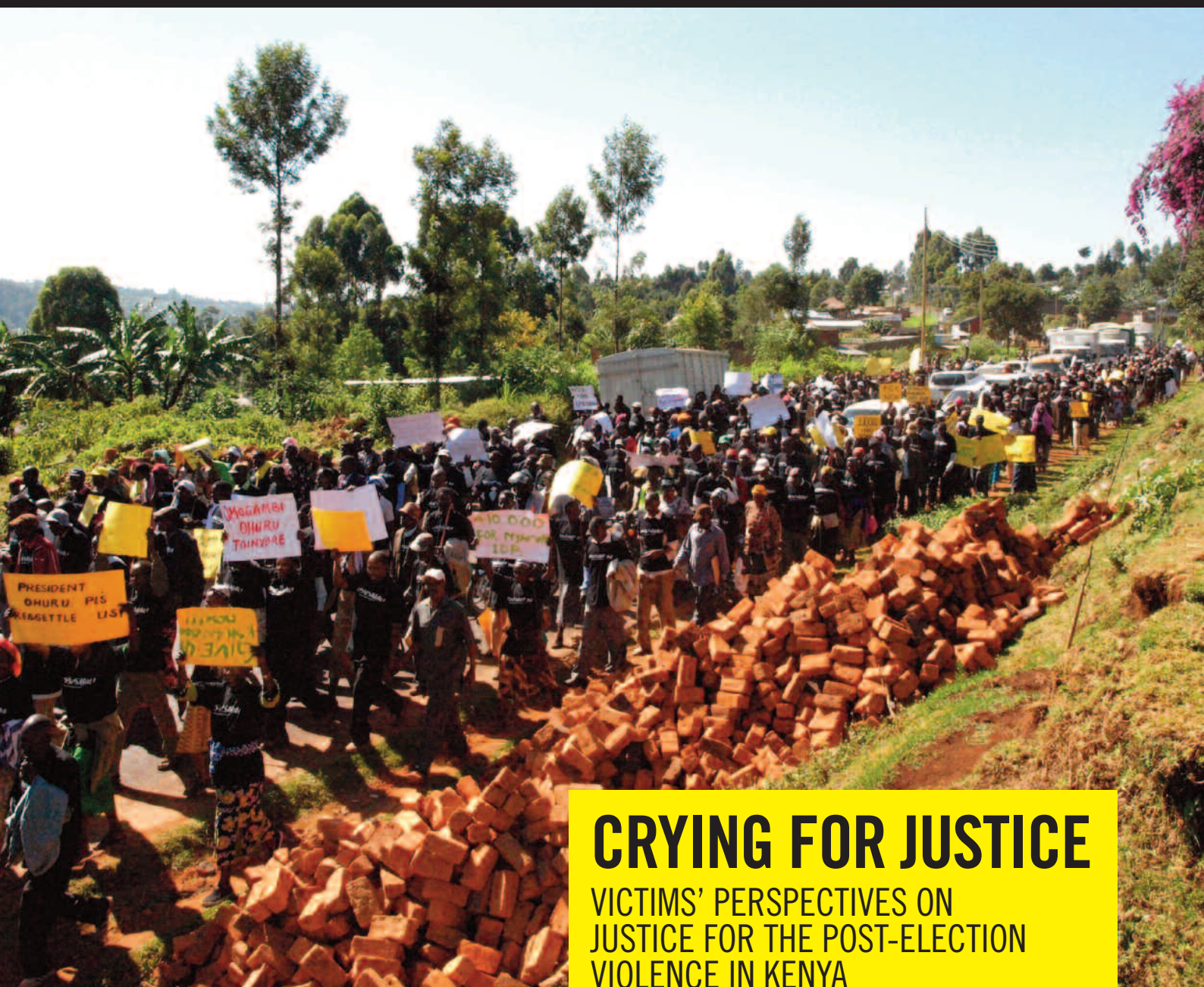




# CRYING FOR JUSTICE

VICTIMS' PERSPECTIVES ON  
JUSTICE FOR THE POST-ELECTION  
VIOLENCE IN KENYA

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*Cover photo:* A march in Nyamira county, Nyanza in Kenya on 4 March 2014 to highlight the plight of people displaced there by the 2007/8 post-election violence.

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# LIST OF ACRONYMS

|       |                                                       |
|-------|-------------------------------------------------------|
| ASP   | Assembly of States Parties                            |
| AU    | African Union                                         |
| CAVI  | Citizens Against Violence                             |
| CIPEV | Commission of Inquiry into the Post-Election Violence |
| COVAW | Coalition on Violence Against Women                   |
| DC    | District Commissioner                                 |
| DPP   | Director of Public Prosecutions                       |
| FIDA  | Federation of Women Lawyers                           |
| GSU   | General Service Unit                                  |
| ICC   | International Criminal Court                          |
| ICCPR | International Covenant on Civil and Political Rights  |
| ICD   | International Crimes Division                         |
| IDP   | Internally displaced people/persons                   |
| IPOA  | Independent Police Oversight Authority                |
| JSC   | Judicial Service Commission                           |
| KNCHR | Kenya National Commission on Human Rights             |
| OB    | Occurrence Book                                       |
| ODM   | Orange Democratic Movement                            |
| OTP   | Office of the Prosecutor                              |
| PNU   | Party of National Unity                               |
| TJRC  | Truth, Justice and Reconciliation Commission          |
| VPRS  | Victims Participation and Reparations Section         |

**SOUTH SUDAN**

**ETHIOPIA**

**UGANDA**

**SOMALIA**

**KENYA**

**WESTERN**

**CENTRAL**

**NORTH-EASTERN**

**COAST**

**INDIAN OCEAN**

**UNITED REPUBLIC OF TANZANIA**

**Nairobi**

**Mombasa**

**Legend:**

- National capital
- Provincial capital
- Town, village
- Airport
- International boundary
- Provincial boundary
- Main road
- Secondary road
- Other road or track
- Railroad

**Scale:** 0 50 100 150 km / 0 25 50 75 100 mi

**Map No. 4167 Rev. 3 UNITED NATIONS December 2011**

**Department of Field Support Cartographic Section**

Kenya, Map No. 4187 Rev. 3 December 2011 © United Nations

# 1. SUMMARY

More than six years ago violence rocked Kenya following national elections. Between December 2007 and February 2008 1,100 people were killed, 660,000 displaced and thousands injured in beatings, machete attacks, rapes, police shootings and other acts that may amount to crimes against humanity. Despite a power-sharing agreement that ended the violence and triggered constitutional, legal, policy and institutional reforms and truth-telling initiatives, as well as investigations and prosecutions by the Office of the Prosecutor (OTP) of the International Criminal Court (ICC), most victims of these crimes are still waiting for justice and reparation.

This report sets out the challenges victims of the post-election violence face in obtaining justice and reparation in Kenya. Based on in-depth interviews conducted between October and December 2013 with 49 victims from areas most affected by the violence it also provides a snapshot of their experiences and perspectives, including their views on the ICC's investigations and cases. Their testimonies paint a picture of disillusionment, with many fearing they will die before they see justice for the crimes committed against them. Many are desperate for assistance to help them recover from injuries sustained and property and livelihoods lost as a result of the post-election violence. Their views demonstrate that justice, truth and reparation are now more important than ever.

Victims who spoke to Amnesty International explained the difficulties they faced in reporting to the authorities crimes committed against them or which they witnessed. Some said the police appeared not to have initiated investigations following their complaints.

Concerns also arose regarding the effectiveness of investigations that have been conducted by the police. These concerns were underscored by reports in February 2014 that the Director of Public Prosecutions (DPP) stated over 4,000 post-election violence investigation files reviewed by a multi-agency task force lacked sufficient evidence to proceed to prosecution.<sup>1</sup>

Although a number of victims who spoke to Amnesty International were supportive of efforts to establish an International Crimes Division of the High Court which may deal with some post-election violence crimes, at the time of publication it remained unclear whether the proposal would proceed.

Interviews conducted by Amnesty International suggest that women, in particular, have continued to suffer as a result of what happened to them and their families. Some who spoke to Amnesty International had been widowed by the post-election violence and were struggling to support themselves and their families. Amnesty International spoke to four women who said they were raped, three of whom are now living with HIV. They told Amnesty International that stigma was one among many

challenges they faced as a result of what happened to them.

Of the 49 victims that Amnesty International spoke to, 35 had been displaced by the violence. Many of them were "integrated" internally displaced people who now lived in host communities or with relatives, and have never been able to resettle in their previous homes or villages. Others remain in unrecognized camps. This was despite government statements that all internally displaced people from the post-election violence had been resettled through a number of compensation and resettlement schemes that have been implemented since 2008. Only 12 of the 35 displaced people who spoke to Amnesty International had received any form of financial assistance to help them resettle. Some of the 12 stated the amount was insufficient to rebuild homes and their livelihoods.

The government has yet to establish a comprehensive and effective reparation programme to provide reparation to all victims of the post-election violence, including victims whose family members were killed, survivors of sexual and gender based violence and those injured. In its 2013 report the Truth Justice and Reconciliation Commission recommended a framework for such a programme that could potentially benefit many of these victims of the post-election violence. However, according to recent legislative changes, the report cannot be implemented until it has been considered by the National Assembly.<sup>2</sup> It is not clear when this will happen or whether the government plans to implement the report. The majority of victims who spoke to Amnesty International, including survivors of gunshot injuries, machete attacks and sexual and gender-based violence, had not received any form of reparation and many still needed medical treatment.

In a few cases, some civil society organizations and victims are taking their demands for justice and reparation to the Kenyan courts, in the form of civil, constitutional and public interest litigation. All cases are at the early stage of proceedings.

In 2010, the OTP at the ICC opened an investigation into the post-election violence on the basis that the authorities were unable or unwilling to genuinely prosecute allegations of crimes against humanity committed during the post-election violence. In particular, the decision followed the National Assembly's rejection of a bill to establish a Special Tribunal proposed by the Commission of Inquiry into the Post-Election Violence (the CIPEV, or Waki Commission) to investigate and prosecute crimes committed during the post-election violence. In March 2011, the OTP issued summonses to appear for six people it accused of committing crimes against humanity during the post-election violence. However, charges against two of these people were not confirmed in the pre-trial phase because the Prosecutor had not presented sufficient evidence to proceed to trial. Charges were also withdrawn against a third person shortly afterwards.

Two cases concerning the post-election violence are currently before the ICC. One of the cases, against William Ruto - who was elected Deputy President of Kenya in March 2013 - and former radio journalist Joshua arap Sang commenced in September 2013. The commencement of the second case against Uhuru Kenyatta, who was elected President of Kenya also in March 2013, is currently adjourned until October

2014. This follows an application to the Court made by the Prosecutor to delay the start of the trial, based on the government's failure to cooperate with her office's request for records which it argues are central to its case.<sup>3</sup> In both cases, the OTP alleges witness interference and intimidation, leading to a number of witnesses withdrawing.

The Kenyan government has also initiated political efforts and supported efforts by the African Union (AU) to undermine the work of the ICC and stop the ICC's cases, including by: calling on the UN Security Council to terminate or defer the Kenyan cases before the ICC; promoting non-cooperation with the ICC; and proposing amendments that seek to undermine the effectiveness of the ICC.

Forty-four of the 49 victims interviewed by Amnesty International supported the ICC's efforts to investigate and prosecute crimes committed in the post-election violence. The remaining five feared that the two ICC cases would disrupt what they perceived as ongoing efforts at reconciliation and national unity by Kenya's President and Deputy President. The majority have high hopes and expectations of the ICC, having become increasingly disillusioned by the country's legacy of impunity and political efforts to derail the ICC cases.

Nevertheless, many interviewed by Amnesty International raised concerns that the charges in the two cases currently before the ICC do not cover the crimes they suffered. Many victims feel excluded from the ICC process and are calling for the ICC to deliver justice for them, and their communities.

In the context of the failures of the national justice system to address crimes committed during the 2007-2008 post-election violence, the expectations which victims place on the ICC are understandable. However, the OTP cannot investigate and prosecute all crimes committed in any situation and it has been unable to present sufficient evidence to proceed with a number of charges in the cases it has initiated.

Many victims interviewed by Amnesty International want to engage with the ICC and some are exercising their right to participate in the ICC cases. However, their Common Legal Representatives<sup>4</sup> face major challenges and lack resources to communicate effectively with their clients and to reach out to all victims within the scope of the cases. "Situation" victims - those who fall outside the scope of the two cases but who suffered violations during the post-election violence - also wanted to engage with the Court. Although the ICC Outreach Unit is conducting outreach to affected communities, increasing political opposition to the work of the ICC is making that task more difficult.

Amnesty International concludes that in order to end impunity for the post-election violence, the Kenyan government must fulfil its obligations to investigate and prosecute the crimes that the ICC does not address, and establish a comprehensive and effective reparation programme to address the harm suffered by the victims. It must also fulfil its obligations to cooperate fully with the ICC and the ICC must continue its efforts to deliver justice to the victims. This report makes detailed recommendations to the government and to the ICC. It also calls on the international

community to support justice and reparation for the victims.

## KEY RECOMMENDATIONS

### GOVERNMENT OF KENYA - GENERAL

- Develop and implement, in consultation with civil society groups, a comprehensive plan of action to ensure the effective investigation and prosecution of crimes under international law committed during the post-election violence, as well as truth and full and effective reparation for the victims, including:
  - Ensure that all complaints related to the post-election violence are thoroughly, promptly and effectively investigated and communicated to the DPP.
  - Ensure that sufficient resources are made available to train law enforcement agencies, including police, prosecutors and the judiciary on the effective investigation and prosecution of crimes under international law, including sexual and gender-based crimes.
  - Ensure that sufficient resources are allocated to the Witness Protection Agency and investigate all relevant reports of threats, intimidation and attacks against victims and witnesses.
  - Consult with civil society groups on the establishment of the ICD. If it is established, ensure it functions independently, effectively and in accordance with international law and standards and that it is provided with sufficient resources.
  - Establish through legislation, the independent Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission (TJRC).
  - Ensure that the TJRC's recommendations in respect of the post-election violence are reviewed promptly in a transparent process, including consultation with victims.
  - Establish a reparation programme to provide full and effective reparation (including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) to all victims and, where appropriate, their families, taking into account the recommendations of the TJRC.
- Cooperate fully with the ICC, including by ensuring the protection of victims and witnesses; supplying records and other evidence requested by the Office of the Prosecutor; and enabling the ICC Registry to undertake outreach meetings in Kenya and communicate effectively with victims.
- Reconsider its policies regarding the ICC and in particular:
  - Refrain from supporting further calls for the Security Council to defer the ICC's cases.

- Oppose efforts by some States in the African Union urging non-cooperation with the ICC.
- Reconsider and withdraw its support for any proposals to amend the Rome Statute of the International Criminal Court, particularly those whose effect is to recognize immunities for sitting Heads of State.

#### POLICE

- Ensure that all complaints and information relating to the post-election violence reported to the police, including cases of sexual and gender-based violence, are thoroughly, promptly and effectively investigated.
- Ensure that police officers are provided with sufficient training to handle these cases and to protect people from sexual and gender-based violence.

#### DPP:

- Issue without further delay a public report on the status of investigations and prosecutions of crimes committed during the post-election violence.
- Direct the police, in accordance with Article 32 of the Director of Public Prosecutions Act,<sup>5</sup> to undertake all necessary investigations, including fresh investigations into the 4,000 case files reviewed by DPP which relate to the post-election violence.
- Engage regularly with civil society organizations on efforts being taken to prosecute the post-election violence cases, particularly through the multi-agency task force.

#### MINISTRY OF DEVOLUTION AND PLANNING

- Organize a full and independent audit of the status of IDPs and the effectiveness of government programmes to assist them, including integrated IDPs.
- In accordance with the Prevention, Protection and Assistance to Internally Displaced People and Affected Communities Act,<sup>6</sup> ensure that all IDPs, including integrated ones, receive sufficient assistance to resettle and rebuild their homes and allocate sufficient resources for this purpose.

#### KENYA NATIONAL ASSEMBLY AND SENATE

- Amend the International Crimes Act, currently applicable to offences committed after 1 January 2009, so that it applies to crimes under international law committed in 2007-2008.
- Refrain from all efforts to withdraw from the Rome Statute or repeal the International Crimes Act.

- Press the government to establish the independent Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission, in accordance with the recommendations of the TJRC Report and adopt relevant legislation. Ensure that adequate financial resources are allocated for this purpose.

#### THE INDEPENDENT POLICE OVERSIGHT AUTHORITY AND THE COMMISSION ON ADMINISTRATIVE JUSTICE AND OTHER COMPLAINTS BODIES

- Conduct outreach activities specifically targeted at informing victims and others with information regarding post-election violence crimes, about their work and how to submit complaints and information.
- Conduct prompt, thorough and effective investigations into relevant complaints.

#### ICC OTP

- Continue to investigate crimes committed during the post-election violence and instances of witness intimidation and interference in relation to cases currently before the International Criminal Court.
- Consider expanding investigations into the 2007-2008 post-election violence beyond the cases of those currently being prosecuted before the ICC.

#### ICC REGISTRY

- Ensure that all victims who submitted applications to participate as victims before the proceedings currently before the ICC are informed of the outcome of their application.
- Provide the Common Legal Representatives with sufficient resources and other assistance to communicate regularly with their clients and to identify and engage all eligible victims that want to participate in the ICC proceedings.
- Expand the ICC's outreach activities to enable affected communities, including victims of the post-election violence that fall outside the scope of the current cases, to be kept regularly informed about the ICC's work.

#### ICC TRUST FUND

- Carry out prompt assessments to establish assistance programmes for victims of the post-election violence as soon as possible.

#### INTERNATIONAL COMMUNITY, INCLUDING INTERGOVERNMENTAL ORGANIZATIONS, THE AFRICAN UNION AND DIPLOMATIC REPRESENTATIVES

- Insist that Kenya meets its international and domestic obligations to investigate

and prosecute crimes under international law during the post-election period and ensure truth and full and effective reparation for victims.

- Commit more resources towards supporting litigation proceedings brought by civil society/human rights groups together with or on behalf of victims.
- Call on the Kenyan government to strengthen relevant institutions aimed at ensuring full accountability at all levels of the post-election violence, particularly the police.

#### AFRICAN UNION HEADS OF STATE AND GOVERNMENTS (THE AU ASSEMBLY)

- Refrain from seeking the suspension or termination of the trials of the President and Deputy President of Kenya, which are currently before the ICC.
- Publicly acknowledge the importance of the ICC and the crucial role it is playing in seeking justice for victims of crimes against humanity, war crimes and acts of genocide in Africa.
- Desist from renewing the calls to the UN Security Council seeking the deferral of the trials of the Kenyan President and Deputy President, which are currently before the ICC.
- Desist from issuing resolutions that, in effect, call on the President of Kenya not to appear before the ICC and instead call on the Kenyan government to provide full, adequate and prompt support and cooperation to the ICC.
- Reconsider and withdraw support to proposals to amend the Rome Statute to the ICC whose effect would grant immunity before the ICC to serving Heads of State and Government and/or grant the UN General Assembly the power to defer ICC investigations and prosecutions.

#### UN SECURITY COUNCIL

- Reject any future initiatives to defer the ICC's investigations and prosecutions in Kenya.

## 2. INTRODUCTION

The violence that rocked Kenya at the end of 2007 and the beginning of 2008 was widespread and had far-reaching consequences. Men, women and children from all over the country were affected, particularly in Rift Valley, Nyanza and Western Provinces, Coast Province, Central Province and Nairobi.<sup>7</sup> At least 1,100 people were killed<sup>8</sup>, 660,000 displaced<sup>9</sup> and thousands injured<sup>10</sup> in beatings, machete attacks, rapes, police shootings and other acts that may amount to crimes against humanity.<sup>11</sup>

Six years on, despite a power-sharing agreement that ended the violence and triggered institutional reforms aimed at ending impunity, the vast majority of victims of these crimes are still waiting for justice and reparation. Victims have engaged with a number of truth-telling initiatives - including the Commission of Inquiry into the Post-Election Violence (CIPEV or Waki Commission) and the Truth, Justice and Reconciliation Commission (the TJRC). The existence of autonomous complaints bodies such as the Kenya National Commission on Human Rights (KNCHR)<sup>12</sup> have provided further platforms for their voices to be heard. However, as will be addressed in further detail in Chapter 5 of this report, the Kenyan government has repeatedly failed to take up the recommendations of these Commissions. It has failed to take genuine steps to investigate and prosecute the post-election crimes, despite commitments given in the 2008 Kenya National Dialogue and Reconciliation Accord. In particular, in 2009, legislation to establish a Special Tribunal to prosecute crimes committed in the post-election violence was voted against by the National Assembly and rejected by the Cabinet. Since then, only a small fraction of cases investigated by the police have resulted in prosecutions. Information available indicates that most of the prosecutions related to minor offences. The Kenyan government's failure to sufficiently investigate and prosecute crimes related to the post-election violence is addressed in more detail in Chapter 4 of this report. Despite some schemes offering financial assistance to internally displaced people,<sup>13</sup> these have been neither comprehensive nor effective in addressing the complaints made by the victims of the 2007-2008 post-election violence. Flaws in the government's reparation efforts are addressed in more detail in Chapter 5 of this report.

Although the OTP stepped in to investigate and prosecute some crimes in 2010 and sought and obtained from the Court summonses against six suspects, only one trial has commenced to date - against the current Deputy President of Kenya William Ruto and his co-accused Joshua arap Sang. The commencement of another trial, of current President Uhuru Kenyatta, is currently adjourned until 7 October 2014 for reasons including delays by the government in providing records requested by the ICC Office of the Prosecutor (OTP).<sup>14</sup> Charges against two others were not confirmed by the ICC's Pre-Trial Chamber due to insufficient evidence and have not proceeded to trial. The Prosecutor withdrew charges against one other person because some witnesses could no longer testify, one key witness admitted to accepting bribes, and because the government had failed to cooperate with uncovering evidence. The challenges arising in the ICC's cases will be addressed in further detail in Chapter 6 of the report.

Since Uhuru Kenyatta and William Ruto were elected as President and Deputy President in March 2013, the government has initiated and supported a number of political efforts to undermine the cases currently before the ICC, including through the AU and the UN Security Council.

Impunity at the national level and challenges arising in the ICC's proceedings affect victims and their right to an effective remedy, including victims' right to justice, truth and reparation. Their voices are, however, rarely heard in the politicized public discourse. This report seeks to address that by documenting the views and concerns of some victims regarding the challenges they face in obtaining justice, truth and reparation nationally, as well as their opinions regarding the ICC's investigations and cases.

Their testimonies paint a picture of disillusionment, with many fearing they will die before they see justice for the crimes committed against them. Many are desperate for assistance to help them recover from injuries sustained and property and livelihoods destroyed as a result of the post-election violence. Their views demonstrate that justice, truth and reparation are now more important than ever.

