



KENYA

“Turning Pebbles”

Evading Accountability for Post-Election Violence in Kenya

HUMAN
RIGHTS
WATCH



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Glossary of Abbreviations

AfriCOG	Africa Centre for Open Governance
CID	Criminal Investigations Division
CIPEV	Commission to Investigate Post-Election Violence (Waki Commission)
CREAW	Center for Rights Education and Awareness
DCI	Directorate of Criminal Investigations
DPP	Director of Public Prosecutions
EACJ	East African Court of Justice
FIDA	Federation of Women Lawyers
GHRC	Genesis for Human Rights Commission Mombasa
ICA	International Crimes Act
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ-Kenya	Kenyan Section of the International Commission of Jurists
ICTJ	International Center for Transitional Justice
IDP	Internally displaced person
IO	Investigating officer
KANU	Kenya African National Union
KEJUDE	Kenyans for Justice and Development
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
KTN	Kenya Television Network
MP	Member of Parliament
NGO	Nongovernmental organization

OCS	Officer Commanding Station
ODM	Orange Democratic Movement
OHCHR	Office of the United Nations High Commissioner for Human Rights
PEV	Post-election violence
PNU	Party of National Unity
SBGV	Sexual and gender-based violence
SLDF	Sabaot Land Defence Force
TJRC	Truth, Justice and Reconciliation Commission
WKLS	Western Kenya Law Society

Summary

We are very good at saying we don't leave a single stone unturned, but we don't turn a single stone. Maybe we turn pebbles.... Small stones are turned. The big ones, no one dares.

—Kalenjin elder, on the lack of justice following post-election violence, Eldoret, May 27, 2011

Four years after the onset of Kenya's 2007-2008 post-election violence—and with a new election campaign underway—Kenya's government has done little to provide justice to victims. The government has failed to ensure the prosecution of perpetrators in all but a handful of the 1,133 or more killings committed during the violence, which pitted ruling party supporters and the police against opposition-linked armed groups and civilians. Victims of rape, assault, arson, and other crimes similarly await justice.

The Office of the Attorney General, through the Department of Public Prosecutions, has compiled lists of thousands of cases allegedly linked to the election violence, ranging from petty theft and rioting to rape and murder. But despite efforts to prioritize and act on serious cases in the immediate aftermath of the violence, there have been few prosecutions and fewer convictions, as well as a near total lack of investigations of those who organized and financed the violence. Hundreds of inquest files literally gather dust in police stations.

The Commission to Investigate Post-Election Violence (CIPEV, also known as the Waki Commission after its president, Justice Philip Waki), which was formed in the wake of the violence, conducted preliminary investigations and recommended establishing a special tribunal, with a mandate to try the persons alleged to be most responsible for the violence. In December 2008 President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement to establish the tribunal and implement the Waki recommendations in full. But the Kenyan government and parliament have since largely disregarded this commitment.

The parliament and the cabinet shot down several proposals in 2009 to establish a special tribunal. Some parliamentarians said they rejected the bills because they preferred to see crimes against humanity tried at the International Criminal Court (ICC) in The Hague. Some of those same parliamentarians later hypocritically called on Kenya to withdraw from the Rome Statute establishing the ICC. Kibaki suggested that the Truth, Justice and Reconciliation Commission (TJRC), formed after the violence, could provide accountability. But while the commission has held hearings to elicit information about the violence, it is not a judicial mechanism and cannot prosecute suspects.

The ICC opened investigations into the post-election violence in March 2010. Kenya repeatedly promised to cooperate with the investigations. However, when the ICC prosecutor requested summons for six high-profile political and opinion leaders in December 2010 the government balked, opting for a series of political and legal acrobatics to try to postpone or prevent prosecutions.

Cases against the six high-profile suspects advanced at the ICC despite the attempts to block them. As “the first institution [Kenyan politicians] have come across that they cannot bribe, kill, or intimidate,” in the words of one Kenyan activist, the ICC is the focus of many victims’ hope for justice.

But hundreds of other perpetrators of serious crimes continue to evade accountability. A few have been convicted for serious crimes. A report prepared by the Department of Public Prosecutions in March 2011 claimed that 94 post-election cases had resulted in convictions. But Human Rights Watch found that only a small percentage of those convictions were for serious crimes that were actually related to the election violence, including two for murder, three for “robbery with violence” (one of the most serious crimes under Kenya’s penal code, which can encompass robberies resulting in the death of the victim), one for assault, and one for grievous harm.

