

Domestic Prosecution of International Crimes

Lessons for Kenya



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EXECUTIVE SUMMARY

Following the announcement of the result of the general election in 2007, Kenya plunged into unprecedented violence. The upheaval left in its wake over a thousand people dead, hundreds sexually violated and hundreds of thousands physically displaced from their homes. Despite the magnitude and gravity of the violations suffered by the civilian population, the Kenyan government failed to investigate or prosecute perpetrators of any of these grave offences, only initiating investigations for the more minor violations and in any event terminating those investigations or prosecutions.

As Kenya is a State party to the Rome Statute, the International Criminal Court,(ICC)intervened in the situation indicting six persons and eventually initiating prosecution against three of these six, alleged to be the most responsible and/or the most senior perpetrators of the violations. Under the principle of complementarity the ICC recognises the primacy of the State in question to prosecute international crime over which it has jurisdiction. The ICC only comes in when the State is unwilling or unable to investigate or prosecute the case.

Most recently however, and as illustrated in the Kenyan case, the ICC can only deal with the most senior and most responsible perpetrators. However, the remaining impunity gap must be addressed by the State in question if the rule of law is to be properly re- established in the country.

Previous attempts at establishing a domestic accountability mechanism have come to naught. This has been attributed to lack of political will, insufficient laws to address the post-election violence (PEV)period, lack of institutional and technical capacity and even lack of sufficient evidence of the crimes perpetrated. Although lack of political will is the overriding factor, the other challenges to the process of establishing a domestic mechanism to prosecute PEV crimes are just as crucial to overcome in the journey towards justice for victims.

The Kenyan situation is not unique. Other countries have had to address violations of an international nature domestically. Uganda, Bosnia-Herzegovina, Cambodia and Sierra Leone are a few examples.

The Special Court of Sierra Leone (SCSL) has finalized all its cases except sentence review hearings under its residual mechanism.¹ The Extraordinary Chambers in the Courts of Cambodia (ECCC) is fully operational having completed one case and having a second with three accused persons ongoing.² The Ugandan International Crimes Division (ICD) has tried only one case so far and not concluded the matter. The War Crimes Chamber (WCC) of Bosnia-Herzegovina on the other hand, from September 2005 to June 2008, has tried 84 persons in 48 cases rendering 32 trial judgments (including 27 convictions and five acquittals).³ Kenya can learn lessons from these mechanisms.

¹ The realities of International Criminal Justice edited by Dawn L. Rothe, James D. Meernik, Thordis Ingadóttir, http://books.google.co.ke/books?id=5dUdAAAAQBAJ&pg=PA9&lpq=PA9&dq=how+many+cases+finalized+by+ECCC&source=bl&ots=utaQNY6fsF&sig=0EiViqPtyjTzZhSIsXusnEHEnjk&hl=en&sa=X&ei=EhH9U8rFOJPiapK3gtgO&redir_esc=y#v=onepage&q=how%20many%20cases%20finalized%20by%20ECCC&f=false

² *ibid*

³ Prosecution Case Studies, The War Crimes Chamber in Bosnia Herzegovina from Hybrid to Domestic Court http://wcjp.unicri.it/proceedings/docs/ICTJ_BiH%20WCC_2008_eng.PDF

Key emerging lessons

1. **A domestic accountability mechanism should be anchored in a solid legislative framework outlining its jurisdiction structure, mandate, operationalization and financing.** Lack of a solid legislative framework exposes such mechanism to political interference as well as competition with other cases. The Ugandan ICD has been placed within the Ugandan judiciary and its judges, prosecutors and investigators are not exclusive to the ICD. Lack of a concise legislative framework has also left the ICD open to political interference and while still on its first and only case, the ICD has been unable to prosecute the indictee as a war criminal, except under its domestic penal system. Further, before addressing any matter substantively from Northern Uganda, the ICD changed its mandate and purpose to include other crimes, such as transnational crimes. Kenya and Uganda share a common law heritage and should Kenya establish a similar ICD it could face similar pitfalls.
2. **A purely domestic system versus a hybrid system.** The Ugandan ICD, which is a creation of an administrative process, is based within the Ugandan judiciary. When a country chooses to establish its domestic accountability mechanism within its justice system, as opposed to independently, then such a system is subject to all domestic laws, including those that are incongruent with international standards on due process. Should Kenya opt for this set up, it would be important to harmonize all laws that would be used procedurally or substantively within such a mechanism.

Further, there is a need for a prosecutorial policy to address the violations in question, especially where, as in the Kenyan cases, the perpetrators are alleged to be large in number. Such a policy could be informed by a comprehensive mapping exercise undertaken similar to the WCC in Bosnia.

3. **The role of international expertise**

The Special Court of Sierra Leone (SCSL), though an ad hoc tribunal of a bygone era, before the International Criminal Court was established, has profound lessons for Kenya, the first of which is on the composition of the bench and prosecutorial teams. Effective prosecutions of international crimes require qualified judges investigators and prosecutors. Often such competence cannot all be found in the country in question. The SCSL for example, obtained judges from West Africa and the Commonwealth with the Sierra Leone government appointing a judge to a panel of three and the UN the other two. The ECCC also included on its panel International judges as well as a prosecutor. The WCC included international actors, phasing them out gradually as local staff obtained the requisite knowledge and skill. This serves to generate faith in the system as being both impartial and competent. Kenya would do well to include international expertise in the bench, in the prosecutorial team and in the investigation teams once a domestic mechanism is established.

4. **The independence of an institution**

The independence of the domestic mechanism needs to be clear. This includes financial independence as well as independence from political interference. The ECCC is a clear example on how the State can co-opt a mechanism, as opposed to co-operate with it to bring justice to victims. Independence can be safeguarded through a sound legislative framework, but more so by political will not to interfere with the quest for justice.

Although the establishment of the ECCC took an inordinately long time as the UN insisted on the Chamber meeting international standards, former Khmer Rouge members who have defected to the government have not been prosecuted.

5. Witness protection and victim participation

These aspects have formed the cornerstone of International systems and are now becoming common in internationalized systems. The successes of the WCC for example, are dimmed by the outcry that the process focused on the perpetrator and not the victim. Kenya, whose system is common law and does not provide for victim participation, could introduce this concept through legislation. Witness protection and victim reparation in the context of transitional justice should be addressed in detail.

I. INTRODUCTION

Following the disputed results of the general election in 2007, Kenya plunged into violence. It had been a very closely contested election between Mwai Kibaki, the incumbent president, and Raila Odinga the leader of opposition. Their supporters were both emotive and impassioned about the entire process. Initially it was thought that the violence following the announcement of the election results was a spontaneous public reaction to what was seen as a flawed electoral process. The widespread and systematic nature of the violence however, hinted at a more deliberate and articulate plan to attack the civilian population.⁴The violence led to the death of over a thousand persons, the rape and sexual violation of over nine hundred women and the displacement of over six hundred thousand people.⁵

The 2007-2008 electoral violence was not a first of its kind.⁶ Since 1992 politicians had used violence as a political tool to displace or threaten electorates and therefore change the outcome of an election, or to punish voters for taking a particular political stance. Such violence was unleashed through government institutions where the politician was in government, or through organized militia groups when politicians were not, and sometimes through both. A failure to apprehend the instigators of such violence every successive election from 1992 to 2007, meant a culture of impunity had crystalized. Those who eventually obtained instruments of power by this means would never be held accountable and those who had not gained power continued to see violence as a viable option to obtaining it. The magnitude and gravity of the 2007-2008 post-election violence was evidence of this impunity.

As the violence of 2008 threatened to sink the country into civil war, the international community intervened, initiating a mediation process under the auspices of the African Union and chaired by the United Nations former Secretary General, Kofi Annan. The outcome of the mediation process was twofold: a political agreement termed the National Accord which elucidated a power sharing agreement between the two opposing political sides under Agenda Item Three of the National Dialogue and Reconciliation process, and a substantive action plan dubbed Agenda Items One, Two and Four, which addressed both the immediate humanitarian needs, as well as the longer term issues that had led to the violence in the first place.

One of the agreements in the mediation process was to establish a ‘Commission of Inquiry into the Post-Election Violence’ (CIPEV). Once established, CIPEV undertook investigations into the violence and

recommended that Kenya set up a hybrid Special Tribunal of domestic and international judges to try high-level perpetrators of the post-election violence.⁷ However, if it failed to do so, CIPEV had a trigger mechanism: Kofi Annan was to turn over the evidence and other material that CIPEV had entrusted to him at the end of 2008, to the ICC.⁸ Three attempts to establish the recommended special tribunal

Since 1992 politicians had used violence as a political tool to displace or threaten electorates and therefore change the outcome of an election, or to punish voters for taking a particular political stance.