## ABOUT THIS REPORT

This report provides a snapshot of some of the concerns shared by victims of the post-election violence, who have been waiting six years for justice, truth and reparation. This report does not evaluate fully the impact of the Kenyan government's interventions aimed at assisting victims or internally displaced people, and does not represent the situation of all beneficiaries of these interventions. The report does not offer a quantitative analysis of victims' views, but is based on in-depth interviews Amnesty International conducted with 49 victims of the post-election violence from October to December 2013. Victims who met with Amnesty International were from some of the worst affected areas of the post-election violence: Nairobi, Naivasha and Nakuru (Central Rift Valley), Eldoret (West Rift Valley), Kericho (South Rift Valley), Kisumu and Kisii (Nyanza).<sup>15</sup> They included internally displaced persons, victims of police shootings or their relatives, survivors of rape and victims beaten by groups of men, some of whom were suspected to be from the criminal gang and political militia known as Mungiki. Victims who spoke to Amnesty International discussed their views regarding the government's failure to address impunity and the cases before the ICC. In particular, this report considers the following key concerns raised by victims interviewed by Amnesty International:

- The failure of Kenyan authorities to conduct prompt thorough and effective investigations of serious crimes committed during the 2007-2008 post-election violence and the lack of prosecutions of those suspected of committing them.
- The failure to provide victims with full and effective reparation to address the harm they have suffered, including inadequate government assistance and compensation programmes for internally displaced people.

- Concerns related to the investigations by the OTP and cases currently before the ICC, particularly their scope and the ability of victims to be involved meaningfully in the Court proceedings.

Amnesty International met victims in safe places where they could not be identified, at times far away from where they lived. This was because a number of them expressed concern that meeting with human rights organizations may create suspicions in their community that they, as victims, were providing information to the ICC or participating in its proceedings. Some victims were also sceptical about being part of Amnesty International's research, with many complaining they had given their stories to human rights organizations and journalists in the past, but were never subsequently informed of how the information was used. Although all victims gave their consent to have their information used for this report, many expressed fear of repercussions from the government or people in their communities. As a consequence, pseudonyms have been used for all victims quoted in this report.

Amnesty International did not seek to identify or meet with victims who are witnesses in the ICC's cases, in order to protect their security. Amnesty International acknowledges that serious concerns exist regarding the protection of these witnesses from intimidation and interference.<sup>16</sup> These are important issues that must be addressed, but do not fall within the scope of this report.

In addition, Amnesty International met with three representatives from human rights organizations, the Inspector General of Police, the Deputy Director of Public Prosecutions, representatives from the Ministry of Devolution and Planning and the Ministry of Foreign Affairs, Kenya's Witness Protection Agency and complaints bodies including the Independent Police Oversight Authority (IPOA), the Commission of Administrative Justice (the Ombudsman) and the National Gender and Equality Commission. Meetings and correspondence also took place with different sections of the ICC, including the Common Legal Representatives, the Registry and the OTP. Amnesty International requested meetings with the Cabinet Secretary for Devolution and Planning and the Chief Justice, but at the time of publication these meetings had not taken place.

At the end of the report, Amnesty International sets out recommendations which should be implemented to ensure justice and reparation for the victims.

## TRUTH, JUSTICE AND REPARATION

Whenever human rights violations and abuses that amount to crimes under international law are committed - such as genocide, crimes against humanity, war crimes, torture, extra-judicial executions and enforced disappearances - Amnesty International calls on national authorities to fulfil their obligations to ensure truth, justice and full reparation for victims.

These measures are not discretionary. They form part of the duty of all states to provide an effective remedy to victims of human rights violations and abuses as recognized in Article 8 of the Universal Declaration of Human Rights; the United Nations 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; and Article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR), which Kenya ratified on 1 May 1972. Kenya also has specific obligations to take these measures in relation to torture as guaranteed in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which it acceded to on 21 February 1997.

## TRUTH

Victims of crimes under international law have a right to truth.<sup>17</sup> States must take measures to establish the truth about the crimes, including the reasons, circumstances and conditions of the human rights violations and abuses; the progress and results of the investigation; the identity of perpetrators (both subordinates and their superiors); and in the event of death or enforced disappearance, the fate and whereabouts of the victims. Truth can help victims and their families understand what happened to them, counter misinformation and highlight factors - such as discrimination - that led to the violations and abuses.

## JUSTICE

International law obliges states to investigate and prosecute those responsible for committing crimes under international law.<sup>18</sup> States must ensure that the crimes are investigated and, if sufficient admissible evidence exists, those suspected of criminal responsibility should be prosecuted in fair trials in accordance with international law and standards without recourse to the death penalty. As a state party to the ICC Statute, Kenya has accepted that it has the primary responsibility to investigate and prosecute genocide, crimes against humanity and war crimes committed on its territory or by its nationals. If it fails to do so genuinely, the ICC can step in. Genuine investigations and prosecutions ensure that there can be no impunity.

## REPARATION

Victims of crimes under international law have a right to full and effective reparation.<sup>19</sup> Measures must be taken – including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition – to address the harm they have suffered and to help them rebuild their lives. The aim of reparation is to “as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>20</sup> In situations where victims suffer serious harm or when family members are killed, it is impossible to fully restore them to the situation which would exist if the violation had never occurred. Nevertheless, the obligation to ensure that as much as possible is done to address the suffering of the victims towards achieving this aim remains.

### 3. VICTIMS' EXPERIENCES OF THE POST-ELECTION VIOLENCE

On 30 December 2007, the day that former President Mwai Kibaki's victory in the presidential elections on 27 December 2007 was announced, violence broke out in Nairobi, Nyanza Province and parts of Rift Valley Province. It quickly spread to other parts of the country. The Kenya National Commission on Human Rights, among others, stated that the violence was predominantly perpetrated by supporters of the two rival political parties in the election – the Party of National Unity (PNU), led by Mwai Kibaki, and the Orange Democratic Movement (ODM), led by Raila Odinga – and the security services (the regular and administrative police as well as the General Service Unit, (GSU)<sup>21</sup> as they responded to the protests which followed the election.<sup>22</sup>

The CIPEV, headed by Justice Philip Waki, estimated that at least 900 women were raped,<sup>23</sup> 1,133 people were killed<sup>24</sup> – including 74 women and 11 children - and that 3,561 suffered serious injuries such as shootings by the police or beatings and machete wounds by other perpetrators.<sup>25</sup> The hostilities largely came to an end in February 2008, when the rival political parties signed a power-sharing agreement, although tension and violence in some parts of the country continued for several months afterwards.

Victims of the post-election violence interviewed by Amnesty International described their experiences and the impact on their lives of the crimes committed during that period.

*There were five people who raped me. They had pangas [machetes] and weapons...It was very bad...we passed by roads and saw dead bodies. At least I got treatment but others lost their lives.*

Lucy, Kibera settlement in Nairobi

Of the 49 people interviewed by Amnesty International for this report, four women said they were raped during the post-election violence, 14 said either they or their relative or spouse had been shot by police, and 11 said either they or their relative or spouse were injured from beatings and machete wounds. Many victims were displaced, including the remaining 20 interviewed by Amnesty International, and lost most of their property and livelihoods as a result.

*The men started beating everyone and burning the properties. I was hit very badly on the right leg by a piece of metal and I was rushed to hospital. After that I was treated and stayed there for three weeks, then I found all my properties were burned and I had completely nothing.*

Esther, Nakuru



*Victim from Kibera settlement shows gunshot injury from post-election violence, 18 October 2013 © Amnesty International*

*On the way from Mathare to the IDP base [temporary camp for internally displaced people], I found 17 people raping one woman. I took a stone and threw it towards the attackers. Three of them cornered me with a panga. They wanted to get my head but I put my arm up to protect myself and they cut my arm.*

Elijah, Mathare settlement in Nairobi

*I was shot in the left and right upper arm, at around 11 am on 29 December 2007. Two bullets got me from behind. When chaos erupted that time, we were running away. I went to hide in a ditch – that is when I was shot in the left side. I was shot again when I was trying to run away.*

Dennis, Kisumu

*I was talking to my neighbours when I saw some policemen. I saw my husband also coming and heard the police saying, "shoot that guy." Another was saying "I cannot do that, he is an innocent man." The inspector took the gun from him – he was in a brown uniform – and said "let me show you how it's done" and shot my husband. He died instantly. I do not know why they did that, I only heard them saying "we came here to do our job." There were around 10 of them.*

*Less than 20 minutes later, a car came with the police and they took the body away. He was shot on the right chest and the bullet went through. They took him to the mortuary. On that day we could not go so we went there the next day. They had dressed him in a big banner with ODM. He did not have that banner – he would not do such things. Up to now I still ask why did they kill him, what did he do?*

*After that I did not speak to the police. But my husband's boss reported it, to say her driver has been shot.*

Naomi, Mathare settlement in Nairobi



*Mathare settlement in Nairobi © Amnesty International*

Nine people interviewed by Amnesty International had lost a relative or spouse during the post-election violence. Some had been shot by the police, whilst others had been beaten or cut with machetes by groups of men, including the Mungiki,<sup>26</sup> a criminal gang and political militia operating in Nairobi and what was formerly Central Province.

*[My husband] was killed during the post-election violence on 29 January. He was killed by the Mungiki. I was a fishmonger and I lost everything I used to sell. We were running for our safety and there was no time to arrange what to do with the property – we were trying to get to a safer place and the attackers took the opportunity to break in and loot everything.*

Mary, Naivasha

According to the report produced by the CIPEV, the police were responsible for at least 405 of a total of 1,133 killings and 557 bodily injuries in the post-election

violence.<sup>27</sup> Many of these victims were shot.<sup>28</sup>

Approximately 660,000 people were reportedly displaced by the post-election violence, with around 300,000 of those fleeing to camps.<sup>29</sup> Many fled their homes when groups of men started burning and looting property in the area.

*They came and burned the house and property. A lot of people came, I can't really explain who they were. They were destroying houses all over the village. They burned the houses of any Kikuyus in Block 10. We went to the police station that night and were taken to showground [temporary camp for internally displaced people] where we stayed for four years.*

Joshua, Eldoret

*Many people ran from their houses to the police, stadiums, showgrounds, leaving their property at home. Those caught in their homes were blocked and beaten up, their property was torched and burned. If you were lucky the police would come but there were bodies on the ground everywhere.*

Vincent, Nakuru

Those who did not flee to the camps were hosted by their families or communities. Camps were erected in churches, national stadiums and police stations in the worst affected areas, including North and South Rift, Nyanza, Western and Nairobi Provinces. Victims told Amnesty International that when they returned to the homes from which they had fled they found their property had been destroyed or stolen. In some cases, strangers had moved into their former houses.

Fred fled his village on 3 January 2008. He said that when he returned, he was told to leave his job working on the Kenya Pipeline.

*When we moved from there, we were put in one pick-up, about 50 people. I had a family – my wife and four kids – we were put in that vehicle, squeezed in together until we reached there. I had a home so we didn't go to the tents. When I was home, there was no proper communication in Eldoret because of the chaos. When I went back on 25 February – when Kofi Annan said there was peace – I was sacked. When I saw my house on 25<sup>th</sup>, I only found a floor. The house was taken – the iron sheets [which support the structure of the house], everything, my belongings. They'd taken the certificates of my children and me, meaning I could not be employed anywhere.*

Fred, Kisii

Morris has lived in Naivasha since 1981. He told Amnesty International that he was forced to flee with his family to Nyanza Province during the post-election violence, and now lives in Gilgil, further outside Naivasha, because he does not feel safe returning to Naivasha town where he used to live.

*On 28 January, we moved out of our house and camped in the police station.*

*People were killing aimlessly. Some had guns, pangas, arrows, stones...after one week, we went to see the home so I could get some clothes. We requested the police to take us and found everything had been burned to ashes.*

Morris, Naivasha

Francis told Amnesty International that he stayed with his family in Kedong camp for internally displaced people for six months after fleeing the violence in Naivasha. He said that when he returned to his home, he found a stranger had moved in.

*When I went back home after one week, I found another person inside and there was nothing of my items left... They were all looted. She was not familiar to me. I asked her about my belongings but she said she found it empty. I could not ask questions as some tensions were still hanging, so I just had to move back to where my family was.*

Francis, Naivasha

## THE NATIONAL ACCORD AND GOVERNMENT REFORMS

In January 2008, a Panel of Eminent African Personalities led by Kofi Annan was established by the AU to assist Kenyans in finding a peaceful solution to the crisis. It mediated between the two main political parties - the PNU and ODM. On 1 February 2008, the PNU and ODM endorsed the Kenya National Dialogue and Reconciliation Accord on resolution of the political crisis and its root causes, a framework which committed Kenya to four key agenda items: immediate action to stop the violence and restore fundamental rights and liberties; immediate measures to address the humanitarian crisis and promote healing and reconciliation and restoration; overcome the political crisis; and identify long term issues and solutions.<sup>30</sup> This last agenda item included commitments to constitutional, legal and institutional reform, tackling poverty and regional development imbalances, tackling unemployment, consolidating national cohesion and unity, undertaking land reform and addressing accountability, transparency and impunity.<sup>31</sup>

A new coalition government comprised of the two political parties and tasked with implementing the agenda items was established under the National Accord and Reconciliation Act,<sup>32</sup> which came into force on 28 February 2008.

Significant gains have been made since 2008 in terms of constitutional, legal and institutional reforms aimed at ending impunity. Kenya's enactment of a new Constitution in 2010 paved the way for measures aimed at creating a more professional and accountable police force and judiciary.<sup>33</sup> The Independent Police Oversight Authority (IPOA) was established to investigate police violations and recommend prosecutions and other disciplinary measures where there is sufficient evidence.<sup>34</sup> The IPOA has reported it has already received over 1,000 complaints since becoming operational in 2012, although none of these relate to the post-election violence.<sup>35</sup>

The CIPEV and the TJRC have advanced efforts to document the truth about crimes committed during the post-election violence, although the Report of the TJRC is awaiting consideration by the National Assembly and implementation of its recommendations is yet to begin. However, as will be demonstrated in the following section, victims of the post-election violence have continued to be unable to access justice and reparation, which are also vital measures towards ending impunity and providing effective remedies. Victims told Amnesty International about the difficulties they faced in accessing justice and that they had not received reparation for injuries sustained, or property and livelihoods lost, as a result of the post-election violence. Many remain displaced. Their experiences are recounted in more detail below.

## 4. FAILURE TO INVESTIGATE AND PROSECUTE CRIMES IN NATIONAL COURTS

*We are in a culture of impunity – of “who will ask me.”*

Evelyne, Kibera settlement in Nairobi

### **NATIONAL JUSTICE FOR THE POST-ELECTION VIOLENCE: POLICY AND PRACTICE**

The Kenya National Dialogue and Reconciliation Accord provided for the establishment of the CIPEV to investigate the facts and circumstances behind the post-election violence, including acts and omissions of the security services, and to recommend measures of a legal, political or administrative nature, including measures to bring to justice persons responsible for criminal acts. It also provided for the establishment of the TJRC to investigate gross and systemic human rights violations and other historical injustices committed between 12 December 1963 and 28 February 2008.

Chaired by Justice Waki of Kenya's Court of Appeal, the CIPEV issued its report in October 2008<sup>36</sup> documenting the extent of the post-election violence, and found that state actors, in particular the police, were responsible for many crimes.<sup>37</sup> The CIPEV also made recommendations to ensure justice for the crimes. It called for the establishment, within 60 days, of a Special Tribunal, including international judges, to prosecute persons accused of bearing the greatest responsibility for the crimes committed. It also called for the International Crimes Bill to be passed to facilitate national investigations and prosecutions of crimes committed and utilization of the 2008 Witness Protection Act, which established the Witness Protection Agency, to implement a nationwide witness protection programme. The CIPEV handed a sealed list of those suspected of committing crimes during the post-election violence to Kofi Annan in his capacity as Chair of the AU Panel of Eminent African Personalities, to pass onto the Special Tribunal or, if it was not established, to the ICC.

The CIPEV's report and its recommendations were reportedly approved by the Kenyan Cabinet on 27 November 2008.<sup>38</sup> Parliament went on to adopt the International Crimes Act in 2009, defining crimes against humanity and other crimes under international law as crimes in national law, although the Act only applies to offences committed after 1 January 2009 and does not apply retroactively to cover crimes committed during the post-election violence.<sup>39</sup> The Witness Protection Agency was also established in 2008. However, Parliament then voted against the establishment of a Special Tribunal, and subsequent efforts to table and pass the implementing legislation failed.<sup>40</sup> Kofi Annan later handed the list of alleged perpetrators of the post-election violence to then ICC Prosecutor, Luis Moreno Ocampo. In November 2009, the Prosecutor filed a request to the Pre-Trial Chamber for authorization to initiate an investigation. The request was granted on 31 March 2010. On 8 March 2011, the Pre-Trial Chamber approved summonses to appear against six persons accused by the Prosecutor of committing crimes against humanity during the post-election violence.

Shortly after the ICC announced the summonses, the government filed submissions to the ICC asserting that, with a new Constitution in place and police and judicial reforms being implemented, there was no longer need for the suspects to be tried at the ICC.<sup>41</sup> It argued that the High Court could prosecute post-election violence

crimes.<sup>42</sup> The challenge was however rejected by the Pre-Trial Chamber in May 2011 on the basis that the government had not presented concrete evidence that it was conducting an investigation into the same individuals that the ICC was seeking to prosecute. In fact, the government had indicated only that it would investigate those responsible for the crimes "at the same level of the hierarchy" as those the ICC was investigating.<sup>43</sup> The Pre-Trial Chamber found that arguments Kenya presented "cast doubt on the will of the State to actually investigate the [...] suspects" even if it had been convinced that an ongoing investigation existed.<sup>44</sup> The decision to reject Kenya's challenge was upheld on appeal.<sup>45</sup>

Proposals to establish an International Crimes Division (ICD) of the High Court were also mooted by the government in January 2011 to demonstrate Kenya's commitment to prosecute post-election violence crimes domestically.<sup>46</sup> Reports also indicate that on 30 October 2012, Kenya's Judicial Service Commission (JSC) formally recommended the ICD's establishment to address post-election violence crimes as well as other international and transnational crimes<sup>47</sup> and that the following month the Chief Justice of the High Court, Willy Mutunga, announced that the ICD would target perpetrators of serious crimes, including those behind the post-election violence who were not under investigation by the ICC.<sup>48</sup>

After long delays, the TJRC published its report in May 2013.<sup>49</sup> It included recommendations<sup>50</sup> to: prosecute senior government officials, including those suspected of planning, funding, participating in or incitement during the post-election violence; fast-track the establishment of the ICD; and establish a reparation programme for victims and survivors of gross and systemic human rights violations, including internally displaced people and those affected by the post-election violence. The report also listed dozens of government officials and public figures that had been implicated in the post-election violence by the Kenya National Commission on Human Rights.<sup>51</sup>

However it is not yet clear whether or how the TJRC recommendations will be implemented. A requirement in the Truth, Justice and Reconciliation Act to commence implementing the report within six months of publication<sup>52</sup> was removed by an amendment to the Act by Parliament on 13 December 2013.<sup>53</sup> Instead, the amended Act includes a new requirement that the report must be considered by the National Assembly and that the report can only be implemented thereafter "in accordance with recommendations of the National Assembly."<sup>54</sup> It also amended the Act so that the Minister will establish a mechanism to monitor the implementation of the report in accordance with the recommendations of the National Assembly and update the Assembly after three months and then twice a year thereafter on progress made.<sup>55</sup>

The Act had previously required that such a mechanism should be established in accordance with the recommendations of the Commission and that, in addition to monitoring, it would also facilitate the implementation of the report's recommendations.<sup>56</sup> The TJRC Report had recommended that an independent Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission be established through legislation.<sup>57</sup> It proposed that the Committee should have a broad mandate and powers not only to monitor implementation, but to work with the relevant agencies and departments of government and other stakeholders to facilitate the implementation of the recommendations and to manage and administer the reparation fund.<sup>58</sup> More than six months after the amendments to the Act and a year since the publication of the report, there are no indications of when the Report will be considered by the National Assembly or implemented by the government, raising concern as to whether there is any political will to do so.<sup>59</sup>

A meeting held in February 2014, comprising members of the Kenyan judiciary and law enforcement agencies and development partners, deliberated over the role of an ICD in Kenya.<sup>60</sup> However, as of June 2014, no

concrete steps had been taken towards establishing the ICD. Statements attributed to Kenya's Director of Public Prosecutions (DPP) at the same meeting suggest his office do not believe an ICD is appropriate or necessary to prosecute post-election crimes.<sup>61</sup> The DPP has been quoted as suggesting that over 4,000 post-election violence investigation files reviewed by a multi-agency task force lacked sufficient evidence to proceed to prosecution,<sup>62</sup> and that the opportunity to create the ICD to try such cases "was long lost when Parliament rejected the Special Tribunal Bill" in 2009.<sup>63</sup>

The DPP's office has reportedly attributed the failure to prosecute to victims' unwillingness to come forward and the long period that has passed since the post-election violence occurred, allegedly asserting that it is difficult to collect credible evidence.<sup>64</sup> The DPP has also reportedly argued that the majority of post-election case files lacked sufficient witness statements, that cases of rape or injury often lacked victims' statements or P3 forms (supporting medical statements issued by the police) and were reported a long time after the crimes committed.<sup>65</sup>

The DPP's task force, established in 2012 to investigate and prosecute post-election violence crimes, was expected to release a report on progress with prosecutions<sup>66</sup> but, as of June 2014, no report had been issued. Amnesty International requested the DPP's office to provide up to date figures related to investigations and prosecutions of post-election crimes. Representatives of the office responded that the information will be contained in the public report.<sup>67</sup>

It therefore remains unclear which cases have been prosecuted and which have led to convictions. A report issued by the Attorney General was submitted by the government to the ICC in 2011 as part of its efforts to demonstrate that it was genuinely able and willing to prosecute the ICC's cases.<sup>68</sup> It indicated that over 150 post-election cases had proceeded to trial and that investigations were underway into other cases.<sup>69</sup> However, this report was disputed by human rights organizations.<sup>70</sup> One organization suggested in 2013 that few prosecutions had taken place of serious crimes, such as murder or rape, committed during the post-election violence.<sup>71</sup> Another found that only seven such serious cases are estimated to have resulted in convictions, including three for the offence of murder.<sup>72</sup> It reports that the majority of prosecutions have apparently resulted in acquittals.<sup>73</sup>

To Amnesty International's knowledge, none of the serious crimes prosecuted involved local politicians or the police, despite widespread public allegations of their involvement and complicity in the post-election violence.<sup>74</sup>

## BARRIERS ENCOUNTERED BY VICTIMS AND WITNESSES IN REPORTING POST-ELECTION VIOLENCE CRIMES

Thirty-five of the 49 victims interviewed by Amnesty International said they attempted to report the crimes to the police.<sup>75</sup> Only one of these victims suggested to Amnesty International that the police had taken action on their behalf. In that case, a woman who said her daughter was raped in Kericho told Amnesty International the police arrested someone in connection with the alleged rape, but she was unable to pursue the case as she and her family fled Kericho because of the post-election violence and her daughter was too afraid to return.

