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Prosecuting International and Other Serious Crimes in Kenya

Introduction

This briefing paper focuses on the topic of prosecuting international and other serious crimes in Kenya, including crimes committed in the context of the postelection crisis of late 2007 and early 2008.¹ In particular, it identifies and analyzes obstacles and opportunities for such prosecutions within current legal and institutional frameworks.

While Kenya's obligations under the Rome Statute require it to support the ongoing International Criminal Court (ICC) process, this brief concludes that it is equally important to create an institutional framework to ensure that national prosecutions for serious crimes take place. To this effect, the chief justice should establish a special division of the High Court, and the Kenyan Parliament should adopt legislation that establishes an independent special prosecutor to deal with the 2007–2008 postelection violence (PEV) cases and possibly other international crimes cases. Furthermore, the brief recommends that a special witness protection unit or agency be established for PEV-related offenses.

Postelection Violence Cases and the ICC

In October 2008, the Commission of Inquiry into Post-Election Violence (CIPEV) published its report, recommending that a special tribunal composed of Kenyans and foreigners be established to prosecute cases arising from the PEV.² Shortly after, in December 2008, Kenya enacted the International Crimes Act to domesticate the Rome Statute.³

However, it soon became clear that the political leadership in the country was not committed to accountability. On February 12, 2009, the Kenyan Parliament voted down a bill seeking the establishment of a special tribunal to deal with the PEV. Later attempts to establish a national accountability mechanism also failed.⁴ As a consequence of Kenya's failure to prosecute these crimes in its national courts, on March 31, 2010, Pre-Trial Chamber II (PTC II) of the

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1 The Kenya Transitional Justice Brief, a bulletin by the International Center for Transitional Justice (ICTJ), seeks to highlight current developments in the field of transitional justice in Kenya. ICTJ's goal in publishing the brief is to provide a central and reliable source of transitional justice information for critical stakeholders, including development partners, policymakers, and civil society actors. Each issue of the brief focuses on one or more critical areas for transitional justice in Kenya, including truth-seeking, criminal prosecutions, institutional reforms under the new constitution, and reparations and other victims' considerations.

2 Commission of Inquiry into the Post-Election Violence, Report of the Commission of Inquiry into the Post-Election Violence (Nairobi, Kenya: 2008).

3 Act no. 16 of 2008. The act makes provision for the punishment of certain international crimes, namely genocide, crimes against humanity, and war crimes, and enables Kenya to cooperate with the ICC. The International Crimes Act came into force on January 1, 2009, and was gazetted on June 5, 2009.

4 See Hansen, Thomas Obel, "Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns," *California Western International Law Journal* 42, no. 1 (2011): 1–35; Brown, Stephen and Chandra Lekha Sriram, "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya," *African Affairs* 111, no. 443 (2012): 244–60.

ICC authorized the ICC prosecutor, acting *proprio motu*, to commence an investigation into the Kenyan situation.⁵

After the ICC prosecutor named six suspects, five of them high-ranking government officials, the Kenyan Parliament passed a nonbinding motion on December 22, 2010, urging the government to withdraw from the Rome Statute and repeal the International Crimes Act.⁶ In this context, several members of Parliament called for the establishment of a domestic accountability process to replace the ICC. In mid-January 2011, the government announced that the coalition partners had agreed to establish a special division of the High Court to try PEV cases. However, government officials simultaneously argued that a criminal justice process could jeopardize peace and security, and launched diplomatic efforts aimed at gathering support for a United Nations Security Council deferral of the Kenyan ICC cases.

Further, on March 17, 2011, Police Spokesperson Eric Kiraithe stated that PEV files had been prepared, implicating up to 6,000 individuals, and that the cases would be prosecuted once a special tribunal or a special division was created. This statement appears to be connected to the Kenyan government's admissibility challenge to the ICC cases, filed on March 31, 2011, which argued that investigations into the PEV were ongoing, or alternatively, that ongoing judicial reforms would soon allow a national accountability process to commence.⁷ However, PTC II rejected the admissibility challenge, noting that there remains a "situation of inactivity" in Kenya. It made it clear that for an admissibility challenge to succeed, proceedings at the national level must be ongoing and concrete evidence must be presented to support their existence.⁸ The decision was upheld by the Appeals Chamber.⁹

On January 23, 2012, PTC II confirmed charges against four of the initial six suspects—William Ruto, Joshua Sang, Uhuru Kenyatta, and Francis Muthaura.¹⁰ In response, the Kenyan government once again stated that it wished to "bring the cases home," simultaneously arguing that the ICC suspects should be prosecuted in national courts, in the East African Court of Justice, and in the African Court of Justice and Human Rights. However, on August 17, 2012, a multiagency task force established by the Director of Public Prosecutions (DPP), which had been mandated to review PEV cases and make recommendations to the DPP on how to process them, concluded that most PEV cases were unsuitable for prosecution due to a lack of evidence.¹¹ At the same time, however, the DPP stated that some of the PEV cases could be prosecuted as international crimes, but implied that this would happen only if a special division of the High Court were established to deal with the cases.¹² On October 30, 2012, a committee of the Judicial Service Commission (JSC) released a report recommending the establishment of an International Crimes Division of the Kenyan High Court to prosecute PEV cases as well as other international and transnational crimes.¹³

5 Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010). Majority decision.

