an offence in Kenya; or (ii) a crime under international law. In other words, the current constitutional order explicitly exempts international crimes from the ban of retroactive application of the law. This provision would seem to offer sufficient justification for why an accountability mechanism set up to deal with PEV crimes could prosecute and convict perpetrators of international crimes, including crimes against humanity, despite the fact that these crimes were not criminalised in Kenyan law at the time and the fact that the past constitutional order prohibited retroactive application of the law *and* relied on dualist theory. Interestingly, such an interpretation has been supported by the AG's working committee on the ICC: "as a matter of law, the committee notes that 'international crimes' (which include crimes against humanity) that were allegedly committed during the PEV are triable in Kenya despite being committed before the coming into force of the International Crimes Act on 01 January 2009. The committee further notes the provisions set out in Article 50 (2)(n) of the Constitution of 27 August 2010, which in the view of the committee could permit Kenya to have jurisdiction in respect of crimes that were crimes under international law at the time of PEV."⁸³

However, on its own, Article 50(2)(n) does not necessarily solve issues pertaining to the legality of prosecuting PEV crimes as international crimes.

According to the doctrine of strict legality (which stands in contrast to the principle of substantive justice), a person may only be held criminally liable and punished if at the moment when a certain conduct took place, that conduct was regarded criminal under the applicable law.⁸⁴ This principle entails the following components: 1) criminal offences may only be provided for in written law enacted by Parliament (referred to as *nullum crimen sine lege scripta*); 2) criminal legislation must abide by the principle of specificity, whereby rules criminalising certain conduct must be as specific and clear as possible (referred to as *nullum criem sine lege stricta*); 3) criminal rules may not be retroactive (that is, a person may only be punished for behaviour that was considered criminal at the time when the act took place) (referred to as *nullum crimen sine proevia lege*); 4) resort to analogy in applying criminal rules is prohibited.⁸⁵

Consequently, while Article 50(2)(n) technically resolves the issue of retroactivity, it does not necessarily solve the problem that for crimes to be prosecuted they must both be specific and appear in written national law. In other words, even if Article 50(2)(n) implies it would not constitute retroactive application of the law to prosecute crimes against humanity, this does not change the facts that there was no basis in Kenyan written law for prosecuting international crimes and that the rules that make crimes against humanity punishable in customary international law are not necessarily specific, for example, in that they do not spell out applicable sentences.

One opportunity would be to argue that crimes recognised in the Kenyan Penal Code, such as murder and rape, form the basis for prosecuting crimes against humanity. However, the principle of specificity is understood to relate to the objective elements of a crime as well as the subjective elements of the crime (the required *means rea*). With respect to the latter, crimes against humanity sets itself apart from the crimes punishable under Kenyan law at the time.

⁸³ Government of Kenya (AG), Committee on the International Criminal Court, March 16, 2012 (on file with author), para 70.

⁸⁴ Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p 139-40.

⁸⁵ *Ibid*, p 141-42.

For example, crimes against humanity are preconditioned on the perpetrator being aware of the connection between her/his misconduct and a policy or plan to commit a widespread or systematic attack on the civilian population.⁸⁶ Consequently, allowing an accountability mechanism which operates within the existing structures of the Kenyan legal system to prosecute crimes against humanity on the basis of provisions in the Kenyan Penal Code would likely contravene the principle of specificity.

Such an interpretation was used by the Court of Justice of the Economic Community of West African States (ECOWAS), which held that Senegal could not use its domestic courts to try Hissène Habré for allegedly committing, from 1982 to 1990, torture and crimes against humanity in Chad. According to the Court, the legislative changes adopted in 2007 by Senegal, incorporating international crimes into its Penal Code and providing for extraterritorial jurisdiction of Senegalese courts over international crimes, would violate this principle as well as the principle of non-retroactivity of criminal law if applied to prosecute crimes allegedly committed by Habré almost 20 years before.⁸⁷

In light of this, the most viable solution for prosecuting PEV crimes as international crimes would be to create a basis for this in national law, which provides for the objective as well as subjective elements of crimes against humanity, applies retrospectively to the 2007/8 crisis and spells out penalties for these crimes. This could be done by amending the International Crimes Act, which as it currently reads, applies to conduct committed after January 1, 2009. Doing so would create the necessary specificity of the international crimes to be prosecuted, including applicable penalties (Article 6(3)). Importantly, the International Crimes Act defines crimes against humanity in accordance with Article 7 of the Rome Statute *and* as defined in customary international law. Consequently, it must be assumed there is no requirement to the existence of a state or organisational policy as stipulated by Article 7(2)(a) of

the Rome Statute, since, as already noted, customary international law does not entail such a requirement, but requires the existence of a systematic or widespread attack on the civilian population.

Allowing the International Crimes Act to cover conduct that took place before its adoption would be constitutional in accordance with Article 50(2)(n) of the Constitution, simply because the crimes detailed in the Act are international crimes.

The principle of legality, including the prohibition of retroactive law, from an international perspective

Having established that the International Crimes Act can constitutionally be amended to apply retrospectively, the last legal issue to consider is whether such an amendment could be challenged from an international law perspective. This is not the case. Article 50(2)(n) is compatible with international standards, meaning that objections to its permission of prosecuting international crimes not recognised in Kenyan law when the acts were committed cannot be challenged in an international forum. This follows from Article 15(2) of the International Convention on Civil and Political Rights (ICCPR), which provides that prohibition of retroactivity does not “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 recognised by the community of nations.” Thus, as noted by Valentina Spiga, from an international law perspective, the principle of *nullum crimen sine lege* is not violated when the acts at issue, although not criminalised under domestic law, amount to conduct criminalised by “general principles of law recognised by the community of nations,” that is, international crimes such as crimes against humanity.⁸⁸ From an international perspective, when new incorporating legislation is passed concerning conduct previously criminalised in international law, it allows courts to exercise jurisdiction over such conduct, and is not seen to have the function of creating *new* crimes:

86 See ICTY, *Tadic Judgment (Appeal)*. See further Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p 81-82.

87 ECOWAS Judgment, *Hissein Habré c. République du Sénégal* (ECW/CCJ/JUD/06/10), Judgment of November 18, 2010, <http://www.hrw.org/fr/news/2010/11/18/arr-t-cedeaoecowas-ruling-hissein-habr-c-r-publique-du-s-n-gal>.

88 See further Valentina Spiga, “Non-retroactivity of Criminal Law: a new chapter in the Hissène Habré Saga,” *Journal of International Criminal Justice*, 2011, <http://jicj.oxfordjournals.org/content/early/2011/01/22/jicj.mq081.full>.

it is seen to have a jurisdictional function; as a tool enabling national courts to apply the relevant rule of international law criminalising the conduct.⁸⁹ One way of looking at a retrospective application of the International Crimes Act in Kenya is thus to say that it grants Kenyan courts jurisdiction over crimes already criminalised when they were committed.

Ramifications for the two accountability mechanisms under consideration

In conclusion, neither Kenya's Constitution nor international law prohibits that PEV crimes be prosecuted as international crimes in an accountability mechanism established within structures of the Kenyan legal system, but the principle of legality means there must be a basis in Kenyan written law for such prosecutions. Because crimes recognised in the Kenyan Penal Code in various aspects differ from international crimes, it would be necessary to amend the International Crimes Act, currently applicable to offences committed after January 1, 2009, so the Act applies to the conduct that took place in 2007/8.

On the other hand, should the accountability mechanism opted for prove to be international and thus operate outside the Kenyan legal system – established for example by treaty, such as the Special Court for Sierra Leone (SCSL) – it would not be necessary to revise the International Crimes Act. This is because crimes to be prosecuted in such a mechanism would be defined in its statute, and applying the statute to crimes committed in 2007/8 would neither violate the Kenyan Constitution even if one argues Kenyan substantial law sets limits to the legality of treaties accepted by Kenya (cf. Article 50(2)(n)), nor the principle of legality, including prohibition of retroactivity, as recognised in international law to the extent definitions of the crimes reflect already existing definitions in international law and are sufficiently specific.⁹⁰

Other considerations necessary to take into account in deciding the applicable legal framework

Besides issues pertaining to the legality of prosecuting international crimes, other considerations must be taken into account in deciding whether an accountability mechanism for the PEV should be mandated to prosecute international crimes or crimes recognised in national law.

First, it is necessary to consider whether an accountability mechanism that prosecutes domestic crimes would satisfy the complementarity principle under the Rome Statute. In other words, should those responsible for organising and planning the PEV (besides the four presently involved in the ICC process) be tried for murder, rape, arson and other domestic law offences, would that mean the cases are inadmissible before the ICC?

While there are different perceptions on this matter, the majority of legal scholars argue a fair and credible local accountability process, which does not prosecute international crimes but serious crimes under domestic law, could suffice making the cases inadmissible before the ICC.⁹¹ This view was recently endorsed by the ICC's Office of the Prosecutor (OTP) in a response to Libya's admissibility challenge: "there is no requirement that the crimes charged in the national proceedings have the same 'label' as the ones before this Court. The Statute does not set out to regulate how States may choose to incorporate crimes within the jurisdiction of the Court into their national legal system. There is no requirement under the Statute, for example, for States to adopt legislation incorporating the crimes listed in Article 6 through 8 into national law. Therefore, there may be discrepancies in the way a particular act is criminalised under the Rome Statute and under national law."⁹²

89 Valentina Spiga, "Non-retroactivity of Criminal Law: a new chapter in the Hissène Habré Saga," *Journal of International Criminal Justice*, 2011, <http://jicj.oxfordjournals.org/content/early/2011/01/22/jicj.mqq081.full>.

90 See further Neha Jain, "Conceptualising Internationalisation in Hybrid Criminal Courts," *Singapore Yearbook of International Law*, 2008, Vol 12, p 82-95.

91 See further Kevin Jon Heller, "A Sentence-Based Theory of Complementarity," *Harvard International Law Review*, Vol 53, No 1, Winter 2012.

92 ICC, OTP, *Situation in Libya in the Case of the Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi (public redacted version)*, Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-No ICC-01/II-01/II, June 5, 2012, para 23.

Hence, it will be compatible with the Rome Statute if Kenya prosecutes crimes recognised in national law in 2007/8. However, as explained by the Appeals Chamber in the Kenyan cases, for a domestic accountability process to render a specific case inadmissible, which is already pending before the ICC, it is a requirement that “the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.”⁹³ This is important because it means the establishment of local accountability process, in by itself, cannot be used as an argument for the ongoing ICC cases being “brought home.” It also means that, unless local trials aim at shielding suspects from justice (or for other narrow reasons specified in the Rome Statute), the ICC cannot exercise jurisdiction over other individuals potentially prosecuted in a local accountability mechanism.

Further, some practical observations are required. Prosecuting crimes recognised by Kenyan domestic law in 2007/8 may be more feasible to secure convictions than prosecuting international crimes, such as crimes against humanity, where *inter alia* it is required that the perpetrator was aware of a link between the objective element of the crime and the existence of a systematic or widespread attack on the civilian population. As noted by Australian scholar, Kevin Jon Heller: “pressuring states to prosecute international crimes as international crimes significantly increases the likelihood that national prosecutions will fail. International crimes are far more difficult to investigate and prove than ordinary crimes, requiring better-trained personnel and significantly more financial resources. Prosecutions of ordinary crimes are thus much more likely to result in a conviction.”⁹⁴

Heller further notes: “proving the underlying criminal act itself is also often more difficult for international crimes. Many such acts are simply ordinary crimes—

murder as a crime against humanity, rape as a war crime. But numerous others are unique to international criminal law, requiring specialised knowledge to prosecute: deportation, forced pregnancy, and enforced disappearance as crimes against humanity.”⁹⁵

Furthermore, according to Heller: “proving a crime against humanity not only requires investigators to tie the perpetrator to the underlying act, it also requires them to develop evidence (1) that the victim was a civilian and not a combatant; (2) that the underlying act was part of a widespread or systematic attack on civilians; (3) that the widespread or systematic attack involved a course of conduct involving multiple crimes against humanity; (4) that the multiple crimes against humanity were committed pursuant to a state or organisational policy; and (5) that the perpetrator knew of the widespread or systematic attack.”⁹⁶

Given that most Kenyan legal sector personnel have limited experience dealing with international criminal law, to the extent the accountability mechanism relies only or mainly on Kenyan staff, the above-mentioned problems are likely to occur in Kenya. It must further be emphasised that, if a Kenyan accountability mechanism is to rely on existing PEV files prepared by the police, these files were not prepared with the intention of prosecuting international crimes. Thus, in addition to other problems in respect of the files mentioned above, the files will likely prove insufficient for achieving convictions for crimes against humanity.

In conclusion, if an accountability mechanism is to prosecute international crimes, it seems important that international staff are included at all relevant levels, including the judicial level, the prosecutorial level and the investigatory level (especially the latter two). Even if this proves possible, the accountability mechanism should prosecute both international crimes and crimes under domestic law, in light of the facts that many of the offences committed during 2007/8 would not meet the required threshold for crimes against humanity

93 ICC, Appeals Chamber, *Situation in the Republic of Kenya* (PNU Case), para. 39 (and similarly AC Decision of 30 August, ODM Case, para 40).

94 Kevin Jon Heller, “A Sentence-Based Theory of Complementarity,” *Harvard International Law Review*, Vol 53, No 1, Winter 2012, p 100.

95 *Ibid*, p 101.