The limited success of cases in the ordinary courts shows that Kenyan authorities have been unwilling or unable to effectively prosecute post-election violence. In Uasin Gishu district, for instance, an epicenter of turbulence, no one has been convicted for at least 230 killings. The fact that not a single police officer has been convicted for shootings or rapes directly related to the post-election violence, despite an estimated 962 police shootings, 405 of them fatal, and dozens of reported rapes by police, also demonstrates the extent of impunity for certain groups that appear to be protected.

Lack of political will to address post-election violence is further demonstrated by government failure to adequately compensate victims—including at least 21 victims of police gunshots who filed, and won, civil suits claiming damages. When courts awarded them compensation, the government failed to pay up.

The ICC is a court of last resort and is likely to prosecute only a handful of those responsible for the crimes within its jurisdiction—which covers genocide, war crimes, and crimes against humanity—in any given situation. Additional investigations and prosecutions are needed in Kenya to widen accountability for the post-election violence.

This report, based on interviews with victims of the post-election violence, police officers, defense and prosecution lawyers, judges, local officials, civil society organizations and others, and analysis of 76 court files, documents the difficulties faced by election violence victims in obtaining access to justice in Kenya. It identifies the principal weaknesses within the criminal justice system that have contributed to the paltry number of convictions, including police officers' unwillingness to investigate and prosecute their colleagues; the poor quality of investigations in general; incompetence on the part of some police prosecutors; political influence and corruption to subvert the judicial process; and the absence of an operative witness protection system.

Given concerns about the independence and competence of the Kenyan justice system, and the evidence documented in this report, the CIPEV's recommendation for a special tribunal remains relevant and urgent. Human Rights Watch calls on the Kenyan government to establish special mechanisms within the Kenyan judicial system to investigate and prosecute the most serious election-related crimes, either as international crimes or as serious ordinary crimes. Cases against lower-level perpetrators or for less serious crimes could be dealt with through either a special mechanism or the ordinary courts.

Kenya's police and judicial sectors should also learn from the past and make necessary reforms. Numerous nongovernmental organizations (NGOs) and independent commissions, including the CIPEV, have recommended reforms that are now commonly agreed upon as necessary. Among those that appear most urgent in light of failed prosecution of election violence are: improving police investigations capacity; replacing police prosecutors with legal professionals; and vetting police, excluding from service those known to have committed human rights abuses.

The government should immediately provide full funding to the existing Witness Protection Agency and ensure that it is robust, credible, and has the option of relocating at-risk, high-value witnesses outside Kenya. The Witness Protection Agency will have to prove itself before many election violence witnesses are willing to testify in court. Its activation should be an urgent priority.

Under international law, Kenya has an obligation to prosecute serious international crimes, and all victims of such crimes have the right to an effective remedy and access to justice. Providing redress for post-election violence victims is a requirement, not an option. Nearly four years after the violence, victims have been waiting for justice for far too long.

Recommendations

On Establishing a Special Mechanism to Prosecute Post-Election Violence

To the Parliament of Kenya

- Establish a special mechanism or mechanisms, such as a special division within the High Court of Kenya and a special investigatory unit, to investigate, prosecute, and adjudicate post-election violence cases.
- Appoint international and Kenyan judges to the special mechanism.
- Form a special appeals panel within the Court of Appeals that will hear appeals arising from the special mechanism.
- Ensure that the mandate of the special mechanism includes:
 - Constituting investigative and prosecutorial teams composed of Kenyan and international members; and,
 - Establishing a specific unit to investigate police shootings and excessive use of force, as well as police negligence, during the post-election violence.
- Ensure that high-value witnesses to the special mechanism benefit from witness protection.
- Provide full funding for the special mechanism.
- Pass legislation to establish the position of special prosecutor, to lead prosecutions at the special mechanism to try cases of post-election violence.

To International Donors in the Justice Sector, including Canada, Denmark, Finland, Germany, The Netherlands, Sweden, The United Kingdom, Norway, The United States, the European Commission, the United Nations Development Programme, and the United Nations Office on Drugs and Crime

- Closely monitor steps to establish a special mechanism to prosecute post-election violence in Kenya. Consider offering support, including training, human resources support, and financing, on the condition that the mechanism is credible, independent, and capable of protecting witnesses.

To the Office of the Prosecutor of the International Criminal Court

- Closely monitor steps to establish a special mechanism to prosecute post-election violence in Kenya. Consider sharing evidence and offering support, including training, on the condition that the mechanism is credible, independent, and capable of protecting witnesses and that Kenya demonstrates continued cooperation with the ICC.