6 Motion 144 in Kenya National Assembly, Motions 2010 (Dec. 22, 2010). The government, however, did not act on this motion.

7 Pursuant to article 19(2)(b) of the Rome Statute of the International Criminal Court.

8 Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-02/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute (May 30, 2011); Prosecutor v. Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/11-96, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

9 Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of May 30, 2011, Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011); Prosecutor v. Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of May 30, 2011, Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011).

10 Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012); Prosecutor v. Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012). Muthaura's case has since been dropped.

11 Kiplang'at, Jeremiah, "Lack of Evidence Derails Local Trials," *Daily Nation*, Aug. 17, 2012, www.nation.co.ke/News/Lack-of-evidence-derails-local-trials/-/1056/1482054/-/item/0/-/xunefez/-/index.html.

12 Amran, Athman, "Post-Election Violence Suspects may Face International Law," *Standard*, Aug. 18, 2012, www.standardmedia.co.ke/?articleID=2000064300&story_title=Post-election-violence-suspects-may-face-international-law.

13 Judicial Service Commission, Report of the Committee of the Judicial Service Commission on the Establishment of an International Crimes Division in The High Court of Kenya (Oct. 30, 2012).

The Struggle Over Complementarity and Political Resistance to Accountability

The Kenyan government has continuously stated that it wishes to prosecute PEV cases locally. In the context of its appeal of PTC II's decision, the government submitted information indicating that concrete investigatory steps had been undertaken with respect to (some of) the ICC suspects. 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, William Ruto.¹⁴ However, in the majority decision of August 2011, the Appeals Chamber ruled that PTC II had not erred in dismissing Kenya's admissibility challenge. The chamber clarified that national proceedings must involve the same suspects as well as substantially the same conduct as those investigated by the ICC.¹⁵

Although article 19(4) of the Rome Statute states that only in "exceptional circumstances" may the ICC grant leave for a government to file a second admissibility challenge, Kenyan government officials continue to challenge the ICC cases and cite the complementarity regime, arguing that the ICC cases should be "brought home." Most recently, the Kibaki administration stated that it wished to "transfer the ICC cases" to the African Court of Justice and Human Rights, or the East African Court of Justice, though neither of these courts are currently mandated or resourced to conduct such trials.

Amid the government's struggle with the ICC over admissibility, serious crimes have been committed on a large scale in Kenya. In late 2012 and early 2013, serious violence occurred in Mombasa, Kisumu, Tana River, Baragoi, and elsewhere.¹⁶ A commission established to investigate the Tana River clashes, which claimed the lives of more than a hundred people, was told that two members of Parliament, a minister, and other leaders were responsible for the violence.¹⁷

The ongoing violence highlights the need to address the impunity gap in Kenya. This requires an analysis of the legal and institutional barriers to prosecuting international and other serious crimes in the country.

Legal Barriers and Opportunities

In considering whether international crimes can be prosecuted in Kenyan courts, it is necessary to distinguish between acts committed before and after January 1, 2009, the date when the International Crimes Act of 2008 came into force.

The International Crimes Act applies to crimes committed after January 1, 2009. Accordingly, war crimes, crimes against humanity, and genocide committed in Kenya—or by Kenyan citizens abroad—can be prosecuted in the Kenyan High Court. Importantly, article 6(4) of the International Crimes Act defines crimes against humanity in accordance with article 7 of the Rome Statute and as defined in customary international law.¹⁸

¹⁴ Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11-336, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of May 30, 2011, Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," Dissenting Opinion of Judge Anita Ušacka (Sept. 20, 2011).

¹⁵ Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11-307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of May 30, 2011, Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011); Prosecutor v. Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of May 30, 2011, Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011).

¹⁶ See Human Rights Watch, "Kenya: Investigate All Politicians in Tana River Violence: Police Failed to Prevent Clashes Despite Warnings," Sept. 13, 2012, www.hrw.org/news/2012/09/13/kenya-investigate-all-politicians-tana-river-violence.

¹⁷ Nyassy, Daniel, "MPs, Envoy and Church Leaders Named in Tana Chaos," Daily Nation, Oct. 18, 2012, www.nation.co.ke/News/politics/MPs+envoy+and+church+leader+named+in+Tana+chaos/-/1064/1536658/-/oyikquz/-/index.html.