96 Kevin Jon Heller, “A Sentence-Based Theory of Complementarity,” *Harvard International Law Review*, Vol 53, No 1, Winter 2012, p 102.

and existing files have not been prepared with an eye on prosecuting the offences as international crimes. Charges of international crimes could thus be reserved for senior government officials and other who played a role in planning and organising the violence, while the majority of on-the-ground offenders could be charged with ordinary crimes under Kenyan law.

6.2. Legal issues pertaining to the set-up of an accountability mechanism to try PEV crimes

Issues relating to the judicial structure

What is the legality of setting up a Special Division of the High Court, a Special Tribunal and the bodies associated with these two options? This Section will discuss what is required in legal terms to facilitate the establishment of the two different accountability forums. The discussion of international staffing, below in Section 6.3, must be read in light of the present Section.

A Special Division of the High Court to try serious crimes committed in 2007/8, whether categorised as domestic law offences or international crimes, can be established without a constitutional amendment or an Act of Parliament. There are no constitutional obstacles to creating a Special Division. Article 164(3) states the High Court shall be organised and administered according to an Act of Parliament. The legal framework in place, including the Judicial Service Act, implicitly grants the Chief Justice (CJ) the authority to establish such a division.⁹⁷ Since Article 165(3)(a) of the Constitution grants the High Court “unlimited original jurisdiction in criminal and civil matters,” serious crimes committed in the context of the PEV, if prosecuted as crimes under national law, would fall under the jurisdiction of the High Court. The CJ’s powers to “exercise general direction and control over the judiciary” and other powers granted by the Judicial Service Act must be understood to include the discretion to assign particular types of cases to

particular divisions of the courts that, according to the Constitution, have jurisdiction. To the extent PEV cases will be prosecuted as international crimes under the International Crimes Act, the same argument applies as Article 8(2) of that Act stipulates that trials pertaining to the crimes mentioned in the Act must be conducted by the High Court. There should be no legal challenges related to creating one centralised division of the High Court to hear PEV cases. All cases relating to the PEV could thus be transferred administratively to one Special Division located within the High Court in Nairobi (but possibly conducting trials elsewhere from time to time).⁹⁸

However, even if a Special Division of the High Court with exclusive jurisdiction over PEV cases is established, the decisions of the division would still be subjected to the review of the Court of Appeal according to Article 164(3) of the Constitution, and possibly the Supreme Court (Article 163(3)(b), cf. Article 163(4)). Only a constitutional amendment could ensure that decisions of a Special Division of the High Court are not subjected to review by superior courts established by the Constitution. Again, however, there is nothing that prevents the CJ from setting up a Special Division of the Court of Appeal to hear appeals from the Special Division of the High Court.

Because the system of courts is outlined in Article 162 of the Constitution, establishing a Special Tribunal which functions independently of existing judicial structures and the decisions of which are not subject to the review of the superior courts named in the Constitution would require a constitutional amendment. Further, since Article 165(3)(a) of the Constitution stipulates the High Court has unlimited original jurisdiction in criminal and civil matters, a constitutional amendment would be required to ensure a Special Tribunal gains exclusive jurisdiction over PEV cases.

⁹⁷ The powers to administratively establish a Special Division of the High Court to hear PEV cases flows from general powers assigned the CJ in the Constitution and the Judicial Service Act (2011), including Section 5(2)(a), which authorises the CJ to assign duties to the Deputy Chief Justice, the President of the Court of Appeal, the Principal Judge of the High Court and the Chief Registrar of the Judiciary (cf Section 8 of the same Act that describes the responsibilities of the Chief Registrar, including the responsibility of the overall administration and management of the Judiciary). Section 5(2)(c) further authorises the CJ to “exercise general direction and control over the Judiciary.”

⁹⁸ Phone interview with Luis G Franceschi, Dean of Strathmore Law School, June 21, 2012.

However, should the Special Tribunal take the form of an international or internationalised institution established, for example, by means of treaty (such as the SCSL), the legality of creating it should be evaluated from an international law perspective, rather than a national law perspective. If so, the Constitution's provisions concerning the system of courts arguably become irrelevant, simply because the tribunal is not part of the national judiciary but rather an international body with legal powers. The question of the constitutionality of an international tribunal endorsed by the government was brought up in connection to the SCSL:

In the so-called "constitutionality decision" in *Prosecutor v Kallon, Norman and Kamara*, the Appeals Chamber of the SCSL had to consider whether the SCSL was an unconstitutional institution by virtue of the fact that the government of Sierra Leone had failed to respect the proper procedure for establishing a "national" court. The Chamber relied on the Secretary General's Report setting out the rationale for establishing the SCSL and its powers and capacities in concluding that the SCSL was an "international tribunal." It referred to Section 11(2) of the Ratification Act passed by the government of Sierra Leone incorporating the Sierra Leone Special Agreement into domestic law which stated the Special Court shall not form part of the Sierra Leonean judiciary. The Chamber observed the SCSL is an independent *sui generis* treaty based institution not anchored in any existing system and specifically established outside the national legal system. On this basis, it was concluded the SCSL was constitutional because the relevant procedures for ratifying treaties had been followed, rendering considerations with regard to the order and establishment of national courts irrelevant.⁹⁹

In other words, there is precedence for claiming that a Special Tribunal, not established by Kenyan national law but rather an international law instrument, renders constitutional requirements concerning modalities for establishing courts and their internal hierarchy irrelevant.

Some have debated whether a Special Tribunal to try the PEV cases could be established as a subordinate court

under Article 169(1)(d) of the Constitution, which allows Parliament to establish as a subordinate court "any other court or local tribunal". While this is possible, it is hardly a "Special Tribunal" in that it will be subjected to the "supervisory jurisdiction" of the High Court according to Article 165(6).

In sum, establishing a Special Division of the High Court does not require any legal change, but decisions of the Special Division can be appealed to higher courts in accordance with constitutional provisions and the Special Division should be considered part of Kenya's existing legal system. Establishing a Special Tribunal requires an amendment of the Constitution to the extent the tribunal works outside existing judicial structures and is essentially Kenyan (regardless of its composition and other factors), which would be the case if established by Kenyan law. In contrast, should the Special Tribunal be an international body, established by an international law instrument such as a treaty, it would, in accordance with the practice of the SCSL, not require a constitutional amendment (though some might argue that the government by signing the treaty would be defying the Constitution).

Issues relating to the prosecutorial and investigatory structures

Besides questions pertaining to the legality of setting up an adjudicating body to hear PEV cases, it is necessary to assess requirements and possibilities with regard to other legal bodies that will be involved.

Should an accountability mechanism be established within the Kenyan legal system (the Special Division option), the starting point is that the Inspector-General of the National Police Service is responsible for investigating and the DPP for prosecuting, and that no other authorities may instruct these State Officers in this regard (Articles 245(4)(a) and 157(6), respectively).

However, as already mentioned in this Report, relying on the Police and the DPP for investigation and prosecution of PEV crimes has so far proven fruitless, due to the lack of political will and the fact these bodies remain unreformed and lack capacity to deal with serious

⁹⁹ SCSL (appeals Chamber), *Prosecutor v Kallon, Norman and Kamara*, SCSL-04-16-PT-032, Decision on Constitutionality and Lack of Jurisdiction, March 13, 2004. See further Neha Jain, "Conceptualising Internationalisation in Hybrid Criminal Courts," *Singapore Yearbook of International Law*, 2008, Vol 12, p 82-95.

and complex crimes. To the extent an accountability mechanism is to operate within the ordinary courts, it is therefore essential that a solution be reached whereby alternatives for investigation and prosecution are found.

The AG's working committee on the ICC notes in its report that Article 157(9) of the Constitution states that powers of the DPP may be exercised in person or by subordinate officers acting in accordance with general or special instructions. The committee understands this provision to allow for the appointment of a Special Prosecutor for PEV cases with dedicated resources.¹⁰⁰ While this is true, the provision implies the Special Prosecutor will be appointed by the DPP and take instructions from the DPP. In other words, such a solution is far from ideal because it does not solve the problem of independence from the current prosecutorial system.

A more credible solution might be found in Article 157(12) of the Constitution which allows Parliament to enact legislation conferring powers of prosecution on authorities other than the DPP. This means an Act of Parliament could establish a dedicated prosecutorial office to focus on PEV cases, outside the structures of the DPP. However, it is not clear if a Special Prosecutor for PEV cases can be granted exclusive authority to deal with PEV cases, or if the DPP would continue to have the authority to deal with PEV cases despite the establishment of a specialised office for PEV crimes. One way of reading Article 157 of the Constitution is to say that while Parliament can enact legislation conferring prosecutorial powers to other bodies with regard to particular types of cases, this does not prevent the DPP from exercising prosecutorial authority in these cases if he so wishes (a reading that would seem to be supported by Article 157(10), which states that "the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority"). If this interpretation is supported it is not unlikely that the DPP may interfere in politically sensitive cases and claim prosecutorial authority. Another interpretation of Article 157(12) would view the provision as a modification to proceeding provisions, with the result that a special body set up by

law could gain exclusive authority to prosecute particular types of cases, and that the specialised body or agency would not be subject to the supervision of the DPP and work independently of existing structures. Endorsing this reading is preferable, though not uncontroversial, because it limits the possibilities of political interference in the work of the Special Prosecutor.

Though it will prove difficult to obtain political support for creating a Special Prosecutor for PEV cases, it seems to be the only viable solution for achieving (some level of) prosecutorial independence and a commitment to bring PEV cases before the courts, including those involving government officials. The question of how the credibility of a Special Prosecutor for PEV cases could be enhanced through international involvement is discussed below in Section 6.3.

Next the question of how to deal with investigation emerges. Though the police are allowed to set up a dedicated team of investigators to carry out additional investigations with regard to the PEV cases, there is not much talk in favour of such a solution. First, creating a dedicated team of investigators with sufficient resources to locate witnesses and gather additional evidence does not solve the problem that the police is largely unreformed and is unlikely to resist political interference in sensitive cases. Second, relying on existing structures poses the problem that the police are unlikely to carry out investigations with respect to police violence in 2007/8.

Even if a Special Prosecutor for PEV cases could perhaps be granted powers, in accordance with Article 157(4) of the Constitution, to direct the police to undertake investigations, internal resistance in the police would render such a solution unsuitable, at least when it comes to police violence and sensitive cases involving high-level government officials and other influential individuals.

A more credible solution might therefore be to propose that a Special Prosecutor for PEV cases, working independently of existing structures, has a team of dedicated investigators connected to its office and not supervised by the Inspector-General of the National

¹⁰⁰ Government of Kenya (AG), Committee on the International Criminal Court, March 16, 2012 (on file with author), para 80-81.

Police Service, but taking instructions from and being supervised by the Special Prosecutor for PEV cases. However, certain legality issues arise. Article 245(4) of the Constitution stipulates that “the Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to – (a) the investigation of any particular offence or offences; (b) the enforcement of the law against any particular person or persons; or (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. Article 247 further states Parliament may enact legislation establishing other police services under the supervision of the National Police Service and the command of the Inspector-General of the Service. In combination this could be understood to exclude that an investigatory unit, carrying out police functions, is set up under the Special Prosecutor for PEV cases. On the other hand, there is nothing in the Constitution that explicitly states only the Police can carry out investigations, and there is a blurred line between preparing a case for prosecution and investigating, meaning that prosecutorial units are normally empowered to undertake some investigation. Notably, other agencies in Kenya, including the Kenya Bureau of Standards (KBS), the Ministry of Public Health, the City Inspectorate, the Kenya Revenue Authority (KRA), the Kenya Wildlife Service (KWS), have been granted powers both to investigate and prosecute.¹⁰¹

Connecting a dedicated team of investigators to the prosecutor’s office is a solution known from other hybrid attempts at accountability for serious crimes. In Timor Leste, for example, the Deputy General Prosecutor for Serious Crimes was authorised to direct and supervise investigations. The United Nations Transitional Administration in East Timor (UNTAET) Regulation 2000/16 of June 6, 2000 provided the Deputy General Prosecutor for Serious Crimes (DGPSC) shall have the exclusive prosecutorial authority to direct and supervise

the investigation and prosecution of serious crimes in the competent courts (the Special Panels) (Article 14(4)), and further stipulated the DGPSC shall have such staff as may be necessary to enable him/her to effectively investigate and prosecute serious crimes. (Article 14(6)).¹⁰² In practice, this support was provided by a unit of UN staff, the Serious Crimes Unit. Originally located within the Human Rights Unit of UNTAET, the SCU was made part of the DGPSC once it was created in June 2000.¹⁰³

In sum, whether or not the judicial functions of a solution for handling the PEV cases are rested with a Special Division of the High Court or a Special Tribunal set up by Kenyan law, it will be preferable to create special measures for prosecuting and investigating PEV crimes. The most feasible and suitable solution appears to be the creation of a Special Prosecutor for PEV cases, with a dedicated team to both investigate and prosecute the crimes. There are no constitutional barriers to the creation of such an office, but it would require an Act of Parliament, under Article 157(12) of the Constitution. Needless to say, should the Special Tribunal take the form of an international court set up by treaty, there are no constitutional obstacles to creating special investigatory and prosecutorial units associated with the tribunal.

6.3. Can a Kenyan accountability mechanism include international staffing?

Benefits of international involvement

Can constitutional provisions concerning the recruitment of judicial officers be ignored or amended to allow for international judges and experts to form part of the local justice mechanism without these persons being made subject to processes such as vetting by the Judicial Service Commission? And should international staff be included in the investigatory and prosecutorial bodies associated with the accountability mechanism?