On Further Steps to Address Impunity for Post-Election Violence and Improve Access to Justice

To the Government of Kenya

- Fully fund and make operational the existing Witness Protection Agency.
- Allocate the Directorate of Public Prosecutions sufficient funds to hire new civilian prosecutors and to train select well-performing police prosecutors to join the State Law Office.
- Comply with court orders in civil cases providing for compensation to victims.
- Establish a national reparations program to provide reparations for victims of human rights violations.

To the Kenya National Police

- Publicly release the results of any internal inquiries conducted into police conduct during the post-election violence.
- If such investigations have not been conducted, commence internal investigations against police officers and units suspected of violations, including those adversely mentioned in the Waki Report and the Kenyan National Commission on Human Rights report. Suspend police who are found to be guilty of misconduct, and prosecute those suspected of crimes.
- Ensure that the planned police vetting process provide civilians the chance to bring complaints against individual police officers, and that such complaints are taken into consideration in decisions on hiring and firing.
- Strengthen training on investigations for members of the newly established Directorate of Criminal Investigation.

To the Director of Public Prosecutions

- Request additional funds for at least 400 new civilian prosecutors.
- Allow private prosecutions by individuals and civil society organizations wishing to prosecute cases of post-election violence.

To Parliament

- Investigate allegations that corruption and political pressure influenced the attorney general's filing of *nolle prosequis* (motions to withdraw charges) in post-election violence cases.
- Amend Section 21 of the Government Proceedings Act so that it no longer prevents enforcement of judgments against the government.

To Parliament and President Kibaki

- Ensure that anyone suspected of complicity in the post-election violence or other serious human rights abuses is not appointed to the new position of inspector general of police.

To Parliament and the Finance Ministry

- Ensure that sufficient funds are budgeted to the Directorate of Public Prosecutions for the hiring of 400 new civilian prosecutors.

To the Truth, Justice and Reconciliation Commission

- Recommend the investigation of high and mid-level perpetrators in the post-election violence named before the commission.
- Recommend that the government pay all civil damages awarded by courts in election violence related cases.
- Order reparations for victims of post-election violence.

Methodology

Human Rights Watch conducted research between February and November 2011 into the status of national investigations and prosecutions for the 2007-2008 post-election violence in Nairobi, Rift Valley, Western, Nyanza, and Coast provinces—the provinces most affected by the violence. The primary aim of the research was to assess to what extent victims have been able to access justice for post-election violence and to identify obstacles that they encountered.

Human Rights Watch researchers interviewed 172 people, including 75 victims of post-election violence, focusing on those that tried to bring a complaint at the time of the violence; those involved in court cases that went forward; or those that recognized perpetrators and would be willing to testify. Researchers also interviewed police, prosecutors, defense lawyers, magistrates, judicial officials, local administrative officials, and local civil society actors concerning the specific challenges to access to justice in each location and in particular cases.

Researchers consulted 76 court files in Bungoma, Butere, Eldoret, Kakamega, Kericho, Kitale, Molo, Mombasa, Nairobi, Naivasha, Nakuru, Sotik, and Webuye. They particularly focused on high-profile cases involving politicians, police, businesspeople, or other influential citizens and cases involving serious charges, such as murder, robbery with violence, rape, defilement, and assault causing actual bodily harm.

Human Rights Watch submitted a letter to the commissioner of police on June 7, 2011, requesting information on recent progress in investigations, if any; the outcome of any internal investigations into the conduct of the police during the post-election violence; and whether police investigations into sexual offenses during the post-election violence had resulted in any prosecutions (see Appendix II). The same letter was delivered to the Criminal Investigations Division (CID) of the police on July 13, 2011. Human Rights Watch, in the same letter and in subsequent phone calls, requested meetings with the police commissioner and the director of the CID to seek their views on the issues raised in this report, in the interests of ensuring fairness and balance. Despite promises from the deputy police spokesperson, as of this writing, no response had been received.

Many of the interviews were conducted in English; others were conducted in Swahili, Kikuyu, Kipsigis, Nandi, Dholuo, Luhya, or Sabaot, with the assistance of interpreters.

The names of those officials who spoke on condition of anonymity, and of victims and witnesses who feared repercussions, have been withheld or replaced with pseudonyms.

I. Background: Cycles of Violence and Impunity

Political violence in Kenya, along with excessive use of force by security agencies, neither began nor ended with the 2007-2008 post-election violence. The response has been consistent both before and after the elections: impunity, spotted with occasional promises by the authorities to set up investigative commissions. Such commissions have rarely been effective: they fail to publish reports, or produce reports that conceal rather than reveal, and when they do conduct serious investigations, their recommendations are largely disregarded.