Some victims did not go to the police because they feared reprisals from those committing the violence in their communities.

Mary said her husband was killed on 29 January 2008 in Naivasha by a group of men she suspected were from the Mungiki. She fled to her ancestral home in Nyanza Province with her nine children, returning two months later to bury her husband. She told Amnesty International:

*I didn't report to the police as I feared for my life. I was fearing that I'd be targeted as I was living still in this community, so I could not make that report.*

Mary, Naivasha

Stigma was another factor attributed by the CIPEV to victims' fears of reporting to the police, particularly in relation to sexual and gender-based violence.<sup>76</sup> One Kenyan women's organization has noted that 900 such cases reported to the Waki Commission were likely to represent only a fraction of the total number, with some estimates as high as 40,000 incidents of sexual and gender-based violence in the first few months of 2008.<sup>77</sup> At the time of the post-election violence, "gender desks" existed at some police stations. These were part of a programme initiated by the government in 2003 to mainstream responses to violence against women. However the initiative has been criticized by civil society groups for, among other reasons, not having a sufficient number of trained staff to manage the desks and for not being well publicized.<sup>78</sup>

Ten of the 35 victims who did report to the police told Amnesty International that they were discouraged from pursuing their complaints further because the police had attempted further violations or because they had failed to conduct any follow-up. Many also highlighted their lack of confidence in the national justice system due to what they perceived was political interference in the system and ongoing impunity. These perceptions and experiences demonstrate some of the factors that may underpin the lack of evidence reported by the DPP, including the failure of the authorities to identify and address these issues to rebuild trust and engagement in the national justice system.

Monica informed Amnesty International that she was in Kibuye market in Kisumu on 1 January 2008 when police started firing from a van and a bullet hit her right index finger. She told Amnesty International:

*I reported to the police on 10 March 2008. They gave me a P3 form. When I went there with it they asked me for money which I didn't have.*

Monica, Kisumu

Grace told Amnesty International that she and her family, including her seven-year-old daughter, were attacked at their home in Eldoret on 31 December 2007. She suspects it was because her husband was Kikuyu and they both lived in a Kalenjin area where most of the neighbourhood voted for the ODM. She told Amnesty International:

*The next day we went to hospital and reported to police on the way home. The police*

*gave us an OB [occurrence book] number but nothing ever happened. After two weeks I returned to record a statement but they said it was not a good time and they were not sure who attacked us. So I decided not to go back again.*

Grace, Eldoret

In one case reported to Amnesty International, a woman from Mathare settlement in Nairobi who had been attacked by men wielding machetes and whose husband had also been injured, was fleeing when a police officer on patrol offered to take her to his home to get assistance from his wife. When they arrived, she found the wife was absent and the police officer raped her. She is now living with HIV. She told Amnesty International she knew the police officer who had raped her and that he was still working in a nearby police station. She gave up on reporting to the police as, whenever she tried, she was asked to pay money or provide original documents as evidence to them.

One victim who spoke to Amnesty International said that the police refused to help him on the grounds that he may have been involved in some of the violence he had witnessed. This discouraged him from pursuing his complaint further.

Edward told Amnesty International that he was at his home in Kisumu on 29 December 2007 when he became aware of a crowd of people running along the nearby highway, being chased by the police. When he went outside to find out what was happening, he was shot in the arm. He was 15-years-old at the time.

*After one year I went to the Central Police Station to report it. They said most people who were shot were trying to loot, so they did not cooperate. They were trying to say I was looting also. They didn't arrest me but they did not offer any help. They did not provide me with an OB number. After that I did not go back to the police station and they did not come to me.*

Edward, Kisumu



Kisumu Town, Kenya © Amnesty International

Amnesty International is unable to assess comprehensively the thoroughness and effectiveness of police investigations and hopes that such an assessment will be included in the promised forthcoming report of the multi-agency task force. However, victims' accounts of the challenges they have faced with reporting to the police, and reports that 4000 case files relating to post-election violence crimes contain insufficient evidence, suggest flaws within the police investigation process that need to be addressed.

A number of victims who had reported to the police told Amnesty International they had not heard anything since from them.

Julius said he was shot in the hip on his bicycle on the way to his home in Kisumu on 31 December 2007. He told Amnesty International:

*A group of us who were shot went and reported to the police station in Kondele. They were not serious in their response. They just took our reports and sent us away. They never said anything, except "we have heard what happened to you, so go away." There's been no follow-up from anybody since.*

Julius, Kisumu



*Victim shows gunshot injury from post-election violence, Kisumu 6 November 2013 © Amnesty International*

Prisca said her property was looted and her money stolen from her home in Karagita settlement in Naivasha during the post-election violence.

*We reported to the police in April [2008], in Naivasha station. They said nothing – they just did the abstract and stamped it and gave the receipt. We had no follow-up after that. Nobody helped with the property that was lost.*

Prisca, Naivasha

Wilfred told Amnesty International he fled his home in Nakuru when the Mungiki started attacking the area. He stayed in Kisumu in Nyanza Province, his ancestral home, for one week. When he returned, he found his property had been destroyed. During that time, his wife and three children disappeared. He has not yet found them.

*We've reported to the police several times – they wrote in the OB Occurrence Book. What I know with the current government is that, if you come from Nyanza, nothing will happen.*

Wilfred, Nakuru

Amnesty International acknowledges that law enforcement agencies face challenges in investigating post-election violence crimes. Complainants may be the only witness of what happened. They may not have seen their assailants because they were running away at the time. Some victims may have been displaced and no longer reside in the areas where attacks took place. However, the difficulties victims have in reporting to police, demonstrated in interviews held with Amnesty International, raise serious concern that credible efforts have not been made to fully investigate all complaints of violence and ensure that those responsible for these offences are brought to justice.

In a meeting with Amnesty International, the Inspector General of Police, David Kimaiyo,<sup>79</sup> stated that investigations into the post-election violence were ongoing and encouraged victims and witnesses to come forward with further information. He also said that the police are waiting for the DPP to advise whether the current investigations are being conducted effectively enough to prosecute post-election violence suspects or whether the police need to proceed in a different way.

### LACK OF CONFIDENCE IN THE NATIONAL JUSTICE SYSTEM

The barriers that victims interviewed by Amnesty International have faced when reporting crimes to the police have clearly undermined their confidence in the national justice system. Kenya's legacy of political interference in the national justice system and impunity appears to have added to this lack of trust. As a result, victims expressed to Amnesty International their cynicism regarding calls made by the AU in May 2013<sup>80</sup> for the ICC cases to be transferred to Kenya. The AU made this decision despite the fact that the ICC judges had already rejected applications by the government to prosecute the cases nationally.

*If the cases came back to Kenya, in two months' time, you'll hear no one is guilty. To find someone guilty, we would have to pay money. That is what is wrong in our country... There is no justice in Kenya. Minus money, no justice.*

Pamela, Nakuru

*The government can't play any role in bringing justice in this country. We have a long history of impunity. A lot of reform needs to be done and it will take many years. Change of leaders is not enough. Now the President and Deputy President are so powerful... if the cases are brought to Kenya no one will be able to bring them to Court. So the ICC are the right ones to find justice for the post-election violence.*

Philip, Eldoret

*Which witness can be allowed to be a witness in this country against the President? So the ICC cases should continue. The ICC can bring some speediness in bringing justice. But us at home, they don't want to give us justice.*

Michael, Kisumu

Reports of interference and intimidation of witnesses of the post-election violence<sup>81</sup> suggest that the concerns about the security of these witnesses expressed by some

victims interviewed by Amnesty International have some validity.

The establishment of a Witness Protection Agency with powers to protect witnesses of international crimes is an important step. However, it does not appear to have allayed fears such as these of possible witness intimidation in post-election cases prosecuted at national level. The Witness Protection Agency seconded an officer to the DPP's task force to advise it on appropriate security measures for witnesses. As it is a relatively new body, it is possible that there is not yet sufficient awareness about, or trust in, the agency among victims and potential witnesses, although it has outreach programmes to encourage witnesses to come forward.<sup>82</sup> The agency has received approximately 300 applications so far and is providing protection to 50 witnesses of different crimes and offences but is struggling with insufficient funding.<sup>83</sup>

### CONTINUED HOPES FOR NATIONAL JUSTICE

Despite concerns raised about the national justice system, some victims who spoke to Amnesty International were supportive of establishing an ICD and believed this could ensure lower-level perpetrators were also prosecuted. As Erick from Kisii in Nyanza Province noted:

*We heard that they will start an International Crimes Division. After that is when we can accuse these others locally – after the three [accused in the ICC cases]... There were more than 600 ... We want to sue the others so they can face justice.*

Erick, Kisii

Samuel, also from Kisii, argued some form of local justice was essential in order for lower-level perpetrators to be tried and for victims of the post-election violence to feel justice was being done.

*I'm only seeing people being charged internationally. They are missing those at national level. I would like to advocate for efforts to be joined for justice at local level. I know the people who took my property in Kericho. Our children were raped and we know who raped them.*

Samuel, Kisii

These views regarding the proposed ICD of the High Court would suggest that, despite victims' concerns, there is potential to rebuild their confidence in the national justice system. However, there is not enough information about the ICD currently available for victims and civil society groups to determine whether it is a genuine attempt to address impunity. It is not clear whether the conference held in February 2014 on the ICD resulted in concrete actions to be taken by the JSC responsible for operationalizing it.<sup>84</sup> Recommendations made by the JSC that the ICD would focus on transnational and organized crimes such as trafficking and money laundering, as well as international crimes, have also raised concern that the broad scope of the ICD's jurisdiction may limit its role in prosecuting crimes committed during the post-

election violence.<sup>85</sup> Civil society organizations are also concerned that, given the DPP's discouraging statements regarding the case files his office has reviewed, the government may use the ICD as a smokescreen to allow impunity to continue.<sup>86</sup>

## 5. FAILURE TO PROVIDE EFFECTIVE REPARATION AND COMPENSATION

*They forgot us. I'm starting from zero after clashes. I want to eat, I don't have money, I want school fees, I don't have money. If I'm sick, I can't go to town for help. What I need is the government to pay us. My wife was beaten, even now she is sick.*

Joseph, Nakuru

The post-election violence has had long-lasting, debilitating effects on victims, survivors and their families. Victims who spoke to Amnesty International attached great importance to the need for reparation to address the harm they suffered. However, despite some schemes to provide financial and other support to IDPs, most victims have not received any reparation.

Victims told Amnesty International about the challenges they face in rebuilding their lives without reparation and the negative impact this has had on themselves and their families. Survivors of sexual violence described the stigma they experience which deters them from seeking justice and reparation. Many women highlighted the challenges they face, including the loss of livelihoods after their husbands were injured or killed in the post-election violence. Some survivors of injuries had not received medical assistance to help them go back to work. Internally displaced people could not return to their homes and their livelihoods, and criticized the government's resettlement programmes.

The TJRC recommended a framework for a reparation programme<sup>87</sup> which would cover the post-election violence. But no steps have been taken to consider or implement it. In a few cases, civil society organizations and victims have brought constitutional cases forward seeking reparation, but the litigation is only at the preliminary stages. Problems experienced by victims are addressed below, followed by an examination of the government's assistance to internally displaced people.

### CHALLENGES FACED BY WOMEN

Interviews conducted by Amnesty International suggest that women, in particular, have continued to suffer as a result of the human rights violations and abuses they and their families experienced. Some who spoke to Amnesty International had been widowed by the post-election violence and others had been raped. Amnesty International spoke to four women who were raped during the post-election violence, three of whom are now living with HIV. They told Amnesty International they had been stigmatized as a result of what happened to them and although they had access to anti-retroviral treatment, they had not received any direct assistance from the government.

Jane informed Amnesty International that in January 2008, she was raped as she tried to flee her home in Eldoret. She went to live in the temporary camp at the local administrative police station. For several days, she couldn't find her five children. Two of her daughters died of kidney failure in 2012. Her husband has since left her and remarried, and is unwilling to offer her any assistance. She now lives in Kisii.

*My husband brought another woman as a wife during this time. I was told my home is in Eldoret even though my children died and I brought them here. So I feel the environment is hostile for me so the only place is Eldoret where it is also hostile.*

*The children stopped school; the last-born did class eight last year but could not proceed to secondary education.*

*I feared to report [the rape] to police because of the stigma. But two years later [after the rape] when I returned to Eldoret, I reported it [to the police] and I was taken to a health centre for testing. After that, I found out I was infected with HIV. They put me under medication.*

Jane, Kisii

In addition to being subjected to sexual and gender-based violence, many women lost their husbands. Women whose husbands were shot, killed or injured told Amnesty International their circumstances had been worsened, and their families were now living hand-to-mouth, as a result.

Grace said she was working as a market trader near Eldoret when she and her husband were attacked by a group of men at their house on 31 December 2007. She has six children.

*I had to leave the business as my husband was injured in the spine and could not work and I was cut on my hand.*

*I was attacked at the house. They came to the house, they were aiming to cut me on the head. When I raised my hand, they cut me on the hand. They also did the same to my daughter and cut her in the leg. She was seven-years-old at the time. They first went to my husband – they knocked him using a hard object.*

*My husband remained in hospital for three years. Now, he is never awake, he is just sleeping. He has to be carried everywhere.*

*My husband was the breadwinner. Now our life has changed. I'm the only one who can be depended on for school fees, so our life has turned. Our business collapsed and there is no capital to start again.*

Grace, Eldoret

Stella told Amnesty International she was living in the Karagita settlement of Naivasha during the post-election violence. Her husband was killed on 29 January

2008 and she now has nine children to take care of on her own.

*[The post-election violence] affected me as my husband, the sole breadwinner, was killed and the business came to an end as everything was looted. I had no ability to get a house to rent, as I had no income. I have no permanent residence as of now. I have no way of helping the family. The children are not going to school due to lack of money. Sometimes they go without meals. When the husband was killed, he had no permanent home where we could settle.*

*Now I have stress in my body. How can I feed the family and how can I find a permanent home. I see no benefit in life as I have no job and no home and I have no way of educating my kids. I'm not happy at all, there is nothing to comfort me or bring happiness in my life. I have no peace wherever I am.*

Stella, Naivasha

### CHALLENGES FACED BY THOSE WITH INJURIES

Amnesty International spoke to several victims who survived beatings or police shootings and were unable to return to their previous jobs, resulting in difficulties for them and their families.

Edward, who said he was shot in the arm by the police in Kisumu, explained how his injuries have affected him:

*My arm is still affecting me. Some of the fingers are not active; I can't use the arm and hand much. I can't do work; I'm not employed that much and to get something I need power from both hands. So I'm not in a very good condition. I use my left hand for most things nowadays.*

Edward, Kisumu

Joseph uses a catheter as a result of the injuries he sustained on his abdomen when he was beaten at his home in Nakuru and he is unable to continue his work as a mason.

*From the beating I started to bleed. Even now I'm so very bad...I don't get the treatment I need because I don't have the money.*

Joseph, Nakuru

Elijah was also unable to return to his previous work after he lost his arm in a machete attack in Mathare settlement in Nairobi.

*Since that time, I've had so many problems and although I have a job, it is not what I was doing before. Many of my family depend on me. I've been hoping the government will one day hear our cry. I am overworking, with only one hand. I am getting older by the day, with no hope.*



*Victim from Kibera settlement shows gunshot injury from post-election violence, 18 October 2013 © Amnesty International*

## CHALLENGES FACED BY INTERNALLY DISPLACED PEOPLE

Amnesty International spoke to 35 people displaced from their homes in Eldoret, Kericho, Nakuru and Naivasha in Rift Valley<sup>88</sup> during the post-election violence. Many of them did not return to these areas and are now living in their ancestral homes or elsewhere. They have become destitute after their property was burned and their livelihoods destroyed.

Ruth said she fled with her children to Naivasha from her home in Eldoret when it was burned down. She told Amnesty International:

*When I was [living] the other side [in Eldoret] life was not difficult as it was this time, I was taking care of the children and I was going well. I was doing farming and my work was OK as I had my own farm.*

*The difficulty I have is the business as I'm investing a lot. The cost is very high as I'm in town. There I was in the farm but here is very expensive to look after the home and the children, so I'm struggling.*

Ruth, Naivasha

Benson also said he fled to Naivasha from Eldoret.

*My life changed when I left and came to this place. I was doing a business there with maize and cereals. Since coming here, I can't send my kids to school or pay for the house. I'm struggling. I developed a lot of debts in my life and it is a problem sending my kids to school.*

Benson, Naivasha

Erick said that he had lived in Nakuru since 1987 but was forced to flee when his property was looted and burned on 2 January 2008. He left behind a timber business and is now a farmer in Kisii.

*Now I don't have anything. I was affected with my family. Some of my children were in school. My timber was stolen. They burned my house where I was staying. I was left without anything. And transferring to this place was a problem. When I came here for a new life, even paying school fees was a problem. I started even begging. Shelter was a problem and getting food was a problem.*

Erick, Kisii

## REPARATION FOR INTERNALLY DISPLACED PEOPLE

### INTERNALLY DISPLACED PEOPLE OF THE POST-ELECTION VIOLENCE: POLICY AND PRACTICE

Agenda item number 2 of the Kenya National Dialogue and Reconciliation Framework included commitments to assist internally displaced people with resettlement and basic services while they remained displaced through a humanitarian fund administered by the Ministry of Special Programmes.<sup>89</sup>

In 2008, Kenya did not have a law to protect internally displaced people although it did have policies to address their needs through other laws.<sup>90</sup> In October 2012, a draft National Policy on the Prevention of Internal Displacement and the Protection and Assistance to Internally Displaced Persons was adopted by the Cabinet. On 18 January 2013, the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act came into effect. It provided for mechanisms to be put in place to prevent displacement,<sup>91</sup> protect people from displacement,<sup>92</sup> ensure disaster preparedness and mitigation<sup>93</sup> and create conditions for durable solutions.<sup>94</sup> The Act also established a new Fund to help implement these measures and replace the previous Humanitarian Fund.<sup>95</sup> The law brought into effect regional and international mechanisms which provide safeguards on the rights and needs of displaced people, such as the UN Guiding Principles on Internal Displacement, 1998 and the Protocols and Pact to the International Conference on the Great Lakes Region, 2006. The Internally Displaced Persons Policy was expected to facilitate the implementation of the Act, but reports indicate little action has been taken yet in moving the policy beyond the draft stage.<sup>96</sup> Kenya has also yet to ratify the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention),<sup>97</sup> a regional framework which outlines duties to respond to, prevent and find durable solutions for internal displacement, which was adopted in October 2009 and came into force on 6 December 2012.

In 2008, the government launched a series of initiatives to provide assistance and compensation to internally displaced people who fled the post-election violence.<sup>98</sup> This included Operation Rudi Nyumbani (Operation Return Home). Launched in May 2008, it aimed to encourage people residing in camps to return to the places from which they had fled, with the government offering transport costs, building and farming materials and KES10,000 (approximately USD115). Some were also offered KES25,000 (approximately USD287) for the reconstruction of houses, to compensate those who could demonstrate their homes had been burnt down or otherwise destroyed. Some displaced people were relocated to smaller camps nearer to their homes to await resettlement in proper housing during Operation Rudi Nyumbani. The government also constructed tens of

thousands of houses in affected areas through assistance from the private sector, the UN and bilateral development assistance and humanitarian agencies.<sup>99</sup> The resettlement plan was, however, criticized by some for being poorly organized and administered, targeting only some communities whilst neglecting others and focusing on displaced people who had moved to the camps and not to their ancestral areas.<sup>100</sup>

Discriminatory provision of assistance to internally displaced people in Kenya was highlighted by civil society groups<sup>101</sup> and in an April 2012 Parliamentary Select Committee report.<sup>102</sup> The Committee found resettlement of internally displaced people had been hampered by the Provincial Administration (the local government Chiefs, District Officers and District Commissioners), who were accused of falsely registering displaced persons, excluding genuine ones from registration and making payments to registered persons that were often discriminatory, unfair and corrupt. Resettlement was also delayed due to the government's failure to operationalize and implement the Department of Mitigation and Resettlement and the National Humanitarian Fund for mitigation of effects and resettlement of victims of the 2007-2008 post-election violence.<sup>103</sup>

The Parliamentary Select Committee also acknowledged that integrated internally displaced people - those who fled their homes and lived with host communities and friends or family rather than in camps - had been neglected in government assistance programmes. The Committee noted that displaced people in camps were given more attention than others, including integrated internally displaced people, and called on the government to recognize all categories of displaced persons.<sup>104</sup> The discriminatory treatment of internally displaced people was also highlighted as a key obstacle to finding durable solutions to displacement by the UN Special Rapporteur for the human rights of internally displaced people in his February 2012 report<sup>105</sup> following a mission to Kenya. This was reiterated in a subsequent visit in May 2014.<sup>106</sup>

In addition to previous resettlement schemes, in September 2013 the government announced a KES3.3 billion (USD380,000) fund to resettle internally displaced people who remained in the camps. It was reported in the media that each family displaced in Rift Valley Province received KES400,000 (USD4,600) each from this fund.

In his state of the nation address on 27 March 2014, the President announced the KES3.3 billion resettlement fund was helping to resettle the remaining 8,298 households affected by the post-election violence, with an estimated 777 households having benefitted so far from the KES400,000 cash payments.<sup>107</sup> Media reports, however, suggested some of the money was distributed to displaced persons who had remained in the camps but larger sums went to another group not affected by the post-election violence - people who were evicted from Mau Forest in 2009.<sup>108</sup>

According to the Commission on Administrative Justice (Office of the Ombudsman),<sup>109</sup> the majority of complaints lodged with them related to the post-election violence are from internally displaced people who have not received compensation. Out of 19 displaced people who have lodged complaints, only one case has been settled in the complainant's favour.<sup>110</sup> The reason given in three cases as to why the complainant had not received the KES25,000 provided for some displaced persons was that they had not registered their particulars - including evidence of their property being destroyed - by the allocated deadline of 31 December 2008.<sup>111</sup>

Only 12 of the 35 internally displaced people interviewed by Amnesty International had received financial assistance to help them resettle. Of these, two who were living in Eldoret at the time of the post-election violence were given KES25,000. One of them was also given a further KES10,000 whilst the other was given basic food supplies. The remaining 10 who had received financial assistance told Amnesty International that they were given only KES10,000 and this was insufficient to help

them resettle and restart their lives after losing their homes and property.