101 Samuel Mbithi Kimeu, *Ethics and Anti-Corruption Body: to prosecute or not*, Transparency International Kenya, http://tikenya.org/index.php?option=com_content&view=article&id=130&Itemid=147.

102 UNTAET, Regulation No 2000/16 on the organisation of the public prosecution service in East Timor, <http://www.unmit.org/legal/UNTAET-Law/Regulations%20English/Reg2000-16.pdf>.

103 ICTJ, *Justice Abandoned? An assessment of the serious crimes process in East Timor*, June 2005, p 5.

It should be emphasised (as briefly discussed above in Section 6.1) that prosecuting international crimes in a Kenyan accountability mechanism is likely to be difficult if international expertise is involved at all necessary stages, including investigation, prosecution and adjudication (and possibly witness protection and defence).¹⁰⁴ Furthermore, whether or not the mechanism to be established deals with international crimes and/or crimes under Kenyan law at the time, relying on Kenyan staff is likely to make the mechanism more open to political manipulation. As noted by Human Rights Watch:

*While an all-Kenyan special mechanism would be preferable to no such mechanism at all, previous Kenyan truth seeking and quasi-judicial bodies, including the Akiwumi Commission, the Waki Commission, and the TJRC, have included international personnel out of the recognition that their inclusion provided some guarantee of political neutrality. The Akiwumi Commission, for instance, was headed by a Nigerian judge.*¹⁰⁵

In this regard, the AG's working committee on the ICC recommended that, where necessary, the government of Kenya should consider engaging relevant international expertise to assist in the investigative, prosecution and trial processes, to further promote the professionalism required which could assist to inspire confidence in the local process.¹⁰⁶

On the other hand, international involvement should not be seen as a silver bullet which will solve all problems of political manipulation, as indicated by the failure of the TJRC and the allegations of politicisation made against various international and internationalised tribunals in other countries.

Involving international judges

The legality under the current constitutional order of recruiting judicial staff, including internationals,

in a manner not consistent with normal procedures, is straightforward: an amendment of the Kenyan Constitution is required if judges are to be appointed in a manner that circumvents present rules whereby the Judicial Service Commission (JSC) makes recommendations for the appointment of judges (Article 172(1)(a)), and the President of the Republic, in accordance with these recommendations, appoints the judges (Article 166(1)).

However, while these procedures for appointment will apply to any accountability mechanism established within the Kenyan judicial system, there is nothing that prohibits international judges from obtaining a seat in the bench of a Kenyan court, whether a Special Division of the High Court or a Special Tribunal. Article 166(2) lays down the criteria for appointment as a judge of a superior court in Kenya, according to which judges must: (a) hold a law degree from a recognised university, or be advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction; (b) possess the experience required as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and (c) have a high moral character, integrity and impartiality. With regard to High Court judges, these must, according to Article 166(5), be appointed from among persons who have: (a) at least ten years' experience as a superior court judge or professionally qualified magistrate; or (b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

These criteria apply regardless of whether the court in question concerns the High Court (the Special Division solution) or a Special Tribunal outside existing judicial structures, unless the constitutional amendment

¹⁰⁴ Human Rights Watch, "Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya, December 2011", p 76 similarly notes "an international presence would also strengthen the capacity of the mechanism. International personnel could bring knowledge of the prosecution of international crimes in other jurisdictions. In addition to foreign judges, foreign prosecutors and investigators would help make up for the current lack of capacity found within the Kenyan police. The same would likely be true for foreign witness protection experts, given that Kenya's Witness Protection Agency is not yet operational. Defendants before the special bench or division charged with international crimes should also have access to both Kenyan and foreign counsel."

¹⁰⁵ Ibid.

¹⁰⁶ Government of Kenya (AG), Committee on the International Criminal Court, March 16, 2012 (on file with author), para 85).

necessary to create the latter stipulates otherwise. In contrast, should the Special Tribunal be established by means of treaty – and be an international court – the constitutional requirements concerning appointment will not apply, and the statute of the Special Tribunal can define the composition of the court and criteria for selection.

In sum, unless a constitutional amendment is passed, the appointment of judges for an accountability mechanism must follow the procedures established by the Constitution, whereby the JSC is responsible for making recommendations for appointment. But there is nothing in the Constitution that prohibits international judges with the experience required according to the above from obtaining a seat in the bench. Only if established as an international court (by means of treaty) will these rules not apply.

However, while it is possible to have international judges appointed through normal procedures, it remains a challenge that they will be employed on normal conditions: there will not automatically be an end to their tenure or exit strategy once the accountability process is completed or international staffing is no longer deemed necessary to ensure integrity and credibility. It would thus be an advantage if a constitutional amendment could be passed to allow a special procedure for the appointment of judges, including internationals, to serve in the accountability mechanism for a specified period of time.¹⁰⁷ However, taking into account the current political climate discussed above in Section 5.2, it is unlikely this could happen in the near future. Combined with observations made in Section 6.2, the best solution seems to be to advocate for the inclusion of international judges through normal procedures and consult the CJ as to a special arrangement concerning their terms of employment.

Involving internationals in the investigatory and prosecutorial bodies associated with the accountability mechanism

With regard to other legal sector bodies, nothing in the Constitution prohibits the appointment of international staff as prosecutors or investigators (or as advisors to a special prosecutorial or police unit dedicated to

dealing with PEV cases). Article 78(1) and (2) of the Constitution prohibits internationals and persons with dual citizenship from being appointed to a “State Office,” including the DPP, but not any other public office, such as investigators or prosecutors, whether supervised or not by the DPP (see below).

As for the DPP, it is within her/his authority to decide who should be appointed to serve in her/his office. Should it be decided that prosecution of PEV cases will rely on existing prosecutorial structures, it is up to the DPP to decide whether s/he wishes to employ non-Kenyans in her/his office to deal with these cases. On the other hand, should a Special Prosecutor’s Office for PEV cases be established under Article 157(12) of the Constitution, relevant legislation could lay down requirements as to the composition of this Office, arguably also with regard to the nationality of the Special Prosecutor (though it could be argued that a Special Prosecutor not subject to the supervision of the DPP holds a State Office and must be a Kenyan citizen).

With regard to the police, Article 245(4) of the Constitution spells out that, while the Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, no person may give a direction to the Inspector-General with respect to the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. Article 246(3)(a) further establishes the National Police Service Commission which is responsible for recruiting and appointing persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service. In other words, it would not be possible to include internationals in the Police Service to assist with investigation and preparation of files relating to the PEV, should the police be opposed to such inclusion. In this event, a constitutional amendment would be required to have international staff appointed to a special investigatory unit of the police.

However, there is nothing in the Constitution which explicitly states only the police can carry out investigations. One way of ensuring international involvement in reviewing existing PEV files and carrying

107 Interview with Param-Preet Singh, Senior Counsel, International Justice Program, Human Rights Watch, June 2012.

out further investigations could therefore be to enact legislation creating a Special Prosecutor's Office for prosecuting PEV cases, with the authority to review PEV files and carry out further investigations where needed (for example by having dedicated investigators attached to it).

In sum, ensuring qualified international involvement at the investigatory and prosecutorial levels will require the creation of a Special Prosecutor for PEV. The legislation necessary to create this Office could spell out requirements to the composition of the office, including requirements for international involvement. As this office could be mandated to prosecute as well as carry out additional investigations with a team of dedicated investigators, serious obstacles to integrity and credibility could be overcome.

6.4. Use of special procedures

How can special rules and procedures be utilised for an accountability mechanism, either in the form of a Special Division or a Special Tribunal? Special procedures are understood to include procedures relating to: 1) victims' participation (and reparation and protection); and 2) rules of procedure, including rules of evidence.

Victims' participation, reparation and protection

It is beyond the scope of this Report to undertake an assessment of how victims' participation, reparation and protection could best be promoted in an accountability mechanism to deal with the PEV cases. But a few comments should be made. As noted by ICTJ, Kenya currently employs Common Law practice which does not allow for victims' participation.¹⁰⁸

If the accountability mechanism created to deal with PEV cases is international (a Special Tribunal set up by treaty), the statute of the tribunal would spell out applicable procedures, including on victims' participation. There is no requirement that these resemble Kenyan law and no domestic legal change would be needed.

If the accountability mechanism is Kenyan (a Special Division of the High Court or a Special Tribunal set up by Kenyan law), allowing victims' participation would require an Act of Parliament, stipulating the Criminal Procedure Code is not applicable (or is modified) with regard to PEV cases and creating special procedures for victims' participation. Such special procedures could stipulate that victims, through a legal representative, could make statements and written submissions related to law or fact as well as guarantee the right to obtain compensation (either from the perpetrator or a special fund), as with ICC proceedings.¹⁰⁹

However, even in the absence of an Act of Parliament, victims have certain rights under the Criminal Procedure Code – including a right to be heard with regard to the contents of a possible plea agreement (Article 137(d)). A victim impact statement, though not mandatory, can be called for and taken into account in sentencing convicted offenders (Article 329 (C)(1), cf. Article 329 (D)(1) and Article 1371 (1)). And the Court may order compensation to victims for criminal proceedings if it is found that “the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person” (Article 175(2)(b)). Stolen property can be restored to the person from whom it was stolen (Article 177). Further, Article 176 stipulates “in all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated,” which could prove relevant for some PEV cases.

It is beyond the scope of this Report to determine whether these provisions safeguard the interests of victims, and, if not, what specific procedures could be adopted to further promote their interests. However, legal change is required to both create the necessary legal framework for prosecuting international crimes, set up an independent Special Prosecutor for PEV

¹⁰⁸ KPTJ –ICC working group, *Report of Meeting*, April 30, 2012, p 7.

¹⁰⁹ See further Thomas Obel Hansen, “What can the ICC do for the victims of Kenya's post-election violence,” *ICC Kenya Monitor*, <http://www.icckkenya.org/2011/09/what-can-the-icc-do-for-the-victims-of-kenya%e2%80%99s-post-election-violence/>, September 2011.

cases and ensure international involvement in this office. Facilitating victims' participation and reparation beyond what is stipulated in the Criminal Procedure Code through special legislation would likely prove less politically sensitive than, for example, establishing a Special Prosecutor. In other words, enhancing the interests of victims may not necessarily make the combined proposal less feasible.

Concerning victims' protection, the Witness Protection Amendment Act (2010) establishes a Witness Protection Agency (Article 3(a)(1) with the purposes, *inter alia*, to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their cooperation with prosecution and other law enforcement agencies (Article 3(b)(1). The Agency is mandated, *inter alia*, to establish and maintain a witness protection program; (b) determine the criteria for admission to and removal from the witness protection program; (c) determine the type of protection measures to be applied (Article 3(c)(1)). Under the Witness Protection Act, there is an application procedure and the decision to be admitted into, or excluded from, the protection program is made by the Director of the Witness Protection Agency (Article 7).

According to Christine Alai of ICTJ (Kenya Section), the Witness Protection Agency is now functional and in a position to protect witnesses.¹¹⁰ Others, however, are more sceptical. According to Human Rights Watch: "the government has allocated only a fraction of the funding requested by the agency, not even enough to cover basic operations."¹¹¹ Human Rights Watch further notes: "in order to address post-election violence within the Kenyan judicial system, funding the Witness Protection Agency is an obvious priority. But many Kenyans question the agency's ability to adequately protect witnesses at all, given Kenya's history of attacks on witnesses that are attributed to the very security agencies that in principle should play a role in protecting them.

The police commissioner sits on the agency's board; while the board need not be privy to sensitive information held by the agency, one civil society activist questioned the wisdom of any role for the police commissioner in witness protection, given the number of cases likely to arise involving police as perpetrators."¹¹² A report by the Open Society Justice Initiative (OSJI) similarly expresses concern with the Witness Protection Agency's ability to implement its mandate.¹¹³

Especially in PEV cases involving high-level government officials, it is not unlikely that witnesses will perceive the current witness protection program as insufficient for safeguarding their security. In this light, the best way of enhancing the security of witnesses – and their willingness to testify – would be to create a special unit of the Witness Protection Agency, perhaps headed by a non-Kenyan with experience of witness protection in complicated political contexts, and, in this way strengthen credibility in the eyes of the public. Although such a unit could be established within the existing legal framework (nothing in the law prevents creating a special unit which includes non-Kenyans among its staff), this does not guarantee funding for the unit. Further, taking into account that *perceptions* of willingness and ability to protect will be crucial to encourage witnesses to testify, it would be preferable if measures are taken to create a special witness protection unit or agency for PEV related offences, outside existing structures and guaranteed independence, powers and resources. To the extent this unit or agency operates independently of the existing agency, new legislation would be required.

Rules of procedures

It is beyond the scope of this Report to undertake an assessment of existing criminal procedures, including rules of evidence, in Kenyan law and suggest how these could apply or be altered to deal with PEV cases. Instead, the Report will explain what general rules apply to the different options for accountability outlined and what would be needed to create special rules.

110 KPTJ, *Report of Civil Society Conference on Justice, held from February 21-22 2012 at Heron Hotel, Nairobi* (on file with author), p 19.

111 Human Rights Watch, "Turning Pebbles: evading accountability for post-election violence in Kenya, December 2011, p 52.

112 *Ibid*, p 53.

113 OSJI, *Putting Complementarity into Practice: domestic justice for international crimes in DRC, Uganda, and Kenya*, 2011, <http://www.soros.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>, p 90-93.