Post-independence Kenya's reputation across the globe as relatively stable and peaceful is not supported by the country's political history. The series of political assassinations that took place under President Jomo Kenyatta's post-independence regime, from 1963 to 1978, was never seriously investigated. Under Daniel arap Moi, Kenyatta's successor, hundreds of political opponents were tortured, and despite several court decisions awarding victims compensation, no one was prosecuted for the abuses.¹ Moi's regime was also known for excessive use of force by the state security apparatus. It committed abuses that may amount to crimes against humanity, as in the case of the 1985 Wagalla Massacre, in which hundreds if not thousands of ethnic Somalis were killed during an operation to seize weapons.²

After Moi agreed under diplomatic pressure to hold multi-party elections in 1992, organized groups affiliated with Moi's party, the Kenya African National Union (KANU), incited violence against members of the Kikuyu ethnic group in the Rift Valley, where Kikuyus were suspected of supporting the nascent opposition. KANU supporters rallied Kalenjin residents³ around the idea that Kikuyus were "non-indigenous" and had appropriated Kalenjin land.⁴ They attacked Kikuyus before the elections, to push them out and ensure the maximum number of Moi votes, and after the elections, to solidify claims

¹ Some victims have been compensated, but only after being "forced ... to engage in further court and protracted political action to have the monies released." Kenya Human Rights Commission, "Surviving After Torture: A Case Digest on the Struggle for Justice by Torture Survivors in Kenya," 2009, pp. 42, 85-86.

² Billow Kerrow, "The Wagalla Massacre Was a Crime Against Humanity," *Daily Nation* (Nairobi), February 9, 2010, <http://allafrica.com/stories/201002091141.html> (accessed July 19, 2011); "Kenya: Wagalla massacre survivors testify," April 18, 2011, BBC News Online, <http://www.bbc.co.uk/news/world-africa-13123813> (accessed November 1, 2011).

³ The term "Kalenjin" is a colonial-era construction grouping together at least 10 distinct Nilotic ethnic groups that share linguistic and cultural traditions. The largest among them are the Kipsigis and the Nandi.

⁴ Land conflict in the Rift Valley has roots in the colonial area, when British settlers expropriated land from Kalenjins. After independence, President Kenyatta's regime facilitated the transfer of some of this land to Kikuyus.

on their land.⁵ In 1992 a parliamentary committee investigated the violence and found that 779 people had been killed and 56,000 families rendered homeless. The committee's report named several dozen senior and mid-level political figures, including cabinet members, members of parliament, local councilors, and chiefs, who had organized and funded the attacks. They were never held accountable, and violence continued.⁶ Human Rights Watch estimated that between October 1991 and November 1993, 1,500 Kenyans were killed and 300,000 displaced.⁷

Violence in the Rift Valley, most often in the form of attacks by Kalenjin and Maasai groups seeking to evict Kikuyus from their land, continued sporadically throughout the mid-1990s, killing dozens and displacing thousands.⁸ After a second round of multiparty elections in 1997, groups affiliated with KANU again attacked suspected opposition supporters in the Rift Valley and in Coast province—in many cases with police complicity. Kikuyu groups carried out reprisal attacks.⁹

In 1998 the president established the Akiwumi commission, tasked with investigating “tribal clashes” from 1991 to 1998. The commission's 1999 report was only made public in October 2002 after a legal battle. It confirmed that prominent ruling party politicians had fueled multiple incidents of so-called ethnic clashes in Kenya since 1991, and had sabotaged attempts to investigate these incidents. One hundred and eighty nine people were “adversely mentioned” in the report, including current president Mwai Kibaki and current internal security minister George Saitoti, both members of parliament at the time.¹⁰

⁵ Election observers found that the elections themselves were marked by irregularities, vote-buying, and the lack of an even playing field. See, for instance, International Republican Institute, “Kenya: The December 29, 1992 Elections,” <http://www.iri.org/sites/default/files/Kenya%27s%201992%20Presidential,%20Parliamentary%20and%20Local%20Elections.pdf>.

⁶ Republic of Kenya, Kenya National Assembly, “Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya,” September 1992, Nairobi Kenya. The report cited Jackson Kibor, a Kalenjin elder charged with incitement to violence during the 2008 post-election violence, as having also instigated ethnic violence in 1992; see p. 52.