The majority of internally displaced people who spoke to Amnesty International stayed a short time or not at all in the camps – instead opting to live in host communities or with their families. Civil society organizations have noted with concern that these integrated internally displaced people were often excluded from assistance as they did not formally register.<sup>112</sup> Civil society and religious organizations constructed approximately 19,521 houses for integrated displaced people, mainly in Western and Rift Valley Provinces<sup>113</sup> but these only catered to a fraction of the estimated 300,000 displaced by the violence who did not reside in the camps. Many integrated displaced people who spoke to Amnesty International confirmed that they had received little or no support from the government whilst others they knew who stayed in the camps had been given compensation or resettlement packages.

Patricia told Amnesty International she fled her home in Kericho with her husband and children in January 2008 when the Luo and Kalenjin communities started targeting Kikuyu in the area. Her husband's business was burned down and she lost materials she used for her work as a pastor. They went to Naivasha and stayed in the Stadium camp but, according to Patricia, life was hard there as she was a Luhya and not accepted by most people in the camp who, like her husband, were Kikuyu. When they decided to leave after six months, they were given KES10,000 to help them resettle.

*The government has not helped us apart from the 10,000 shillings when we left the camps. On the one hand they have tried – some of my colleagues were helped with houses. But I've not heard of any of the integrated being helped. I have all the documents to prove I came from Kericho but we have not been helped in any way.*

Patricia, Naivasha

Simon said his house was burned in Nakuru during the post-election violence and he and his family sought refuge at the local police station in Lanet before fleeing to another village. He raised a complaint with the District Commissioner (DC) in June 2010 when he realized only some people in his neighbourhood had been compensated for loss of property.

*We received no assistance from anyone. I raised a complaint with the DC in around June 2010. I wrote a letter asking for compensation but they did not reply. I reported the burning and loss of property to Lanet police in early March 2008. They did not give me any information. The government could have helped with compensation to assist in our lives. Because our lives have gone back.*

Simon, Nakuru

Some internally displaced people were advised by the government to set up self-help groups for compensation and resettlement assistance to be efficiently administered.



*Internally displaced people in Eldoret, 30 April 2008 © Melanie Stetson Freeman/The Christian Science Monitor/Getty Images*

Moses is the chair of a self-help group of 322 internally displaced people. He said his group has yet to receive compensation and remains in temporary shelters in a makeshift camp in Kambi Thomas in Eldoret.

*After a campaign was launched by government, they asked everybody to leave the showground for renovation. They said "if you don't have a shamba [plot of land], you should organise a self-help group to help us to assist you." We set this up to rent a shamba to put our tents. Even now we are there...*

*The government was giving us relief but now they have stopped and said we're not on that list of victims [eligible for compensation].*

Moses, Eldoret

Moses and other displaced people have sued the government for compensation before Kenya's High Court. The case is ongoing but Moses told Amnesty International that they are struggling to raise money to pay their lawyer.

The government's announcements in 2013 and 2014 that internally displaced people still residing in camps in Rift Valley Province would receive a KES400,000 resettlement package heightened suspicions that treatment of victims affected by the post-election violence has been unequal.

Lillian told Amnesty International that she and her husband were farmers in Nakuru.

Three days after the election results were announced in late 2007, a group of 100 men arrived in her village and started taking people's livestock and burning houses. She fled with her family to Nakuru Showground camp, where they stayed for two months. In March 2008, they moved to Kisii, her ancestral home, to start a new life. She did not receive any help from the government. She explained:

*After settling in Kisii, I thought the Chief would intervene so IDPs could get help. Then I heard the IDPs in Nakuru got help – so I went back there to ask if we could benefit. But I was told all IDPs who stayed on had been paid because they stayed. I was told that now I'm in Kisii I should go back there and find help there as I was registered there.*

*All IDPs belong to the same government, whether in Central, or Nyanza or Kisii. Now the government has done something for Central and Rift Valley, they should do something for Kisii or Luo, whether compensation or land. What others received should be replicated.*

Lillian, Kisii

In November 2013, the Cabinet Secretary for Devolution and Planning acknowledged some integrated internally displaced people had received assistance amounting to between KES10,000 and KES35,000 but the government did not have further funds to help this group.<sup>114</sup> The government has since suggested all remaining internally displaced people were assisted through the resettlement programme.<sup>115</sup> The Ministry of Devolution and Planning has also told Amnesty International that there were difficulties in the registration process and that as a result some internally displaced people may not have registered.<sup>116</sup> It has also expressed concern that some people who have tried to benefit from the compensation schemes were not genuine internally displaced persons.<sup>117</sup> Amnesty International's interviews demonstrate that there are still displaced people who have not received any help – including those who are integrated or living in unrecognized camps. According to the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012, which came into effect in 2013, the government has a responsibility to provide protection and assistance to all displaced persons and, where this is not possible through its own funds, to seek help from the international community.<sup>118</sup> Although the Act establishes a "Fund" for this purpose,<sup>119</sup> to replace the Humanitarian Fund set up in the aftermath of the post-election violence, the government has not made any public commitment to raise money for this fund to resettle all people displaced by the post-election violence, including integrated displaced persons.

The discriminatory treatment of internally displaced people has been raised by a number of human rights experts<sup>120</sup> and is an ongoing concern for displaced people interviewed by Amnesty International, as well as other victims who have not received any assistance.

## LACK OF REPARATION FOR OTHER VICTIMS

No other programmes have been established to provide reparation to other victims of

the post-election violence, including victims whose family members were killed, survivors of sexual and gender based violence and those injured.

Some victims - particularly those in Kibera and Mathare settlements in Nairobi – told Amnesty International that they were disappointed that while internally displaced people had received compensation and resettlement from the government, other victims with injuries had not received any assistance.

*I see that all government is doing is continuing with work on IDPs. But helping those who were injured or raped, no time is being taken with them.*

Charity, Kibera

*They [the government] have concentrated very much on the IDPs but the people of Mathare have been forgotten. I suffered a lot because I have only one hand, but I have been completely forgotten.*

Elijah, Mathare

The majority of victims who Amnesty International spoke to had not received reparation through the existing schemes and wanted the government to take further measures to address the harm they suffered and to help them rebuild their lives.

*The good thing for government to do is compensation and full support to all victims. There are several people who can't walk, others who lost their hands. With medical attention...we have pain particularly in the rainy season...so medical attention should be given to victims.*

Edward, Kisumu

*It seems the government is playing a hidden card. They have not fulfilled their promise to bring people together and live in harmony and address the needs of victims.*

Prisca, Naivasha

*[The government should] give us some jobs. It's the only thing the government can do to help with our lives. .... It is my prayer for the government to help every Kenyan.*

Janet, Nakuru

The importance of providing reparation to victims of human rights violations, including the post-election violence, was addressed in the TJRC's report. Its report recommended a framework for a reparation programme, which would have included victims of the post-election violence. Amnesty International acknowledges that there are many positive aspects of the framework proposed. In particular, applying international standards,<sup>121</sup> the Commission has proposed a programme which covers victims of abuses by both state and non-state actors and proposes all recognized

forms of reparation (including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) as well as collective and individual reparation.<sup>122</sup> Importantly, the Commission states that the participation of victims in the process of design, implementation and monitoring of the programme is a fundamental principle.<sup>123</sup> However, further consideration should be given to the Commission's recommendations to limit reparation for many victims who do not fall within its definition of "most vulnerable",<sup>124</sup> recognizing that all victims of serious human rights violations have a right to full and effective reparation.<sup>125</sup> The National Assembly has yet to consider the TJRC Report and the government has not declared whether it plans to establish the programme.

## EFFORTS TO OBTAIN REPARATION BEFORE KENYAN COURTS

In a few cases, civil society organizations and victims are taking their demands for justice and reparation to the Kenyan courts, in the form of civil, constitutional and public interest litigation. *Federation of Women Lawyers (FIDA)-Kenya and others vs Attorney-General and others*<sup>126</sup>:

Twenty-five victims and three civil society organizations<sup>127</sup> have challenged the government's failure to implement sufficient measures to protect victims of the post-election violence, particularly internally displaced people, which has resulted in death, displacement and other harms and continued suffering in the displaced people's camps.<sup>128</sup> They claim that the camps remain inadequately maintained with deplorable conditions and are the sites of murder, grievous injury and rape, where residents have been forcibly evicted and have not received the required compensation.<sup>129</sup> They seek reparation, including compensation, and participation in decision-making processes on the displaced people's camps and those living in them.<sup>130</sup> The case has been heard three times, with the next hearing due on 22 July 2014.

*Constitutional Petition Number 122 of 2013, Coalition on Violence Against Women (COVAW) and others vs Attorney-General and others*<sup>131</sup>:

Eight victims and four civil society organizations<sup>132</sup> are seeking to compel the government to respond to the sexual and gender based violence that occurred during the post-election violence. The petition describes a range of offences, including rape, forced pregnancy and deliberate transmission of HIV against females and crimes committed against men such as forced circumcision, penile amputations and sodomy. The petitioners request the Court to consider the human rights violations that took place as crimes against humanity, thereby obliging the government to investigate and prosecute these crimes wherever evidence is available<sup>133</sup>.

The petition claims the government has contravened both its old and current Constitutions as well as regional and international treaties it is party to by failing the victims of these crimes.<sup>134</sup> The government is accused of failing to provide adequate training to the police to protect people from such violence;<sup>135</sup> refusing to document cases,<sup>136</sup> leading to miscarriages of justice;<sup>137</sup> denying medical services to victims at the time;<sup>138</sup> and failing to provide the necessary care and compensation to victims.<sup>139</sup> The petitioners seek, among others, a public apology from the government for their failures to protect citizens during the post-election violence; adequate compensation, psycho-social support and other reparation for survivors; and investigations of cases of sexual and gender based violence and prosecutions of those suspected of responsibility, including through the establishment of a special team comprising of national and international staff within the DPP to pursue these cases.<sup>140</sup> The first hearings of this case took place on 25 March and 14 May 2014 and at the time of publication proceedings were continuing.

Citizens Against Violence (CAVI) and others vs Attorney-General and others <sup>141</sup>

Four Kenyan civil society organizations<sup>142</sup> and 15 victims who were either shot or had their relatives shot by the police accuse the government of failure to train the police in lawful methods of conducting law enforcement operations;<sup>143</sup> failures in planning and preparation for police operations during the post-election violence;<sup>144</sup> unlawful orders;<sup>145</sup> and failures to respond to allegations of unlawful conduct by the police.<sup>146</sup> They claim these failures resulted in death and serious injury to victims of the post-election violence<sup>147</sup> and unlawful and fatal shootings by the police that have not been sufficiently investigated.<sup>148</sup> The petitioners call, among others, for an independent and internationalized body to address these crimes<sup>149</sup> which they argue amount to crimes against humanity.<sup>150</sup> The case has been delayed due to one of the petitioning civil society organizations, the Kalenjin Youth Alliance, being dissolved after the March 2013 General Elections. It is set to resume with the remaining petitioners in 2014.<sup>151</sup>

## 6. EFFORTS OF THE ICC OTP TO INVESTIGATE AND PROSECUTE CRIMES AGAINST HUMANITY COMMITTED DURING THE POST-ELECTION VIOLENCE

*I want justice for me and for all those who suffered. The ICC should go further and dig deeper in these cases, and ensure justice is found by addressing all victims and witnesses. In Kenya we cannot access justice.*

Diana, Kisumu

### THE INTERNATIONAL CRIMINAL COURT'S INVESTIGATIONS AND CASES

A year after the Pre-Trial Chamber's March 2010 decision to authorize the Prosecutor to conduct an investigation into crimes committed during the post-election violence, the ICC issued summonses to appear against six individuals. Each individual was charged with crimes against humanity and grouped into two cases:

Case I against ODM members William Ruto and Henry Kiprono Kosgey as well as radio producer and journalist Joshua arap Sang related to violence committed against perceived supporters of the PNU. The victims were predominantly from the Kikuyu, Kisii and Kamba ethnic communities living in and around Eldoret.

Case II against Uhuru Kenyatta from the PNU, former police commissioner Mohammad Hussein Ali and former Head of the Civil Service Francis Muthaura related to violence committed against perceived supporters of the ODM predominantly from the Kalenjin, Luo and Luhya communities living in Nakuru and Naivasha.

The Prosecutor did not request arrest warrants and the summonses to appear allowed the suspects to participate voluntarily in the proceedings against them without being arrested or detained by the ICC.

After the ICC rejected, in May 2011, the government's challenge to the ICC's cases on the basis that it had failed to demonstrate that Kenya was conducting any investigations into the allegations against these suspects nationally, the ICC continued its pre-trial process. In January 2012, the Pre-Trial Chamber issued its decision on the charges.<sup>152</sup> It confirmed those against William Ruto and Joshua arap Sang in Case I, and against Uhuru Kenyatta and Francis Muthaura in Case II. The decision meant the cases against the four men would proceed to trial. However, the Pre-Trial Chamber also decided the OTP had failed to provide sufficient evidence to proceed against Henry Kiprono Kosgey in Case I and Mohammad Hussein Ali in Case II – the only

member of the police charged by the ICC. Shortly afterwards, in May 2013, the Prosecutor announced she was withdrawing the charges against Francis Muthaura in Case II. Her reasons included that some witnesses had died or were too afraid to testify, that the government had failed to cooperate fully with uncovering evidence and that a key witness recanted a significant part of his incriminating evidence and admitted to accepting bribes.<sup>153</sup> Uhuru Kenyatta and William Ruto formed a political alliance and ran together for the offices of President and Deputy President respectively. They were elected in March 2013. They took office in April of the same year, months before their trials at the ICC were originally scheduled to begin.

The trial of William Ruto and Joshua arap Sang started in September 2013. In response to the AU's claims that the ICC's cases were distracting and preventing the President and Deputy President from fulfilling their constitutional duties,<sup>154</sup> the ICC's Assembly of States Parties (ASP) amended the ICC's Rules of Procedure and Evidence to allow a Trial Chamber to excuse an accused person mandated to fulfil extraordinary public duties at the highest national level from being present at their trial.<sup>155</sup> Based on the new rule, the Trial Chamber conditionally granted a request by William Ruto to be excused from continuous presence at trial, although he must attend certain hearings.<sup>156</sup> The start of Uhuru Kenyatta's trial has been postponed on four occasions. Most recently, in March 2014, the Trial Chamber adjourned the commencement of the trial to October 2014 following a request of the Prosecutor to vacate the trial date until the government complies with a pending request to provide the OTP with records it argues are central to its case.<sup>157</sup> In both cases, the OTP alleges witness interference and intimidation, leading to a number of witnesses withdrawing. On 15 September, four witnesses withdrew from testifying at the trial of William Ruto and Joshua arap Sang. On 15 May 2014, the Prosecution withdrew another witness.<sup>158</sup> In April 2014, the Trial Chamber decided to compel eight Prosecution witnesses to appear. This decision is currently being appealed.<sup>159</sup>

Meanwhile, the OTP had withdrawn seven witnesses in the Kenyatta case by January 2014.<sup>160</sup> Three of these witnesses are what the OTP calls "insiders" – people who could have made direct allegations against Uhuru Kenyatta about his alleged role in the post-election violence. The defence has also made serious allegations concerning the credibility of a further eleven witnesses in the case, including claims that some of them are involved in fabrication of evidence and coaching of false testimony.<sup>161</sup> The Prosecutor issued, in August 2013, an arrest warrant against journalist Walter Barasa for offences against the administration of justice charging him with corruptly or attempting to corruptly influence witnesses in Case I. In the other case (Case II), the OTP has also initiated investigations into possible offences against the administration of justice in response to claims made by Uhuru Kenyatta's defence in relation to certain witnesses and their intermediaries.<sup>162</sup>

A number of political efforts have been initiated either by or with the support of the government to undermine the ICC's cases and stop the trials. Although the AU had called, as early as January 2011, for the UN Security Council to defer the cases, these calls escalated following the 2013 General Elections as the trials approached. In May 2013, Kenya's Ambassador to the UN in New York lobbied the UN Security Council requesting action to "terminate" the two cases, despite the UN Security Council possessing no such power of termination.<sup>163</sup> In November 2013, on the back of further AU decisions calling for a deferral,<sup>164</sup> Rwanda, Morocco and Togo pushed a draft resolution to a vote at the UN Security Council. It was defeated. The Constitutive Act of the African Union grants the AU the right to intervene if war crimes, crimes against humanity and acts of genocide are being committed in a Member State (Article 4(h)). It also requires the AU to respect human rights (Article 4(m)), and to ensure the sanctity of human life and reject impunity (Article 4(o)). Nevertheless, the AU has argued no charges should be brought by the ICC or any international tribunal against serving AU heads of state or government, or persons entitled to act in such a capacity.<sup>165</sup> This argument is despite provisions in Article 27 of the Rome Statute that official capacity "shall in no case exempt a person from criminal responsibility under the Statute."<sup>166</sup> Kenya's Constitution also states that immunities do not

apply in cases where the President is being prosecuted under any treaty to which Kenya is a party and which does not recognise such immunity.<sup>167</sup> The AU has nevertheless purported to decide that Uhuru Kenyatta should not appear before the ICC “until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC.”<sup>168</sup> In addition, Kenya has proposed amendments to the Rome Statute that seek to recognize immunities for serving heads of state. In January 2014, the AU issued a decision calling on its members to support the proposals as well as another proposal by African states parties to the ICC Statute to allow the UN General Assembly, in addition to the UN Security Council, to defer ICC investigations and prosecutions. On 5 September 2013, Kenyan parliament voted to commence a process for Kenya to withdraw from the Rome Statute and repeal the International Crimes Act. However, such steps would not stop the current cases.<sup>169</sup> As of July 2014, the parliament has not taken measures to advance the process.

### VICTIMS' VIEWS ON THE ICC'S INTERVENTION

Forty-four of the 49 victims interviewed by Amnesty International supported the ICC's efforts to investigate and prosecute crimes committed in the post-election violence. Many have invested hope in the ICC, having become increasingly disillusioned by Kenya's legacy of impunity.<sup>170</sup> Independent research suggests many Kenyans understand the ICC's importance in this regard, despite evidence of growing public opposition to the ICC.<sup>102</sup>

Diana told Amnesty International she was shot in the back of the head by the police on her way home from work in Kisumu on 28 December 2007. Although she was not part of the cases before the ICC like many other victims of the post-election violence in Kisumu, she still believes the ICC's intervention would act as a deterrent throughout Kenya.

*I have a lot of hope that the success of the ICC will bring some change on what is happening in Kenya. Anybody living in Kenya will fear to violate rights if he or she thinks about what the ICC does on these issues.*

Diana, Kisumu

Dennis, also from Kisumu, said he was shot in both arms by police driving in a Landrover as he was trying to flee some of the fighting on 29 December 2007.

*As a victim, we have all put trust in the ICC. The success of the ICC will contribute to truth and to peace in this country. If the three are prosecuted, I will have the assurances that nothing like this happens again. So I request the ICC cases to continue.*

Dennis, Kisumu

Jane told Amnesty International that she was living in Eldoret when she was raped and fled her home during the post-election violence

*I would like to see justice done and the truth unfolded so I can at least feel better psychologically and so people in the country can learn lessons. So for that reason I would like [the ICC cases] to proceed and be concluded.*

Jane, Kisii



*Residents at 'Ya-Mumbi' Internally Displaced Persons village in Eldoret react to a radio broadcast of ICC Prosecutor Louis Moreno Ocampo's announcement on 15 December 2010 regarding the ICC's investigations in Kenya. © TONY KARUMBA AFP/Getty Images*

Some victims told Amnesty International that they thought the ICC represented an instrument to deter future crimes and end impunity, and that the country should continue to be a State Party to the Rome Statute. Without the ICC's presence, some expressed fear more human rights violations would have been committed or could occur in future. Its presence therefore brought comfort to victims that the events of 2007-2008 would not be repeated if the trials continued.

*Withdrawing Kenya from the ICC – I cannot support it. After that, what about the violence that will come later? I'm supporting Kenya to remain in the ICC as a signatory.*

Moses, Eldoret

*Kenya must remain a member of the Rome Statute. The leaders are rich people, they would reign supreme, do injustice and know that no one will address them. This kind of suffering will continue. The Rome Statute shows there is someone beyond the leader that people can fall back to.*

Jeremiah, Kisii

Only five victims interviewed indicated they did not support the ICC's intervention. They were of the opinion reconciliation was underway, pointing to the fact that Kenyatta and Ruto were on opposing political sides during the 2007 General Election. They felt the ICC's intervention could undermine unity and destabilize the country.

Ruth, who fled from Eldoret to Naivasha on 25 January 2008 after her property was burned and looted, told Amnesty International:

*The leaders came from different tribes, they saw what happened and have come together to say "we are one." So there is no need to take these people to The Hague. It's enough to prevent further violence from happening.*

Ruth, Naivasha

This position reflects a campaign message promoted by Uhuru Kenyatta and William Ruto during the run-up to the 2013 General Election that their alliance would promote peace and reconciliation in the country.<sup>171</sup> Public opinion about the ICC's role in Kenya shifted after the campaign began, coinciding with the period in which charges were confirmed for four of the accused.<sup>172</sup> It has also been suggested that Uhuru Kenyatta and William Ruto's rhetoric that a vote for them was a vote against the ICC may also have influenced some of the electorate, including victims of the violence – particularly the Kikuyu and Kalenjin communities from which the two respectively originate.<sup>173</sup>

Some victims now see the government's role in promoting reconciliation as essential to ensuring the crimes of 2007-2008 are not repeated and view the ICC as a threat to this role. They fear the violence of 2007-2008 could be repeated if the trials continue, as the President and Deputy President's presence in The Hague will take them away from their duties as leaders promoting peace and would inflame political divisions.

*If they're found guilty, that will take us to where we were in 2007. If they truly want peace for Kenya and they say they are for peace, they should stop these cases instead of taking years to then bring us back to zero...We are talking about the leaders of the country. Having these cases is like forgetting the whole country. For the sake of the country, I would like their cases to be left out.*

Grace, Eldoret

*If that case continues, there will be no peace again. Because the tribes will start to differ again. They will be saying "your person is in jail" and another will say "it is because of you that this person is undergoing a, b or c." So it is better to leave these cases. At present, there is no fighting. The people have come together and they like each other.*

Benson, Eldoret

These opinions were, however, disputed by most of the interviewed victims who were not convinced the apparent reconciliation of Uhuru Kenyatta and William Ruto was sufficient to guard against violence erupting again.

Joyce told Amnesty International she was living in Nakuru and working on a flower farm there when the Mungiki started attacking. She said she was warned by Kikuyus that she should leave as she was a Luo. She fled with her family to Nyanza Province, where she stayed for one year before returning to Nakuru.