To the extent a Special Tribunal is created as an international body (by means of treaty), applicable procedures, including rules pertaining to evidence, follow from the relevant statute and no changes of Kenyan law would be required as Kenyan criminal procedure law has no relevance for such a tribunal. On the other hand, should a Special Tribunal be created as a Kenyan institution (by Kenyan law) or should a Special Division of the High Court be established, the starting point would be that that these mechanisms would utilise procedural rules accepted in the existing legal framework detailing criminal procedures – the Criminal Procedure Code for ordinary crimes and the Criminal Procedure Code and the International Crimes Act for international crimes.

It has been suggested that it would be beneficial to create special procedures not presently accepted in Kenyan law for an accountability mechanism to deal with PEV cases because current standards of proof are seen as

too high for such a process and would overly complicate it.¹¹⁴ While it is true that lowering the standards of proof by creating special procedures could make it easier to obtain convictions, any special procedures must be framed so they conform to international human rights standards as well as the standards laid down in the Constitution concerning presumption of innocence and other fair trial standards.

Whether or not there is need to create special procedures – and if so, what these procedures should entail – is not clear from the limited research on the topic and the limited time frame to conduct this Report. A separate comprehensive study should thus be carried out once more fundamental issues discussed in detail in this Report, including the relevant forum and set-up of the needed mechanisms as well as the relevant substantive law, have been settled. This would allow for a thorough assessment of how current or special procedures would affect the pursuit of accountability in the decided forum.

7. LESSONS FROM ELSEWHERE: HOW OTHER COUNTRIES HAVE CREATED ACCOUNTABILITY PROCESSES TO DEAL WITH SERIOUS CRIMES

What comparative analysis of judicial mechanisms set up by other post-conflict countries could be used to guide the creation of an accountability mechanism for PEV cases in Kenya?

7.1. International Crimes Division (ICD) of the Ugandan High Court

The Ugandan government has set up an International Crimes Division (ICD) in its High Court (originally referred to as the War Crimes Division), with dedicated

investigations and prosecution teams within the Uganda Police Force and Directorate of Public Prosecutions.¹¹⁵

The idea for the ICD arose during peace talks between the government of Uganda and the Lord's Resistance Army (LRA) in Juba (2006-8) on ending the conflict in northern Uganda. The peace talks led to an agreement concerning the establishment of a "special division" of the Ugandan High Court to hold national trials of serious crimes. While the LRA leadership never signed the final agreement, the Ugandan government committed to unilaterally implementing the agreements to the extent possible.¹¹⁶

114 KPTJ, *Report of Civil Society Conference on Justice, held from February 21-22, 2012 at Heron Hotel, Nairobi* (on file with author), p 12.

115 OS JI, *Putting Complementarity into Practice: domestic justice for international crimes in DRC, Uganda, and Kenya*, 2011, <http://www.soros.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>.

116 Human Rights Watch, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division*, 2011, p 4.

The statutory basis of the ICD is a legal notice that Uganda's CJ issued in May 2011, which formally establishes the ICD and defines its operations. The ICD is mandated to try genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy, and any other crimes defined in Uganda's 2010 International Criminal Court Act, the 1964 Geneva Conventions Act, the Penal Code Act, or any other criminal law.¹¹⁷

However, the International Criminal Court Act only entered into force on June 25, 2010. Because the ICD prosecutors assume that Ugandan courts would disapprove retroactive application of the Act, they are reportedly not willing to attempt to prosecute anyone for international crimes, such as crimes against humanity, committed prior to June 2010 and not criminalised explicitly in Ugandan law prior to the adoption of the International Crimes Act.¹¹⁸

Penalties for crimes under the ICD's jurisdiction range from a few years imprisonment to the death penalty. The rulings of the ICD of the High Court can be appealed to Uganda's Constitutional Court and ultimately the Supreme Court.¹¹⁹

ICD judges are appointed by Uganda's CJ in consultation with the President of Uganda's High Court. At least three judges sit on the ICD. According to Human Rights Watch, judges appointed to date have some experience in international criminal law along with knowledge of the conflict in northern Uganda. However, the ICD judges also work on cases not related to international crimes.

ICD judges have one paid and three unpaid staff to support their work who conduct legal research and writing. The assistants are not assigned to a particular judge, but assist all ICD judges as needed. One of the ICD judges serves

as a head of division who, with the registrar's support, is responsible for the ICD's overall administration. The registrar handles the ICD's daily administration. According to Human Rights Watch, no ICD staff has yet been charged with the responsibility for functions relating to witness protection and support, outreach or public information.¹²⁰

ICD's prosecution function is entrusted to a unit of Uganda's Directorate of Public Prosecutions (DPP). Between five and six prosecutors are appointed to this unit, but the number of those actively working on ICD cases varies according to the workload and ICD prosecutors sometimes work on cases not related to international crimes.¹²¹

The Criminal Investigations Department (CID) of the Ugandan Police Force is responsible for investigating crimes that may be tried before the ICD. According to Human Rights Watch, senior police investigators based in Kampala and focal points around the country work together with local police officers on ICD investigations.¹²² Again according to Human Rights Watch, the DPP and the CID work more closely together on international crimes cases than on ordinary crimes.¹²³

Uganda's Justice, Law and Order Sector (JLOS) secretariat provides a degree of oversight and administration for the ICD and deals with issues related to funding.¹²⁴

The ICD has its headquarters in Kampala. According to Human Rights Watch interviews, some ICD staff expressed concern with the office, noting, for example, it is too small to host all staff, meetings with witnesses or among defence counsel. The headquarters has a courtroom, although proceedings in its only serious crimes case to date took place at Gulu High Court in northern Uganda.¹²⁵

117 Ibid, p 5.

118 Ibid, p 14-15.

119 Ibid, p 5.

120 Ibid, p 6-7.

121 Ibid.

122 Ibid.

123 Ibid.

124 Ibid.

125 Ibid, p 8.

According to the OSJI, frequent personnel transfers constitute a problem for the capacity of the ICD and related units. Staff turnover has tended to dilute the impact of training seminars organised for prosecutors and investigators, OSJI also notes the Ugandan legal community lacks international criminal law knowledge and though most Ugandan judges have been trained in public international law, they rarely hold expertise in international criminal law. However, OSJI notes two judges in the ICD either have practical or academic knowledge of international criminal law.

Other capacity challenges include the lack of: equipment for court recording and expertise in operating such equipment; standardised education or training requirements for judiciary support staff; professional court interpreters; good archive management; and adequate witness protection.¹²⁶

Another complication was the existence (until recently) of the Amnesty Act, which allowed ex-combatants to apply for amnesty unless their name appeared on an ineligibility list drawn up by the Interior Minister and approved by Parliament (to date, no such exemption list has been tabled).¹²⁷ On April 14, 2012, the Deputy Speaker of the Ugandan Parliament, Jacob Oulanyah, announced the extension of the Amnesty Act for two years as a done deal and said the law just waits being gazetted.¹²⁸ However, by mid June 2012, commentators reported the Amnesty Act had not been extended: “the recent expiry of Uganda’s long-running amnesty provision for armed rebels has taken quite a number of observers by surprise. On May 23rd, the centrepiece of Uganda’s twelve year old Amnesty Act, which provides blanket amnesty to anyone who denounces armed rebellion, lapsed despite

media reports and statements by politicians suggesting that the entire Act was going to be renewed. The expiry of the essential part of the Act clearly has far-reaching implications for the debate about whether to forgive or prosecute members of the notorious Lord’s Resistance Army (LRA).¹²⁹

Although the ICD’s jurisdiction is not limited to particular individuals or groups, such as the LRA or the Ugandan army, there are concerns the ICD will be a one-sided affair in which only LRA members are tried for international crimes, leaving behind prosecution of atrocities allegedly committed by the Ugandan army and others.¹³⁰

So far, only one person has been charged with international and other serious crimes in the IDC.¹³¹ Thomas Kwoyelo, taken into custody in March 2009, has been charged with war crimes. Though Kwoyelo applied for amnesty under Uganda’s Amnesty Act, he did not receive a response from Uganda’s DPP, and was subsequently (by August 2010) charged with 12 counts of violations of Uganda’s 1964 Geneva Conventions Act, including wilful killing, taking hostages and extensive destruction of property in Amuru and Gulu districts of northern Uganda. As the trial commenced on July 11, 2011, the Prosecutor added 53 alternative counts of crimes under Uganda’s Penal Code, including murder, attempted murder, kidnapping, kidnapping with the intent to murder, robbery and robbery using a deadly weapon. Kwoyelo pleaded not guilty to all charges. During the second session of the trial on July 25, 2011, the defence lawyer’s objections concerning ICD jurisdiction to try crimes for which Kwoyelo

126 OSJI, *Putting Complementarity into Practice: domestic justice for international crimes in DRC, Uganda, and Kenya*, 2011, <http://www.soros.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>, p 90-93.

127 Ibid.

128 Patrick Wegner, “Where to With Transitional Justice in Uganda? The situation after the extension of the Amnesty Act,” *Justice in Conflict*, April 22, 2012, <http://justiceinconflict.org/2012/04/22/where-to-with-transitional-justice-in-uganda-the-situation-after-the-extension-of-the-amnesty-act/>.

129 Mark Schengel, “The Path Towards Prosecution: an end to amnesty in northern Uganda,” *Justice in Conflict*, June 11, 2012, <http://justiceinconflict.org/2012/06/11/the-path-towards-prosecution-an-end-to-amnesty-in-northern-uganda/#more-3430>.

130 Human Rights Watch, *Justice for Serious Crimes before National Courts: Uganda’s International Crimes Division*, 2011, p 5, 15-16.

131 However, a case involving charges of human trafficking reached preliminary hearings before the ICD, but was subsequently transferred to the civil division of Uganda’s High Court. Further, the trial of 14 people charged with terrorism for the July 11, 2010 Kampala bombings began in September 2011 and is ongoing before the ICD. Ibid, p 10.

was allegedly admissible to amnesty was referred to Uganda's Constitutional Court for consideration. On September 22, 2011, Uganda's Constitutional Court ruled the Amnesty Act is constitutional and that Kwoyelo's case should be halted on the ground that he was treated unequally under it.¹³²

Although the case was stopped, Kwoyelo remained in detention, which led him to sue the government for illegal detention. He again petitioned the Ugandan High Court for amnesty on November 23, 2011. The High Court ruled that Thomas Kwoyelo should be given amnesty and be set free. The DPP and the Amnesty Commission are the two competent institutions in this case and decided to meet to consult on the Kwoyelo case after the High Court ruling. In early February 2012, the DPP again denied amnesty to Thomas Kwoyelo, claiming there can be no amnesty for charges of war crimes. Thomas Kwoyelo remains imprisoned in Luzira Prison in Kampala to date.¹³³

According to one observer, a key lesson from the Ugandan experiences is that while there are demands for domestic trials even where the ICC is involved, creating institutions to promote accountability at the national level is not sufficient: "one has to ensure that appropriate laws are in place and that the court is qualified to deal with international war crimes cases. There are several examples of how things went wrong in this context at the ICD. In general, the GoU was seemingly in a hurry to demonstrate that the ICD was up and running by presenting a first case and preferably a conviction. Some sources have accused the GoU of presenting the ICD with a pre-determined budget and timeline for a ruling in the Kwoyelo case."¹³⁴

Furthermore, Uganda's High Court Division competent of ruling on Rome Statute Crimes – the first of its kind

in Africa – has, according to observers, suffered from inadequate witness protection mechanisms: "the judges are only able to order ad-hoc measures to protect witnesses if there are clear signs for danger. The JLOS of the Ugandan government is working on laws to alleviate this problem, but results are not expected before mid-2012."¹³⁵

It is also important to note that the ICD has, so far, worked with guiding principles instead of rules of procedure. Wegner notes: "the guiding principles are open for best practice approaches from other cases of international criminal law, which makes them highly flexible. Yet, a lack of full rules of procedures may lead to problems of fair trial or delays in some cases."¹³⁶ Wegner concludes: "all in all, the Kwoyelo trial has proven that the ICD is a politically independent institution that is to be taken seriously. Still, it has also shown the remaining weaknesses in the systems and has highlighted the danger of cases becoming politicised. The fact that Kwoyelo is still in jail despite numerous court rulings seems to be an indicator that the DPP was trying to make a political point by indicting Kwoyelo."¹³⁷

In sum, the Ugandan experience with war crimes trials has so far illustrated flaws. Though there are significant differences between Uganda and Kenya, key lessons can be drawn for Kenya. First, had the ICD included international staff, this would have helped to overcome perceptions of bias, and made it more likely that Ugandan army atrocities would be dealt with. Second, the reported reluctance of the Prosecutor to prosecute international crimes not criminalised in domestic law at the time the acts were committed points to the importance of having a clear legal framework for prosecuting international crimes.

132 Ibid, p 10-12.

133 Patrick Wegner, "The Kwoyelo Trial: a final(?) roundup," *Justice in Conflict*, February 13, 2012, <http://justiceinconflict.org/2012/02/13/the-kwoyelo-trial-a-final-roundup/>.