⁴ 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 23-01-2012 1/193 FB PT at 37

⁵Institute for War and Peace reporting <http://iwpr.net/report-news/five-years-kenyas-rift-valley-still-tense>

⁶ David Throup, Charles Hornby (1998). Multi-party Politics in Kenya. Oxford: James Currey as cited in Waweru Daniel DIY Violence is Corrosive of Nationhood, Oxford Transitional Justice Research, Debating International Justice in Africa, 2008-2010 University of Oxford

⁷ Securing Justice, Establishing a domestic mechanism for the 2007/8 post-election violence in Kenya, Africog Africa Centre for Open Governance, KENYANS FOR PEACE WITH TRUTH & JUSTICE EDITORIAL, KPTJ, http://www.africog.org/kptj_homepage

⁸ *ibid*

were defeated by Members of Parliament.⁹The overall goal of many MPs was to use as many delaying tactics as possible to ensure that no one would ever be held accountable for the violence.¹⁰ Amidst the pretence of establishing a Special Tribunal, while MPs were doing nothing and attempting to buy time, Annan gave Kenya two extensions to set up the tribunal. None was set up. He finally submitted the material obtained by CIPEV to the Prosecutor of the International Criminal Court (ICC) in July 2009.¹¹

Following the Kenyan government's unwillingness to investigate or prosecute these violations, the ICC initiated investigations and indicted six persons.¹²Subsequently three persons suspected to be the most senior and most responsible perpetrators, were sent for prosecution.

The prosecution by the ICC turned the tide. Since 1992 no one in Kenya had ever been held accountable for electoral violence. However, the number of perpetrators was many more than the number apprehended by the ICC.

The Rome Statute to the ICC provides for primary jurisdiction for the State to prosecute core international crimes and only intervenes where the State is unwilling or unable to do so.¹³ This is referred to as complementarity. However, informed by the various situations, as well as the capacity of the Court, the ICC Office of the Prosecutor more recently interpreted it as positive complementarity. This is when the ICC addresses the violations in partnership with the State in question. The ICC could address the most senior and most responsible perpetrators while the State in question addresses the mid and low level perpetrators.¹⁴

This approach is particularly important for Kenya. The large number of victims of the post-election violence, as well as the widespread nature of the crime, was evidence that there were an equivalent number of perpetrators who could be referred to as mid and low level perpetrators. Although the ICC is handling the most senior and most responsible of the perpetrators, such as the planners and inciters, the execution of their plan was conducted by foot soldiers who were just as culpable.

Nevertheless, the Kenyan government has not established an accountability mechanism during the last seven years. Whereas the biggest challenge to this process has been political will, technical hurdles have led to missed opportunities in establishing such a mechanism. These have included lack of capacity by the police to investigate the violations and of the prosecutors to prosecute the crimes; a deficiency of substantive and procedural law to be applied to that specific period of violation; lack of evidence to prosecute the matters, and to an extent, deficient capacity within the judiciary to adjudicate international criminal justice matters.

Discussions have recently been reignited concerning the possible establishment of an International Criminal Division of the High Court. If the issues that have encumbered previous attempts at accountability measures are not addressed then this attempt, as those before it, will come to naught, further dashing hopes of an already fatigued victim population.

⁹ The Bill is available at [http://www.kenyalawreport.co.ke/Downloads/Bills/2009/The_Constitution_of_Kenya_\(Amendment\)_Act_2009.pdf](http://www.kenyalawreport.co.ke/Downloads/Bills/2009/The_Constitution_of_Kenya_(Amendment)_Act_2009.pdf)

¹⁰ See Human Rights Watch, Kenya: Swiftly Enact Special Tribunal: International Criminal Court should be a last resort for justice, March 25, 2009, <http://www.hrw.org/en/news/2009/03/24/kenya-swiftly-enact-special-tribunal>

¹¹ Securing Justice, Establishing a domestic mechanism for the 2007/8 post-election violence in Kenya, Africog Africa Centre for Open Governance, KENYANS FOR PEACE WITH TRUTH & JUSTICE EDITORIAL, KPTJ, http://www.africog.org/kptj_homepage

¹² *ibid*

¹³ Article 17 Rome Statute

¹⁴ http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/pages/situations%20and%20cases.aspx

In seeking to establish domestic mechanisms that can address this impunity gap, lessons can be drawn from existing hybrid and domestic systems established to prosecute international crimes. With an understanding that these systems ideally should represent the best of international and domestic regimes,¹⁵ a study of these mechanisms can provide a roadmap for the legal framework, scope (material, person and temporal jurisdiction) as well as the procedure that a domestic regime complementing the ICC could take. The challenges that these mechanisms face on the other hand, present the weaknesses, both in the domestic justice regime and in the international one and as such highlight the possible pitfalls a similar mechanism in Kenya must be prepared to address.

This report therefore is a comparative study of the various justice mechanisms established outside of the ICC in order to address international core crimes. Focusing on Uganda, Cambodia, Bosnia-Herzegovina and Sierra Leone, this study seeks to compare different frameworks in order to draw lessons that Kenya can use in its quest for justice. These four regimes represent a purely domestic system, an internationalized domestic system, and two distinct hybrid systems.

In its pursuit of accountability for middle- and low-level perpetrators, Kenya is facing challenges as regards the legislative framework, the nature of violations to pursue, witness protection and victim reparation. While the biggest hurdle to the establishment of an accountability process is the lack of political will, failure to address the more technical and even practical hurdles has provided excuses for the State not to establish an accountability mechanism.

¹⁵ Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group
April 2013

II. UGANDAN INTERNATIONAL CRIMES DIVISION

i) Background

The conflict in northern Uganda raged for more than two decades.¹⁶ The Lord's Resistance Army (LRA) under Joseph Kony, had terrorized the northern region of Uganda killing, maiming and raping civilians who were largely from the local Acholi tribe in that region.¹⁷ Claiming to be under religious influence, Kony led the LRA in the abduction of children, either to be used as child soldiers or sex slaves.¹⁸ This militia would return frequently to raid civilian villages and to punish those who spoke out against them or reported them to the authorities by chopping off their lips or hands so as "never to speak out against them or point out where they went."¹⁹

The Ugandan government responded to the situation using its military forces, which committed further atrocities against the local community. This was attributed to the fact that Kony was also Acholi and the government response involved 'leveraging' the already suffering local community to give up members of the dissident group.²⁰

Following a request by the Ugandan government to the ICC Office of the Prosecutor (OTP), the OTP opened an investigation into northern Uganda in 2004.²¹ The ICC issued warrants in 2005 for five LRA leaders for war crimes and crimes against humanity. Two of those commanders have since died and three warrants are still outstanding.²²

After the indictments issued by the ICC, peace talks were initiated between representatives of the LRA and the Ugandan government and it is under this context that the concept of a domestic International Crimes Division (then War Crimes Division) was born.²³ It is a contentious issue as to whether the threat of prosecution forced the LRA to the table with the Ugandan government, or the ICC process threatened to derail the peace talks.²⁴

However the talks were officially held in Juba, Southern Sudan, from 2006 to 2008.²⁵

Claiming to be under religious influence, Kony led the LRA in the abduction of children, either to be used as child soldiers or sex slaves

The outcome was an agreement on accountability and reconciliation with the LRA. The agreement stipulated, among other things, that the government, with a view to ensuring justice and

¹⁶ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

¹⁷ Sverker Finnström, Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda 317 (Upsalla 2003) (describing lack of legitimacy of LRA regarding reform in Uganda).

¹⁸ Linda M Keller, Achieving Peace with Justice, the International Criminal Court and Ugandan Alternative Justice Mechanisms https://www.tjsl.edu/sites/default/files/files/Achieving-Peace-w-Justice-Rev4_11_08-FINAL.pdf cited 9th April 2014

¹⁹ *ibid*

²⁰ Linda M Keller, Achieving Peace with Justice *supra* note 18

²¹ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

²² *ibid*

²³ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, June 29, 2007 (Juba, Sudan), available at [https://www.google.com/search?q=Agreement+on+Accountability+and+Reconciliation+between+the+Government+of+the+Republic+of+Uganda+and+the+Lord%E2%80%99s+Resistance+Army%2FMovement%2C+June+29%2C+2007+\(Juba%2C+Sudan\)%2C&aq=chrome..69i57.1558j0j8&sourceid=chrome&es_sm=93&ie=UTF-8](https://www.google.com/search?q=Agreement+on+Accountability+and+Reconciliation+between+the+Government+of+the+Republic+of+Uganda+and+the+Lord%E2%80%99s+Resistance+Army%2FMovement%2C+June+29%2C+2007+(Juba%2C+Sudan)%2C&aq=chrome..69i57.1558j0j8&sourceid=chrome&es_sm=93&ie=UTF-8) last cited 19th April 2014

²⁴ Linda M Keller, Achieving Peace with Justice, the International Criminal Court and Ugandan Alternative Justice Mechanisms *supra* note 18

²⁵ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

accountability for atrocities committed during the war, was to create institutions and adopt an appropriate legal framework to accommodate the gravity of the atrocities committed.²⁶