¹⁸ Because there does not appear to be a requirement of a state or organizational policy in customary international law, it must be assumed that Kenyan prosecutors will not be required to prove the existence of such a policy, though of course other elements of the crime, including the existence of a systematic or widespread attack on the civilian population, must still be proved. See Hwang, Phyllis, "Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court," *Fordham International Law Journal* 22, no. 2: 502–504.

However, the International Crimes Act does not apply to crimes committed before January 1, 2009, including those associated with the PEV. The question of whether these crimes can be prosecuted as international crimes must take into account relevant principles in international law as well as Kenya's constitutional order. Equally, consideration should be given to the question of whether prosecuting the conduct as ordinary domestic crimes would sufficiently meet the objectives of combating impunity, according justice for victims, and guaranteeing non-repetition.

In essence, it would probably be very difficult to prosecute any conduct predating January 1, 2009, as an international crime in Kenya. Such an approach would almost certainly need an amendment of the International Crimes Act. Neither international law nor the Rome Statute regime requires that crimes in question be prosecuted as international crimes. The concern is that the conduct itself be appropriately prosecuted at the national level.¹⁹ As such, prosecutions for murder, serious assault, or rape, among others, might well suffice. As a policy issue, it is far from clear that there is anything particularly to be gained from such an amendment to the International Crimes Act. Not only would it be a laborious process with no guarantee of success, current criminal law in Kenya easily accommodates the possibility of prosecuting ringleaders and masterminds, at a minimum, as aiders and abettors in the relevant conduct, if not as principals. Justice would be swifter, and serious prosecutions and convictions could ensue without the need for a delayed amendment.

Institutional Barriers and Opportunities

Over the last two years, Kenya's judiciary has undergone significant changes. With the passage of the Judicial Service Act, the Vetting of Judges and Magistrates Act, the Supreme Court Act, and other laws, the institutional framework for a reformed judiciary is now in place. Additionally, the new chief justice, Willy Mutunga, is generally seen as being committed to the principles that underpin a strong and independent judiciary. Furthermore, a vetting process has been implemented that is likely to help remedy problems in the judiciary, such as widespread corruption and incompetence.²⁰

While the strengthening of Kenya's judiciary is a precondition for the impartial prosecution of international crimes and other serious crimes in national courts, it is no guarantee of success. Judicial independence and the courts' ability to conduct impartial proceedings in these types of cases also depend on the extent to which other actors, including government officials, respect the separation of powers and the rule of law.

Further, successful adjudication also depends on the will and ability of other legal-sector bodies, such as the police and the DPP, to process cases. Though the 2010 Constitution requires that these legal-sector bodies be reformed, only limited progress has been made to date. Internal opposition, especially from the police, and the possible inability of these institutions to resist political pressure are widely recognized to constitute the most serious obstacles to prosecuting criminal cases—including international crimes cases—that involve government officials and other powerful actors.

Discussions of how to overcome institutional barriers to prosecuting international crimes have tended to focus on two possible approaches, which both concern possible modalities for a national accountability mechanism to complement the ICC and prosecute PEV cases, namely the establishment of a special tribunal or a special division of the High Court.

Currently, it seems unrealistic to expect that a special tribunal will be set up to prosecute PEV cases, in particular because creating a special tribunal that operates entirely independently of existing legal

¹⁹ See article 20[3] of the Rome Statute.

²⁰ See International Center for Transitional Justice, "One Year Since Promulgation: Assessing the Reform Process in the new Constitutional Dispensation," Kenya Transitional Justice Brief 1, no. 2 (Sept. 2011); The Kenya National Dialogue and Reconciliation Monitoring Project, Progress in Implementation of the Constitution and Preparedness for 2012 (Jan. 2012), kofiannanfoundation.org/sites/default/files/Jan_2012_FINAL_PDF.pdf.

structures would require a constitutional amendment and thus significant political will.²¹ Moreover, prior experience with tribunals of this nature indicates that operating a special tribunal would be very costly, and neither the Kenyan government nor international partners would be likely to fund it.

Though also posing significant challenges, it may prove more feasible to create a special division of the High Court to deal with PEV-related cases, as proposed in a recent report by the committee of the JSC.²² Importantly, no new legislation would be necessary for establishing such a division; it could be done administratively by the chief justice. However, new legislation would be required to ensure that a special division solution does not fall victim to factors like political interference, which have so far rendered accountability for the PEV almost nonexistent.