⁷ Africa Watch (now Human Rights Watch/Africa), *Kenya – Divide and Rule: State Sponsored Ethnic Violence in Kenya*, November 1993, pp. 1, 98-102.

⁸ Africa Watch (now Human Rights Watch/Africa), *Kenya – Multipartism Betrayed in Kenya: Continuing Rural Violence and Restrictions on Freedom of Speech and Assembly*, 1994, p. 2

⁹ Amnesty International, “Kenya: Political Violence Spirals,” June 10, 1998, <http://www.amnesty.org/en/library/asset/AFR32/019/1998/en/67dd2c7e-daa5-11dd-80bc-797022e51902/afr320191998en.pdf> (accessed July 19, 2011).

¹⁰ The Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya (The Akiwumi report), “List of persons adversely mentioned and notified,” is available at http://www.marssgroupkenya.org/pdfs/2008/jan_08/Judicial_Commission_Report_On_Tribal_Clashes_In_Kenya/List_Of_Persons_Adversely_Mentioned.pdf (accessed September 13, 2011). Henry Kosgey, current MP and suspect before the ICC, is also cited in the Akiwumi report as having played a role in stoking ethnic tensions in the Rift Valley; see pp. 10, 54 of the chapter on the Rift Valley, http://www.hrw.org/sites/default/files/related_material/Akiwumi.Rift%20Valley.pdf.

No one was prosecuted on the basis of the report.¹¹ In 2008 Attorney General Amos Wako told the CIPEV that he had directed the police to carry out investigations but that he had no power to enforce this request, a claim that the commission challenged since the constitution in effect at the time required the police to comply with requests from the attorney general.¹²

Given this context of well-established impunity for political crimes, it is no surprise that politicians believed that they could get away with virtually anything in order to achieve their political ends, both before and after the 2007 elections.

Empowered by Impunity: The 2007-2008 Post-Election Violence

Human Rights Watch documented the 2007-2008 post-election violence in the 2008 report *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*.

Though generally referred to as “post-election” violence, politically motivated attacks began before the December 2007 elections. The European Union election observer mission documented 34 election-related deaths between August and December 2007.¹³ In Mt. Elgon region, Western Province, by far the greatest number of politically motivated killings during the pre-election period was perpetrated by the Sabaot Land Defence Force (SLDF), a militia group that killed over 730 people between 2006 and 2008. SLDF attacks took on increasingly political overtones in the run-up to the election, with militiamen targeting officials associated with Kibaki's Party of National Unity (PNU) and civilians who were seen as unlikely to support the SLDF's favored candidates from the opposition Orange Democratic Movement (ODM).¹⁴

Elections took place on December 27. On December 30, the Electoral Board announced Kibaki as the winner over ODM candidate Raila Odinga. Kibaki's victory was widely regarded by Kenyans as the result of rigging, provoking protests and riots throughout the country. The government responded with excessive police force, killing and wounding hundreds of demonstrators and raping women and girls in opposition strongholds.¹⁵

¹¹ A Kenyan NGO, Africa Centre for Open Governance (AfriCOG), squarely places the blame on Wako's shoulders for the failure to prosecute perpetrators of both the 1992 and 1997 episodes of violence. AfriCOG notes that the Criminal Investigations Department of the Kenyan police forwarded cases to the attorney general's office for prosecution, but they were never taken up. AfriCOG, “Poisoned Legacy,” August 2011, p. 11.

¹² Commission of Inquiry into the Post-Election Violence (CIPEV), “Report of the Commission of Inquiry into the Post-Election Violence,” October 16, 2008, p. 449.

¹³ Human Rights Watch interview with European Union election observers, Nairobi, January 8, 2008.

¹⁴ Human Rights Watch, “*Hold Your Heart*”: *Waiting for Justice in Kenya's Mt. Elgon Region*, October 2011, <http://www.hrw.org/reports/2011/10/27/hold-your-heart>, pp. 41-43.

¹⁵ Statistics suggest the police may be responsible for more killings than any other single group.