“An overview of the agreement demonstrates that a national, rather than international jurisdiction, was the forum preferred for implementing accountability.”²⁷ A domestic process would underscore traditional dispute resolution mechanisms including a truth and reconciliation commission²⁸ as well as require the government to set up a special division of the High Court to prosecute some of the violations.²⁹ Such a division was established and designated the War Crimes Division of the High Court later re-designated the International Crimes Division of the High Court (ICD).³⁰

Provision was made to grant amnesty to LRA soldiers who gave up the war and surrendered their weapons to the government.³¹ However, the LRA leadership declined to sign the agreement, requiring the Ugandan government to first withdraw the cases against LRA commanders that were before the ICC.³² The Ugandan government eventually did ask for the withdrawal of the cases but the ICC did not grant the request.³³ The Ugandan government nonetheless, committed to unilaterally implement the agreements to the extent possible.³⁴

ii) Legislative framework

In pursuance of the peace talks the ICD was established through a legal notice issued by Uganda’s Chief Justice in May 2011.³⁵ Initially referred to as the War Crimes Division, the division was reconfigured into the International Crimes Division. The War Crimes Division had jurisdiction only over war crimes. However, the ICD mandate includes the prosecution of genocide and crimes against humanity, as well as war crimes.³⁶ It is also mandated to try cases of terrorism, human trafficking, piracy, and any other international crime defined in Uganda’s 2010 International Criminal Court Act, 1964 Geneva Conventions Act, Penal Code Act, or any other criminal law.³⁷

²⁶ Sylvie Namwase, *The Principle Of Legality And The Prosecution Of International Crimes In Domestic Courts: Lessons From Uganda*,

²⁷ *ibid*

²⁸ Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement *supra* note 13

²⁹ *Ibid*

³⁰ OS JI, *Putting Complementarity into Practice: domestic justice for international crimes in DRC, Uganda, and Kenya*, 2011, <http://www.soros.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>.

³¹ Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord’s Resistance Army/Movement (Juba Peace Agreement), 29 June 2007.

³² Linda M Keller, *Achieving Peace with Justice*, the International Criminal Court and Ugandan Alternative Justice Mechanisms

³³ *Uganda: Government to Seek Review of ICC Indictments Against LRA Leaders*, IRIN, June 21, 2007, available at <http://www.irinnews.org/report/72861/uganda-government-to-seek-review-of-icc-indictments-against-lra-leaders> last visited 19 April 2014

³⁴ *ibid*

³⁵ Human Rights Watch, *Justice for Serious Crimes Before a National Court: Uganda’s International Crimes Division*

³⁶ *ibid*

³⁷ Human Rights Watch, *Justice for Serious Crimes Before a National Court: Uganda’s International Crimes Division*

Procedurally, the ICD uses standard Ugandan judicial procedure and practice, as the division is viewed as part and parcel of the Ugandan domestic judicial system.³⁸ The Amnesty Law, as part of national statute, is also part of the legislation applicable to the proceedings before the ICD.³⁹

iii) Structure

The principal High Court Judge, in consultation with the Chief Justice, appoints at least three judges to sit within the ICD.⁴⁰ Viewed as a division of the High Court of Uganda all appointees are Ugandan judges, whose decisions within the ICD are subject to appeal in the Ugandan Court of Appeal and subsequently the Supreme Court.⁴¹

One of the three judges sits as head of division and works together with a registrar for the administration of the division. Although the ICD judges have legal assistants,⁴² these assistants are not exclusively assigned to ICD cases. The three judges also adjudicate over other domestic cases, since the ICD is merely a division of the High Court.

There is no administrative or legislative structure for witness protection or victim participation in the proceeding or reparation.⁴³

With regards to prosecution, Uganda's Directorate of Public Prosecutions (DPP) has directed this function to one of its units.⁴⁴ Within this unit, five to six prosecutors work for the unit, although the number has been known to fluctuate depending on the workload on the DPP from other units.⁴⁵

Investigation of these crimes, like other crimes within the Ugandan jurisdiction, falls under the Criminal Investigation Department (CID) of the Ugandan Police Force.⁴⁶ An administrative arrangement has been made where senior police investigators based in focal stations around the country address ICD related investigations, although not exclusively so.⁴⁷

Accused persons can retain private counsel to defend themselves or receive a state appointed counsel at no cost through the 'state brief' system. It should be noted that the state brief system however, is only available to accused persons charged with capital offences punishable by death.⁴⁸

³⁸ Ibid ;OS JI, Putting Complementarity into Practice: domestic justice for international crimes in DRC, Uganda, and Kenya, 2011, <http://www.soros.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>.

³⁹ Constitutional Reference filed on July 25, - Human Rights Watch, Justice for Serious Crimes before a National Court: Uganda's International Crimes Division; *Thomas Kwoyelo v Uganda*, Constitutional Petition No. 36 of 2011, para 605-610.

⁴⁰ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

⁴¹ *Ibid*

⁴² Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group April 2013; *ibid*

⁴³ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

⁴⁴ Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group April 2013; *ibid*

⁴⁵ *ibid*

⁴⁶ Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group April 2013; *ibid*

⁴⁷ *ibid*

⁴⁸ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

As part of the High Court, the ICD is funded by the Ugandan government, although it also enjoys support from international donors. This support has included capacity building on areas of weakness, such as witness protection.⁴⁹

iv) Challenges

Legislative inadequacy

The establishment of the ICD through a legal notice meant a lack of comprehensive policy and legislative framework to deal with the scope of violations the unit was to address. This gap has played out most clearly on two issues - lack of substantive law to prosecute cases and a conflict of laws.

A gap in substantive law

The conflict in northern Uganda qualified to be termed as an internal armed conflict. As such, the violations that occurred within this context were proscribed both by the Geneva Convention, particularly Additional Protocol II,⁵⁰ and the Rome Statute. Unfortunately Uganda's Geneva Convention Act, which domesticates and criminalizes grave breaches of the four Geneva conventions, applies only to international armed conflict. Although the first case before the ICD⁵¹ *Thomas Kwoyelo Versus Uganda*, on an LRA matter, cites the Geneva Convention Act,⁵² its applicability is tenuous. Perhaps in recognition of this, the Ugandan DPP has also instituted alternative charges against the defendant, *Thomas Kwoyelo*.⁵³ Although in August 2010 Kwoyelo was charged with 12 counts of violating Uganda's 1964 Geneva Convention Act, including grave breaches of willful killing, the DPP subsequently amended the indictment to reflect 53 alternative counts of crimes under the Uganda Penal Code.⁵⁴ The counts included murder, attempted murder, kidnapping, kidnapping with the intent to murder, robbery, and robbery using a deadly weapon."⁵⁵

However, the International Criminal Court Act, which criminalizes war crimes more broadly, was domesticated after the northern Uganda conflict occurred.⁵⁶ It cannot therefore be applied retrospectively. The consequences of a failure to address the retrospectivity question in policy or legislation beforehand have now become evident.

Inconsistencies in international law and domestic law

The creation of a division within the high court of Uganda, through administrative action, to address international crimes, failed to legislatively address the interaction between international law standards and domestic law. It therefore could not predict the conflict of laws that emerged.

Firstly, Uganda subscribes to the death penalty, which is prescribed in the penal code and therefore available within the ICD for application. In line with the preference in international law for abolition of the death

⁴⁹ *ibid*

⁵⁰ Sylvie Namwase, *The Principle Of Legality And The Prosecution Of International Crimes In Domestic Courts: Lessons From Uganda*,

⁵¹ *Thomas Kwoyelo v Uganda*, Constitutional Petition No. 36 of 2011, para 605-610. ; Government appeals against Kwoyelo release, 26 September 2011 *Daily Monitor*. Available at <http://mobile.monitor.co.ug/News/-/691252/1243006/-/format/xhtml/-/5o14gm/-/index.html> (accessed on 15 October 2011).

⁵² Sylvie Namwase, *The Principle Of Legality And The Prosecution Of International Crimes In Domestic Courts: Lessons From Uganda*,

⁵³ Human Rights Watch, *Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division; Securing Justice, Establishing a domestic mechanism for the 2007/8 post-election violence in Kenya*, Africog Africa Centre for Open Governance, KE-NYANS FOR PEACE WITH TRUTH & JUSTICE EDITORIAL, KPTJ, http://www.africog.org/kptj_homepage

⁵⁴ *ibid*

⁵⁵ Human Rights Watch, *Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division*

⁵⁶ *Ibid*

penalty, the death penalty has not been a punishment available to international and hybrid war crimes courts.⁵⁷ Secondly Uganda only provides legal representation for accused persons whose charges attract the death penalty upon conviction.⁵⁸

Thirdly, with the passage of the Amnesty Law, amnesty could be granted to perpetrators of war crimes. Uganda's Amnesty Act provides that any rebel who "renounces and abandons involvement in the war or armed rebellion" may receive amnesty.⁵⁹ By its terms, the Act appears to include all cases of LRA members so long as they reject rebellion, irrespective of the ICD or the crimes in which LRA members may be implicated. Over 12,000 LRA members have received amnesty since the Amnesty Act was adopted in 2000, including more senior members than Kwoyelo, and LRA members have continued to be granted amnesty since the ICD's inception.⁶⁰ Notably, Lt. Col. Charles Arop, the LRA's former director of operations, surrendered to Ugandan troops in November 2009, and was granted amnesty in late 2009. Arop is accused of leading the 'Christmas Massacres', part of a series of attacks in 2008 and 2009 resulting in the deaths of at least 620 civilians and the abduction of more than 160 children in the DRC.⁶¹

These three practices are in contradiction with international law standards and practice for prosecuting international crimes.