It is particularly important that special measures be taken to secure the independence and impartiality of the investigatory and prosecutorial bodies associated with the division. The best way of doing so would be to create a special prosecutor, who would work independently of the DPP and have a team of dedicated prosecutors and investigators, to deal with PEV cases (and possibly other international crimes cases). To safeguard the independence of the special prosecutor, he or she must have exclusive competence over the cases. For this to happen, Parliament must enact legislation under article 157(12) of the Constitution, which allows powers of prosecution to be conferred on authorities other than the DPP.

Furthermore, though Kenya's Witness Protection Agency is now operational, there is a perception that the agency may not have the capacity to protect witnesses in sensitive cases, like those relating to the PEV. Although a special unit could be established within the existing legal framework, this does not guarantee necessary funding and may be insufficient to counter perceptions that the unit would lack the capacity to protect witnesses. It would therefore be preferable to establish by law a special witness protection unit or agency for PEV-related offences that would operate outside existing structures and be guaranteed necessary independence, powers, and resources.

To enhance the credibility of a complementary accountability mechanism to prosecute PEV-related cases, it may also be useful—even necessary—to involve international legal expertise at different stages, including in investigation, prosecution, and adjudication. Should a special prosecutor be established under article 157(12) of the Constitution, the relevant legislation could lay down requirements for the composition of this office, including a requirement that international staff be included.

There are no legal obstacles to appointing international judges to serve on the bench of a Kenyan court, but it remains a challenge that international judges would need to serve under ordinary conditions and that there would not be an inbuilt exit strategy for international judges once the accountability process was completed.²³ Whether or not international judges are involved in the process, Kenyan judges serving on the bench must receive sufficient training on international criminal law.

Notwithstanding the importance of creating a complementary accountability mechanism to address the impunity gap for PEV cases, it is also important to consider more sustainable solutions to

21 The system of courts in Kenya is described in article 162 of the Constitution. Accordingly, it would require a constitutional amendment to establish a special tribunal that functions independently of the existing judicial structures, the decisions of which are not subject to the review of the superior courts named in the Constitution. Article 165(3)(a) stipulates that the High Court has unlimited original jurisdiction in criminal and civil matters.

22 Judicial Service Commission, Report of the Committee of the Judicial Service Commission, October 2012, 146–8.

23 Article 166(2) of the Constitution 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 recognized university, 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 10 years' experience as a superior court judge or professionally qualified magistrate; (b) at least 10 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 10 years.

prosecuting international and other serious crimes in Kenya. The proposal made by the committee of the JSC to create a permanent International Crimes Division of the High Court may prove useful. However, it should be kept in mind that, on its own, creating such a division is insufficient for overcoming institutional barriers to successful prosecution of international and other serious crimes. To ensure respect for the rule of law and promote accountability principles in the long term, it is vital to strengthen the capacity and independence of existing legal-sector bodies, including the police and prosecutorial bodies. This requires a commitment to sincerely implementing the reforms envisaged in the 2010 Constitution, continued investments to strengthen the capacity and expertise of these bodies, and—perhaps most importantly—a change of mindset so that legal-sector bodies serve the people, not the ruling elite, and are held to account for their actions.

Conclusion

The Kenyan government must fully cooperate with the ICC and as a matter of urgency, ensure that other cases relating to the PEV are prosecuted nationally. To this effect, the chief justice should establish a special division of the High Court, which—as recommended by the committee of the JSC—could be permanent in nature.

Rather than trying to amend the International Crimes Act to cover crimes committed prior to January 1, 2009, prosecutions should focus on those bearing the greatest responsibility in respect of domestic crimes, focusing especially on senior figures who contributed to the PEV by planning, organizing, ordering, or instigating events, or who acted in a way that provided material contribution to crimes in question.

The Kenyan Parliament should adopt legislation establishing a special prosecutor who operates independently of the DPP and is granted all necessary powers to effectively deal with PEV cases, and possibly other international crimes cases. Furthermore, a special witness protection unit or agency for PEV-related offences should be established outside the existing structures and be guaranteed the necessary independence, powers, and resources to effectively protect witnesses.

It is of the utmost importance that the Kenyan government ensure that serious crimes committed in the run-up to the March 2013 elections, including those committed in Tana River, Baragoi, and elsewhere, are swiftly and independently investigated and prosecuted, regardless of whether political actors or other powerful individuals may be implicated. The Kenyan government must continue its efforts to build strong and independent legal-sector bodies, including ensuring the full and urgent implementation of reforms of legal-sector bodies stipulated in the 2010 Constitution.

International partners must continue to support accountability for the PEV, which requires that pressure be put on the government to cooperate fully with the ICC and establish a national accountability mechanism. International partners should also continue to support the capacity building of Kenya's legal-sector bodies and encourage the government to pursue accountability for serious crimes committed recently in other ways.

Finally, civil society has an important role to play in advocating that international and other serious crimes be investigated, prosecuted, and adjudicated by the relevant authorities.