*Today they are saying there is peace between Kikuyus and Kalenjins but then they were rivals. The President being Kikuyu, the Deputy being Kalenjin and working together, they don't want these to go to the ICC. We want those cases so they'll be disciplined so these things will not happen again. If you leave the issue to Kenya, these things will happen again.*

Joyce, Nakuru

## CONCERNS REGARDING THE SCOPE OF THE ICC'S CASES

The ICC was never intended to investigate and prosecute all crimes of genocide, crimes against humanity and war crimes in situations where the crimes have been committed and impunity exists. It is complementary to national authorities and will only step in when they are genuinely unable or unwilling to investigate and prosecute genocide, crimes against humanity and war crimes. When the ICC does step in, it will only ever be able to deal with a small number of cases. By breaking the cycle of impunity, it is hoped that national authorities will be prompted to fulfil their obligations to deal with other cases.

Nevertheless, despite the support of the majority of victims interviewed for the ICC's intervention in Kenya, many interviewed by Amnesty International expressed concerns regarding the number of cases currently before the ICC and their scope. Their concerns are addressed in further detail below.

## ICC PROSECUTION STRATEGY IN KENYA

Since its establishment, the OTP has developed a policy of seeking to prosecute "those bearing the greatest responsibility" for such crimes and has conducted focused investigations and prosecutions.<sup>174</sup> However, in 2013, the second ICC Prosecutor, Fatou Bensouda, issued a new Strategic Plan for 2012-15,<sup>175</sup> which indicates a change of approach, including expanding the scope of investigations and possibly prosecuting mid- and low-level suspects.<sup>176</sup> The OTP has requested a budget increase over the next four years to implement it.<sup>177</sup> Furthermore, in June 2014, the OTP issued a Policy Paper on Sexual and Gender-Based Crimes, committing to pay attention to the commission of sexual and gender-based crimes in all stages of its work.<sup>178</sup>

The current Kenya cases reflect the previous strategy. The Pre-Trial Chamber authorized the OTP to investigate crimes against humanity in the situation in Kenya between 1 June 2005 and 26 November 2009 allegedly committed throughout the territory of Kenya.<sup>179</sup> Notwithstanding this broad material, temporal and territorial scope, the OTP focused its investigations into the post-election violence in areas where crimes were committed on a large scale and focused on individuals it believed to bear the greatest responsibility for the crimes. Case I and Case II both focus on crimes committed in the Rift Valley during the period immediately following the

2007 General Election which saw an upsurge in violence.

The charges confirmed against William Ruto and Joshua arap Sang concern crimes committed on 31 December 2007 in Turbo town in Uasin Gishu county; between 1 and 4 January 2008 in the greater Eldoret area; between 30 December 2007 and 16 January 2008 in Kapsabet town in Nandi county, and; between 30 December 2007 and 2 January 2008 in Nandi Hills town in Nandi county.<sup>180</sup> Thus, attacks against perceived PNU supporters by pro-ODM supporters not within these specific dates are not within the scope of the Ruto and Sang case.<sup>181</sup> The OTP did seek to expand slightly the temporal scope of this case but the request was refused.<sup>182</sup>

Similarly, in Case II, the charges confirmed relate to crimes committed between 24 and 28 January 2008, when the Mungiki allegedly carried out attacks in Nakuru and Naivasha.<sup>183</sup> Thus, attacks against perceived ODM supporters by pro-PNU and the Mungiki not within these five days are not within the scope of Case II against Uhuru Kenyatta.<sup>184</sup>

The OTP originally sought to prosecute six people. This included charges against those suspected of committing crimes on both political sides of the violence, and including violence committed by security services in Case II.<sup>185</sup> Nevertheless, the non-confirmation and withdrawal of a number of charges, resulting in cases against three suspects not proceeding to trial, has further narrowed the scope of the ICC's cases. In particular, despite the OTP acting on the request by victims to investigate crimes committed by the police,<sup>186</sup> the ICC judges determined that the Prosecutor had not presented sufficient evidence in the confirmation of charges process to show that the police had participated in crimes against humanity directly or by failing to stop attacks by the Mungiki.<sup>187</sup> As a result charges against Police Commissioner Mohammad Hussein Ali in relation to crimes by the police were not confirmed. Since these events, the OTP has noted the challenges it faced in obtaining sufficient evidence to link police to crimes.<sup>188</sup> These include, notably, an order by the Kenyan High Court granting an injunction prohibiting OTP from taking statements from the police.<sup>189</sup>

The OTP's 2014 budget indicates it is currently only conducting investigations in relation to the current cases and is not investigating other suspects.<sup>190</sup>

Some victims interviewed by Amnesty International understood and agreed with the ICC's decision to prosecute only high-level suspects, noting the importance of prosecuting those alleged to have financed and organized crimes as much as those who are suspected of directly committing the crimes.

Lillian believed prosecuting senior officials suspected of the crimes was important to ensure justice is achieved for all victims of all crimes and to end impunity.

*Not everybody can be taken to the Court. But...the level 1 justice might lead to level 2 justice or level 3 justice. Even for the big fish at level 1 to go, it will give justice to the grassroots in level 3 – psychological justice, as those people will fear to attack their neighbour as they've seen justice at the top.*

Lillian, Kisii

However, other victims Amnesty International spoke to expressed frustration that Uhuru Kenyatta, William Ruto and Joshua arap Sang are the only individuals being

prosecuted.

*Let justice be found for others. The three is not enough. Some should be there also. It was not organized by those three – they may be the head organizers but their assistants are not there nor their agents. For justice, the cases must continue and reality should be told.*

Pamela, Nakuru

*I'm not satisfied by the three [indicted]. There are a large number of people behind all of this. Witnesses saw them do harm. So those three cannot bring justice unless others are there, especially those identified by witnesses directly.*

James, Eldoret

Some question why the ICC is only focusing on three people when reports at the time the Prosecutor launched initial investigations indicated that the ICC was examining as many as 20 individuals could be held responsible for the post-election violence.<sup>191</sup>

Rispa told Amnesty International that her husband was attacked and killed in Eldoret on 28 January 2008 after people believed to be Kikuyus arrived in the area and threatened to kill anyone from the Kalenjin community.

*Justice must happen; but I do not see justice at the ICC. They just have three people. Was that war brought by three people? We better be punished together. Better to throw the case away and let those people free so we can say all politicians at that time did some evil. They say there are 20, why bring 6, or 3?*

Rispa, Eldoret



A news vendor displays daily newspapers carrying photos of four Kenyans to face charges of crimes against humanity before the International Criminal Court, in the Kenyan capital Nairobi on 24 January 2012 © TONY KARUMBA/AFP/Getty Images

Victims expressed disappointment that the ICC is not prosecuting crimes that affected them and some said they felt excluded from its proceedings. These particular victims included individuals who previously fell within the scope of the cases under investigation but are no longer part of them, owing to charges not being confirmed or withdrawn, and others who have never had any interaction with the ICC.

Edward, who said he was shot in the arm by the police in Kisumu, expressed the dissatisfaction with the ICC of many interviewed in Kisumu by Amnesty International.

*The three at ICC are not enough. The investigations did not indicate those people involved in the violations here. The cases in Kisumu were not indicated. It's made victims in Nyanza feel neglected. Several people were injured and died and their cases have not been taken and they are in a serious way.*

Edward, Kisumu

Naomi told Amnesty International that her husband was shot by the police outside their home in Mathare settlement in Nairobi. She believed the ICC was the only way that some justice may be realized.

*Maybe through the ICC we can have some justice. But I have not heard them mention that people died in Mathare North. When Ocampo came, I thought maybe I would get a chance to speak to him but then he left. Bensouda came but I did not see her. There is no one from Nairobi mentioned in this case. The world should know there are still people in Kenya who are suffering and need justice. These people in*

*government know that but my story was just abandoned. I'm crying for justice.*

Naomi, Mathare

Emily said her husband was shot and killed by the police in Kisumu on 30 December 2007. She told Amnesty International:

*With us, when we heard about our case being thrown away from ICC, it makes our hope go down. We lost hope as we don't see a way through which justice can be realized. I am happy the way the process is going at the ICC but I request they consider cases in Kisumu because there is a very big number of victims and survivors. As well as my husband, I knew another mother – two or three of them – whose husbands were killed.*

Emily, Kisumu

The fact that many victims feel excluded from the ICC process and are calling for the ICC to deliver justice for them or their communities is understandable. Faced with injustice at the national level, victims have clearly attached high hopes and expectations to the ICC's intervention. However, the OTP cannot investigate and prosecute all crimes committed in any situation and it has been unable to present sufficient evidence to proceed with a number of charges in the cases it has selected. Amnesty International emphasizes that the Kenyan authorities continue to have the primary responsibility to investigate and prosecute the crimes the ICC does not address, and the obligation to cooperate fully with the ICC.

## 7. VICTIMS' INTERACTION WITH THE ICC

Many victims Amnesty International interviewed, including victims of crimes not being prosecuted by the ICC, wanted to engage with the Court and be informed about its work. Victims of crimes being prosecuted by the ICC have a right to participate in the proceedings, including through a legal representative in the courtroom. The ICC Registry facilitates victims' participation in the cases and also conducts outreach to keep affected communities, including victims of other crimes, informed about its work and its cases. However, the ICC Registry faces significant challenges in Kenya; large numbers of victims of the post-election violence are spread across the country, and there are resource constraints and security concerns. These are addressed in more detail further below.

### VICTIMS' RIGHT TO PARTICIPATE IN PROCEEDINGS AT THE ICC AND OUTREACH

Victims have a right to participate in the ICC's proceedings and to raise their views and concerns at appropriate stages.<sup>192</sup> Victims are represented during the ICC's proceedings by a Common Legal Representative who, among other things, attends hearings, presents their views and concerns to the Judges, puts questions to witnesses and request reparation for crimes committed against them if a person is convicted.

During investigations, before charges have been brought, the scope of victims who can participate is broad. However, as the charges are defined through issuance of arrest warrants or summonses to appear and, later, following pre-trial confirmation of charges, the scope of eligible victims narrows. Only those victims of crimes being prosecuted by the ICC can participate during the trial preparation, trial, sentencing, reparation or appeal phases. It is, however, recognized that other victims and communities affected by the crimes should be able to follow the proceedings and the ICC's Registry conducts outreach to keep them informed and engaged.

In Kenya, the Victim Participation and Reparation Section at the ICC Registry initially worked with civil society organizations to inform victims of their rights, consult them about their views on what should be investigated, and help them complete forms applying to participate and for reparation. Efforts to engage with victims occurred at an early point in the cases – prior to the issuances of summonses – and the ICC Registry launched a multi-pronged effort to reach victims, as well as through media and civil society organizations, sustaining this engagement over time. Approximately 5,000 applications to participate had been received by the end of 2012.<sup>193</sup> However, many of those forms were incomplete and could not be processed, indicating problems with the forms and the support being provided to victims in completing them.<sup>194</sup> In October 2012, the Trial Chamber adopted a new approach to the application process in the Kenya cases, deciding only individual victims who wish to appear directly before the ICC Chamber had to apply. It decided all other victims could participate through the ICC-appointed Common Legal Representatives without applying, but by registering under a less onerous process.<sup>195</sup> Under the new scheme, a single Common Legal Representative in each case, working with the Registry, is responsible for identifying victims who fall within the scope of the cases. The judges do not

make a determination on each application, as they had previously, unless the victims wish to appear directly before the Chamber.

According to recent periodic reports from the ICC Victim Participation and Reparation Section, a total of 506 individuals have been assessed as victims falling within the scope of Case 1 by the Common Legal Representative and 437 of these individuals have been registered as victims by the VPRS to date.<sup>196</sup> In the Kenyatta case, 706 individuals have been registered as victims by the VPRS to date.<sup>197</sup>

At the time of writing, the two Common Legal Representatives for Case I and II had made a total of 39 and 38 public submissions respectively to the Court on behalf of victims, including communications and requests made to the Trial Chamber in relation to victims' participation and observations on trial proceedings.<sup>198</sup>

In 2010, the ICC commenced outreach to affected communities in Kenya, including victims, to inform them about the ICC and its work. This has been conducted primarily through the media and outreach meetings. According to the ICC's Outreach Unit, approximately 10,000 Kenyans took part in outreach meetings between the end of 2011 and the beginning of 2013.<sup>199</sup> There were approximately 47 meetings held in 2013, with each meeting convening between 15 and 200 people from affected communities.<sup>200</sup> Efforts have also been made to increase the participation of women.<sup>201</sup>

Amnesty International met with both victims who appear to fall within the scope of the ICC's two cases (case victims), some of whom were participating in proceedings. Three victims told Amnesty International that they were participating in the court proceedings and were being represented by one of the Court's Legal Representative of Victims. Amnesty International also met with victims of crimes not being prosecuted by the ICC - "situation victims", some of whom had had contact with the ICC. Ten victims who spoke to Amnesty International said that they had such contact, including attending meetings organized by the Victims Participation and Reparation Section or the Outreach Unit.

## CHALLENGES RELATING TO PARTICIPATION

The number of victims of the post-election violence has posed a major challenge to the ICC, particularly due to the fact that the estimated hundreds of thousands of victims are spread across an enormous area and there are significant security challenges associated with trying to meet them. The length and complexity of proceedings has undoubtedly contributed to the difficulty of adequately informing and engaging victims through either outreach or participation.

Amnesty International spoke to the Common Legal Representatives for victims of both Kenya cases who highlighted major challenges they face in representing victims.

Firstly, the Common Legal Representatives stated that they face challenges in reaching out to all victims who fall within the cases. The Common Legal Representative for Case II has estimated there are as many as 20,000 victims who fall within the scope of that case. He has managed to meet approximately 760 of them with the available time and resources and in light of other constraints.<sup>202</sup> He noted that victims are spread across the country, having fled Nakuru or Naivasha during the post-election violence. Furthermore, he expressed concern that the

political environment, in which there is growing anti-ICC sentiment, may affect victims' willingness to participate in proceedings.<sup>203</sup> The Common Legal Representatives state the amount of legal aid and support they receive is insufficient to reach out effectively to victims.<sup>204</sup>

Secondly, both Common Legal Representatives highlighted a lack of resources and other factors that make it difficult to meet regularly with their clients to keep them informed of the cases and take their instructions. In 2013, an Independent Panel of Experts recommended that the Common Legal Representatives "should meet or provide updates to their clients every four months to keep them informed of the status of the proceedings, prevent misinformation spreading, maintain engagement in the process and obtain an update on their needs, views and concerns."<sup>205</sup> However, the Common Legal Representatives for victims state they do not have sufficient resources to meet regularly with their clients.<sup>206</sup> Both face the dilemma of choosing between using their resources to meet and conduct regular follow-up meetings with their clients or continuing to reach out to new victims that may be within the scope of the cases.

In addition to resource constraints, the Common Legal Representative in the Ruto case is reported to have referred to the time it takes to conduct risk and security assessments as an obstacle to having regular meetings with victims.<sup>207</sup> Conditions in Kenya make organizing such meetings challenging. The area covered by the cases is large despite the exclusion of many places that experienced post-election violence. The Common Legal Representatives rely on intermediaries to call these meetings and their logistical capabilities and resources vary. Fear of being seen to support the ICC or being mistaken for a prosecution witness also makes it difficult for victims to attend these meetings. As a result, the meetings often have to be organized away from victims' residences, which has become increasingly difficult given the resource constraints.<sup>208</sup> Travel to meetings can mean victims missing work or taking their children out of school, which impacts attendance levels. Moreover, the Common Legal Representative for Case I has highlighted security concerns, including attempts by government officials to monitor meetings, place constraints on the meetings and intimidate victims directly.<sup>209</sup> Meetings have, at times, had to be re-scheduled or cancelled as a result.<sup>210</sup>

## CHALLENGES IN CONDUCTING OUTREACH TO SITUATION VICTIMS

"Situation" victims at times understood the ICC's limitations but also highlighted the importance of regular communication from the Court so they could feel reassured that justice was being pursued on their behalf:

*If the ICC involved us in those cases, we would feel more part of Kenya.*

Edward, Kisumu

*For justice to prevail, the ICC must follow up on victims directly affected by the process, to see how they are doing. That will bring justice. The ICC should be close to us as victims, to build trust, so we are aware of what steps are going on and we*

*can feel the justice we are fighting for is being achieved.*

Dennis, Kisumu

Outreach is vital to engage these victims and communities affected by the crimes. However, increasing political hostility towards the ICC is posing significant challenges. A small number of other victims indicated that they feared having any interaction with the ICC, suggesting that there are some victims who may have avoided the outreach efforts of the ICC due to concerns over their safety.

*If they came, I may not talk. Because those who talk to ICC are known by the leaders.*

Lillian, Kisii

*I don't want to talk directly to the ICC. If you disclose anything about the violence, you could be cut off or killed. They could come to your house and attack you at night.*

Joyce, Nakuru

The number of meetings held has decreased since 2013.<sup>211</sup> In at least one instance in 2014, local authorities have obstructed an outreach meeting.<sup>212</sup>

#### CHALLENGES IN INFORMING VICTIMS WHO HAVE APPLIED TO PARTICIPATE THAT THEY DO NOT FALL WITHIN THE SCOPE OF THE CASES

Three victims who had been encouraged to fill in application forms for participation and reparation but had yet to receive any response told Amnesty International they felt increasingly excluded from the ICC proceedings. The Victims Participation and Reparation Section informed Amnesty International that they believed all eligible victims who had applied to participate in the two cases had been contacted by the Common Legal Representative. However, it had not yet been able to reach all victims who were determined not to fall within the scope of the cases. The three victims Amnesty International met with voiced frustration at the lack of response.

*With the ICC, I feel I'm not represented in that case. What I went through, no one has touched my case...I'm not being updated by anyone on these cases. The ICC lawyer has said nothing. We filled in a form in 2012. ...I've never heard of anything since then.*

James, Eldoret

*When they came and sent their people to Eldoret, we filled in the forms. They came five or six times and told us when this case goes well that every victim must be considered. But they went away and stopped.*

Sarah, Eldoret

*The ICC have come to me. We filled the forms for the ICC but so far nothing has*

*happened. Last year they came three times. They told me the case is going on so we should wait. The trust is going down so I don't expect much as the ICC is not going back to help us. We would wish to be helped.*

Grace, Eldoret

Since this research was conducted, Amnesty International has been informed that the Victims Participation and Reparation Section have held a number of meetings with victims to inform them of the outcome of applications files, possibly with the participation of some of the victims interviewed by Amnesty International.<sup>213</sup> However the concerns raised in these cases highlights weaknesses within its system to communicate with "situation" victims seeking to participate in proceedings.

The disappointment expressed by victims who had not received a response after filling in these application forms also highlights that, without regular communication and updates, trust and confidence in the ICC can diminish. The narrowed scope of the cases<sup>214</sup> and setbacks in commencing the trials in both Case I and Case II<sup>215</sup> have undoubtedly also influenced the perceptions of the ICC of victims who spoke to Amnesty International. Their dissatisfaction with engagement and participation in relation to the ICC can therefore be attributed to a variety of factors, including their frustrations with progress in providing justice and reparation.

### VICTIMS' HOPES FOR ASSISTANCE FROM THE ICC

A few victims who spoke to Amnesty International believed the ICC might be able to provide material assistance to address the harm they suffered.

Our country is very corrupt, especially to the poor. If the ICC would assist us, they can assist us to start our own business. They can offer seminars to teach us how to do certain things.

Erick, Kisii

We are really suffering here. If the ICC process goes successfully, we hope there will be some compensation.

Julius, Kisumu

Expectations among victims remain high. The Common Legal Representatives have noted that, despite efforts to clarify their roles in their meetings with victims, many victims still view them – and more broadly the ICC – as capable of providing material assistance and compensation.<sup>216</sup>

The ICC can award reparation to victims, but only against a person who has been convicted of crimes by the Court. The ICC's Trust Fund for Victims, however, supports rehabilitation projects for victims of situations under investigation by the ICC. At present, the Trust Fund has not established such projects in Kenya. It has stated that in 2014 it will prioritize carrying out assessments for conducting activities, although

this will depend on the availability of resources.<sup>217</sup>

While the Trust Fund may be able to provide assistance to Kenyan victims in the future and the ICC may order reparation to victims if persons are convicted, the Trust Fund cannot and should not be expected to fulfil the state's obligations to provide full and effective reparation to victims. The continuing failure of the Kenyan government means that victims will continue to rely on external organizations and institutions such as the Trust Fund, along with non-governmental organizations, to provide the assistance they need to address their suffering.

## 8. CONCLUSION

As outlined in the introduction of this report,<sup>218</sup> the Kenyan government has an obligation to conduct thorough, prompt and effective investigations into all allegations of crimes under international law committed during the post-election violence. Where sufficient admissible evidence exists, those suspected of committing the crimes must be prosecuted in accordance with international fair trial standards. It also has an obligation to ensure victims have access to the truth about the human rights violations and full and effective reparation.

Unfortunately, despite these obligations, impunity for crimes committed in the 2007-2008 post-election violence remains pervasive. Despite some important constitutional, legal and institutional reforms in Kenya, including the adoption of the International Crimes Act and Witness Protection Act, as well as the establishment of the Witness Protection Agency, efforts to improve police accountability and to strengthen the judiciary, most victims are still waiting for justice and reparation. The Commission of Inquiry into the Post-Election Violence and the Truth, Justice and Reconciliation Commission were important platforms for truth-telling and have made a significant contribution to establishing the truth about what happened during the post-election violence. However, justice and reparation are also vital to end impunity and provide effective remedies to victims.

The views of victims, expressed in this report, highlight the impact the crimes have had on their lives and the additional impact of the continued injustice they are forced to endure.

Both the Kenyan government and parliament have consistently obstructed efforts to investigate and prosecute those suspected of committing crimes under international law. Victims cited in this report highlight the challenges they faced in reporting the crimes to a police force that is implicated in much of the post-election violence. The majority of the victims' complaints have not led to prosecutions. Contrary to the CIPEV's recommendations, the Parliament and the Cabinet rejected legislation to establish a Special Tribunal in 2009. Recent proposals to establish an International Crimes Division have made some progress, but in the absence of information on how the ICD will operate, it is impossible to evaluate it. Given the context within which the proposal is being developed, it is unsurprising that civil society organizations are sceptical of the government's motives. The statement by the Director of Public Prosecutions earlier this year that, after reviewing more than 4,000 files, there is insufficient evidence to proceed with any cases suggests that many investigations may have been ineffective. The government's limited response to the situation indicates a continued lack of political will to ensure justice for the victims of the post-election violence.

Victims expressed a lack of confidence in the national justice system. Some feared making complaints to the police. Many who tried to do so were discouraged or obstructed from filing reports. Some were threatened with arrest. The government has

a responsibility to address this and to make sure victims can seek effective remedies, including by taking measures to establish victims and witnesses' confidence in complaints procedures and protecting them from threats, intimidation and attack at all stages of the justice process.