Impartiality

The ICD so far, has not made a move to prosecute Ugandan defence forces for their role in the violations. Its prosecution therefore has been one-sided. Further, other than choosing to prosecute only the LRA former soldiers, the granting of amnesty has also been arbitrary. Despite Thomas Kwoyelo applying for amnesty it has not been granted. Yet perpetrators of more grievous violations were granted amnesty.

Justice not only needs to be done but also needs to be seen to be done. The impartiality of judicial officers can come into question when accused persons are of the same ethnicity as perpetrators or victims. Although only one case concerning the northern Ugandan conflict has been instituted in the ICD, this institutional question is important.

Capacity

Although the judges within the ICD have so far shown a good understanding of international law,⁶² their position within the ICD is not permanent and they can be transferred to other divisions of the High Court and replaced by other less qualified judges.⁶³ Consequently there can be a lack of capacity amongst the judicial officers to adjudicate international criminal cases. International and regional partners have targeted

⁵⁷ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

⁵⁸ *ibid*

⁵⁹ Amnesty Act 2000, Laws of Uganda available at [https://www.icrc.org/applic/ibl/ibl-nat.nsf/0/7d2430f8f3cc16b6c125767e00493668/\\$FILE/Ugandan+Amnesty+Act+2000.pdf](https://www.icrc.org/applic/ibl/ibl-nat.nsf/0/7d2430f8f3cc16b6c125767e00493668/$FILE/Ugandan+Amnesty+Act+2000.pdf) last visited 19th April 2014

⁶⁰ Securing Justice, Establishing a domestic mechanism for the 2007/8 post-election violence in Kenya, Africog Africa Centre for Open Governance, KENYANS FOR PEACE WITH TRUTH & JUSTICE EDITORIAL, KPTJ, http://www.africog.org/kptj_homepage; Sylvie Namwase, The Principle Of Legality And The Prosecution Of International Crimes In Domestic Courts: Lessons From Uganda; Sylvie Namwase, The Principle Of Legality And The Prosecution Of International Crimes In Domestic Courts: Lessons From Uganda,

⁶¹ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

⁶² Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

⁶³ Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group April 2013; Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

the capacity building of the judges presently assigned to the ICD, oblivious of the transfer possibility.⁶⁴ The legal assistants assigned to High Court Judges are not exclusively assigned to specific judges either, but are shared among judges.⁶⁵

Secondly, the reality of the case backlog in the Ugandan judiciary means the judges not only deal with the cases within the ICD but with other cases within the Judiciary.⁶⁶ This arrangement has interfered with institutional integrity in the sense that a unit established specifically to address the violations in northern Uganda had its scope widened to address international and transnational crimes. This arrangement has diverted attention from the fact that only one case from the Northern Ugandan conflict has been addressed and even then not to completion.⁶⁷

⁶⁴ *ibid*

⁶⁵ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda's International Crimes Division

⁶⁶ *ibid*

⁶⁷ *Thomas Kwoyelo v Uganda*, Constitutional Petition No. 36 of 2011, para 605-610; "Government appeals against Kwoyelo release" 26 September 2011 *Daily Monitor*. Available at <http://mobile.monitor.co.ug/News/-/691252/1243006/-/format/xhtml/-/5o14gm/-/index.html> (accessed on 15 October 2011).

III. THE SPECIAL COURT FOR SIERRA LEONE

i) Background

Since its independence in 1961, Sierra Leone has been beset by coups, with intermittent breaks controlled by one party regimes corrupted with self-enriching politicians.⁶⁸ Ultimately a civil war broke out in 1991 with militia groups, notably the Revolutionary United Front supported by Charles Taylor's National Patriotic Front of Liberia, against the Sierra Leonean army. The armed conflict in Sierra Leone became synonymous with civilians with amputated limbs, with the use of child soldiers and with the exploitation of blood diamonds.⁶⁹

After various attempts by the international community to negotiate peace between the warring factions, the Lomé Peace Accord was signed in July 1999.⁷⁰ This peace accord granted blanket amnesty to many of the perpetrators of human rights and humanitarian law violations.⁷¹ The UN established a peacekeeping mission later in 1999 with a mandate to monitor the implementation of the Lomé Peace Accord and oversee the disarmament and demobilization of the rebels.⁷² However the agreement collapsed in 2000 prompting a military intervention by ECOWAS (Economic Community of West African States) and the deployment of a UN peacekeeping operational force, as well as a military contingent from the United Kingdom. Eventually the war was declared over and elections were held in 2001.⁷³

In response to the atrocities perpetrated, particularly following the signing of the Lomé Peace Accord,⁷⁴ the Security Council requested the UN Secretary General to negotiate an agreement with the Government of Sierra Leone "to create an independent Special Court" for the country.⁷⁵ Thus, the Government of Sierra Leone entered into agreement with the United Nations to establish a special court.

ii) Legislative framework

The Special Court of Sierra Leone (SCSL) was established through a statute approved by the Security Council and signed by both the Sierra Leonean government and the UN on 16th January 2002.⁷⁶ Therefore, the SCSL

The armed conflict in Sierra Leone became synonymous with civilians with amputated limbs, with the use of child soldiers and with the exploitation of blood diamonds.

was a treaty-based creation between the UN and the Government of Sierra Leone. The agreement and statute provides for the material jurisdiction of the Special Court over serious violations of international humanitarian law and Sierra Leone law, thereby encompassing

⁶⁸ Generally view Eileen Skinnidier, Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia, <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/ExperiencesfromInternationalSpecialCourts.pdf> last visited 19th April 2014 Also generally review *Historical and Political Background to the Conflict in Sierra Leone* in Kai Ambos and Mohamed Othman (Eds) *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Freiburg: 2003) Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone, S/2000/915, 4 October 2000.

⁶⁹ *ibid*

⁷⁰ Eileen Skinnidier, Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia *supra* note 68

⁷¹ Nancy Kaymar Stafford "A Model War Crimes Court: Sierra Leone" (2004) 10 ILSA J. Int'l & Comp. L. 117 ;

⁷² Eileen Skinnidier, Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia *supra* note 68

⁷³ *ibid*

⁷⁴ *Historical and Political Background to the Conflict in Sierra Leone* in Kai Ambos and Mohamed Othman (Eds) *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (Freiburg: 2003)

⁷⁵ Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone, S/2000/915, 4 October 2000,

⁷⁶ *ibid*

both national and international law.⁷⁷ The statute defines in articles 2 to 5: crimes against humanity;⁷⁸ violations of the Common Article 3 of the Geneva Conventions and of Additional Protocol II;⁷⁹ and other serious violations of International Humanitarian Law. Crimes under Sierra Leone law specifically include offences under the Prevention of Cruelty to Children Act 1926 and offences under the Malicious Damage Act 1861.⁸⁰

The agreement and the statute both provided that the targets of prosecution are to be those “persons who bear the greatest responsibility for serious violations”.⁸¹ The statute specifically defined such persons as “including those leaders who committing such crimes have threatened the establishment and implementation of the peace process in Sierra Leone”.⁸² However, this does not limit the competence of the Court to prosecuting only persons who held leadership positions.⁸³

The Special Court’s temporal jurisdiction commenced 30 November 1996.⁸⁴ It was felt that the temporal jurisdiction had to be time-limited to avoid the situation where the Court could be overloaded with cases. While some suggested that the temporal jurisdiction should go back to 1991 when the civil war started, others suggested that the date of 30 November 1996 should be chosen as it was the date of the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the parties to the conflict, the collapse of which led to large scale hostilities. The statute also limited jurisdiction to crimes committed “in the territory of Sierra Leone”.⁸⁵

iii) Structure

The SCSL had three organs: the Chambers, Office of the Prosecutor and the Registry.⁸⁶ The Trial Chamber was made up of a panel of three judges, one appointed by the Government of Sierra Leone and the other two appointed by the UN Secretary General.⁸⁷ The Appeals Chamber was a panel of five judges. The founding agreement provided that preference for judges would be from the West African sub-region and the Commonwealth.⁸⁸ The Special Court was not subordinate to any other UN ad hoc tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The SCSL however, stood guided by the decisions of the Appeal Chambers of the ICTY and

⁷⁷ UN Security Council, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000, S/2000/915, available at: <http://www.refworld.org/docid/3ae6afb4.html> [accessed 25 August 2014]

⁷⁸ Article 2 Statute of the Special Court for Sierra Leone

⁷⁹ Article 3 Statute of the Special Court for Sierra Leone

⁸⁰ Special Court Statute, Article 4(b), as well as Article 4(c) “Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.”