134 Ibid.

135 Ibid.

136 Ibid.

137 Ibid.

7.2. War Crimes Trials in the DRC

Until recently, international crimes could only be prosecuted in military tribunals in the DRC (even when involving civilians). The military tribunals have tried international crimes with limited success. However, mobile courts, which organised to conduct trials in remote areas, have convicted a number of individuals for war crimes and crimes against humanity.¹³⁸

Whereas military tribunals continue to try war crimes committed in the country, in July 2011, the Congolese Parliament adopted legislation establishing so-called specialised mixed tribunals to try those responsible for the worst human rights violations in the DRC. The courts will rely on both national and international staff and have jurisdiction over war crimes, crimes against humanity and genocide committed on Congolese soil since 1990, as long as the crimes are not being prosecuted by the ICC. The current legal framework guarantees the presence of international staff in the court's chambers, but international presence in the prosecution and registry offices remains discretionary.¹³⁹

The decision to establish the mixed court appears to be, in part, a response to the October 2010 publication of the UN Mapping Report on serious human rights violations committed in Congo between 1993 and 2003. This report documented 617 alleged violent incidents, covering every province in the country and described the role of all the main Congolese and foreign parties responsible – including military or armed groups from Rwanda, Uganda, Burundi, and Angola or controlled by governments of these countries.

Congolese civil society expressed support for the government's proposal to establish a specialised mixed court for grave crimes in Congo. Representatives of non-

governmental organisations (NGOs) from each of Congo's 11 provinces, as well as international organisations, met in Goma from April 6-8, 2011 and adopted a common position on the government's initial draft legislation, recommending important improvements.¹⁴⁰

The current version of the legislation appears to mandate the death penalty as the only applicable punishment for those convicted of crimes by the mixed court, a feature that has led to criticism from human rights organisations.¹⁴¹

Commentators have also questioned whether the mixed courts, even with the inclusion of international staff, present a feasible solution to accountability for international crimes given that: "[the DRC] lacks capacity in every area needed to conduct proper investigations and prosecutions and hold fair trials. Police are, on the whole, ill-prepared and ill-equipped to provide security, undertake investigations or make arrests in support of domestic war crimes proceedings. A severe shortage of legal professionals to serve in the DRC legal system exists, including prosecuting and trial magistrates along with defence lawyers—and systematic training in international criminal law is lacking. Capacity for court management [is] 'close to zero'—officials still use paper and pencils to track proceedings and little international assistance has been directed towards the area of court management. No legal basis currently exists in the DRC for the protection of victims and witnesses."¹⁴²

It remains to be seen how successful the mixed courts will be. Again, there are significant differences between the DRC and Kenya (including the scope of the crimes and the existence of functioning judicial bodies), but one important lesson for Kenya is that it is important not only to focus on the bench, but to take a holistic view, taking the capacity of all relevant legal sector bodies into account when creating a domestic/hybrid accountability solution.

138 See Amnesty International, *The Time for Justice is Now: new strategy needed in the Democratic Republic of the Congo*, AFR 62/007/2011, August 2011, <http://www.amnesty.org/en/library/asset/AFR62/007/2011/en/f4f8fc53-de34-42bc-a0fa-9e098f50a8a8/af620072011en.pdf>.

139 Human Rights Watch, *DR Congo: Pass Mixed Court Law*, August 17, 2011, <http://www.hrw.org/news/2011/08/17/dr-congo-pass-mixed-court-law>.

140 Ibid.

141 Ibid.

142 See further Kevin Jon Heller, "A Sentence-Based Theory of Complementarity," *Harvard International Law Review*, Vol 53, No 1, Winter 2012, p 104.

7.3. War Crimes Chamber in Bosnia and Herzegovina

In 2003, the Office of the High Representative in Bosnia and Herzegovina (OHR), together with the International Criminal Tribunal on Yugoslavia (ICTY), pushed for the creation of a specialised War Crimes Chamber at the state level to try atrocity crimes stemming from the 1992-5 Bosnian war.¹⁴³ This followed earlier attempts to pursue accountability in Cantonal Courts (the Federation of Bosnia and Herzegovina) and District Courts (Republic of Srpska). Not unlike past attempts in Kenya, these efforts were undermined by poor case preparation by prosecutors, weak investigations, ineffective witness protection and bias among judges and prosecutors alike.¹⁴⁴

Since its creation, the Chamber has completed over 200 cases involving serious violations of international law.¹⁴⁵

A crucial component was the temporary inclusion of international judges in the chamber and international prosecutors in the Special Department for War Crimes (SDWC) of the Prosecutor's Office to bolster capacity. Following the adoption of the relevant laws by the Bosnian authorities,¹⁴⁶ the War Crimes Chamber began operations in March 2005. Human Rights Watch argues the Bosnian model of international support for a national court has proven to be a viable alternative to purely national trials where there are concerns about capacity, independence or impartiality.¹⁴⁷

Interviews conducted by Human Rights Watch confirmed international judges and prosecutors have encouraged public faith in the impartiality and day-to-day work

of both institutions. International prosecutors have reportedly played a key role in investigating and prosecuting serious cases that would likely have remained unaddressed without them because of their sensitivity. Further, good working relationships have developed between national and international judges and prosecutors, which has facilitated the transfer of knowledge and skills.¹⁴⁸

Technically, the set-up in the Bosnian Chambers meant international judges initially represented a majority on three-judge trial and five-judge appeals panels, with the national judge always presiding. This ratio shifted in 2008. For a period of time, there was only one international judge per panel. Currently, international judges only sit on appeals panels. Initially, international judges were appointed directly by international grantmakers, but this did not always lead to the appointment of the most qualified individuals. Later on, international judges were appointed by the High Judicial Prosecutorial Council (the independent body mandated to establish and protect the independence and impartiality of the judiciary and the Prosecutor's Office). The court's administrative arm started to manage a pool of grants to pay the salaries of those selected through a competitive process. International judges had to meet criteria, including eight years' experience in criminal law.¹⁴⁹

With regard to the prosecutorial set-up, initially, there were five international prosecutors in the Special Department for War Crimes (SDWC) assigned to five of the six regional prosecution teams. Each team was "mixed," meaning it had at least one national prosecutor and a national prosecutor always headed the team.¹⁵⁰

143 Human Rights Watch, *Justice for Atrocity Crimes: lessons of international support for trials before the state court of Bosnia and Herzegovina*, March 2012, p 1-5.

144 *Ibid*, p 9.

145 *Ibid*, p 1-5.

146 Law on the Court of Bosnia and Herzegovina (Consolidated Version), Official Gazette of Bosnia and Herzegovina, No. 49/09, 2008, http://www.sudbih.gov.ba/files/docs/zakoni/en/Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf; Law on the Court of Bosnia and Herzegovina"); Law on the Prosecutor's Office of Bosnia and Herzegovina.

147 Human Rights Watch, *Justice for Atrocity Crimes: lessons of international support for trials before the state court of Bosnia and Herzegovina*, March 2012, p 1-5.

148 *Ibid*.

149 *Ibid*, p 12.

150 *Ibid*, p 16.

It is worth noting a special criminal defence support section was established (in 2005) to provide support to attorneys representing defendants accused of war crimes, crimes against humanity, and genocide. The section has since evolved into an independent institution, with its international staff being slowly replaced by nationals.¹⁵¹

Notwithstanding positive aspects, the national accountability process in Bosnia has faced challenges. Many of those interviewed by Human Rights Watch expressed concern the international community and the Bosnian authorities had failed to develop a strategic vision at the outset, which could have maximized the benefits of international staff. It is argued it would have been useful for policymakers and grantmakers working closely with national authorities to devise ways to make the most of the presence and experience of international staff as early as possible.¹⁵²

While there has been success in knowledge transfer in some areas, notably among judges, results have been more limited within the SDWC. According to Human Rights Watch, this is because neither the international community nor the Bosnian authorities had a vision for international prosecutors beyond handling complex and sensitive cases. Little attention was paid to encouraging teamwork and information sharing between international and national prosecutors, limiting opportunities for international and national staff to share skills. The SDWC has not consistently pursued simple solutions, like pairing international prosecutors with national legal officers (instead of international legal officers), using knowledge transfer as criteria to evaluate performance of international and national prosecutors or holding regular meetings to encourage office cohesion.¹⁵³

Another problem is that initially the international community and the Bosnian authorities gave little consideration to recruiting international staff with experience in institution-building. Thus, the SDWC did not direct attention to mundane tasks associated with setting up an office that could function effectively after international staff left (such as putting in place standard operating procedures and developing policies to encourage consistency in investigations and prosecutions).¹⁵⁴

There were also shortcomings with regard to creating a functioning witness protection programme. The international community and Bosnian officials have only recently started to address this concern.¹⁵⁵

Moreover, the transition strategy devised by the international community and the Bosnian authorities to phase out international staff within five years has proven unworkable because investigation of complicated and politically-sensitive cases sometimes takes longer. In 2009, despite recognition by key actors of the need to extend the mandates of international judges and prosecutors, there was no consensus in the Bosnian Parliament to do so. As a result, the OHR stepped in at the last minute to unilaterally extend the tenure of international judges and prosecutors by three years.

It is important to note public appetite for justice in Bosnia as dispensed by the War Crimes Chamber and the SDWC has shrunk over time. As ethnic fissures in Bosnia's political landscape have grown deeper and more pronounced, several vocal and influential politicians have questioned the legitimacy of the SDWC and the court because of an alleged anti-Serb bias.¹⁵⁶

The Bosnian experience is relevant to Kenya in several ways. On a positive note, the Bosnian experience shows that, even after an initially failed process, it is possible to create a new national/hybrid solution for accountability.

151 Ibid, p 14.

152 Ibid, p 1-5.

153 Ibid, p 1-5.

154 Ibid.

155 Ibid.

156 Ibid.

It also points to the need to have a clear strategy at the outset concerning how international staff can contribute to capacity-building as well as an exit strategy build on benchmarks of success. To the extent international staff will be involved in an accountability mechanism for the PEV, a key lesson from Bosnia is that, rather than setting an arbitrary deadline, grantmakers and national authorities should develop an exit strategy for international staff which is linked to benchmarks for handling cases and the development of a sustainable institutional framework. The need to counter allegations of ethnic bias, for example, through an efficient outreach programme, is also an important lesson for Kenya.

7.4. Special Panels for Serious Crimes in Timor Leste

After more than two decades of military occupation by Indonesia, in late 1999, East Timor entered a transition period under the auspices of UN administration. On May 20, 2002, the country was declared independent. To deal with the abuses committed during Indonesian occupation, Timor Leste established a truth commission as well as Special Panels for Serious Crimes (SPSC). Caitlin Reiger notes East Timorese demands for justice had focused on the establishment of an ad hoc international tribunal, such as those created for the former Yugoslavia and Rwanda, but ultimately the international community preferred to establish “a double-track of national mechanisms for accountability: within Indonesia as well as within Timor Leste.”¹⁵⁷ One of these modalities involved the hybrid SPSC.

The SPSC – composed of a Panel in the District Court of Dili and a Panel at the Court of Appeals of Dili to hear and decide on appeals lodged against the judgments handed down by the Trial Chamber – were established by Regulation 2000/11 of March 6, 2000, by the UNTAET. Article 10 of the ruling conferred jurisdiction to the SPSC

to prosecute international crimes, including genocide, war crimes, crimes against humanity and torture, as well as other offences, including murder and sexual offences, as recognised in the Timorese criminal code. The SPSC have “exclusive jurisdiction” to judge serious human rights violations committed during the conflict in East Timor. At any stage of the proceedings, the Panel may have referred to it as a case pending before another court in East Timor. However, the exclusive jurisdiction of the SPSC applies only insofar as the offence was committed between January 1, 1999 and October 25, 1999 and covers sexual offences or murder.¹⁵⁸

The SPSC are mandated to prosecute those responsible for these crimes on the basis of the principle of universal jurisdiction as the jurisdiction of the SPSC does not require the crime to be committed within the territory of East Timor and/or by an East Timorese citizen or against a citizen of East Timor.¹⁵⁹

In accordance with the UNTAET regulations, each of the two Panels (at the level of the Trial Chamber or the Appeals Court) is composed of two international judges and one East Timorese judge. However, in cases of special importance or gravity, three international judges and two East Timorese judges may sit in the Court of Appeal.¹⁶⁰

According to Regulation 2000/16, the prosecution is led by the Deputy General Prosecutor for Serious Crimes (DGPSC) who reports to the Prosecutor-General of Timor Leste. The DGPSC is in charge of the Serious Crimes Unit (SCU), responsible for conducting investigations and preparing indictments of those responsible for serious violations of human rights committed in East Timor in 1999. The mandate of the SCU ended in 2005.¹⁶¹ All investigations conducted by the SCU were brought to a close in November 2004 in accordance with Resolutions 1543 (2004) and 1573 (2004) of the UN Security Council (May 14 and 16 and November 2004).¹⁶²

157 Caitlin Reiger, “Hybrid Attempts at Accountability for Serious Crimes in Timor Leste”, in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century*, Cambridge University Press, 2006, p 145-46.

158 Trial, *Information on SPSC*, <http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/special-panels-for-serious-crimes-timor-leste/organisation-of-the-courts.html>.

159 Ibid.

160 Ibid.

161 Ibid.

162 Ibid.

From 2002-5, the SPSC conducted 55 trials, involving 87 defendants. Guilty verdicts were handed down against 83 of the defendants. By May 20, 2005, the date at which the mandate of the SPSC came to an end, charges were still pending against 339 persons who remain at large, most of them reportedly outside the jurisdiction of Timor-Leste, including the former Indonesian Defence Minister and Commander in Chief of the Indonesian Army, General Wiranto, six high ranking military commanders and the former Governor of East Timor. Due to these pending cases, in March 2005, the governments of East Timor and Indonesia reached an agreement to set up a so-called "Joint Commission of Truth and Friendship" to conduct investigations into serious human rights violations committed by the Indonesian armed forces during its occupation of Timor and, in particular, during the events of 1999.