In addition, most victims interviewed by Amnesty International have not received full and effective reparation to address the harm they have suffered. Considerable efforts have been made by the Kenyan government to assist some internally displaced people through compensation and resettlement schemes, with many able as a result to leave the camps they were residing in and move to new homes. However despite these schemes for internally displaced people, a comprehensive and effective reparation programme has yet to be established. Many of those who benefited from resettlement schemes claimed what has been provided was insufficient to rebuild their homes and livelihoods and others have not received any assistance whatsoever. The government's failure to ensure justice and reparation for all victims over the last six years has created further fear, distress and despair.

Given the government's unwillingness to address impunity, the ICC was right to step in, in accordance with the principle of complementarity set out in the ICC's Statute.

Most victims interviewed for this report welcome the ICC's intervention, although a minority expressed concern the trials would hamper reconciliation and lead to more violence. The majority were hopeful the ICC would be able to deliver some justice and oppose efforts by the government and through the AU to undermine the work of the Court and stop its cases. Notwithstanding their support of the ICC, many victims are disappointed at the scope of the cases.

Victims interviewed by Amnesty International want to engage with the ICC, and some are exercising their right to participate in the ICC cases. However, their Common Legal Representatives face major challenges and lack resources to communicate effectively with their clients and to reach out to all victims within the scope of the cases. Victims of other crimes also wanted to engage with the Court. Although the ICC is conducting outreach to affected communities, increasing political opposition to the work of the ICC is making that task more difficult.

In situations where impunity exists for large numbers of crimes, victims' expectations of the ICC and what it will be able to achieve may inevitably be high. Although this is understandable, it must also be recognized that the ICC will never be able to fully address impunity in any situation. The government of Kenya has the primary obligation to investigate and prosecute the crimes, including the crimes the ICC does not address, and to provide reparation to the victims. Amnesty International therefore focuses the following recommendations primarily on the government fulfilling its obligations. Additional recommendations are addressed to the ICC, the international community and intergovernmental organizations.

## 9. RECOMMENDATIONS

### GOVERNMENT OF KENYA - GENERAL

- Develop and implement, in consultation with victims and civil society organizations, a comprehensive plan of action to ensure the effective investigation and prosecution of crimes under international law committed during the post-election violence, as well as truth and full and effective reparation for the victims, including:
  - Ensure that all complaints related to the post-election violence are thoroughly, promptly and effectively investigated and communicated to the DPP.
  - Ensure that further investigations are conducted into the 4,000 case files that the DPP has stated lack sufficient evidence to enable the initiation of prosecutions.
  - Ensure that sufficient resources are made available to provide police and prosecutors with sufficient training on effective investigation and prosecution of crimes under international law, including sexual and gender-based crimes.
  - Ensure that sufficient resources are allocated to the Witness Protection Agency so it can provide effective protection to witnesses of the post-election violence in relevant domestic criminal proceedings.
  - Investigate all relevant reports of threats, intimidation and attacks against victims and witnesses.
  - Make available training to the judiciary on international criminal law including the law and procedures relevant to the International Crimes Act.<sup>219</sup>
  - Consult with victims and civil society groups on the establishment of the ICD. If it is established, ensure it functions independently, effectively and in accordance with international law and standards and that it is provided with sufficient resources.
  - Establish through legislation, the independent Committee for the Implementation of the Recommendations of the TJRC, in accordance with the recommendations of the TJRC Report.
  - Ensure that the TJRC's recommendations in respect of the post-election violence are reviewed promptly in a transparent process, including consultation with victims, with a view to implementing recommendations that ensure justice, truth and full and effective reparation for victims of the post-election violence.
  - Establish a reparation programme to provide full and effective reparation (including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) to all victims and, where appropriate, their families, taking into account the recommendations of the TJRC. Ensure that reparation is

transformative and seeks to address root causes of the crimes, including discrimination against women.

- Take effective steps to end the harassment and intimidation of those who document or speak publicly about the post-election violence, including victims, witnesses and human rights defenders and implement appropriate measures to ensure their safety.
- Cooperate fully with the ICC, including by ensuring the protection of victims and witnesses; applying to lift the injunction against the OTP requesting police officers to give statements in connection with the 2007-2008 post-election violence; supplying records and other evidence requested by the Court; and enabling the ICC Registry to undertake outreach meetings in Kenya and communicate effectively with victims.
- Reconsider current policies regarding the ICC and in particular:
  - Refrain from supporting further calls for the Security Council to defer the ICC's cases.
  - (b) Oppose efforts by some States in the AU urging non-cooperation with the ICC.
  - Reconsider and withdraw the proposal made to the Assembly of States Parties to the Rome Statute of the ICC seeking the amendment of article 27 of the Rome Statute with the objective of granting sitting Heads of State and Government immunity from prosecution.
  - Reconsider and withdraw support to other proposals to amend the Rome Statute of the ICC, especially those whose effect is to recognize immunities for sitting heads of state.

## POLICE

- Ensure that all complaints and information relating to the 2007-2008 post-election violence reported to the police, including cases of sexual and gender-based violence, are thoroughly, promptly and effectively investigated.
- Ensure that police officers are provided with sufficient training to handle sexual and gender-based violence cases and to protect people from sexual and gender-based violence.

## DPP

- Issue, without further delay, a public report on the status of investigations and prosecutions of crimes committed during the post-election violence.
- Direct the police, in accordance with Article 32 of the Director of Public Prosecutions Act,<sup>220</sup> to undertake all necessary investigations, including fresh investigations into the 4,000 case files reviewed by DPP which relate to the post-election violence.

- Engage regularly with victims and civil society groups on efforts being taken to prosecute the post-election violence cases, particularly through the multi-agency task force.

#### MINISTRY OF DEVOLUTION AND PLANNING

- Organize a full and independent audit of the status of internally displaced people and the effectiveness of government programmes to assist them, including integrated internally displaced people.
- In accordance with the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act,<sup>221</sup> ensure that all internally displaced people, including integrated ones, receive sufficient assistance to resettle and rebuild their homes and allocate sufficient resources for this purpose.

#### KENYA NATIONAL ASSEMBLY AND SENATE

- Amend the International Crimes Act, currently applicable to offences committed after 1 January 2009, so that it applies to crimes under international law committed in 2007-8.
- Refrain from all efforts to withdraw from the Rome Statute or repeal the International Crimes Act.
- Press the government to establish the independent Committee for the Implementation of the Recommendations of the TJRC, in accordance with the recommendations of the TJRC Report and adopt relevant legislation. Ensure that adequate financial resources are allocated for this purpose.

#### THE INDEPENDENT POLICE OVERSIGHT AUTHORITY AND THE COMMISSION ON ADMINISTRATIVE JUSTICE AND OTHER COMPLAINTS BODIES

- Conduct outreach activities specifically targeted at informing victims and others with information regarding post-election violence crimes, about their work and how to submit complaints and information.
- Encourage the public to come forward with complaints related to the post-election violence and, where sufficient evidence exists of crimes and human rights violations relative to the respective mandates, conduct investigations.
- Conduct prompt, thorough and effective investigations into relevant complaints.

#### ICC OTP

- Continue to investigate crimes committed during the post-election violence and instances of witness intimidation and interference in relation to cases currently before the International Criminal Court.

- Consider expanding investigations into the 2007-2008 post-election violence beyond the cases of those currently being prosecuted before the ICC.

### ICC REGISTRY

- Ensure that all victims who submitted applications to participate as victims before the proceedings currently before the ICC are informed of the outcome of their application.
- Provide the Common Legal Representatives with sufficient resources and other assistance to identify and engage all eligible victims that want to participate in the ICC proceedings.
- Provide the Common Legal Representatives with sufficient resources to enable them to meet, and communicate regularly, with their clients to ensure that victims are kept informed of developments in the cases and are able to give instructions to their representatives.
- Expand the ICC's outreach activities to enable affected communities, including victims of the post-election violence that fall outside the scope of the current cases, to be kept regularly informed about the ICC's work.

### ICC TRUST FUND

- Carry out prompt assessments to establish assistance programmes for victims of the post-election violence as soon as possible.

### INTERNATIONAL COMMUNITY, INCLUDING INTERGOVERNMENTAL ORGANIZATIONS, THE AFRICAN UNION AND DIPLOMATIC REPRESENTATIVES

- Insist that Kenya meets its international and domestic obligations to investigate and prosecute crimes under international law during the post-election period and ensure truth and full and effective reparation for victims.
- Commit more resources towards supporting litigation proceedings brought by civil society/human rights groups together with or on behalf of victims.
- Call on the Kenyan government to strengthen relevant institutions aimed at ensuring full accountability at all levels of the post-election violence, particularly the police.

### AFRICAN UNION HEADS OF STATE AND GOVERNMENTS (THE AU ASSEMBLY)

- Refrain from seeking the suspension or termination of the trials of the President and Deputy President of Kenya, which are currently before the ICC.
- Publicly acknowledge the importance of the ICC and the crucial role it is

playing in seeking justice for victims of crimes against humanity, war crimes and acts of genocide in Africa.

- Desist from renewing the calls to the United Nations Security Council seeking the deferral of the trials of the Kenyan President and Deputy President, which are currently before the ICC.
- Desist from issuing resolutions that - in effect - call on the President of Kenya not to appear before the ICC.
- Issue resolutions that call on the Kenyan government to provide full, adequate and prompt support and cooperation to the ICC.
- Reconsider and withdraw support to the proposal to amend Article 27 of the Rome Statute to the ICC, whose effect is to grant immunity from prosecution before the ICC to serving Heads of State and Government.
- Reconsider and withdraw support to the proposal to amend Article 16 of the Rome Statute of the ICC, whose effect is to grant the United Nations General Assembly the power to defer ICC investigations and prosecutions, in addition to the power currently exercised by the United Nations Security Council.

#### UN SECURITY COUNCIL

- Reject any future initiatives to defer the ICC's investigations and prosecutions in Kenya.

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## ENDNOTES

<sup>1</sup> Capital Reporter, "Stakeholders reach consensus on proposed ICD Court," *Capital FM News*, 9 February 2014 <http://www.capitalfm.co.ke/news/2014/02/stakeholders-reach-consensus-on-proposed-icd-court/>; Macharia Mwangi, 'JSC, Tobiko in row over special court', *Daily Nation*, 6 February 2014 <http://mobile.nation.co.ke/news/JSC-Tobiko-in-row-over-special-court/-/1950946/2196020/-/format/xhtml/-/kk3oddz/-/index.html>.

<sup>2</sup> The Truth, Justice and Reconciliation (TJRC) Amendment Act, passed in December 2013, provides for the National Assembly to consider the report of the TJRC before any recommendations are implemented, when previously the Act required implementation within six months of the report's publication.

<sup>3</sup> *Decision on the Prosecution's applications for a finding of non-compliance pursuant to Article 87 (7) and for an adjournment of the provisional trial date* ICC-01/09-02/11, 31 March 2014. <http://www.icc-cpi.int/iccdocs/doc/doc1755190.pdf>.

<sup>4</sup> Victims who participate in the ICC proceedings are represented by a Common Legal Representative who, among other things, attends hearings, presents their views and concerns to the Judges, puts questions to witnesses and requests request reparation for crimes committed against them if a person is convicted.

<sup>5</sup> Article 32, Kenya Office of the Director of Public Prosecutions Act, 2013.

<sup>6</sup> The Prevention, Protection and Assistance to Internally Displaced People and Affected Communities Act, Number 56 of 2012.

<sup>7</sup> At the time of the post-election violence, Kenya was divided into eight provinces. A newly devolved structure established under the Constitution of Kenya, 2010 and after the 2013 General Elections has led to the provinces now being named administrative divisions, within which there are a total of 47 counties.

<sup>8</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A human rights account of the post-2007 election violence*, August 2008, [http://www.knchr.org/Portals/0/Reports/KNCHR\\_REPORT\\_ON\\_THE\\_BRINK\\_OF\\_THE\\_PRECIPICE.pdf](http://www.knchr.org/Portals/0/Reports/KNCHR_REPORT_ON_THE_BRINK_OF_THE_PRECIPICE.pdf); Report of the Commission of Inquiry into the Post-Election Violence, 15 October 2008, available at: [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf), accessed on 27 June 2014.

<sup>9</sup> Kenya Human Rights Commission (KHRC) and National IDP Network report, *Gains and Gaps: a status report on IDPs in Kenya, 2008-10*, Nairobi: Kenya, February 2011, [http://www.khrc.or.ke/component/docman/doc\\_details/17-gains-and-gaps-a-status-report-on-idps-in-kenya-2008-2010.html](http://www.khrc.or.ke/component/docman/doc_details/17-gains-and-gaps-a-status-report-on-idps-in-kenya-2008-2010.html), accessed on 2 July 2014.

<sup>10</sup> The Commission of Inquiry into the Post-Election Violence (CIPEV or the Waki Commission) estimated 3,561 people were injured, 557 from gunshot wounds whilst the majority of others were from forceful use of objects such as machetes. The report can be found at: [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf).

<sup>11</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A human rights account of the post-2007 election violence*, August 2008, [http://www.knchr.org/Portals/0/Reports/KNCHR\\_REPORT\\_ON\\_THE\\_BRINK\\_OF\\_THE\\_PRECIPICE.pdf](http://www.knchr.org/Portals/0/Reports/KNCHR_REPORT_ON_THE_BRINK_OF_THE_PRECIPICE.pdf).

[E.pdf](#), accessed on 27 June 2014; The Prosecutor v Ruto and Joshua arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012; The Prosecutor v Francis Kirimi Muthaura and Kenyatta, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012.

<sup>12</sup> The Kenya National Commission on Human Rights was established under article 59 of the 2010 Kenyan Constitution, and is the successor to the body of the same name established under a 2002 Act of Parliament. Other complaints bodies, mentioned later in this report, include the Commission on Administrative Justice and the Independent Police Oversight Authority.

<sup>13</sup> Amnesty International uses the term “internally displaced people” or “internally displaced persons” throughout this report, unless directly citing from others who use the acronym IDP.

<sup>14</sup> The adjournment was granted in order to allow the Kenyan government to respond to a request made by the Prosecutor in April 2012 for the financial records of the accused, which in November 2013 she alleged in a non-compliance filing that the Kenyan Government had failed to comply with, see: *Prosecutor v. Uhuru Muigai Kenyatta, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date*, ICC-01/09/02/11-908, 31 March 2014.

<sup>15</sup> Both the CIPEV and the TJRC found crimes took place in a number of other places. Amnesty International did not visit all these places to speak to victims directly but notes that post-election violence was widespread in the Coast Province and elsewhere.

<sup>16</sup> Concerns raised by civil society actors in meetings with Amnesty International on 2 and 3 April 2014. See also, Blake Evans-Pritchard and Simon Jennings, “Action Urged on ICC Witness Protection”, *Institute of War and Peace Reporting*, 28 March 2014, <http://iwpr.net/report-news/action-urged-icc-witness-protection>.

<sup>17</sup> See for example: Article 32, Additional Protocol I to the 1949 Geneva Conventions; Article 24 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance; Principles 2 and 4 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, addendum to the Report of the independent expert (UN Doc: E/CN.4/2005/102/Add.1), 8 February 2005; Principle 24 of the United Nations 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, adopted by General Assembly Resolution 60/147, 21 March 2006; and Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, (UN Doc: E/CN.4/2006/91), 8 February 2006, para. 38 and Conclusions.

<sup>18</sup> See for example: Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide; Articles 49, 50, 129 and 146 of the Geneva Conventions; Article 85 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, Principle I; Article 7 and 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Articles 3, 4 and 5 of the International Convention for the Protection of All Persons from Enforced Disappearance; Preamble of the Rome Statute of the International Criminal Court, para. 6; Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by General Assembly Resolution 3074 (XXVIII) of 3 December 1973; Principles on the Effective Prevention and Investigation

of Extra-legal, Arbitrary and Summary Executions endorsed by General Assembly Resolution 44/162 of 15 December 1989; Principle 4 of the United Nations 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; and Rule 158 of International Committee of the Red Cross's (ICRC) Customary Rules of International Humanitarian Law.

<sup>19</sup> See for example: Article 3 of 1907 Hague Convention IV; Article 91 of Protocol I, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 24 (4) of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 75 of the Rome Statute of the International Criminal Court; United Nations 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; and Rule 150 of ICRC's Customary Rules of International Humanitarian Law.

<sup>20</sup> *The Factory at Chorzów case (Germany v. Poland)*, Judgment, Permanent Court of International Justice, 13 September 1928, p. 47.

<sup>21</sup> The General Service Unit is a special reserve unit of the police that provides security to the Presidency and other government bodies and deals with civil disorder and special operations.

<sup>22</sup> Kenya National Commission on Human Rights, *On the Brink of the Precipice: A human rights account of the post-2007 election violence*, August 2008, [http://www.knchr.org/Portals/0/Reports/KNCHR\\_REPORT\\_ON\\_THE\\_BRINK\\_OF\\_THE\\_PRECIPICE.pdf](http://www.knchr.org/Portals/0/Reports/KNCHR_REPORT_ON_THE_BRINK_OF_THE_PRECIPICE.pdf); Report of the Commission of Inquiry into the Post-Election Violence, 15 October 2008, available at:

[http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf).

<sup>23</sup> Report of the Commission of Inquiry into the Post-Election Violence, 15 October 2008, available at:

[http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf), accessed on 2 July 2014 at p. 248

<sup>24</sup> Report of the Commission of Inquiry into the Post-Election Violence, 15 October 2008, available at:

[http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf) at p.384

<sup>25</sup> Report of the Commission of Inquiry into the Post-Election Violence, 15 October 2008, available at:

[http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf), accessed on 2 July 2014 at p. 384

<sup>26</sup> According to the findings of the CIPEV, the Mungiki criminal organization began as a cultural cum religious cult in the Kikuyu inhabited areas of the Rift Valley in the 1980s, later emerging as a Mafioso style gang that grew and eventually became a shadow government in the slums of Nairobi and in parts of Central Province. It meted out justice and extorted local businesses, becoming a large and powerful criminal organization within the context of a political culture that both used and tolerated extra-state violence. See report of the CIPEV, at p.27. Both the CIPEV and the ICC Pre-Trial Chamber II concluded that the Mungiki were responsible for perpetrating violence during the post-election period.

<sup>27</sup> Report of the Commission of Inquiry in to the Post-Election Violence, 15 October 2008, p 311 and 336;

[http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf)

[nce.pdf](#).

<sup>28</sup> Ibid, pages 331-334. See also Independent Medico-Legal Unit, *Forensic Investigations in to Post-Election Violence Deaths*, 24 February 2008, <http://www.pambazuka.org/actionalerts/images/uploads/Forensicrep.pdf>, accessed on 2 July 2014.

<sup>29</sup> In February 2008, the UN Head of Emergency Relief Operations in Kenya, John Holmes, announced that approximately 600,000 people in Kenya had become internally displaced persons (IDPs) as a result of the post-election violence, with 300,000 of these living in camps. BBC News, 'Some 600,000 displaced in Kenya,' 11 February 2008; <http://news.bbc.co.uk/1/hi/world/africa/7239234.stm>, accessed on 3 July 2014. However, subsequent government figures put the number of displaced at 660,000. See also Kenya Human Rights Commission (KHRC) and National IDP Network report, *Gains and Gaps: a status report on IDPs in Kenya, 2008-10*, Nairobi: Kenya, February 2011.

<sup>30</sup> Kenyan National Dialogue and Reconciliation through the mediation of H.E. Kofi Annan and the Panel of Eminent African Personalities on the resolution of the political crisis: Annotated Agenda and Timetable, 1 February 2008 available at: <http://www.dialoguekenya.org/Agreements/1%20February%202008%20-Annotated%20Agenda%20for%20the%20Kenya%20Dialogue%20and%20Reconciliation.pdf>, accessed on 2 July 2014.

<sup>31</sup> Ibid.

<sup>32</sup> National Accord and Reconciliation Act, 2008, Section 3 and 4.

<sup>33</sup> This includes the National Police Service Act, 2011, the National Police Service Commission Act, 2011, the Judicial Services Act, 2011, the Vetting of Judges and Magistrates Act, 2011 and the Supreme Court Act, 2011. There were also open, competitive appointments for a new Chief Justice, Deputy Chief Justice, Attorney General and Director of Public Prosecutions (DPP).

<sup>34</sup> No such public body investigating complaints against the authorities existed at the time of the post-election violence. The Public Complaints Standing Committee, established in 2007, was a government appointed body falling under the Ministry of Justice and Constitutional Affairs. It was replaced in 2011 by the independent Commission on Administration of Justice (the Office of the Ombudsperson), mandated to investigate abuses of power and all forms of maladministration. In a meeting held on 13 February 2014, the Commission on Administration of Justice indicated to Amnesty International it had not received complaints from victims of the post-election violence in relation to police crimes or human rights violations.

<sup>35</sup> According to the last performance report of the Independent Police Oversight Authority (IPOA), published in December 2013, it had received 1,061 complaints. The complaints included death in custody, harassment by the police, assault, serious injuries, sexual offences and misuse of office. The IPOA plans to set up an historical complaints unit to investigate human rights violations that took place before it was established, including during the post-election violence.

<sup>36</sup> The Report of the Commission of Inquiry into the Post-Election Violence, 15 October 2008..

<sup>37</sup> Ibid, pages 416-420.

<sup>38</sup> BBC News, "Kenya to get poll violence court", *BBC News*, 27 November 2008; <http://news.bbc.co.uk/1/hi/world/africa/7753241.stm>, accessed on 2 July 2014.

<sup>39</sup> Article 15 (2) of the International Covenant for Civil and Political Rights provides that retroactive legislation can be enacted in relation to crimes under international law. It states:

"[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." A number of common law countries have done so, including Australia, see:

<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Prohibitiononretrospectivecriminallaws.aspx>.

<sup>40</sup> On 12 February 2009, Parliament failed to adopt the Constitution Amendment Bill which would have paved the way for debate on a Special Tribunal Bill which had been finalized on 28 January 2009. Subsequent attempts to introduce a Bill in Parliament aimed at establishing the Special Tribunal failed due to lack of quorum and opposition from a number of Cabinet Ministers. The phrase, "Don't be Vague, Go to the Hague" was famously adopted by parliamentarians, including William Ruto and Uhuru Kenyatta, prompting MPs to walk out of Parliament when the legislation was being tabled.

<sup>41</sup> *Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Rome Statute*, ICC-01/09-01/11-19, 31 March 2011.

<sup>42</sup> *Ibid*, paras. 47-59. The Pre-Trial Chamber notes the government failed to provide "any information as to the conduct, crime or the incidents" being investigated. See *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute* (Pre-Trial Chamber II), ICC-01/09-02/11-96, ) 30 May 2011 *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute* Pre-Trial Chamber II) 30 May 2011 at para. 65.

<sup>43</sup> *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute* (Pre-Trial Chamber II), ICC-01/09-02/11-96, 30 May 2011 at paras. 56, 60, 61.

<sup>44</sup> *Ibid* para. 56.