⁸¹ Article 1, Statute of the Special Court for Sierra Leone; Charles Chernor Jalloh, *Prosecuting Those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone*, 96 Marq. L.Rev. 863 (2013). Available at: <http://scholarship.law.marquette.edu/mulr/vol96/iss3/5>; Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone, S/2000/915, 4 October 2000,

⁸² Statute of the Special Court for Sierra Leone arts. 2–5, Jan. 16, 2002, 2178 U.N.T.S. 145

⁸³ Charles Chernor Jalloh, *Prosecuting Those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone*, supra note 73

⁸⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone Article 1; Statute of the Special Court Article 15

⁸⁵ *Ibid*

⁸⁶ Hassan Jallow “*The Legal Framework of the Special Court for Sierra Leone*” in Ambos and Othman as cited in Eileen Skinnidier, *Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia* supra note 68

⁸⁷ Article 12 Statute for Special Court

⁸⁸ Article 2 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone

ICTR.⁸⁹ The Prosecutor was appointed by the Secretary General and is independent of both the Government of Sierra Leone and the UN.⁹⁰ The funding for the Court came from voluntary contributions from UN Member States and the donor community, not from the regular budget of the UN.⁹¹

The Special Court was not an organ, subsidiary, or otherwise of the United Nations. Because the Special Court was the creation of a *sui generis* treaty, the Court was independent in its judicial functions of both the UN and the Government of Sierra Leone. The agreement and the statute were incorporated into the Law of Sierra Leone, formally providing legal recognition of the court in the jurisdiction within which it was based.⁹² The SCSL stood to be guided on points of local law by the decisions of the Supreme Court of Sierra Leone and applied certain aspects of that law. The Special Court enjoyed primacy over other courts of Sierra Leone and could formally request such courts to defer to its competence. It did not however enjoy any position of supremacy over courts outside Sierra Leone.⁹³

iv. Challenges

Legislative interpretation

There were arguments as to whether or not the SCSL mandate was limited to the most serious perpetrators of the conflict, or that Article 1 merely gave the parameter around which the Prosecutor could prosecute.⁹⁴ The Security Council wanted to limit the Special Court's scope to the key players, rather than lesser actors. However since Article 1(1) had not been clearly defined the door to considerable prosecutorial discretion in this regard remained open.

There is no consistent jurisprudence on this issue as judges were split on this position. The common ground however was that under the principle of individual criminal responsibility, Article 6(2) of the Special Court Statute held that no official position, including that of Head of State, exempted a person from criminal responsibility or punishment.

Few perpetrators

The provision on prosecuting only the most responsible perpetrators has also led to criticism that the Special Court prosecuted very few perpetrators in comparison to their vast numbers. There was a widespread public perception that the "greatest responsibility" standard would allow too many key actors to remain at large and, of particular concern, those in the army.⁹⁵ Court officials in fact noted repeatedly that many were eager to see more individuals held accountable for the suffering.⁹⁶ This perception was to some extent addressed through outreach, preventing victim groups such as amputees from withdrawing their support for the process.

⁸⁹ Eileen Skinnidier, Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia *supra* note 68

⁹⁰ Article 15 Statute to Special Court

⁹¹ Hassan Jallow "The Legal Framework of the Special Court for Sierra Leone" in Ambos and Othman as cited in Eileen Skinnidier, Experiences and Lessons from Hybrid Tribunals, *supra* note 68

⁹² *ibid*

⁹³ Charles Chernor Jalloh, *Prosecuting Those Bearing "Greatest Responsibility": The Lessons of the Special Court for Sierra Leone*, 96 Marq. L.Rev. 863 (2013). Available at: <http://scholarship.law.marquette.edu/mulr/vol96/iss3/5>

Statute of the Special Court for Sierra Leone arts. 2–5, Jan. 16, 2002, 2178 U.N.T.S. 145

⁹⁴ *ibid*

⁹⁵ ICTJ Report ICTJ Report of Special Court for Sierra Leone. <https://www1.umn.edu/humanrts/instree/SCSL/Case-studies-ICTJ.pdf>

⁹⁶ *ibid*

Capacity

Initially, the judges appointed to the Special Court did not display sufficient experience in handling matters brought before it. There were concerns regarding the initial proceedings relating to confusion from the bench about rules and procedure.⁹⁷ Some judges, for example, gave too much leeway to the parties or individual defendants, or were not adequately sensitive to witnesses.⁹⁸ Conversely, there were concerns that the Appeals Chamber was too interventionist and occasionally adopted an inquisitorial approach.⁹⁹ Court observers, such as Human Rights Watch, noted some improvements over time, but not enough to altogether eradicate the challenge.

Secondly under this vein, the judges did not have any senior legal assistance, for a long period of their tenure. Although this unit was subsequently augmented, it was still held that the unit was inefficient.

Efficiency

The Special Court was established at a time when there was heightened criticism against ad hoc tribunals as being overly expensive and not in touch with the relevant contexts. Although the Special Court was situated in Sierra Leone where the violence took place, it was touted as being inefficient in its use of funding as well as time.

Based on the United Nations scale of salaries for a one-year period, the costs of personnel requirements along with the corresponding equipment and vehicles were estimated to be US\$25million.¹⁰⁰ This cost was not inclusive of the building facilities required for the court processes or the detention facilities. Bearing in mind the number of persons to be prosecuted before the Special Court, the SCSL may not have been very cost effective.

⁹⁷ ICTJ Report of Special Court for Sierra Leone. <https://www1.umn.edu/humanrts/instree/SCSL/Case-studies-ICTJ.pdf>

⁹⁸ *ibid*

⁹⁹ Prosecution Case Studies Series : Special Court for Sierra Leone under scrutiny <https://www1.umn.edu/humanrts/instree/SCSL/Case-studies-ICTJ.pdf>

¹⁰⁰ *ibid*

IV. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

i) Background

Following the independence of Cambodia, the Khmer Rouge regime under Pol Pot brutalized Cambodian society from 1954 to 1979 with a genocide being perpetrated between 1975 and 1979, leading to the deaths of approximately 1.7 million people.¹⁰¹ Subsequently Vietnam invaded Cambodia, ending the genocide but resulting in a further conflict from 1979 to 1999.¹⁰²

In July 1997, a joint appeal to the UN by the two Cambodian prime ministers, called for the establishment of an international tribunal to prosecute the Khmer Rouge.¹⁰³ The prime ministers asserted that Cambodia did not have the requisite resources or expertise to conduct this very important procedure. They also argued that crimes of the magnitude Cambodia had experienced were a concern to all persons in the world¹⁰⁴

This appeal was still in place in 1998 despite Pol Pot dying in the same year and some of the Khmer Rouge leaders having defected to government units. In 1998 the UN General Assembly condemned the genocide that had taken place in Cambodia and sent a task force to evaluate the available evidence for purposes of prosecution. The outcome of the taskforce was to recommend an international tribunal. However, Cambodia did not approve of the recommendation. Nonetheless, bilateral discussions with other states, such as the USA, resulted in the proposal of a supermajority system that included a majority of Cambodian judges with at least one international judge.¹⁰⁵ In July 2001 the Cambodian National Assembly and Senate passed legislation establishing Extraordinary Chambers in the Courts of Cambodia (ECCC) for prosecution of crimes in what had been Democratic Kampuchea.¹⁰⁶ The UN however, criticized the proposed legislation as not meeting minimum international standards, such as on ‘no amnesties for perpetrators of core international crimes’.

In July 2001 the Cambodian National Assembly and Senate passed legislation establishing Extraordinary Chambers in the Courts of Cambodia (ECCC) for prosecution of crimes in what had been Democratic Kampuchea.