Numerous NGOs as well as certain UN bodies expressed dismay at this attempt to set aside criminal proceedings in favour of a political arrangement.¹⁶³ This attempt also seemed to be at odds with resolutions of the UN Security Council. Prior to this, on February 18, 2005, the UN Secretary General had created a Commission of Experts to review prosecution of serious crimes after the closure of the SPSC on May 20, 2005. On July 15, 2005, the experts completed their report and presented it to the UN Security Council. The report underlined the good work of the SPSC and the necessity for the District Court of Dili to continue. The report also pointed out "the mandate of the Truth and Friendship Commission included provisions which were incompatible with international norms which do not permit serious crimes go unpunished." The UN Security Council reaffirmed, in Resolution 1599 of April 28, 2005, "the need for credible accountability for the serious human rights violations committed in Timor Leste in 1999."¹⁶⁴

Therefore, despite the winding up of the SPSC, Timorese legislation, designed to punish perpetrators of serious crimes committed before independence, remained in place and jurisdiction to judge persons charged with crimes committed between January 1 and October 25, 1999 reverted to the Court in Dili. On January 25, 2006, a suspect was arrested and charged with participation in a massacre of civilians in September 1999 within the context of Indonesian occupation of Timor. Apparently, this is the only arrest since the mandate of the SPSC came to an end.¹⁶⁵

By 2007, the Court of the District of Dili was made up of three international judges, two international prosecutors and two national prosecutors. Six international lawyers and three national lawyers also practice before the Court. This presence of international judges and prosecutors was made possible under Timorese legislation adopted following the Regulations approved in 2000 by UNTAET. The international judges and prosecutors are employed directly by the Timorese authorities, enabling them to make up for the lack of training and experience on the part of their Timorese counterparts. Their presence is thus not strictly tied to the ongoing jurisdiction of the District Court of Dili in matters related to serious crimes: such foreign personnel are there, above all, to lend assistance to the Timorese in dealing with common-law cases.¹⁶⁶

The experience from Timor Leste provides an interesting example of how international staff can be included in bodies associated with accountability at the national level for serious crimes. It is relevant that the prosecutorial division of the accountability process in Timor Leste was also given the mandate to carry out investigations. However, the SPSC were created by the UN, not by national authorities, which stands in contrast to the probable set-up of an accountability mechanism in Kenya.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

7.5. Special Court for Sierra Leone

Following the end of the civil war in Sierra Leone, on July 7, 1999, the government, the United Revolutionary Front (RUF) rebels led by Foday Sankoh and the UN Secretary General's Special Representative signed the Lome Peace Agreement, granting amnesty to the RUF and setting up a Truth Commission to document violations of international humanitarian law. Shortly afterward, the RUF resumed hostilities, including the targeting of civilians and the taking of 500 UN peacekeepers hostage. Sankoh was subsequently captured by government forces and the British government spearheaded an effort to establish prosecutions of war criminals, including Sankoh.¹⁶⁷

In a letter to then UN Secretary General Kofi Annan (of June 12, 2000), Sierra Leonean President Ahmad Dejan Kabbah requested UN assistance to establish a special court to prosecute Sankoh and other senior members of the RUF for crimes against the people of Sierra Leone and for taking UN peacekeepers hostage. In his Fifth Report to the UN Security Council on the UN Mission in Sierra Leone (UNAMSIL) of July 31, 2000, Annan stated an information-gathering mission conducted by the UN Office of Legal Affairs had concluded broad-based preference among Sierra Leone's governing authorities and NGOs for a national court with an international component, including jurisdiction over the international crimes of genocide, crimes against humanity and war crimes, as well as crimes under national law. In its Resolution 1315 of August 14, 2000, the UN Security Council requested the Secretary General to negotiate an agreement with Sierra Leone to establish "an independent special court." On October 4, 2000, Annan reported to the UN Security Council on the basic content of an agreement with Sierra Leone for the establishment of the Special Court. Another 15 months was required to complete negotiations, including funding options, the particular crimes and their definitions and the category

of persons that would be within the jurisdiction of the Special Court.¹⁶⁸

Then, on January 16, 2002, the UN and the Government of Sierra Leone signed an Agreement (treaty) establishing the Special Court for Sierra Leone (SCSL). The Court, which sits in Sierra Leone, functions in accordance with the Statute of the Special Court for Sierra Leone, which is part of the Agreement. The jurisdiction of the SCSL includes "persons 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."¹⁶⁹

Subject matter jurisdiction includes war crimes, crimes against humanity and certain crimes under national law (genocide was excluded as there was little evidence of that crime having been committed). The SCSL differs from its predecessor ad hoc international criminal tribunals (for the former Yugoslavia and Rwanda) which are international tribunals established by the UN Security Council acting pursuant to its authority under Chapter VII of the UN Charter. In contrast, the SCSL has been described as a "hybrid" court, meaning it is the product of both international and national creation and jurisdiction.¹⁷⁰

The SCSL has held three trials and convicted nine individuals, including, most-recently, former Liberian Head of State Charles Taylor, on charges of crimes committed during the Sierra Leone conflict. Cases have been grouped according to the suspects' affiliation with the three main warring factions: the Armed Forces Revolutionary Council (AFRC), the Civil Defence Forces (CDF), and the Revolutionary United Front (RUF). No other indictments are expected and the court is in the process of winding down its operations.¹⁷¹

There are several challenges in relying on the SCSL as an example for Kenya's pursuit of accountability for the PEV.

167 ICRC, *Agreement for and Statute of the Special Court for Sierra Leone*, January 16, 2002, <http://www.icrc.org/ihl.nsf/INTRO/605?OpenDocument>.

168 Human Rights Watch, *The Special Court for Sierra Leone*, April 11, 2012, <http://www.hrw.org/news/2012/04/11/special-court-sierra-leone>.

169 Ibid.

170 Ibid.

171 Ibid.

First, the SCSL was established in consequence of the collapse of the judiciary and to deal with a civil war with hundreds of thousands of victims, not to deal with post-election violence in a country where, comparatively, the number of victims is low and a functioning judiciary is in place.

Second, the SCSL was established and has operated in a context where the ICC is not involved. Because the ICC has admitted for trial senior members of Kenya's political leadership, it is unlikely that the international community (including bi/multilateral lenders) will support a treaty-based special tribunal for Kenya to deal with those who bear the greatest responsibility for the PEV (and possibly other perpetrators). In the absence of such support, it will prove difficult to cover the costs of establishing a special court of the type created for Sierra Leone.¹⁷²

Third, creating a special court for Kenya on the basis of an agreement with the UN would require lengthy negotiations between the government of Kenya and the UN, which means it would take years for the court to become operational.

7.6. Special Tribunal for Lebanon

On December 13, 2005, the government of Lebanon requested the UN to establish a tribunal of an international character to try those allegedly responsible for the attack of February 14, 2005 in Beirut that killed former Lebanese Prime Minister Rafiq Hariri and 22 others. Pursuant to UN Security Council Resolution 1664 (2006), the UN and the Lebanon negotiated an agreement on the establishment of the Special Tribunal for Lebanon (STL). Further to UN Security Council Resolution 1757 (2007) of May 30, 2007, provisions of the document annexed to it and Statute of the STL thereto attached, entered into force on June 10, 2007.¹⁷³

The mandate of the STL is to prosecute persons responsible for the attack of February 14, 2005 resulting in the death of Hariri and the death or injury of other persons. The STL's jurisdiction could be extended beyond the February 14, 2005 bombing if it finds other attacks that occurred in Lebanon between October 1, 2004 and December 12, 2005 are connected and are of a nature and gravity similar to the attack of February 14, 2005. The connection required includes, but is not limited to, a combination of the following elements: criminal intent (motive); the purpose behind the attacks; the nature of the victims targeted; the pattern of the attacks (modus operandi); and the perpetrators. Crimes that occurred after December 12, 2005 can be included in STL's jurisdiction under the same criteria if it is so decided by the government and the UN, with the consent of the UN Security Council.¹⁷⁴

The STL applies national law. However, it excludes the use of penalties such as the death penalty and forced labour, otherwise applicable under Lebanese law. Sentences will be served in a State designated by the President of the STL from a list of States that have expressed their willingness to accept persons convicted by the STL.¹⁷⁵

The international character of the STL was stipulated in the request submitted by the government of Lebanon to the UN Secretary-General. It was also set out in the mandate provided to the UN Secretary-General by the UN Security Council in Resolution 1664 (2006). The UN and the Lebanese government agreed the Tribunal would have mixed composition with the participation of Lebanese and international judges as well as an international Prosecutor. The Tribunal's standards of justice, including principles of due process of law, would be based on international standards of criminal justice as applied in other international tribunals.¹⁷⁶

172 See similarly Human Rights Watch, *Establishing a Special Tribunal for Kenya and the Role of the International Criminal Court: questions and answers*, March 25, 2009, http://www.hrw.org/sites/default/files/related_material/2009_Kenya_SpecialTribunal_0.pdf, p 6.

173 UN, *Information of STL*, <http://www.un.org/apps/news/infocus/lebanon/tribunal/>.

174 Ibid.

175 UN, *Information of STL*, <http://www.un.org/apps/news/infocus/lebanon/tribunal/factsheet.shtml>.

176 Ibid.

To ensure the independence of the STL, its Statute includes safeguards. It provides for a transparent and thorough process for the appointment of the Tribunal's officials, in particular the judges and the Prosecutor. It stipulates the Chambers shall be composed of Lebanese judges as well as international judges. The establishment of the STL with a majority of international judges, an international Prosecutor and a Registrar is aimed at ensuring independence, objectivity and impartiality. The Statute protects the rights of the accused, including through a Defence Office that carries out its functions independently. The Statute also includes provisions on the rights of the victims to present their views and concerns, as deemed appropriate by the Tribunal. Furthermore, and to ensure efficiency, the Statute includes provisions on enhanced powers of the Tribunal to take measures to ensure expeditious hearing and prevent any action that may cause unreasonable delay. For considerations of justice and fairness, as well as security and administrative efficiency, the seat of the Special Tribunal is located in The Hague, the Netherlands.¹⁷⁷

The Chambers are composed of one international Pre-Trial Judge, a Trial Chamber (three judges: one Lebanese and two internationals), an Appeals Chamber (five judges: two Lebanese and three internationals) and two alternate judges (one Lebanese and one international). The Pre-Trial Judge reviews and confirms indictments and may also issue arrest warrants, transfer requests and any other orders required for the conduct of the investigation and preparation of a fair and expeditious trial. All judges must be persons of high moral character, impartiality and integrity, with extensive judicial experience. The UN Secretary-General appoints the judges in consultation with the Lebanese government and upon recommendation of a selection panel, made up of two judges currently sitting on or retired from an international tribunal and a representative of the UN Secretary-General. The four Lebanese judges were appointed by the UN Secretary-General, from a list of

12 nominees presented by the Lebanese government (upon the proposal of the Lebanese Supreme Council of the Judiciary). The seven international Judges are similarly appointed, from nominations received from Member States or competent persons. The Judges serve for a period of three years and are eligible for reappointment.¹⁷⁸

The Prosecutor is appointed by the UN Secretary-General, after consultation with the Lebanese government and upon recommendation by a selection panel, made up of two judges currently sitting on or retired from an international tribunal and a representative of the UN Secretary-General. The Prosecutor serves for a three-year term and is eligible for reappointment. A Lebanese Deputy Prosecutor is appointed by the Lebanese government in consultation with the UN Secretary-General and the Prosecutor. The Prosecutor and the Deputy Prosecutor must be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor is responsible for the investigation and prosecution of persons responsible for crimes falling within the jurisdiction of the Special Tribunal.¹⁷⁹

The Registry consists of the Registrar and such staff as required. The Registrar is appointed by the UN Secretary-General and is a UN staff member. The Registrar serves for a three-year term and may be eligible for reappointment. Under the authority of the President of the Special Tribunal, the Registry is responsible for the administration and servicing of the Tribunal.¹⁸⁰

An independent Defence Office protects the rights of the defence, draws up the list of possible defence counsel and provides support and assistance to defence counsel and persons entitled to legal assistance. The Head of the Defence Office is appointed by the UN Secretary-General, in consultation with the President of the Special Tribunal.¹⁸¹

177 Ibid.

178 Ibid.

179 Ibid.

180 Ibid.

181 Ibid.

Besides the organs above, a Management Committee is established based on consultations between the UN and the Lebanese government. The tasks of the Management Committee include, inter alia, provision of advice and policy direction on all non-judicial aspects

of operations of the Special Tribunal and review and approval of its annual budget.

The challenges discussed above with regard to relying on the SCSL as a model that could be utilised in Kenya also apply to the STL.

8. COMPARATIVE ANALYSIS: A SPECIAL DIVISION OF THE HIGH COURT OR A SPECIAL TRIBUNAL?

Before presenting the Report's proposal for a credible and feasible accountability mechanism (Section 9), advantages and disadvantages of the two options perceived most relevant (a Special Division of the High Court or a Special Tribunal) are discussed in terms of: 1) legitimacy and credibility; 2) ability to promote desired goals of criminal justice; and 3) feasibility.