<sup>45</sup> *Judgement on the Appeal of the Republic of Kenya against the Decision of the Pre-Trial Chamber of of 30 May 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"*, ICC-01/09-02/11-274, 30 August 2011. "

<sup>46</sup> Bernard Namunane, 'Kenya seeks Africa support over Hague,' *Daily Nation*, 12 January 2011; <http://www.afronline.org/?p=11866>, accessed on 2 July 2014..

<sup>47</sup> International Center for Transitional Justice, *Prosecuting International and Other Serious Crimes in Kenya*, May 2013, <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf>, accessed on 2 July 2014..

<sup>48</sup> Roselyn Obala, 'Judiciary crafting special court to complement ICC,' *Standard Digital*. 27 November 2012; [http://www.standardmedia.co.ke/?articleID=2000071565&story\\_title=judiciary-crafting-special-court-to-complement-icc](http://www.standardmedia.co.ke/?articleID=2000071565&story_title=judiciary-crafting-special-court-to-complement-icc).

<sup>49</sup> *Report of the Truth, Justice and Reconciliation Commission*, May 2013, <http://www.tjrckkenya.org/index.php?Itemid=238&>.

<sup>50</sup> All recommendations are contained within Volume IV, Chapter 1 of the *Report of the Truth, Justice and Reconciliation Commission*, May 2013.

<sup>51</sup> Appendix 2 of Volume IV of the Report of the Truth, Justice and Reconciliation Commission, citing Kenya National Commission on Human Rights, *On the Brink of the Precipice: A human rights account of the post-2007 election violence*, August 2008

<sup>52</sup> The Truth Justice and Reconciliation Commission Act 2008, Section 49(3).

<sup>53</sup> The Truth, Justice and Reconciliation Amendment Act, 2013, Sections 3 and 4 amending

Sections 48 and 49(3) of the Truth, Justice and Reconciliation Act 2008.

<sup>54</sup>Ibid.

<sup>55</sup> The Truth, Justice and Reconciliation Amendment Act, 2013, Section 4 and 5, amending Sections 49 (1) and 50 (1) of the Truth, Justice and Reconciliation Act 2008.

<sup>56</sup> The Truth, Justice and Reconciliation Act 2008, Section 49 (1).

<sup>57</sup> The Report of the Truth, Justice and Reconciliation Commission, Volume IV, Chapter 2, Annex 1.

<sup>58</sup> Report of the Truth, Justice and Reconciliation Commission, Volume IV, p.71-81.

<sup>59</sup> See, for example, Christopher Gitari Ndungu, "Lessons to be learned: an analysis of the final report of Kenya's Truth, Justice and Reconciliation Commission", *International Center for Transitional Justice Briefing Paper*, May 2014 <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf>.

<sup>60</sup> Judiciary of Kenya Press Release, *The International Crimes Division of the High Court of Kenya Stakeholders Workshop*, <http://www.judiciary.go.ke/portal/untitled-resource12.html>, accessed on 3 July 2014. See also, Capital Reporter, 'Stakeholders reach consensus on proposed ICD Court,' *Capital FM News*, 9 February 2014; <http://www.capitalfm.co.ke/news/2014/02/stakeholders-reach-consensus-on-proposed-icd-court/>, accessed on 3 July 2014.

<sup>61</sup> Capital Reporter, 'Stakeholders reach consensus on proposed ICD Court,' *Capital FM News*, 9 February 2014 <http://www.capitalfm.co.ke/news/2014/02/stakeholders-reach-consensus-on-proposed-icd-court/>, accessed on 3 July 2014; Macharia Mwangi, 'JSC, Tobiko in row over special court', *Daily Nation*, 6 February 2014 <http://mobile.nation.co.ke/news/JSC-Tobiko-in-row-over-special-court/-/1950946/2196020/-/format/xhtml/-/kk3oddz/-/index.html>, accessed on 3 July 2014.

<sup>62</sup> Ibid.

<sup>63</sup> Sam Kiplagat, 'Most PEV cases cannot be prosecuted – Tobiko,' *The Star*, 6 February 2014; <http://www.the-star.co.ke/news/article-153986/most-pev-cases-cannot-be-prosecuted-tobiko>, accessed on 3 July 2014.

<sup>64</sup> Bernard Koech, 'Fresh doubts about mandate of Kenya's special court,' *Institute of War and Peace Reporting*, 21 February 2014; <http://iwpr.net/report-news/fresh-doubts-about-mandate-kenyas-special-court>, accessed on 3 July 2014.

<sup>65</sup> Jeremiah Kiplang'at, 'Lack of Evidence Derails Local Trials,' *Daily Nation*, 17 August, 2012; <http://www.nation.co.ke/News/Lack+of+evidence+derails+local+trials+/-/1056/1482054/-/12jpcr6z/-/index.html>, accessed on 3 July 2014.

<sup>66</sup> Commitments made to Amnesty International in a meeting with the Deputy DPP on 6 December 2013 and in written correspondence from the DPP's office to Amnesty International on 30 January 2014. A civil society actor interviewed by Amnesty International on 2 April 2014 for this report also suggested similar commitments were made to his organization in 2012. See also, Athman Amran, "Post-election violence suspects may face international law", *Standard Digital*, 18 August 2012, [http://www.standardmedia.co.ke/?articleID=2000064300&story\\_title=post-election-violence-suspects-may-face-international-law&pageNo=2](http://www.standardmedia.co.ke/?articleID=2000064300&story_title=post-election-violence-suspects-may-face-international-law&pageNo=2), accessed on 2 July 2014;; Judie Kabaria, "New Kenyan Justice Effort Meets Scepticism," *Institute for War and Peace Reporting*, 4 April 2012, <http://iwpr.net/report-news/new-kenyan-justice-effort-meets-scepticism>, accessed on 2 July 2014.

<sup>67</sup> Amnesty International met the Deputy DPP, Kioko Kamula, on 6 December 2013 and subsequently wrote to the DPP on 22 January 2014 requesting this information but was told to await the publication of the multi-agency task force report on both occasions.

<sup>68</sup> A Progress Report by the Attorney General by the team on update of post-election violence related cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces, ICC-01/09-01/11-64-Anx3, March 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1062628.pdf>, accessed on 2 July 2014.

<sup>69</sup> Ibid, pages 70-71. See also Republic of Kenya Criminal Investigations Department Letter to the Director of Public Prosecutions: Update on Investigations in to six ICC suspects, ICC-01/09-01/11-159-Anx1, 1 July 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1093163.pdf>, accessed on 2 July 2014.

<sup>70</sup> Human Rights Watch, *Turning Pebbles: evading accountability for post-election crimes in Kenya*, 2011, at [http://www.hrw.org/sites/default/files/reports/kenya1211webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf) accessed on 2 July 2014; Kenyans for Peace, Truth and Justice and Kenya Human Rights Commission; KPTJ and KHRC, *Securing Justice: establishing a domestic mechanism for the 2007-8 post-election violence in Kenya*, Nairobi: Kenya, May 2013 at; [http://africog.org/new/wp-content/uploads/Securing\\_Justice.pdf](http://africog.org/new/wp-content/uploads/Securing_Justice.pdf), accessed on 2 July 2014.

<sup>71</sup> In its 2013 report, *Run Up to Kenya's 2013 General Elections: where does justice stand for victims of 2007-8 post-election violence?* International Federation for Human Rights (FIDH) and KHRC noted the Task Force had reportedly reviewed all 6,000 cases and had 1,716 suspects, 420 potential witnesses, four murder cases already being prosecuted. 150 sexual and gender-based violence (SGBV)-related crimes among the cases being reviewed but no information was provided as to whether any had resulted in prosecutions. See report at <http://www.fidh.org/en/africa/kenya/Run-up-to-Kenya-s-2013-General-12920>, accessed on 2 July 2014.

<sup>72</sup> Human Rights Watch noted that of the 76 prosecution cases researched, there had been only six convictions for serious crimes such as murder, sexual assault and robbery with violence. The majority of other cases had lead to acquittals. See Human Rights Watch, *Turning Pebbles: evading accountability for post-election crimes in Kenya*, 2011, at [http://www.hrw.org/sites/default/files/reports/kenya1211webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf). In one of the pending cases highlighted by Human Rights Watch – that of Peter Kepkemboi – a conviction of murder has since been entered by the Nakuru High Court. The accused was sentenced to life imprisonment. See KPTJ and KHRC, May 2013, [http://africog.org/new/wp-content/uploads/Securing\\_Justice.pdf](http://africog.org/new/wp-content/uploads/Securing_Justice.pdf).

<sup>73</sup> Human Rights Watch, *Turning Pebbles: evading accountability for post-election crimes in Kenya*, 2011, at [http://www.hrw.org/sites/default/files/reports/kenya1211webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf).

<sup>74</sup> Information on the alleged involvement of public officials and the police in the post-election violence can be found in the Report of the Commission of Inquiry in to the Post-Election Violence, 15 October 2008; Kenya National Commission on Human Rights, *On the Brink of the Precipice: A human rights account of the post-2007 election violence*, August 2008.

<sup>75</sup> Two victims did not report until over a year later. For one victim, this was due to being displaced and not returning to the area until sometime later. For the other, this was due to spending this period recovering from gunshot injuries.

<sup>76</sup> Some fears are outlined in this report, in the section concerning failures in police investigations. One rape survivor who spoke to Amnesty International said she did not report to the police until a year after the incident because of the fear of being stigmatized.

<sup>77</sup> Coalition on Violence Against Women Press Release, *Hearing of the Constitutional Petition filed on behalf of sexual and gender based violence survivors of the post-election violence, at the High Court of Kenya before Justice Isaac Leonaola on 22 January 2014 at 9 a.m* available at: <http://covaw.or.ke/covaw-in-the-news/press-release-nairobi-21-january-2014->

[hearing-of-the-constitutional-petition-filed-on-behalf-of-sexual-gender-based-violence-survivor-of-the-post-election-violence-at-the-high-court-of-kenya-bef/](#), accessed on 2 July 2014.

<sup>78</sup> World Organization Against Torture (OMCT), *Violence against women and children in Kenya, an alternative report to the Committee against Torture*, November 2008; [http://www.omct.org/files/2005/09/3070/alt\\_report\\_on\\_violence\\_against\\_women\\_children\\_kenya.pdf](http://www.omct.org/files/2005/09/3070/alt_report_on_violence_against_women_children_kenya.pdf), accessed on 2 July 2014;; Robert Wanjala, "Kenyan Police need sexual crimes unit - experts", *Institute for War and Peace Reporting*, 16 October 2013, <http://iwpr.net/report-news/kenyan-police-needs-sexual-crimes-unit-%E2%80%93-experts>, accessed on 2 July 2014.

<sup>79</sup> Meeting between Amnesty International and the Inspector General of Police, 10 April 2014.

<sup>80</sup> The May 2013 AU Decision on International Jurisdiction, Justice and the International Criminal Court, Doc. Assembly/AU/13(XXI) supported calls for the "referral of the ICC investigations and prosecutions in relation to the 2007 post-election violence in Kenya, in line with the principle of complementarity, to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation." The decision was widely reported in the Kenyan press. See for instance, Steve Mbogo, "Take Uhuru Ruto case back to Kenya says AU", *Daily Nation*, 27 May 2013, <http://www.nation.co.ke/news/politics/Take-Uhuru-Ruto-case-back-to-Kenya--says-AU/-/1064/1864440/-/h3wsbp/-/index.html>, accessed on 2 July 2014;; Ally Jamah, "International Court ICC dismisses claims on Kenyan cases", *Standard Digital*, 28 May 2013, <http://www.standardmedia.co.ke/?articleID=2000084608>, accessed on 26 June 2014.

<sup>81</sup> Catrina Stewart, "ICC on trial along with Kenya's elite amid claims of bribery and intimidation", *The Guardian*, 1 October 2013, <http://www.theguardian.com/world/2013/oct/01/icc-trial-kenya-kenyatta-ruto>, accessed on 2 July 2014; Wanja Gathu, 'Big Questions about Witness Protection in Kenya.' *Institute of War and Peace Reporting*, 27 May 2014; <http://iwpr.net/report-news/big-questions-about-witness-protection-kenya>, accessed on 26 June 2014.

<sup>82</sup> . Wanja Gathu, 'Big Questions about Witness Protection in Kenya.' *Institute of War and Peace Reporting*, 27 May 2014; <http://iwpr.net/report-news/big-questions-about-witness-protection-kenya>; Amnesty International meeting with Witness Protection Agency, 25 March 2014. Outreach activities include television commercials on the Witness Protection Agency's operations and distribution of educational materials.

<sup>83</sup> Wanja Gathu, 'Big Questions about Witness Protection in Kenya.' *Institute of War and Peace Reporting*, 27 May 2014; <http://iwpr.net/report-news/big-questions-about-witness-protection-kenya>.. Amnesty International meeting with Witness Protection Agency, 25 March 2014.

<sup>84</sup> Press Release by Sam Kobia, Chair, Judicial Service Commission (JSC) Committee on the establishment of an International Crimes Division (ICD) of the High Court in Kenya, 'The International Crimes Division of the High Court of Kenya Stakeholders Workshop', 7 February 2014; <http://www.judiciary.go.ke/portal/untitled-resource12.html>, accessed on 2 July 2014.

<sup>85</sup> Amnesty International interview with civil society actors, 21 March and 2 April 2014.

<sup>86</sup> Amnesty International interview with civil society actors, 21 March 2014 and 2 April 2014.

<sup>87</sup> *Report of the Truth, Justice and Reconciliation Commission*, Volume IV Chapter 3, <http://www.tirckkenya.org/index.php?Itemid=238&>, accessed on 2 July 2014.

<sup>88</sup> The remainder of victims were people from Kisumu and Nairobi who had not been displaced but suffered other human rights violations and abuses during the post-election violence.

<sup>89</sup> Kenya National Dialogue and Reconciliation Public Statement, 4 February 2008; <http://www.dialoguekenya.org/Agreements/4%20February%202008-Agreed%20Statement%20on%20Measures%20to%20Address%20Humanitarian%20Crisis.pdf>, accessed on 2 July 2014

<sup>90</sup> These included laws related to human rights or development. Refugee Consortium and Danish Refugee Council Great Lakes Programme, *Lessons Learned from Developing a National Policy Framework on Internal Displacement in Kenya*, January 2013; [http://drc.dk/fileadmin/uploads/pdf/IA\\_PDF/Great\\_Lakes\\_PDF/BehindTheScenes\\_KenyaIDPReport.pdf](http://drc.dk/fileadmin/uploads/pdf/IA_PDF/Great_Lakes_PDF/BehindTheScenes_KenyaIDPReport.pdf), accessed on 2 July 2014.

<sup>91</sup> The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act Number 56 of 2012, Article 5.

<sup>92</sup> Ibid, Article 6.

<sup>93</sup> Ibid, Articles 7 and 8.

<sup>94</sup> Ibid, Article 9.

<sup>95</sup> Ibid, Article 15.

<sup>96</sup> Internal Displacement Monitoring Centre, *Kenya: Too Early to Turn the Page on IDPs, More Work is Needed*, 3 June 2014, available at: <http://www.internal-displacement.org/assets/library/Africa/Kenya/pdf/201406-af-kenya-overview-en.pdf>, accessed on 2 July 2014.

<sup>97</sup> African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), October 2009.

<sup>98</sup> These initiatives were part of an Emergency Social and Economic Recovery Strategy, which comprised a number of operations aimed at assisting and resettling IDPs, including *Operation for Voluntary Return* (food rations only), *Operation Rudi Nyumbani*, *Operation Ujirani Wwema* (Good Neighbourliness) and *Operation Tujenge Pamoja* (Let's Build Together) which were implemented to promote reconciliation and encourage reconstruction of property.

<sup>99</sup> In a meeting held between Amnesty International and the Department of Special Programmes within the Ministry of Devolution and Planning on 4 July 2014, Amnesty International was informed that approximately 71,000 houses were constructed under *Operation Rudi Nyumbani*. According to a Parliamentary Select Committee report on the Resettlement of IDPs in Kenya, 14,269 houses were built for people benefiting from *Operation Rudi Nyumbani*, and 20,235 houses built for IDPs throughout the country. See Kenya National Assembly, *Report of the Parliamentary Select Committee on the Resettlement of IDPs in Kenya*, April 2012, section 2.1.1., p. 4-7, [http://www.knchr.org/Portals/0/Reports/PSC\\_Final\\_IDPs\\_report\\_2012-2.pdf](http://www.knchr.org/Portals/0/Reports/PSC_Final_IDPs_report_2012-2.pdf).

<sup>100</sup> International Center for Policy and Conflict, *Prosecuting Justice for Victims of the Post-Election Violence – why The Hague option*, 2012, pages 22-3; <http://www.icpcafrica.org/annual-reports/ICC%20Toolkit.pdf>, accessed on 2 July 2014.

<sup>101</sup> In particular, Kenya Human Rights Commission in *Gains and Gaps: A Status Report on IDPs in Kenya 2008-2010*, February 2011, [http://www.khrc.or.ke/component/docman/doc\\_details/17-gains-and-gaps-a-status-report-on-idps-in-kenya-2008-2010.html](http://www.khrc.or.ke/component/docman/doc_details/17-gains-and-gaps-a-status-report-on-idps-in-kenya-2008-2010.html).

<sup>102</sup> Kenya National Assembly, *Report of the Parliamentary Select Committee on the Resettlement of IDPs in Kenya*, April 2012, [http://www.knchr.org/Portals/0/Reports/PSC\\_Final\\_IDPs\\_report\\_2012-2.pdf](http://www.knchr.org/Portals/0/Reports/PSC_Final_IDPs_report_2012-2.pdf), accessed on 2

July 2014.

<sup>103</sup> Kenya National Assembly, *Report of the Parliamentary Select Committee on the Resettlement of IDPs in Kenya*, April 2012, Chapter 4, pages 65-67  
[http://www.knchr.org/Portals/0/Reports/PSC\\_Final\\_IDPs\\_report\\_2012-2.pdf](http://www.knchr.org/Portals/0/Reports/PSC_Final_IDPs_report_2012-2.pdf).

<sup>104</sup> Kenya National Assembly, *Report of the Parliamentary Select Committee on the Resettlement of IDPs in Kenya*, April 2012, Chapter 5, pages 68-71,  
[http://www.knchr.org/Portals/0/Reports/PSC\\_Final\\_IDPs\\_report\\_2012-2.pdf](http://www.knchr.org/Portals/0/Reports/PSC_Final_IDPs_report_2012-2.pdf).

<sup>105</sup> Report of the UN Special Rapporteur for the Human Rights of IDPs, A/HRC/19/54/Add.2, 6 February 2012.

<sup>106</sup> Press Release, UN Special Rapporteur for the Human Rights of IDPs, *Solutions for Kenya's displaced require urgent action determined by reality*, 7 May 2014.

<sup>107</sup> President Uhuru Kenyatta's State of the Nation Speech, 27 May 2014, <http://www.the-star.co.ke/news/article-160655/president-uhurus-state-nation-speech>, accessed on 2 July 2014.

<sup>108</sup> Wanjiru Macharia, '250 IDPs receive cash to buy land,' *Daily Nation*, 23 October 2013; <http://mobile.nation.co.ke/counties/250-IDPs-receive-cash-to-buy-land/-/1950480/2044732/-/format/xhtml/-/ovsq2f/-/index.html>; Yobesh Onwong'a, 'Ksh 996 m for Rongai IDPs,' *Kenya News Agency*, 24 October 2013; <http://kenyanewsagency.go.ke/?p=2144>, both accessed on 2 July 2014.

<sup>109</sup> Information provided to Amnesty International by the Commission on Administrative Justice on 28 February 2014.

<sup>110</sup> Ibid. This was due to cases not having been concluded or having been dropped because the complainants were found not to be genuine IDPs or because the government responded the complainants had not registered their particulars in time to benefit from the compensation.

<sup>111</sup> Information provided to Amnesty International by the Commission on Administrative Justice on 28 February 2014.

<sup>112</sup> Amnesty International meeting with Kenyan human rights organization, 3 April 2014. See also Lillian Ochieng, "'Kenya's Forgotten IDPs: thousands of people displaced by Kenya's 2007-08 electoral violence still waiting for help,'" *Institute of War and Peace Reporting*, ACR Issue 346, 20 April 2013; <http://iwpr.net/report-news/kenyas-forgotten-idps>, accessed on 2 July 2014.

<sup>113</sup> Kenya National Assembly, *Report of the Parliamentary Select Committee on the Resettlement of IDPs in Kenya*, April 2012, p.5.

<sup>114</sup> Samuel Kisika, 'Govt says no funds for integrated IDPs,' *News 24 Kenya*, 5 November 2013 at <http://m.news24.com/kenya/MyNews24/Govt-says-no-funds-for-integrated-IDPs-20131105>, accessed on 2 July 2014.

<sup>115</sup> Notes from meeting between Professor Chaloka Beyani, UN Special Rapporteur on the Rights of IDPs and Kenyan civil society organizations, 6 May 2014. Notes on file with Amnesty International.

<sup>116</sup> These difficulties were attributed to the fact that there were two different initiatives to profile internally displaced people – one by the Provisional Administration for *Rudi Nyumabani* and one by the Bureau of National Statistics for those who did not benefit from this operation. Amnesty International meeting with the Special Programmes Department of the Ministry of Devolution and Planning and the Ministry of Foreign Affairs, 4 July 2014.

<sup>117</sup> Ibid.

<sup>118</sup> The Prevention, Protection and Assistance to Internally Displaced People and Affected

Communities Act, Number 56 of 2012, Article 11(4), (5) and (6).

<sup>119</sup> Ibid, Article 15.

<sup>120</sup> See, for instance, Maina Kiai, 'Nyamira IDPs quash notion that poll violence victims were Kikuyu alone,' 7 March 2014, *Daily Nation*; <http://mobile.nation.co.ke/blogs/Nyamira-IDPs-quash-notion-that-poll-violence-victims-were-Kikuyu/-/1949942/2235010/-/format/xhtml/-/ejr994/-/index.html>, accessed on 2 July 2014;; The Common Legal Representative for Victims of Case II at the ICC also wrote to the UN Special Rapporteur for Human Rights of IDPs on 22 May 2014 to raise these concerns. Letter on file with Amnesty International.

<sup>121</sup> In particular, the Commission references the United Nations 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.

<sup>122</sup> Report of the Truth, Justice and Reconciliation Commission, Volume IV, p.97-102.

<sup>123</sup> Report of the Truth, Justice and Reconciliation Commission, Volume IV, p.121.

<sup>124</sup> Report of the Truth, Justice and Reconciliation Commission, Volume IV, p.105-6, defines the most vulnerable as: Child victims (under 18 years of age at the time of filing); Elderly victims (above 60 at the time of filing); Victims demonstrating urgent health concerns with a causal relationship to the violations of the right to life and personal integrity, including SGBV; Single heads of households demonstrating significant economic hardship with a causal relationship to the violations; Orphans (under 30 years old at the time of filing) ; and individuals who died as a direct result of forcible transfer of populations.