In the Rift Valley, mobilized ODM supporters killed hundreds of Kikuyus, Kisiis, and other suspected PNU supporters, including Kalenjins. Several hundred thousand people were driven from their homes. Many attacks were highly organized.¹⁶ In some cases, local politicians coordinated and funded Kalenjin militias, and a popular radio show broadcast messages inciting violence against Kikuyus and naming locations to be attacked.¹⁷

PNU supporters mobilized in response to the attacks. One response was allegedly to activate the Mungiki, a Kikuyu politico-religious militia and criminal gang that the Kenyan government banned in 2002, but that some political leaders continued to collaborate with.¹⁸ Retaliatory attacks against perceived ODM supporters in and around Nakuru and Naivasha towns during the last week of January 2008 allegedly resulted in over 200 killings, along with a number of cases of rape, forced displacement, forced circumcision, penile amputation, and other serious crimes.¹⁹

All in all, according to the Waki commission, 1,133 persons were killed in the violence between December 27, 2007 and the end of February 2008.²⁰ A total of at least 663,921 were internally displaced.²¹ The signing of the National Accord and Reconciliation Act by PNU and ODM leaders on February 28, 2008, which created a coalition government with Kibaki as president and Odinga as prime minister, brought the violence to an end in much of the country.

Not all election-related violence ceased, however. Waki Commission statistics leave out a further round of atrocities, those committed by the armed forces in Mt. Elgon district in March and April 2008. The SLDF militia, which favored several ODM candidates and intimidated the population to vote for them, had already carried out murder and other atrocities on a massive scale in lead-up to elections. In March 2008 the Kenyan authorities initiated a joint military-police operation known as Operation Okoa Maisha (“Save Lives” in Swahili) to root out the SLDF. Several thousand suspected SLDF supporters, including boys as young as 10, were tortured. Several hundred were forcibly disappeared. This

¹⁶ Human Rights Watch interview with a former member of the Waki Commission, Nairobi, May 3, 2011.

¹⁷ International Criminal Court, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua arap Sang*, ICC-01/09-01/11, “Document Containing the Charges”; Human Rights Watch interviews with Kalenjin youth, Rift Valley province, August 2011.

¹⁸ One historian describes Mungiki as a “criminal gang and private militia ... [that] has its roots in a Kikuyu cultural revival movement dating back to the 1990s but rose to prominence during the summer of 2007 with a series of grisly beheadings of criminal rivals.” Daniel Branch, “At the Polling Station in Kibera,” *London Review of Books*, vol. 30, no. 2, January 24, 2008.

¹⁹ International Criminal Court, Situation in the Republic of Kenya, Document Containing the Charges, August 19, 2011, ICC-01/09-02/1-257/AnxA.

²⁰ CIPEV, p. 383.

²¹ Republic of Kenya, Office of the President, Ministry of State for Special Programmes, “Progress Report on IDP Resettlement as at 18th July, 2011,” (Progress Report on IDP Resettlement) on file with Human Rights Watch.

violent episode is often considered a separate phenomenon from the post-election violence, but the political dynamics behind the SLDF's targeting of civilians, and the government's disproportionate, abusive response, follow the same pattern as seen elsewhere during Kenya's post-election violence.²² As in post-election violence elsewhere in the country, only a handful of suspects—and no members of the security forces—have been prosecuted for crimes in Mt. Elgon.

Ongoing Abuses

Several incidents that occurred after the post-election violence suggest that in spite of additional scrutiny in the wake of the violence, impunity continues to fuel abuses by politicians and members of the security forces. The outcry over the violence was not enough to stem abuses in the absence of accountability.

Crimes attributed to members of the security agencies that have not resulted in investigations or prosecutions include, among others, the October 2008 killing of police whistleblower Bernard Kiriinya, who had provided the Kenya National Commission on Human Rights (KNCHR) with information on the activities of police death squads, and the March 2009 killings of human rights activists Oscar Kamau King'ara and John Paul Oulu.²³ Witnesses, victims' families, and civil society organizations continue to accuse members of the Kenyan police of extrajudicial killings, but police are rarely investigated on the basis of such accusations.²⁴

Civil society activists interviewed by Human Rights Watch could not recall a single case in which a senior politician had ever been convicted of a serious crime in Kenya, despite an endless stream of allegations of criminal behavior. In the last two years, at least five prominent politicians have been forced to step down or “step aside” after being charged in high-profile corruption cases, but not one has been convicted.²⁵

²² Human Rights Watch, “*Hold Your Heart*”, pp. 41-43.

²³ Kenya National Commission on Human Rights (KNCHR), “The Testimony of the late Bernard Kiriinya on Extrajudicial Executions and Disappearances,” February 24, 2009, http://www.facebook.com/note.php?note_id=65107219576 (accessed November 27, 2011); “Kenya: Killing of Activists Needs Independent Inquiry,” Human Rights Watch news release, March 6, 2009, <http://www.hrw.org/news/2009/03/06/kenya-killing-activists-needs-independent-inquiry>; see also “UN urges probe into Kenya murders,” *BBC News Online*, March 6, 2009, <http://news.bbc.co.uk/2/hi/africa/7927873.stm> (accessed September 1, 2011).