8.1. Legitimacy and credibility

The legitimacy and credibility of an accountability solution depends on factors including: respect for human rights, including fair trial standards; independence and impartiality; not being biased; local ownership and relevance to victims and other key audiences; the ability to convict a fair number of perpetrators of crimes (both perpetrators and organisers and planners); and competence and authority.¹⁸²

- Respect for human rights, including fair trial standards: the extent to which the two options for accountability are likely to respect human rights standards, including fair trial standards, is difficult to assess because it depends on their set-up. Special tribunals, operating outside judicial structures and based on international involvement, are often perceived to better comply

with human rights standards than accountability processes relying on existing judicial structures and operating in complicated political situations where the capacity and competence of legal sector bodies can be questioned.¹⁸³ In Kenya, a Special Tribunal, operating outside the Kenyan legal system, enjoying international support and following the modalities of other internationalised tribunals, would likely be preferable from the perspective of fair trials and other human rights standards relevant for criminal prosecutions. On the other hand, a Special Division could also satisfy international standards pertaining to the rights of the accused and due process but only to the extent safeguards are adopted.

- Independence and impartiality: judicial independence is understood to be from both the Executive and the Legislature so courts are not subordinated to other state organs and these other state organs respect the courts' decisions (commonly referred to as "institutional independence"). Besides institutional independence, however, there is a need for "decisional independence" (sometimes referred to as "individual independence"): judges must have the freedom to decide a case according to the law and must not fear reprisals should

¹⁸² Other factors are also to take into account assessing legitimacy and credibility, but these are some of the main issues commonly discussed in the literature. See Marek M Kaminski et al, "Normative and Strategic Aspects of Transitional Justice," *The Journal of Conflict Resolution*, Vol 50, No 3, 2006, p 295-302.

¹⁸³ See Sarah M H Nouwen, "Hybrid courts': the hybrid category of a new type of international crimes courts, *Utrecht Law Review*, Vol 2, No 2, 2006, p 190-193.

their decision dissatisfy powerful individuals or other branches of government. Security of judges' tenure is considered essential for this. Impartiality is related to decisional independence because it refers to neutrality in deciding specific cases.¹⁸⁴ The independence of the Kenyan judiciary has continuously been questioned. The starting point must therefore be that a Special Tribunal operating outside the judicial structures is preferable because it would have greater capacity to resist pressure from politicians and others who might wish to unduly influence proceedings. This is in line with the perception hybrid or internationalised, special tribunals "are considered more independent and impartial" than solutions relying on the domestic court system.¹⁸⁵ Yet, with ongoing judicial reforms discussed in Section 5.2.2 and the commitment of the CJ to accountability, a Special Division of the High Court would not necessarily fall short in respecting standards relating to judicial independence, especially if foreign judges could be included in the bench and other safeguards created.

- Not being biased: accountability measures to deal with serious crimes committed in times of conflict and/or sponsored by powerful actors, including the state, often face accusations of discrimination and politicisation in the sense that they only target one party to a conflict or certain categories of offenders, usually those in opposition to the incumbent. This criticism has been voiced in connection with accountability mechanisms operating within existing judicial structures, including the Bosnian trials before the specialised War Crimes Chamber¹⁸⁶ and the ICD of the Ugandan High Court.¹⁸⁷

Similar concerns have been raised in connection with international or internationalised tribunals, including: the ICC interventions in Uganda and the DRC (for only prosecuting rebel leaders in opposition to the respective governments); the ICTR (for only prosecuting genocide, leaving behind crimes committed by the Rwandan Patriotic Front); and the Extraordinary Chambers in the Courts of Cambodia.¹⁸⁸

The question as to whether an accountability model for Kenya will be biased, may thus not depend on the modality of the process (its being within or outside the conventional justice system), but more on how the process is set-up in terms of creating safeguards against selectivity based on ethnicity or affiliation with the government. Tools for achieving unbiased justice include: involving international staff; an independent prosecutor focused on the gravity of the conduct and taking into account the need to prosecute crimes committed in various regions and by different actors; and an outreach strategy that efficiently counters unmerited perceptions of bias. That being said, in the Kenyan context, it would prove easier to safeguard a mechanism operating outside the existing legal system (a Special Tribunal) against allegations of bias, as compared to a mechanism operating within existing structures (a Special Division).

- Local ownership and relevance to victims and other key audiences: trials by international courts, such as the ICTY, ICTR and ICC, face legitimacy problems because those most directly affected by the crimes lack "ownership" of trials, trials are conducted far away from the scenes of violence and tribunals fail to sufficiently take into account the local context.¹⁸⁹

184 See further Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, p 49-61.

185 Neha Jain, "Conceptualising Internationalisation in Hybrid Criminal Courts," *Singapore Yearbook of International Law*, 2008, Vol 12, p 82-95, at 81.

186 Human Rights Watch, *Justice for Atrocity Crimes: lessons of international support for trials before the state court of Bosnia and Herzegovina*, March 2012, p 3.

187 Patrick Wegner, "The Kwoyelo Trial: a final(?) roundup," *Justice in Conflict*, February 13, 2012, <http://justiceinconflict.org/2012/02/13/the-kwoyelo-trial-a-final-roundup/>.

188 Hermina Grozdanic, "The Extraordinary Chambers in the Courts of Cambodia in a Hybrid System: the effects of politics, law and history," http://gupea.ub.gu.se/bitstream/2077/24093/1/gupea_2077_24093_1.pdf.

189 See Sarah M H Nouwen, "Hybrid Courts: the hybrid category of a new type of international crimes courts," *Utrecht Law Review*, Vol 2, No 2, 2006, p 190-193.

Special hybrid tribunals are said to help overcome these legitimacy problems because they are typically located in the country where the crimes took place and typically include nationals of the country affected among their staff. Conducting trials within existing judicial structures is also accepted as enhancing local ownership and ensuring relevance to victims and other key audiences. Further, such trials help build the capacity of the national judiciary and promote public trust in it.¹⁹⁰ Internationalization may thus work against local ownership and relevance to victims and other key audiences, which leads to a preference for the Special Division solution, though relevance is linked to other factors discussed in this Section, including the mechanism's ability to efficiently deal with different categories of offenders.

- The ability to convict a fair number of the perpetrators of the PEV (both perpetrators and organisers and planners): legitimacy and credibility also depends on the extent to which accountability measures are efficient and can prosecute and convict a fair number of perpetrators. The selection of offenders for prosecution should not exclude certain categories of offenders, such as those who planned or organised the violence. In terms of numbers, there is an assumption that the more international and externalised from the national legal system a tribunal is, the more limited is its ability to prosecute and convict a large number of perpetrators. For example, while the Bosnian specialised War Crimes Chamber, within the national legal system, concluded more than 200 cases and the Special Panels for Serious Crimes in Timor Leste managed to conduct 55 trials involving 87 defendants over a three year period, the internationalised SCSL, outside the national legal system, has only held three trials and convicted nine individuals. However, modalities for accountability based within existing structures do not always perform better. For example, only one person has been charged with international crimes before the ICD of the Ugandan High Court. In terms of the ability to include different
- categories of offenders, including those with greatest responsibility for crimes, the more internationalised and externalised an accountability mechanism is, the easier it is to prosecute high-ranking officials and others responsible for planning and organising violence, especially if these actors are associated with the incumbent. In the case of Kenya, several factors will determine an accountability mechanism's ability to prosecute and convict a fair number of perpetrators from different categories of offenders. Notably: how the investigatory and prosecutorial units are managed and resourced; and the extent to which the mechanism can be safeguarded against political interference. To the extent special measures are taken to remedy problems relating to investigation and prosecution, a solution within the existing structures will manage to prosecute and convict a larger number of offenders. On the other hand, a solution outside existing structures may be more likely to involve high-ranking government officials and others who bear the greatest responsibility for the PEV.
- Competence and authority: in Kenya, important questions involve the mechanism's ability to prosecute international crimes (as opposed to crimes under domestic law) and the mechanism's ability to enforce its decisions. As to the former, a Special Tribunal set up with international involvement and operating externally to the Kenyan legal system would be better suited to prosecute international crimes because international legal expertise can be brought in without constitutional requirements concerning the appointment of judges. However, depending on the set-up of the Special Division and its associated bodies (relating to investigation and prosecution), this solution could also potentially be empowered to deal with international crimes. Concerning the mechanism's ability to enforce its decisions, it is difficult to predict which option would be preferable, though a Special Tribunal, outside the Kenyan legal system, is more likely to face problems giving effect to arrest warrants.

¹⁹⁰ See further Neha Jain, "Conceptualising Internationalisation in Hybrid Criminal Courts," *Singapore Yearbook of International Law*, 2008, Vol 12, p 82-95, at 88.

8.2. Ability to promote desired goals of criminal justice

A second issue to take into account analysing the advantages and disadvantages of a Special Division vis-à-vis a Special Tribunal concerns the mechanisms' ability to promote desired goals of criminal justice. This ability is connected to the mechanism's credibility, but differs from concerns addressed above in Section 8.1.

- **Deterrence:** deterring potential offenders from committing crimes is a goal of criminal justice, whether at the national or international level. Deterrence has two different aspects, one pertaining to the ability to deter members of the public from violating the law (general deterrence) and the other pertaining to the ability to deter specific individuals, namely those who have already violated the law and are subject to a criminal justice process from re-offending (special deterrence).¹⁹¹ While both aspects of deterrence are important, most observers focus on general deterrence when justifying criminal justice in the context of large-scale atrocities (perhaps because it is linked with an ambition to create more peaceful societies).¹⁹² The ability to deter the public from committing crimes (including international crimes) depends on factors such as: perceptions of the chance of being taken into custody, prosecuted and convicted; the extent to which institutional approval of crimes and a violent ideology may guide potential perpetrators; and whether at all potential offenders think in rational terms when "deciding" to commit serious crimes.¹⁹³ A few observations can be made. First, general deterrence is likely to be more effective if an accountability mechanism targets different categories of offenders – and a fair number of offenders from these different categories are prosecuted – for example, because political violence in Kenya results from the interplay between political leaders, local ethnic leaders and community

members.¹⁹⁴ For general deterrence, accountability should be pursued for on-the-ground perpetrators (including specific categories of offenders, such as police officers, who have tended to be beyond the reach of the law) as well as local leaders calling for violence and national political leaders and others who may have planned the violence. As already noted a Special Tribunal, outside the Kenyan legal system, is more likely to convict high-level perpetrators, while a Special Division is more likely to prosecute a larger number of perpetrators, if set up so judicial functions are not undermined by inefficient investigation and prosecution. Second, because deterrence depends on perceptions of how likely it is to be prosecuted and convicted, it also depends on timely prosecuting and punishment. This favours a Special Division, because it is more likely to commence its operations in a timely manner. From the perspective of deterrence and preventing new violence, an accountability mechanism would ideally commence its operations prior to next year's General Elections, to send a message to potential offenders that impunity for electoral-related violence no longer exists. In sum, a Special Division is preferable from a deterrent perspective.

- **Retribution:** retributive theory also justifies criminal trials. The retributivist argues the offender should be punished because s/he deserves it. Punishment is seen as a moral imperative based on the necessity of condemning the criminal's wrongdoing. Though, as noted by Drumbl, "retribution is the dominant stated objective for punishment of atrocity perpetrators at the national and international levels",¹⁹⁵ retribution faces challenges accounting for the trial and punishment of atrocity crimes. Common concerns involve the selective prosecution and punishment of these crimes and the difficulties of punishing adequately international crimes, such as crimes against humanity.¹⁹⁶

191 See further Mark A Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007, p 169-173.

192 Ibid.

193 Ibid.

194 See Thomas O Hansen, "Political Violence in Kenya: a study of causes, responses, and a framework for discussing preventive action," *ISS Occasional Paper 205*, November 2009.

195 Mark A Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007, p 150.

196 Ibid.

If retribution is a relevant justification for punishing perpetrators of the PEV, it is important: those with greatest responsibility are punished; as many perpetrators as possible are punished; and perpetrators of the most serious crimes are punished severely. As already noted, a Special Division is likely to deal with a larger number of perpetrators, whereas, depending on the circumstances, a Special Tribunal may prove more successful punishing high-level perpetrators. From a retributive perspective, there is therefore no clear answer as to what mechanism should be preferred, but emphasis should be paid to allowing severe penalties and punishing a large number of perpetrators, especially those who bear the greatest responsibility for the PEV.

- **Expressivism:** expressivists argue that trial and punishment of offenders is justified with reference to the ability of criminal justice to promote the public's faith in the rule of law, for example, by: educating the public; creating a historical narrative of atrocities and contributing to truth-telling;¹⁹⁷ or communicating and consolidating global norms, such as the prohibition of international crimes.¹⁹⁸ From this perspective, it is crucial: criminal trials are conducted in accordance with human rights standards; the norms expressed have relevance to different audiences; but also that trials are accessible to the public, including making the legal process understandable and acceptable to the general public.¹⁹⁹ On this basis, it is difficult to ascertain whether a Special Division or a Special Tribunal should be preferred. However, a Special Division has the advantage of building trust in Kenya's existing judicial institutions (if they operate in a legitimate and credible manner).
- **Restoration:** though restorative justice has historically been perceived an alternative to criminal justice, there is increased recognition that criminal trials may also serve restorative objectives, such as victims' redress.

For example, the ICC promotes restorative justice because it allows victims to participate in the process and victims can be rewarded compensation.²⁰⁰ Though there is little precedence, a Special Tribunal could be set up so as to enable victims to participate in proceedings and obtain reparations. The same could be done for a Special Division with special procedures. However, awarding compensation to victims depends on the availability of funds, which is likely to be easier within an internationalised Special Tribunal dependent on foreign funding and being less dependent on goodwill in the national political leadership (once it is operationalised). Hence, the assumption must be that a Special Tribunal is more likely to meet expectations of restorative justice, though preceding internationalised tribunals have been criticised for failing to take account of the needs of victims and the need to reconcile perpetrators and victims.