<sup>125</sup> For example, it the programme appears to provide that rehabilitation will only be accessible to the most vulnerable victims, including those with urgent health concerns. .

<sup>126</sup> Republic of Kenya in the High Court at Nairobi, *Petition Number (left blank) of 2011* on file with Amnesty International.

<sup>127</sup> The petitioners include three civil society organizations: the Federation of Women Lawyers (FIDA)-Kenya, KHRC and the International Commission of Jurists (ICJ)-Kenya as well as 25 IDPs.

<sup>128</sup> Republic of Kenya in the High Court at Nairobi, *Petition Number (left blank) of 2011*, para. 41, page 15.

<sup>129</sup> Ibid, paras. 43-46, pages 15-16.

<sup>130</sup> Ibid, prayers on page 19.

<sup>131</sup> Republic of Kenya in the High Court of Kenya at Nairobi Constitutional and Human Rights Division, *Petition No. 122 of 2013*, on file with Amnesty International.

<sup>132</sup> Coalition for Violence against Women (COVAW), ICJ-Kenya, Physicians for Human Rights and the Independent Medico-Legal Unit (IMLU).

<sup>133</sup> Republic of Kenya in the High Court of Kenya at Nairobi Constitutional and Human Rights Division, *Petition No. 122 of 2013*, para. 53, p. 11

<sup>134</sup> Ibid, para. 36, pages 7-8.

<sup>135</sup> Ibid, para. 37 (i) p. 8.

<sup>136</sup> Ibid, para. 46, p. 10.

<sup>137</sup> Ibid, para. 47, p. 10.

<sup>138</sup> Ibid, para. 54-55, p. 12.

<sup>139</sup> Ibid. para. 54-55, p. 12.

<sup>140</sup> Ibid, para. 57, pages 12-15.

<sup>141</sup> Republic of Kenya in the High Court of Nairobi Constitutional and Human Rights Division, *Constitutional Petition number (blank) of 2013*. Petition available at: <http://www.opensocietyfoundations.org/sites/default/files/domestic-kenya-police-shootings-petition-20130213.pdf>, accessed on 2 July.

<sup>142</sup> The petitioners include Citizens Against Violence, South Rift Human Rights and Advocacy Centre and Independent Medico-Legal Unit. IMLU.

<sup>143</sup> Republic of Kenya in the High Court of Nairobi Constitutional and Human Rights Division, *Constitutional Petition number (blank) of 2013*, para. 5 (i) p. 8.

<sup>144</sup> Ibid, para. 5 (ii) p. 8.

<sup>145</sup> Ibid, para. 5 (iii) p. 8.

<sup>146</sup> Ibid, para. 5 (iv) p. 8.

<sup>147</sup> Ibid, paras. 6-10 p. 8-9.

<sup>148</sup> Ibid, para. 13, p. 9.

<sup>149</sup> Ibid, para. 24 (ix) p. 13.

<sup>150</sup> Ibid, para. 22, p. 11.

<sup>151</sup> Information provided to Amnesty International by a civil society organization supporting the petition.

<sup>152</sup> *The Prosecutor v Ruto and Joshua arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, ICC-01/09-01/11-373, 23 January 2012; *The Prosecutor v Francis Kirimi Muthaura and Kenyatta, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, ICC-01/09-02/11-382-Red, 23 January 2012.

<sup>153</sup> *The Prosecutor v Muthaura and Kenyatta*, Prosecution notification of withdrawal of the charges against Muthaura, [ICC-01/09-02/11-687](http://www.icc-cpi.int/iccdocs/doc/doc1755190.pdf), 11 March 2013.

<sup>154</sup> Decision on Africa's relationship with the International Criminal Court, Ext/Assembly/AU/Dec.1, October 2013, paras. 4-7.

<sup>155</sup> *Amendments to the Rules of Procedure and Evidence*, ICC-ASP/12/Res.7.

<sup>156</sup> The decision was delivered during a status conference on 15 January 2014. It requires him to attend a number of hearings during the trial. The Trial Chamber's reasons are set out in: *Prosecutor v Ruto and Sang 'Reasons for the Decision on Excusal from Presence at Trial under Rule 134 quater'*, ICC-01/09-01/11-1186, 18 February 2014.).

<sup>157</sup> *Decision on the Prosecution's applications for a finding of non-compliance pursuant to Article 87 (7) and for an adjournment of the provisional trial date*, ICC-01/09-02/11, 31 March 2014. <http://www.icc-cpi.int/iccdocs/doc/doc1755190.pdf>.

<sup>158</sup> Witness 25 was withdrawn on 15 May 2014. See International Justice Monitor, *Ruto and Sang Trial Adjourned Until June After Prosecution Withdraws Witness*, 16 May 2014, available at <http://www.ijmonitor.org/2014/05/ruto-and-sang-trial-adjourned-until-june-16-after-prosecution-withdraws-witness/>, accessed on 30 June 2014.

<sup>159</sup> On 17 April 2014, Trial Chamber V(a) directed Witness 15, Witness 16, Witness 336, Witness 397, Witness 516, Witness 524, Witness 495, and Witness 323 to testify via video-link or at a location in Kenya. See Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, available at <http://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf>.

<sup>160</sup> See Tom Maliti, "Prosecutor withdraws seven witnesses in Kenyatta case in past year", *International Justice Monitor*, 16 January 2014, <http://www.ijmonitor.org/2014/01/prosecutor-withdraws-seven-witnesses-in-kenyatta-case-in-past-year/>, accessed on 30 June 2014. .

<sup>161</sup> Doubts raised by the Kenyatta defence, which alleges some of these witnesses are responsible for coaching and conspiracy to fabricate evidence and that therefore their evidence should be regarded as "irremediably tainted." See, *Defence Application for a Permanent Stay of Proceedings due to Abuse of Process*, ICC-01/09-02/11-82210 October 2013.

<sup>162</sup> Public redacted version of the Prosecution's 1 November 2013 opposition to the defence application for a permanent stay of proceedings, ICC-01/09-02/11-848-Red, 5 November 2011, at para. 77.

<sup>163</sup> Reuters, "Kenya asks UN Security Council to end Hague Case against President," *Reuters*, 9 May 2013; <http://www.reuters.com/article/2013/05/10/us-kenya-icc-un-idUSBRE94900T20130510>, accessed on 2 July 2014.

<sup>164</sup> See for example, Decision on Africa's relationship with the International Criminal Court, Ext/Assembly/AU/Dec.1, October 2013.

<sup>165</sup> Decision on Africa's Relationship with the International Criminal Court, EXT/Assembly/AU/Dec.1 (Oct 2013), para. 10(i).

<sup>166</sup> Article 27, the Rome Statute of the International Criminal Court, 1998.

<sup>167</sup> Constitution of Kenya 2010, Article 143(4).

<sup>168</sup> Decision on Africa's Relationship with the International Criminal Court, EXT/Assembly/AU/Dec.1 (Oct 2013), para. 10(xi).

<sup>169</sup> Article 127(2) of the Rome Statute states "withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State has a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective."

<sup>170</sup> The TJRC report, published in May 2013, catalogued these violations and government responses, dating back to British colonialism and including: political assassinations; extrajudicial killings and enforced disappearances; detention, torture and ill treatment; sexual violence; illegal acquisition of land; grand corruption and economic crimes.

<sup>102</sup> A July 2013 Ipsos Synovate survey of 2,000 Kenyans found only 39% of respondents preferred the ICC trials to continue, whilst 32% believed the two cases should be addressed in a local tribunal and 29% believed there should be no trials at all. Support for the ICC dropped from 59% in 2011 to 55% in 2012. Of the 39% who favoured the ICC trials continuing, the reasons most cited were lack of trust in Kenyan courts (34%) and the ICC's role in ending impunity (30%).

<sup>171</sup> BBC News, "Uhuru Kenyatta and William Ruto confirm Kenyan alliance", *BBC News*, 3 December 2012, <http://www.bbc.co.uk/news/world-africa-20578837>, accessed on 2 July 2014.

<sup>172</sup> A point noted by Ipsos Synovate in its poll of 2,000 Kenyans conducted between 30 June and 8 July 2011, in which public support for the ICC had declined by 12% from October 2010 to 56%. Support for the ICC in Central Province declined from 73% to 36%, and in Rift Valley Province from 61% to 37%. The survey's authors noted: "Uhuru and Ruto have announced that they intend to run for president in 2012. Since their initial appearance at The Hague in April 2011, the two alongside other members of the G7 Alliance have been crisscrossing the country to garner support for a unified presidential candidate to face Prime Minister Raila Odinga. These campaigns have also been used to whip up support from their ethnic communities and have borne fruit if the Synovate poll is any indication." Another poll of 2,000 Kenyans conducted by the same group in October 2011, shortly after the confirmation of charges hearing, nevertheless showed support for the ICC in Rift Valley and Central Provinces had increased again, to 49% and 59% respectively. Another Ipsos Synovate poll of 1,523 Kenyans conducted from 27 January to 1 February 2012 shortly after the confirmation of charges against Uhuru Kenyatta, William Ruto and Joshua arap Sang, found that although Kenyan satisfaction with the ruling was at 60%, Kenyatta and Ruto's

strongholds of Central and Rift Valley Provinces showed less satisfaction, at 42 and 50% respectively, compared with other regions where the rating was higher, between 68 and 75%. For further information, see Ipsos Synovate in Kenya at <http://www.ipsos.co.ke/home/index.php/downloads>.

<sup>173</sup> "Kenya after the elections", International Crisis Group, Africa Briefing Number 94, Nairobi/Brussels 15 May 2013; <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/b094-kenya-after-the-elections.pdf>, pages 8-9. International Crisis Group noted "Kenyatta and Ruto used nationalist rhetoric grounded in the perception that the ICC discriminates against Africa and unfairly targeted the Kalenjin and Kikuyu communities. The ICC cases provided a convincing narrative that forged solidarity between hitherto antagonistic communities. GEMA and Kalenjin communities recognised that the alliance between Kenyatta and Ruto was necessary to ensure a win, and they sympathised with the plight of their 'heroes' facing trial at the ICC. Kenyatta stated that a vote for him was a no-confidence vote for the ICC."

<sup>174</sup> See for example, ICC Prosecutorial Strategy 2009-2012, 1 February 2010, para. 19; <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>, accessed on 2 July 2014. .

<sup>175</sup> ICC Strategic Plan June 2012-2015; [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf), accessed on 2 July 2014.

<sup>176</sup> Ibid, paras. 4 and 23.

<sup>177</sup> Ibid, paras. 99-102.

<sup>178</sup> ICC Policy Paper on Sexual and Gender Based Crimes, para 2; <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>, accessed on 2 July 2014.

<sup>179</sup> *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (ICC Pre-trial Chamber II), ICC-01/09-19, 31 March 2010,); <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>, para. 207.

<sup>180</sup> *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* (Pre-Trial Chamber II), ICC-01/09-01/11-373, 31 January 2012); <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>, at paras. 349 and 367.

<sup>181</sup> Case I against Ruto and Sang also alleged that between, at least, 30 December 2006 and 22 December 200, Ruto and members of "the Network," including Sang, created a common plan to commit these attacks. Thus while the crime-base is limited to short periods, the overall allegations of the responsibility of the accused cover a longer period.

<sup>182</sup> On 13 December 2013, the Appeals Chamber upheld the ruling of the Pre-Trial Chamber refusing this request, on the grounds that amendments to the scope of the charges cannot take place after the commencement of the trial. See *Decision on the Prosecutor's appeal against the "Decision on the Prosecution's request to amend the updated document containing the charges pursuant to article 61(9) of the Statute"*, Appeals Chamber, ICC-01/09-01/11-1123, 13 December 201313; [http://www.icc-cpi.int/EN\\_Menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/chambers/appeals%20chamber/pages/1123.aspx](http://www.icc-cpi.int/EN_Menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/chambers/appeals%20chamber/pages/1123.aspx) (Judge Anita Ušacka dissenting).

<sup>183</sup> *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome*

*Statute* (Pre-Trial Chamber II), ICC-01/09-02/11-382-Red, para. 428, 23 January 2012. , 31 January 2012); <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

<sup>184</sup> Case II against Kenyatta also alleged that between, at least, November 2007 and January 2008, the accused and members of the Mungiki, allegedly created a common plan to commit these attacks. Thus while the crime-base is limited to short periods, the overall allegations of the responsibility of the accused cover a longer period.

<sup>185</sup> This reflects calls by victims during the investigation phase, see: Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5 (Public Redacted Version), ICC-01/09-17-Corr-Red, Victim Participation and Reparations Section, (March 29, 2010); <http://www.icc-cpi.int/iccdocs/doc/doc853218.pdf>, at para. 128, accessed on 2 July 2014.

<sup>186</sup> At an early point in the proceedings, the ICC's Victims' Participation and Reparations Section (VPRS) asked the Judges, on behalf of victims, to ensure shootings by the police and other crimes were included within the scope of the investigations. Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5 (Public Redacted Version), ICC-01/09-17-Corr-Red, Victim Participation and Reparations Section, (March 29, 2010); <http://www.icc-cpi.int/iccdocs/doc/doc853218.pdf>, para. 127, accessed on 2 July 2014. Some victims also told VPRS during the investigation phase they wanted to see those who planned, organized and funded the violence and those involved in inciting the violence and spreading hate speech investigated. Ibid, paras. 128-130.

<sup>187</sup> *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* (Pre-Trial Chamber II, 23 January 2012); <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>, para. 425 and 224-6, accessed on 2 July 2014.. The evidence presented by the Prosecution was found not to meet the standard of "substantial grounds to believe" that the crimes took place and the accused was responsible for them.

<sup>188</sup> Public Redacted version of Prosecution response to the "Government of Kenya's submissions on the status of cooperation with the International Criminal Court, or in the alternative, Application for Leave to File Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence", ICC-01/09-01/11, 10 May 2013, para. 22; <http://www.icc-cpi.int/iccdocs/doc/doc1591097.pdf>, accessed on 2 July 2014. .

<sup>189</sup> *Jackson Mwangi et al., v The Attorney General et al*, 1 February 2011.

<sup>190</sup> Proposed Programme Budget for 2014 of the International Criminal Court, ICC-ASP/2/10, para. 23.

<sup>191</sup> See for instance, UN News Centre, *Kenya: ICC Official names 20 people most responsible for post-election violence*, 3 March 2010, <http://www.un.org/apps/news/story.asp?NewsID=33952#.U5wr5vZRZ0s>, accessed on 2 July 2014; Xan Rice, "Court given list of suspects in Kenya violence", *The Guardian*, 3 March 2010, <http://www.theguardian.com/world/2010/mar/03/court-given-list-suspects-kenya-violence> accessed on 2 July 2014.

<sup>192</sup> Article 68(3) of the Rome Statute provides for victims' participation: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

<sup>193</sup> These applications relate to victims applying to participate at the "situation" level.

<sup>194</sup> *Report on activities and programme performance of the International Criminal Court for the year 2011*, ICC-ASP/11/8, 4 May 2012, p 51. Approximately 50% of forms received were incomplete. According to the Victims' Participation and Reparations Section (VPRS),

they had trained partners on how to fill in the forms. However, other actors, including local lawyers also downloaded the forms and helped victims to fill them in but as they had not received training in this regard the information provided was not sufficient. Many of those lawyers are no longer engaged in the ICC process, making it difficult for the Registry to follow up with the individuals they helped to apply.

<sup>195</sup> The Prosecutor v. Ruto and Sang, Decision on victims' representation and participation, ICC-01/09-01/11-460, 3 October 2012; and The Prosecutor v Muthaura and Kenyatta, Decision on victims' representation and participation, ICC-01/09-02/11-498 3 October 2012.

<sup>196</sup> Ninth Periodic Report on the general situation of victims in the case of The Prosecutor v Ruto and Sang and the activities of the VPRS and the Common Legal Representative in the field, ICC-01/09-01/11-1316-AnxA available at: <http://www.icc-cpi.int/iccdocs/doc/doc1771108.pdf>, accessed on 2 July 2014.. The outstanding victims who fall within the scope of the case but have not yet been registered by VPRS will be registered when their forms reach the headquarters of the ICC and can be processed.

<sup>197</sup> Eighth Periodic Report on the general situation of victims in the case of The Prosecutor v Kenyatta and the activities of the VPRS and the Common Legal Representative in the field, ICC-01/09-02/11-907-AnxA, available at: <http://www.icc-cpi.int/iccdocs/doc/doc1741952.pdf>, accessed on 2 July 2014. .

<sup>198</sup> For further information see Public Court Records of the Legal Representatives of Victims in the Ruto/Sang case, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/filing%20of%20the%20participants/legal%20representatives%20of%20victims/Pages/index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/filing%20of%20the%20participants/legal%20representatives%20of%20victims/Pages/index.aspx) and Public Court Records of the Legal Representative of Victims in the Kenyatta case, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/filing%20of%20the%20participants/legal%20representatives%20of%20victims/Pages/index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/court%20records/filing%20of%20the%20participants/legal%20representatives%20of%20victims/Pages/index.aspx), both accessed on 2 July 2014.

<sup>199</sup> Information provided to Amnesty International e-mail correspondence by the ICC Outreach Unit on 14 April 2014.

<sup>200</sup> Information provided to Amnesty International by the ICC Outreach Unit, on 13 May 2014.

<sup>201</sup> In addition to the inclusion of women in general outreach activities in Kenya, between 2011 and 2013 the ICC conducted 17 outreach meetings which were attended by a total of 2372 women. Information provided to Amnesty International by the ICC Outreach Unit on 14 April 2014.

<sup>202</sup> Phone interview with Common Legal Representative for Case II, 1 April 2014 and 29 May 2014.

<sup>203</sup> Phone interview with Common Legal Representative for Case II, 1 April 2014. It should be noted that despite these security concerns, no victims currently participating in Case II have been subjected to intimidation or hostility as a direct result of their relationship with the ICC.

<sup>204</sup> Phone interview with Common Legal Representative for Case II, 1 April 2014. See also urgent request by the Victims' Representative pursuant to regulation 83(4) of the Regulations, *Ruto & Sang* (ICC-01/09-01/11-420), Trial Chamber V, 1 June 2012.

<sup>205</sup> Independent Panel of Experts report on victim participation at the ICC, *based on the Panel's meetings and consultations at the Hague*, 24-27 April 2013, para. 102 at: [http://www.iccnw.org/documents/Independent\\_Panel\\_of\\_Experts\\_Report\\_on\\_Victim\\_Particip](http://www.iccnw.org/documents/Independent_Panel_of_Experts_Report_on_Victim_Particip)

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[ation at the ICC.pdf](#), accessed on 2 July 2014. .

<sup>206</sup> Amnesty International meeting with Common Legal Representative for Case I, 14 April 2014 and phone interview with Common Legal Representative for Case II, 1 April 2014.

<sup>207</sup> Nzau Musau, "Why I have not met victims, says Nderitu," *The Star*, 13 February 2014; <http://www.the-star.co.ke/news/article-155199/why-i-have-not-met-victims-says-nderitu>, accessed on 2 July 2014. .

<sup>208</sup> Amnesty International meeting with Common Legal Representative for Case I, 14 April 2014.

<sup>209</sup> Common Legal Representative for the Victims' Comprehensive Report on the Withdrawal of Victims from the Turbo Area by Letter dated 5 June 2013, ICC-01/09-01/11, 5 September 2013, paras. 16-22. The Common Legal Representative for Case 2 has not been subjected to these types of security challenges.

<sup>210</sup> Amnesty International meeting with Common Legal Representative for Case I, 14 April 2014.

<sup>211</sup> Information provided to Amnesty International by the Outreach Unit on 13 May 2014.

<sup>212</sup> For example, on 12 June 2014, it was reported that the County Governor of Usain Gishu had banned an ICC outreach meeting scheduled to take place in Eldoret due to fears that it would rouse tensions in the region. Kevin Tunoi, "Usain Gishu Governor Jackson Mandago bans ICC outreach meeting in Eldoret", *Standard Digital*, 12 June 2014, <http://www.standardmedia.co.ke/thecounties/article/2000124490/mandago-bans-icc-outreach-meeting-in-eldoret>, accessed on 2 July 2014.

<sup>213</sup> This includes at least three meetings held in Nakuru County with victims that fall within the scope of Case I. For further information, see the Eighth Periodic Report on the general situation of victims in the case of The Prosecutor v Ruto and Sang and the activities of the Victims Participation and Reparation Section and the Common Legal Representative in the field, ICC-01/09-01/11-1226-AnxA; <http://www.icc-cpi.int/iccdocs/doc/doc1742013.pdf>, accessed on 2 July 2014.

<sup>214</sup> See text box on ICC Prosecution Strategy in Kenya.

<sup>215</sup> See text box on the ICC's investigations and cases.

<sup>216</sup> Interview with Common Legal Representative for Case I, 14 April 2014 and phone interview with Common Legal Representative for Case II, 29 May 2014.

<sup>217</sup> Proposed Programme Budget for 2014 of the ICC, ICC-ASP/12/10, para. 634.

<sup>218</sup> See text box on right to remedy and truth, justice and reparation.

<sup>219</sup> Kenya International Crimes Act, 2008.

<sup>220</sup> Article 32, Kenya Office of the Director of Public Prosecutions Act, 2013.

<sup>221</sup> The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, Number 56 of 2012.

## **CRYING FOR JUSTICE**

### **VICTIMS' PERSPECTIVES ON JUSTICE FOR THE POST-ELECTION VIOLENCE IN KENYA**

More than six years ago, violence rocked Kenya following general elections. Between December 2007 and February 2008, 1,100 people were killed, 660,000 displaced and thousands injured in beatings, machete attacks, rapes and police shootings.

Despite a power-sharing agreement that ended the violence and triggered institutional reforms and truth-telling initiatives, and the intervention of the International Criminal Court (ICC) to investigate possible crimes against humanity committed in the post-election period, most victims of these crimes are still waiting for justice and reparation.

The Kenyan authorities have consistently failed to conduct prompt and thorough investigations into serious crimes committed during the violence, and impunity remains pervasive. Despite some resettlement schemes for people displaced by the violence, a comprehensive and effective reparation programme has yet to be established, contributing to the fear and despair amongst victims.

The ICC's intervention was welcomed by most victims. However, some are disappointed with the scope of the two Kenyan cases under investigation by the Court's Office of the Prosecutor, and with their level of engagement with the ICC. The ICC has also faced challenges in pursuing its cases due to Kenya's efforts to obstruct the prosecution of the President and Deputy President, including through the African Union and the UN Security Council.

This report calls on the government of Kenya to fulfil its obligations to investigate and prosecute post-election crimes and to provide reparation to victims of those crimes. It also recommends actions that the ICC, the international community and intergovernmental organizations can take to help victims regain trust that justice will be done.

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