²⁴ United Nations General Assembly, Human Rights Council, Seventeenth session, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum, Follow-up county recommendations – Kenya,” April 26, 2011, A/HRC/17/28/Add.4. The report finds, “The rate of investigations and prosecution of police killing remains unacceptably low.”

²⁵ These include: former Minister of Industry Henry Kosgey, who resigned from his ministerial post (but remains in Parliament) in January 2011; former Minister of Foreign Affairs Moses Wetang'ula, and Permanent Secretary Thuita Mwangi, who stepped down in October 2010; former Nairobi mayor Geoffrey Majiwa; and William Ruto, who was suspended from his position as Minister of Higher Education in October 2010. Kenya Human Rights Commission (KHRC), “Lest We Forget: The Faces of

Looking Abroad for Justice

Decades of impunity have left ordinary Kenyans with a sense that the Kenyan justice system has repeatedly failed them.²⁶ This frustration has led many to place their hopes in the International Criminal Court as a last resort for access to justice. As expressed by the brother of a victim of police shooting, “I support the ICC, because we’ve already tried everything in Kenya, and nothing has worked.”²⁷ Victims of rights violations in Mt. Elgon, for their part, have also taken cases before international bodies.²⁸

The ICC and other international judicial instances may bring a measure of accountability. But even as international justice takes its course, the glaring lack of accountability within Kenya remains unaddressed. Many Kenyans are convinced that justice within Kenya is necessary. A June 2011 report by South Consulting, based on a survey of 2500 Kenyans, found that respondents “are disillusioned by the lack of progress in arresting lower and middle level perpetrators and holding senior and influential people to account.”²⁹ A subsequent report expressed concern that “the perception that the ICC is for ‘big people’ may in fact harden impunity among the low-level perpetrators unless a local deterrent mechanism is put in place.”³⁰ South Consulting found Kenyans view prosecutions as a critical means to prevent future political violence.³¹

So far, the Kenyan state has let them down.

Impunity in Kenya,” September 2011, p. 15; Michael Onyiego, “Kenyan President Suspends Minister Facing Major Corruption Charges,” *Voice of America*, October 20, 2010, <http://www.voanews.com/english/news/Kenyan-President-Suspends-Minister-Facing-Major-Corruption-Charges--105337848.html> (accessed November 27, 2011). Wetang’ula was offered a new ministerial post in August 2011, despite ongoing investigations into his conduct. Those who “step aside” continue to receive their full salary and benefits.

²⁶ South Consulting, “The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, Draft Review Report,” April 2011, <http://www.dialoguekenya.org/docs/April2011KNDRReport.pdf> (accessed September 25, 2011), pp. 8-9.

²⁷ Human Rights Watch interview with John Olago, brother of gunshot victim George William Onyango, Nyanza province, May 10, 2011.

²⁸ These include the East African Court of Justice (EACJ) and the UN Working Group on Enforced or Involuntary Disappearances; see Human Rights Watch, “*Hold Your Heart*”, p. 65-67.

²⁹ South Consulting, “The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project,” Review Report, June 2011, <http://www.dialoguekenya.org/docs/June2011ReviewReport.pdf> (accessed September 25, 2011), p. v.

³⁰ South Consulting, “The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project,” Review Report, October 2011, <http://south.co.ke/Downloads/Reports/11threviewreport.pdf> (accessed November 1, 2011), p. ix.

³¹ South Consulting, April 2011, p. 25.

II. Half-Hearted National Efforts toward Accountability

In the immediate aftermath of the 2007-2008 election violence the government seemed willing to explore paths toward accountability. Indeed, there was tremendous pressure from the Kenyan population to do so, leading, ironically, to slapdash investigations and prosecutions that were so hurried that they resulted in acquittals.³² As one human rights activist put it, “The police were busy trying to arrest everyone in a hurry, so when the cases went to court, they didn’t have any witnesses.”³³ Following these initial failures, the criminal justice apparatus appeared to lose momentum in handling election violence cases. And even these early efforts demonstrated only a limited commitment to investigating those who organized and financed the violence.

Positions on accountability for election violence have never been uniform across the coalition government. Early on the PNU took a strong pro-prosecution stance, while the ODM favored amnesty, likely because most of those arrested in the immediate aftermath of the violence were affiliated with the ODM.³⁴ Later, after the ICC prosecutor named the six suspects against whom he was seeking summons—which included key officials on the PNU side, whereas those on the ODM side were of a dissident wing that had already effectively split with Raila Odinga—the positions of leaders in both parties reversed. This is an indication of the extent to which politicians’ commitment to justice has varied based on shifting personal and political interests.