Further the quick development of the legislation meant that the law did not fully factor in the agreement between the UN and Cambodia.¹⁰⁷ The emergent court, according to the UN, would therefore not reflect the impartiality and objectivity that a court established with the support of the United Nations had to have. The UN therefore ended discussions with Cambodia in February 2002¹⁰⁸ but discussions were later reopened after Cambodia requested

¹⁰¹ Kathryn Klein “*Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*” (2006) 4 Northwestern University School of Law 549

¹⁰² Eileen Skinnidier, Experiences and Lessons from Hybrid Tribunals, Sierra Leone, icclr.law.ubc.ca/sites/.../ExperiencesfromInternationalSpecialCourts.pdf

¹⁰³ *ibid*

¹⁰⁴ Eileen Skinnidier, Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia icclr.law.ubc.ca/sites/.../ExperiencesfromInternationalSpecialCourts.pdf

¹⁰⁵ Eileen Skinnidier, Experiences and Lessons from Hybrid Tribunals, Sierra Leone, icclr.law.ubc.ca/sites/.../ExperiencesfromInternationalSpecialCourts.pdf

¹⁰⁶ *ibid*

¹⁰⁷ David Scheffer Mayer, Brown, Rowe & Maw/Robert A. Helman Professor of Law Northwestern University School of Law Chicago, Illinois http://www.cambodiatribunal.org/wp-content/uploads/2013/08/history_history-analysis-scheffer_english.pdf

¹⁰⁸ Eileen Skinnidier, Experiences and Lessons from Hybrid Tribunals, Sierra Leone, icclr.law.ubc.ca/sites/.../ExperiencesfromInternationalSpecialCourts.pdf

assistance. Mandated by the UN General Assembly, the Secretary General resumed discussions, finally leading to the establishment of the judicial mechanism.¹⁰⁹

ii) Legislative framework

The law on the establishment of the Extraordinary Chambers in the Courts of Cambodia was passed on 10 August 2001, for the prosecution of crimes committed during the period of the regime of Democratic Kampuchea from 17 April 1975 to 6 January 1979.¹¹⁰ This law determined the jurisdiction of the Courts, their organizational structure and composition and the rights of the accused. A Memorandum of Understanding between the UN and Government of Cambodia set out how the UN would support the ECCC.¹¹¹

The Chambers were established within the framework of the existing Cambodian court structure. They were to be functionally independent, not being obliged to accept or seek any instructions from any government or any other sources.¹¹² The expenses of the Extraordinary Chambers were to be shared by the Government of Cambodia and the UN Trust Fund. So while there is approval by the UN through a General Assembly resolution, that resolution does not form the legal basis of the Extraordinary Chambers. The agreement only provides for the terms of the assistance and cooperation of the UN in the operation of the tribunal.¹¹³

The Chambers have a mandate over both international and domestic crimes. These are listed as follows: “(i) crimes stipulated in Cambodia’s 1956 Penal Code (homicide, torture, religious persecution – the law related to the period of limitation is extended for 20 years); (ii) crimes of genocide as defined by the 1948 Genocide Convention; (iii) crimes against humanity; (iv) crimes of serious violation of the 1949 Geneva Convention; (v) crimes of destruction of cultural property during armed conflicts, pursuant to the 1954 Hague Convention on Protection of Cultural Property during Armed Conflicts; and (vi) crimes against internationally protected persons, pursuant to the 1961 Vienna Convention on Diplomatic Relations.”¹¹⁴

The persons falling within the jurisdiction of the ECCC are limited to the senior leaders of Democratic Kampuchea and persons most responsible for crimes and violation of the Cambodian criminal laws, international humanitarian laws, international customs and international conventions recognised by Cambodia.¹¹⁵

iii) Structure

All levels of the Extraordinary Chambers include both Cambodian and foreign judges, with the majority at each level being held by Cambodian judges.¹¹⁶ The local judges are appointed by the Supreme Council of Magistracy created by the Constitution of Cambodia.¹¹⁷ The international judges are also appointed by

¹⁰⁹ *ibid*

¹¹⁰ Ben Kiernan “*Historical and Political Background to the Conflict in Cambodia, 1945-2002*” in Ambos and Othman, as cited in Eileen Skinnidier, *Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia*

¹¹¹ *ibid*

¹¹² Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group April 2013; Eileen Skinnidier, *Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia* iclr.law.ubc.ca/sites/.../ExperiencesfromInternationalSpecialCourts.pdf

¹¹³ Eileen Skinnidier, *Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia* iclr.law.ubc.ca/sites/.../ExperiencesfromInternationalSpecialCourts.pdf

¹¹⁴ *ibid*

¹¹⁵ Eileen Skinnidier, *Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia*

¹¹⁶ *ibid*

¹¹⁷ Eileen Skinnidier, *Experiences and Lessons from Hybrid Tribunals, Sierra Leone, East Timor and Cambodia*

the Supreme Council, but upon nomination by the UN Secretary General. Therefore all judges, foreign and Cambodian, are appointed by a national institution under the domestic law. The Courts have been set up within and under the Constitution and the existing court structure in Cambodia, without compromising basic national sovereignty in any way. There are also two co-investigating judges, one Cambodian and the other foreign and two co-prosecutors, one Cambodian and the other foreign.

iv) Challenges

Lack of political will

The ECCC has clashed with the Cambodian government on a number of issues, particularly over the scope of the investigations.¹¹⁸ This is because some former members of Khmer Rouge have defected and joined the government. “Although no member of the Cambodian government has been associated with atrocities, many of them are former members of the Khmer Rouge and there are occasional rhetorical allegations about massacres perpetrated by government members, made by Cambodian opposition leaders.”¹¹⁹ In September 2009, for example, six government officials were required to give evidence as witnesses, but have not done so.¹²⁰ A government spokesman has stated that it is the government’s position that they should not testify, although they can if they wish to.¹²¹

In declining to widen its scope to investigate other perpetrators, judges have held that the purpose of the Court was to try senior leaders and those most responsible for crimes during the period of Democratic Kampuchea, and that Cambodian society could be destabilized if the scope is widened.

The supermajority system

The ECCC has a system where there is an international prosecutor as well as a local Cambodian one and for every hearing there are two judges of Cambodian origin and one international one, or a ratio of three to five. In order to reach a decision a vote is taken. This system has proved to be problematic since there is hardly ever a supermajority vote where the case is contentious.

¹¹⁸ <http://www.r2pasiapacific.org/docs/R2P%20Reports/ECCC%20and%20R2P%20FINAL%202010.pdf>

¹¹⁹ *ibid*

¹²⁰ <http://www.r2pasiapacific.org/docs/R2P%20Reports/ECCC%20and%20R2P%20FINAL%202010.pdf>

¹²¹ *ibid*

V. BOSNIA AND HERZEGOVINA'S WAR CRIMES CHAMBER

i) Background

An international armed conflict took place in the territory of the former Yugoslavia between 1992 and 1995.¹²² The federation broke apart between 1991 and 1992 when the constituent states declared their independence and violence erupted with the newly independent states supporting their ethnic majorities in neighbouring states.¹²³ What was formerly the Republic of Yugoslavia had become a federation of six republics and two autonomous units.¹²⁴

The death toll was originally estimated in 1994 at around 100,000 with two million being physically displaced from their homes.¹²⁵ Ethnic cleansing was a common phenomenon in the conflict. This typically entailed intimidation, forced expulsion or killing of the undesired ethnic group, as well as the destruction or removal of the physical vestiges of the ethnic group, such as places of worship, cemeteries and cultural and historical buildings. It also confined members of the targeted ethnic group in concentration camps.¹²⁶

The United Nations Security Council under Chapter VII of the United Nations Charter passed a resolution for the establishment of an ad hoc tribunal, as the ongoing conflict was deemed to be a threat to international peace and security.¹²⁷ The International Criminal Tribunal for the former Yugoslavia (ICTY) was thus established to prosecute war crimes and crimes against humanity committed during the wars in the former Yugoslavia. The

ICTY has indicted more than 161 persons.¹²⁸

However as part of its completion strategy the UN agreed to devolve cases from the ICTY to domestic institutions.¹²⁹ Therefore, together with the office of the High Representative appointed in Bosnia under the Dayton Peace Agreement, the ICTY in 2003 pushed for the creation of a War Crimes Chamber at the domestic level. The Chamber was to receive cases from ICTY.

The federation broke apart between 1991 and 1992 when the constituent states declared their independence and violence erupted with the newly independent states supporting their ethnic majorities in neighbouring states.

ii) Legislative framework

The War Crimes Chamber (WCC) began its work in early 2005.¹³⁰ The creation of the WCC was considered necessary to enable effective war crimes prosecutions in Bosnia.¹³¹ The Chamber's jurisdiction includes the

¹²² Bosnian Genocide <http://www.history.com/topics/bosnian-genocide>

¹²³ *ibid*

¹²⁴ Ronald C. Slye and Beth Van Schaak, *Essentials International Criminal Law*, Published by Aspen Publishers 2009 at 66

¹²⁵ *Retribution and Restoration: Bosnia on Trial*, Cambridge University <http://www.cam.ac.uk/research/news/retribution-and-restoration-bosnia-on-trial>

¹²⁶ Ronald C. Slye and Beth Van Schaak, *Essentials International Criminal Law*, Published by Aspen Publishers 2009 at 66

¹²⁷ Ronald C. Slye and Beth Van Schaak, *Essentials International Criminal Law*, Published by Aspen Publishers 2009 at 67

¹²⁸ *Retribution and Restoration: Bosnia on Trial*, Cambridge University <http://www.cam.ac.uk/research/news/retribution-and-restoration-bosnia-on-trial>

¹²⁹ *ibid*

¹³⁰ The General Framework Agreement for Peace in Bosnia and Herzegovina (also known as the Dayton Peace Agreement), signed December 14, 1995 [online], http://www.ohr.int/dpa/default.asp?content_id=379 (retrieved September 19, 2005). The Dayton Peace Agreement ended the war in Bosnia. As cited in http://www.hrw.org/reports/2006/ij0206/2.htm#_ftn12