8.3. Feasibility

The feasibility of the two options depends on factors including: political will to enact necessary legislation; challenges to operationalising the process; and funding:

- **Political will to enact necessary legislation:** on its own, creating a Special Division does not require Parliament to pass any legislation. It could be created through a decision by the CJ (though, as discussed elsewhere in this Report, new legislation would be necessary to give effect to desired processes surrounding the Special Division). Creating a Special Tribunal, which does not form part of the legal system, would require a constitutional amendment, unless it is set up by treaty (which would require significant goodwill, both nationally and internationally). Given the lack of political will discussed in Section 5.2, the Special Division option is more feasible, if not the only viable option, in the near future. While political will for

197 Ibid, p 173-180.

198 See Margaret M DeGuzman, "Choosing to Prosecute: expressive selection at the International Criminal Court," *Michigan Journal of International Law*, 2012.

199 See Ibid; Mark A Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007, p 173-180; Carlos Nino, *Radical Evil on Trial*, Yale University Press, 1996.

200 Margaret M DeGuzman, "Choosing to Prosecute: expressive selection at the International Criminal Court," *Michigan Journal of International Law*, 2012.

the establishment of a Special Tribunal could emerge in the future, after next year's General Elections, it seems more likely that it will not. In other words, though it will prove difficult to obtain necessary political support for the legislation required to render the Special Division a legitimate and credible option, it is nonetheless a more feasible solution.

- **Challenges to operationalising the process:** operationalising a Special Division could happen within a relatively short time-frame – and, in the best event, before next year's elections. At the judicial level, it requires the CJ to administratively establish the division. However, as operationalising the process also requires that PEV cases are brought to the division, challenges include creating necessary investigatory and prosecutorial units. Establishing a Special Prosecutor for PEV will take time, even if an Act of Parliament could be passed in the near future. However, in comparison, operationalising a Special Tribunal would take much longer, even if political goodwill emerged in the near future. Experiences from other countries indicate that it can take several years from the decision being made by the national political leadership to the actual hearings commencing. In Sierra Leone, for example, it took 15 months to negotiate the agreement, from the moment national authorities made a formal agreement with the UN to establish the tribunal. After that, it took more than a year before the first indictments were issued; well above another year before the first trial commenced; and four more years before the first conviction was achieved. Put simply, assuming there is political will to create an accountability mechanism, operationalising a Special Division would be faster than operationalising a Special Tribunal.
- **Funding:** it is useful to make preliminary remarks on funding as funding affects the feasibility of an accountability solution. Clearly, running a Special Tribunal externalised from the existing legal system would be more expensive than a Special Division within the existing structures. To exemplify, the total

costs of running the SCSL, which has led to nine convictions, is well above USD 200 million²⁰¹ and the STL has an annual budget for 2012 of around Euros 55 million.²⁰² In comparison, the total operating cost of the SPSC (Timor Leste) – with its 55 trials leading to the conviction of 83 individuals – for the period 2003–5 amounted to around USD 14 million (including the costs of international staff involved in the process).²⁰³ Even if the modalities of a Special Tribunal for Kenya would be different from, say, the SCSL, the costs of creating a Special Tribunal will be higher than those of the Special Division. It is important to note there are no indications that grantmakers – whether the UN or bi/multilaterals – are interested in covering the costs of a Special Tribunal for Kenya (in light of the fact the ICC is already dealing with the PEV).

8.4. Outcome of comparative analysis

In terms of legitimacy and credibility, some factors favour Special Tribunal (respect for human rights, including fair trial standards; independence and impartiality; not being biased; ability to prosecute those who bear the greatest responsibility for the PEV; and competence to prosecute international crimes) whereas others favour a Special Division (local ownership and relevance to victims and other key audiences; the ability to convict a fair number of the perpetrators; and authority to enforce its decisions). However, the scope of these relative advantages depends more on the detailed set-up of each mechanism than whether the mechanism operates inside the Kenyan legal system (the Special Division) or outside (the Special Tribunal).

Thus, analysis of the two options for an accountability process for the PEV in the context of desired goals of criminal justice does not favour one over the other. The preference depends on what goals of criminal justice are perceived of most important. Arguably, attention should be paid to deterrence, not least with an eye to the forthcoming General Elections. This would result in a preference for a Special Division.

201 Government of United Kingdom, <http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120423w0004.htm>.

202 STL, *Press Release*, <http://www.stl-tsl.org/en/media/press-releases/07-03-2012-tribunal-publishes-its-third-annual-report>.

203 ICTJ, *The Serious Crimes Process in Timor-Leste: in retrospect*, <http://ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf>, p 30.

The option of the Special Division is in all aspects – including political will to establish it in a timely manner, ability to operationalise in a timely manner and the likelihood of obtaining necessary funding – more feasible than the Special Tribunal option.

Creating a Special Division and associated structures to try PEV cases in a credible manner presents challenges, not least in terms of obtaining necessary political

support. Yet, the Special Division solution – which, unlike a Special Tribunal solution, does not require an amendment of the Constitution, but “only” Acts of Parliament – appears to be the only realistic solution in the foreseeable future. It is concluded that an advocacy strategy be developed in support of a Special Division. The legitimacy and credibility challenges of this solution should then as be remedied by creating safeguards in the framework governing the pursuit of accountability.

9. STRATEGY AND RECOMMENDATIONS

9.1. Overall structure of an accountability mechanism for the PEV

This Report recommends an advocacy strategy on accountability focused on the establishment of a Special Division of the High Court. It further recommends the establishment of a Special Prosecutor for PEV cases, created under Article 157(12) of the Constitution and working independently of the DPP, to investigate and prosecute PEV cases.

As for the composition of these bodies, it recommends the inclusion of international expertise, both in the Special Division itself and in the office of the Special Prosecutor. The first can be promoted through the existing procedures for appointment (unless a constitutional amendment is adopted). The Act establishing the Special Prosecutor for PEV cases should set requirements for the composition of the office, including the involvement of internationals.

To facilitate enhanced participation of victims, promote reparations and safeguard their security, it recommends the adoption of legislation creating special procedures for PEV cases and the establishment of a special unit or agency working independently of the existing Witness Protection Agency (and preferably involving international expertise).

It is further suggested that a clear legal framework be put in place for prosecuting international crimes, in addition to crimes under domestic law. This requires advocacy for an Act of Parliament to make the International Crimes Act applicable to crimes committed in 2007/8, the adoption of which would be constitutional (cf. Article 50(2)(n)) as well as compatible with international standards.

It is recommended that the issue of applicable procedural law is dealt with at a later stage, once a more thorough assessment of the issue has been undertaken.

In sum, it is recommended that the overall structure of the accountability model takes the form of a Special Division of the High Court and a Special Prosecutor for PEV cases, both involving international staff. Both international crimes and crimes under domestic law should be prosecuted. This seems the most legitimate and credible option that could possibly be achieved, taking into account the current political environment. For advocacy purposes, it appears an advantage that the AG’s working committee on the ICC has proposed a solution not entirely different.

9.2. Detailing the structure of the judicial, prosecutorial and investigatory units

The following presents an initial attempt to offer a framework for deciding the detailed structure of the

accountability mechanism, including the judicial and prosecutorial structure:

- **A Special Division of the High Court is created administratively by the CJ:**

- The Division has exclusive jurisdiction for all cases relating to the PEV;
- Judges serving in the bench of the Special Division are selected among Kenyan judges with integrity and skills in international law already working in the judiciary and international judges are appointed in accordance with the procedures spelled out in the Constitution;
- There is one centralised Division, based at the High Court in Nairobi but operating in other locations when need be;
- Each bench is served by three judges – one Kenyan (presiding) and two internationals;
- Decisions of the Division can, in accordance with the Constitution, be appealed to the Court of Appeal, for which a Special Division is established to hear these appeals and is similarly composed of two international judges and one Kenyan judge (presiding);
- The Division has exclusive jurisdiction over PEV crimes, defined as international crimes as well as serious crimes under Kenyan law (including murder, sexual crimes, arson and other serious crimes if directly connected to the political crisis) committed in the context of the disputed December 2007 election.
- Arrangement should be made to ensure knowledge transfer, for example by ensuring that the judges involved in the Special Division mentor and in other ways transfer knowledge to other judges working in the Kenyan judiciary.

- **A Special Prosecutor for PEV cases is created, in accordance with Article 157(12) of the Constitution:**

- The office of the Special Prosecutor for PEV cases is set up outside the structures of the DPP and works independently of the DPP;
- The Special Prosecutor for PEV is authorised to request and immediately receive any file, including the files currently in possession of the DPP or the police, or any other information relating to the PEV from the police, the DPP or any other state office;

- The Special Prosecutor for PEV is authorised to conduct her/his own investigations in connection to PEV cases where s/he deems additional investigations are necessary for preparing PEV cases for prosecution;
- The Special Prosecutor for PEV cases is a non-Kenyan with significant experience in investigating and prosecuting international crimes;
- The Special Prosecutor for PEV cases is responsible for appointing prosecutors to serve in the office;
- It is a requirement that half of the prosecutors appointed by the Special Prosecutor are internationals, and that all prosecutors (whether Kenyan or internationals) have significant experience investigating and prosecuting international crimes and/or other serious crimes;
- The prosecutors work in teams of 3-5 prosecutors headed by a non-Kenyan, and under the supervision of the Special Prosecutor;
- To each team is connected a number of investigators, appointed by the Special Prosecutor. These investigators can be internationals or Kenyans, but must have significant experience investigating international crimes and/or other serious crimes.
- Arrangement should be made to ensure knowledge transfer, for example by ensuring that the international experts involved in the process mentor their Kenyan colleagues, and the expertise of the Office of the Special Prosecutor can be transferred over time to the DPP.

9.3. Summary of legal change needed

The following summarises legal changes needed to give effect to the above:

- Legislation creating a Special Prosecutor for PEV cases, in accordance with Article 157(12) of the Constitution. The legislation should stipulate that the Special Prosecutor for PEV cases must be non-Kenyan with significant experience prosecuting international crimes and that at least half of the prosecutors serving in the office, appointed directly by the Special Prosecutor, must be non-Kenyans; the Special Prosecutor for PEV cases works independently of the DPP; and the Special Prosecutor has the power to carry out additional investigations of PEV cases;

- Legislation making the application of the International Crimes Act retrospective, in accordance with Article 50(2)(n) of the Constitution and international standards;
- Legislation with regard to victims' rights, which enhances participation of victims in the proceedings; clarifies or strengthens victims' right to reparation; and sets up a special agency or unit for the protection of witnesses, which works independently from the Witness Protection Agency.

9.4. Proposed advocacy strategy for accountability for the PEV

To create a credible accountability process in Kenya, advocacy should be conducted to promote that:

1. The CJ undertakes consultations with civil society and other relevant stakeholders with regard to administratively establishing a Special Division of the High Court as soon as possible;
2. The judiciary encourages that international judges with expertise in international criminal law are appointed through the procedures established in the Constitution (and the judiciary considers if they can be employed on special terms);
3. Parliament enacts the necessary legislation with regard to: 1) establishing a Special Prosecutor for PEV cases; 2) allowing that the International Crimes Act be applied to crimes committed in 2007/8; and 3) enhancing victims' participation, right to reparation and protection. The legislation establishing the Special Prosecutor should set certain deadlines and create benchmarks for success;
4. Once established, the Special Prosecutor for PEV cases develops a strategy to prioritise the prosecution of PEV cases. The strategy must ensure those who bear the greatest responsibility for the crimes are prosecuted (for international crimes if the crimes are deemed to meet the threshold for this), but also that other categories of perpetrators, including police officers, are prosecuted;
5. The DPP task-force already operating carries out its mandate in a transparent and credible manner, aiming to prepare PEV cases for prosecution as soon as possible. This includes offering feedback to complainants, victims' groups, civil society and other interested parties with regard to the status of cases and what measures are proposed and taken to ensure that further investigations are carried out with regard to those cases not presently deemed complete, but which could potentially lead to convictions. Once a Special Prosecutor for PEV cases is established, all cases are handed over to the same;
6. Once the accountability mechanism is established, an outreach programme is created to promote awareness and trust in it;
7. African and other international partners support the strategy and offer necessary funding to the Special Division of the High Court, the Special Prosecutor for PEV cases, witness protection units or agencies and for operationalising the accountability mechanism;
8. Once the mechanism is operational, the ICC shares evidence with the Special Prosecutor for PEV cases in accordance with Article 93(10) of the Rome Statute, with the purpose of prosecuting and convicting high-level perpetrators not currently involved in the ICC cases;
9. The government continues to cooperate with the ICC, including, if necessary, arresting and transferring the four suspects for trial in The Hague. It should be made clear the domestic accountability mechanism is complementary to the ICC process.

Until the Special Division and the Special Prosecutor for PEV cases become operational, accountability and redress for the PEV should be promoted through other measures, including: civil and constitutional suits against the government (which have already happened with some success in connection with police violence); and the use of regional and international judicial bodies to hold the government accountable for its failure to prosecute PEV cases and provide reparations to the victims.

ANNEX 1.

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ANNEX 2.

LIST OF PEOPLE CONSULTED

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State Counsel (anonymous), Attorney General's Office, Nairobi.

Two members of the DPP's multi-agency taskforce.



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