¹³¹ See "Joint Preliminary Conclusions of OHR and ICTY Experts Conference on Scope of BiH War Crimes Prosecutions," January 15, 2003 [online], <http://www.un.org/icty/pressreal/2003/p723-e.htm> (retrieved November 15, 2005); As cited in http://www.hrw.org/reports/2006/ij0206/2.htm#_ftn12

most serious war crimes cases in Bosnia leaving other war crimes to ordinary courts referred to as cantonal and district courts.¹³²

The jurisdiction of the WCC consists of several components. First, the WCC tries middle- to low-level perpetrators. Secondly it addresses cases referred to it by the ICTY, and thirdly, cases submitted to it by the Office of the Prosecutor ICTY on incomplete investigations.¹³³ The WCC therefore represents an important component of the completion strategy of the ICTY.¹³⁴

A unique component referred to as the ‘Rules of the Road’ procedure was first established under the WCC in response to the widespread fear of arbitrary arrest and detention immediately after the conflict in Bosnia.¹³⁵ “Under this procedure, the relevant authorities in Bosnia were required to submit to the Office of the Prosecutor ICTY every war crime case proposed for prosecution in Bosnia, to determine whether the evidence was sufficient by international standards before proceeding to arrest.”¹³⁶ This process reduces arbitrary arrest for war crimes in Bosnia.¹³⁷

The domestic laws of Bosnia and Herzegovina, some of which were written in 2003, incorporate international law and add criminal offences based on the Rome Statute of the International Criminal Court, such as war crimes, crimes against humanity, and genocide.¹³⁸ For instance, the relevant provisions of the criminal codes for the Bosnian War Crimes Chamber are based on the Rome Statute of the International Criminal Court, which defines these three crimes.¹³⁹

¹³² <http://www.hrw.org/reports/2006/ij0206/2.htm>, Background to the Establishment and Mandate of the War Crimes Chamber

¹³³ *ibid*

¹³⁴ The strategy of transferring cases involving intermediate- and lower-level defendants to competent national jurisdictions was endorsed by the United Nations Security Council as part of the ICTY’s completion strategy. See United Nations Security Council, Statement by the President of the Security Council, July 23, 2002 [online], as cited in <http://www.hrw.org/reports/2006/ij0206/2.htm>, Background to the Establishment and Mandate of the War Crimes Chamber <http://daccessdds.un.org/doc/UNDOC/GEN/N02/491/47/PDF/N0249147.pdf?OpenElement> See also United Nations Security Council, Resolution 1503 (2003), S/Res/1503.

¹³⁵ <http://www.hrw.org/reports/2006/ij0206/2.htm>, Background to the Establishment and Mandate of the War Crimes Chamber

¹³⁶ Book of Rules on the Review of War Crimes Cases, KTA-RZ 47/04-1, December 28, 2004, art. 2 [hereinafter “Book of Rules”]. See also Rome Agreement, signed February 18, 1996 [online], http://www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/default.asp?content_id=6093 (retrieved December 16, 2005).

Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group April 2013

¹³⁷ Book of Rules on the Review of War Crimes Cases, KTA-RZ 47/04-1, December 28, 2004, art. 2 [hereinafter “Book of Rules”]. See also Rome Agreement, signed February 18, 1996 [online], http://www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/default.asp?content_id=6093 (retrieved December 16, 2005).

¹³⁸ Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group April 2013

¹³⁹ *ibid*

iii) Structure

The WCC has domestic and international judges, prosecutors, defence counsels, experts in witness protection and support, as well as other officials engaged in providing substantive and administrative support.¹⁴⁰ The inclusion of international professionals is intended to ensure that recognised fair trial standards are met in the work of the WCC.¹⁴¹ Local professionals also have an opportunity to build their expertise within the justice sector to ensure sustainability.

The WCC has both trial and appeals chambers consisting of five judicial panels allocated to the WCC.¹⁴² “Panels are comprised of two international judges and one local judge, who is the presiding judge of the panel”.¹⁴³ The panel progressively moves to a majority of domestic personnel as capacity and goodwill in the chamber is enhanced.¹⁴⁴

The chamber also has prosecution and defence sections, and an administrative support office that includes a registry. In addition, they have special sections focused on victims and witnesses.¹⁴⁵

The Prosecutor of the War Crimes Chamber is appointed by the National Assembly of Bosnia for a four-year term.

The Registry consists of the Legal Department, which provides legal support to judges and panels; a Court Management Section, which manages the Court’s daily activities; a Public Information and Outreach Section, which handles media contacts; and an Administration Section, which provides administrative support, including technological support and translation services.¹⁴⁶

The Bosnian Parliament adopts this Court’s annual budget, including salaries of Bosnian staff and operational costs, as law. The salaries of international personnel are funded by international donors and managed separately from the Court budget.¹⁴⁷

iv) Challenges

Outsourcing

Over reliance on international actors has subsequently made it difficult to transition to the use of domestic mechanisms. There is still a lot of mistrust among the various domestic factions.¹⁴⁸

¹⁴⁰ Registry for Section I for War Crimes & Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor’s Office of Bosnia and Herzegovina, and Ministry of Justice Prison Project, “Project Implementation Plan Progress Report,” <http://www.hrw.org/reports/2006/ij0206/2.htm>, last viewed 19th April 2014

¹⁴¹ *ibid*

¹⁴² Background to the Establishment and Mandate of the War Crimes Chamber <http://www.hrw.org/reports/2006/ij0206/2.htm>,

¹⁴³ *ibid*

¹⁴⁴ <http://www.hrw.org/reports/2006/ij0206/2.htm>, **Background to the Establishment and Mandate of the War Crimes Chamber**

¹⁴⁵ Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group April 2013

¹⁴⁶ Project Implementation Plan Progress Report,” <http://www.registrarbih.gov.ba> (retrieved November 7, 2005), p. 50

¹⁴⁷ Domestic Tribunals For Prosecuting International Crimes: Core Elements Legal Memorandum Prepared By The Public International Law & Policy Group April 2013

¹⁴⁸ *ibid*

Emphasis on trial process but not on victim

Researchers have argued that the entire system from the International Criminal Tribunal for Rwanda to the WCC heavily focuses on the criminals and the trial process and not enough on victim support. Bosnians are reported as still feeling marginalized more than 20 years after the war. A victim-centered approach could include psychological support.¹⁴⁹

Anonymity of perpetrators

The War Crimes Chamber can make its verdicts and indictments anonymous and this to some extent allows the criminals to escape the full responsibility and consequences of their actions. This position has come under heavy criticism, especially because victims do not know the outcome of trial processes.¹⁵⁰

Weak outreach

The outreach programme of the WCC has also been criticized. Outreach is particularly important since the Chamber was not widely accepted or popular.¹⁵¹ National political parties have indeed been critical of the Chamber as undermining the existing justice system.¹⁵² A comprehensive outreach programme would therefore explain the workings and details of the Chamber, thereby gaining public support.

Potential case overload

One of the greatest challenges facing the BWCC is the number of cases that potentially fall within its range of authority. Criminal prosecutors in Bosnia and Herzegovina lack discretion to discard cases and have a legal obligation to initiate a prosecution if evidence exists that a criminal offence has been committed.¹⁵³

¹⁴⁹ Retribution and Restoration : Bosnia on trial <http://www.cam.ac.uk/research/news/retribution-and-restoration-bosnia-on-trial>, University of Cambridge

¹⁵⁰ *Ibid*

¹⁵¹ Retribution and Restoration : Bosnia on trial <http://www.cam.ac.uk/research/news/retribution-and-restoration-bosnia-on-trial>, University of Cambridge

¹⁵² *ibid*

¹⁵³ http://wcjp.unicti.it/proceedings/docs/ICTJ_BiH%20WCC_2008_eng.PDF Human Rights Watch

VI. LESSONS FOR KENYA

Kenya finds itself in a relatively unique position after the 2007-2008 post-election violence. With the ICC addressing three cases of persons who are alleged to be the most responsible and most senior perpetrators of violations during this time, there is an opportunity to practise positive complementarity and to prosecute the hundreds, perhaps thousands of perpetrators of violations.

The challenges that Kenya faces regarding this task are not unique. These challenges can be broadly categorized as lack of a comprehensive legal framework, Lack of institutional and professional capacity, and finally lack of political will. Lessons from Uganda, Cambodia, Sierra Leone and Bosnia Herzegovina shed some light on the path Kenya can take and to some extent on the path not to take, as follows.

Legal requirements

Substantive legal basis

Domestic mechanisms to address international crimes can be established either administratively or by statute. Where the legal basis for such a mechanism is administrative several challenges inherently occur. As can be seen under the Ugandan ICD, which was administratively established through a gazette notice, the division is open to infringement of its independence.

It also has to fit into the existing hierarchy and structure of the Judiciary in the country in question. As such, the question of obtaining international expertise by way of international judges or prosecutors can prove particularly difficult unless the national/domestic laws already provide for this. This is a missed opportunity, not only on the expertise, but also the presentation of an independent mechanism with external actors. The Ugandan ICD has so far only addressed one case and even then, not to a substantive conclusion¹⁵⁴ With the Kenyan Constitution as well as laws drawing heavily from a common law heritage similar to Uganda, these same challenges could arise were Kenya to choose an analogous path to creating its own ICD.

The cases that are to be subject to such a division also fall within the ordinary pool of crimes in the country to be investigated and prosecuted as such. In the Ugandan experience once again, although administratively the prosecutors and investigating police are placed in departments to investigate and prosecute war crimes, these responsibilities are not exclusive. For Kenya this would be a big problem. With a considerable backlog of ‘ordinary’ cases, those cases emerging from the post–election violence period would simply add to the backlog and not be addressed specifically, or as a matter of priority.

The other challenge as regards an administrative decision is the ability to change the mandate of such a division with ease. The ICD, initially known as the War Crimes Division and initially created to address war crimes, now has to address other crimes such as genocide, crimes against humanity, and transnational crimes

such as terrorism. This change shows the ease with which the mandate of the division can be interfered with, including through prosecutorial discretion.

With a considerable backlog of ‘ordinary’ cases, those cases emerging from the post–election violence period would simply add to the backlog and not be addressed specifically, or as a matter of priority.

Should Kenya choose this route however, due to lack of rigidity, best practice and international standards can be adopted into the entire Judiciary, including investigative practices, prosecution,

¹⁵⁴ Human Rights Watch, Justice for Serious Crimes Before a National Court: Uganda’s International Crimes Division

and witness protection mechanisms. The realities of political will however, may mean interference with such a process. This could be by way of reduced funding or developing of legislation inimical to the court process. The development of an amnesty law in Uganda for example, not only was contrary to international standards as regards core international crimes, but also ensured many of the people who should have been prosecuted in the Chamber were not.

An independent tribunal, through national legislation, provides an opportunity to lay out comprehensively the jurisdiction structure and laws of such tribunal, including the aspects of investigation and prosecution. Such a statute would lay out the modalities of interaction between statutes, the constitution and international laws in the set up tribunal thereby addressing the question of hierarchy of laws. There is also an opportunity to legislate on the impartiality of the tribunal and its protection from interference, politically or otherwise. The War Crimes Chamber best exemplifies this position despite its origin being in a UN Security Council treaty.

It should always be clear that the establishment of a judicial mechanism outside of the ordinary judicial structure is done to serve a very specific purpose. That purpose should not be lost in larger reforms of the Judiciary or the efficacy agenda of the same.

Procedural laws

The WCC provided for procedural law to be used inclusive of an amended penal code that recognised international law, including the Rome Statute. As a result there was abundant clarity as to which law applied. Kenya can borrow from this. In addressing the question of retrospectivity of the law, procedural legislation can be adopted to prosecute violations found under customary international law and therefore already a part of Kenyan law. Although Kenya's International Crimes Act proscribes crimes against humanity, it was legislated after the post-election violence and therefore is not applicable to that situation.

In establishing a legislative framework Kenya may wish to review its domestic criminal procedure codes to incorporate international standards and best practice, as well as to recognise core crimes for purposes of prosecution. This is particularly important if the mechanism is purely domestic and has to fall within the judicial system.

Institutional capacity

Institutional capacity here refers to the ability of the institution to protect witnesses and facilitate victim participation and reparation. Lessons from other mechanisms indicate a weakness in the structural support for witness protection, as well as victim reparation. Even the relatively successful WCC has had its share of criticism as regards victim participation. Usually left to international partners, this agenda should be at the core of the justice mechanism.

Kenya in this regard is starting from a slightly elevated position. With the Witness Protection Agency¹⁵⁵ there is both legislative and actual foundation for witness protection. In the past there has been skepticism that the agency would be able to protect witnesses against high ranking state officials. However with specific legislation towards developing an accountability mechanism, corresponding laws can be put in place to use sections of the agency exclusively for such a mechanism with the necessary safeguards.

With regard to victim participation and reparation, lessons can be drawn from the ICC. Participation in a domestic court process can provide a cathartic process for post-election violence victims. Even though the era of establishing ad hoc tribunals in partnership with the UN has gone, lessons from these tribunals are still relevant. The Special Court for example operated a witness-protection programme that sought to meet victims' and witnesses' needs,

¹⁵⁵ Witness Protection Amendment Act 2010 KLR

including psychological assistance, before, during, and after trial.¹⁵⁶ There were even contempt proceedings following the disclosure of the identity of a witness.¹⁵⁷ Some witnesses were relocated to different countries under informal arrangements, as it was difficult to conclude formal arrangements with these countries in good time; however the long-term complications of those arrangements are yet to be fully comprehended.¹⁵⁸

Capacity

The legislative framework for a domestic mechanism addressing international crime ought to address the fundamental issue of staffing. The majority of constitutions and national statutes restrict the positions of judges, prosecutors and police or investigative officers to nationals. Kenyan laws are no different. Appointment to the justice sector specifically, has elaborate procedures and clear criteria. The criteria are found within the Constitution, the Judicial Services Act, the National Police Service Act¹⁵⁹ and the Police Standing Orders.

A review of the laws to provide an exception to this provision would be important, as international actors not only create a sense of impartiality in the judicial process, but they can also build the sustainability capacity of national actors of the entire Judiciary. This provision would be particularly attractive should such a tribunal be scope- and time-bound as it could then provide mechanisms for handing over the processes to the national Judiciary.

A special court, as was the case under the WCC and ECCC, can be drafted very specifically in temporal and material jurisdiction that can allow staffing including international staff. The ECCC was not based on a treaty and its agreement with the UN was for purposes of funding, technical support and ensuring the Chamber met international standards. The legislation establishing the ECCC was wholly domestic.

Kenya could similarly seek to establish a chamber with a very specific temporal and material jurisdiction and limited in scope, based on legislation. Appointment of international staff within the Judiciary would require a constitutional amendment. However the same is not the case in the units of investigation or prosecution, which would require a statutory amendment.¹⁶⁰

Best practices

Some of the domestic mechanisms have developed best practices in specific aspects, which the proposed Kenyan domestic mechanism can learn from. The outreach programme in Sierra Leone for instance, was exemplary and even touted as the best in comparison to any other tribunal to date. The SCSL had to explain several factors, including why the number of accused persons were fewer than the actual number of perpetrators. They also had to explain why child soldiers, who were the hallmark of the conflict, were not prosecuted. This was in the context in which a large part of the population was illiterate and based in the rural areas.

Although this outreach did not receive funding from the core of the Court's budget it began the work even before the Court's first case. This was done through non-governmental organizations reaching out to the population through radio programmes, district coordinated activities and community leaders. The Court's official outreach programme therefore found well-established groundwork and followed up with town hall

¹⁵⁶ ICTJ Prosecution case study series, <https://www1.umn.edu/humanrts/instate/SCSL/Case-studies-ICTJ.pdf>

¹⁵⁷ *ibid*

¹⁵⁸ ICTJ Prosecution case study series, <https://www1.umn.edu/humanrts/instate/SCSL/Case-studies-ICTJ.pdf>

¹⁵⁹ National Police Service Act Section 29; http://covaw.or.ke/wp-content/uploads/2013/11/NationalPoliceServiceAct_No_11Aof2011_.pdf; Article 166 of the Constitution of Kenya

¹⁶⁰ National Police Service Act Section 29; http://covaw.or.ke/wp-content/uploads/2013/11/NationalPoliceServiceAct_No_11Aof2011_.pdf

meetings with the Prosecutor of the SCSL going out to meet the population and establishing their opinion of the Court. Kenyan civil society can also learn from this and bring awareness to the general public on the need for a domestic mechanism to address mid and low level perpetrators so as to support such an exercise.

The War Crimes Chamber of Bosnia trail blazed as regards legislative reform. “The creation of the WCC was part of an overhaul of the national justice system by the High Representative”. As opposed to using existing domestic laws, which would be incongruent with international law standards, Bosnia undertook comprehensive reforms of Bosnian criminal law, including introducing in 2003 state-level criminal law and criminal procedure codes, the former establishing the State Court’s jurisdiction over war crimes.¹⁶¹ The WCC was therefore able to successfully conduct trials that met international standards approval, including on fair trial.¹⁶²

¹⁶¹ Organization for Security and Co-operation in Europe – Mission to Bosnia and Herzegovina, “War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles,” March 2005, p.9

¹⁶² Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of Bosnia and Herzegovina and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 61/04, art. 2

CONCLUSION

As Kenya contemplates setting up its own domestic mechanism to prosecute mid and low level perpetrators of post-election violence, it does not have to reinvent the wheel. It can learn and apply lessons from similar initiatives that have been successfully established before and also avoid their mistakes. In this way, Kenya will significantly improve the chances of such a domestic mechanism delivering real and meaningful justice to victims of post-election violence.

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