In early 2011 the government undertook to assure the ICC that investigations in Kenya were advancing. But this seemed to be little more than posturing, linked to the government’s “admissibility challenge,” a motion filed before the ICC which sought, unsuccessfully, to have the cases returned to Kenyan jurisdiction.³⁵ The government argued that Kenya was able and willing to prosecute post-election violence at home, rendering the ICC intervention unnecessary. The court rejected the government’s challenge, finding no evidence that Kenya was investigating the same six suspects for the same conduct for

³² Human Rights Watch interviews with judicial officials, Nakuru, April 2011, and with civil society activists, Eldoret, May 2011.

³³ Human Rights Watch interview with Ken Wafula, director of the NGO Council, Eldoret, May 23, 2011.

³⁴ South Consulting, June 2011, p. 4.

³⁵ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua arap Sang*, ICC-01/09-01/11, “Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute,” March 31, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf> (accessed September 24, 2011); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, “Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute,” March 31, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1050028.pdf> (accessed September 24, 2011).

which they were summoned by the ICC.³⁶ The Kenyan investigations have not resulted in any new arrests in the eight months since they were allegedly initiated.

Initial Caseload: Priority Cases

In mid-2008 newly appointed Ministry of Internal Security George Saitoti drew up a list of cases to be treated with particular speed. According to a June 2008 news report, Saitoti “ordered police to speed up investigations and prosecutions of the remaining cases, and particularly those linked to capital and serious offences” and “directed that the cases be ranked according to their gravity so that suspects can be charged more quickly.”³⁷ Described as “priority cases” were 103 cases that were already before the courts, with 137 suspects on remand, as of June 2008.

Police have not responded to a request from Human Rights Watch for the list of priority cases, and the Director of Public Prosecutions told Human Rights Watch he was not aware of the list.³⁸ According to a police communiqué, it included the following well-known “Cases of Interest,” all in Rift Valley province:³⁹

- The burning of a church at Kiambaa, Uasin Gishu district, in which at least 28 Kikuyu were killed;⁴⁰
- The killing of Kikuyu priest, Father Michael Kamau, by a mob in Eldama Ravine;
- The burning of a home in Naivasha, in which 19 people, mostly Luos, were killed;
- The killing of administration police officer Hassan Omar Dado in Ainamoi;
- The killing of former Ainamoi member of parliament David Too in Eldoret;
- The killing of two police officers, Police Constable Peter Githinji and Administration Police Constable David Odiambo, in Bureti;
- The killing of Nahashon Mburu in Molo;

³⁶ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua arap Sang*, ICC-01/09-01/11, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,” May 30, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf> (accessed September 24, 2011); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,” May 30, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf> (accessed September 24, 2011).

³⁷ Fred Mukinda, “Police Won’t Free Suspects,” *Daily Nation* (Nairobi), June 1, 2008, <http://allafrica.com/stories/200806010004.html> (accessed June 27, 2011).

³⁸ Human Rights Watch interview with Director of Public Prosecutions Keriako Tobiko, Nairobi, September 22, 2011.

³⁹ Eric Kiraithe, “Police Action on Post-Election Violence,” March 19, 2008, Kenya Police, <http://www.kenyapolice.go.ke/News128.asp> (accessed September 13, 2011); Fred Mukinda, “Police Won’t Free Suspects,” *Daily Nation* (Nairobi), June 1, 2008, <http://allafrica.com/stories/200806010004.html> (accessed June 27, 2011).

⁴⁰ Reported death tolls for this incident vary. Human Rights Watch relies here on the figure established by CIPEV, p. 46.

- The killing of District Officer Benedict Omolo and Chief Inspector Elias Wafula Wakhunghu in Cheptiret district of Eldoret; and,
- The killing of Charles Keittany Korir, a former government irrigation officer, in Koibatek district.

By 2011, six of these nine cases had not resulted in convictions. There was one minor assault conviction linked to the killing of Hassan Omar Dado, but those suspected of killing Dado were acquitted.⁴¹ A suspect was convicted of manslaughter in the killing of David Too, but while that case may have been of interest in that it provoked further violence, the killing itself was unrelated to the elections. There were, however, convictions for the murder of the police officers in Bureti. Notably absent from the list of known “priority cases” are shootings by police officers. The proceedings and outcomes in these and other high profile cases are discussed in detail in Chapter III, and the police impunity, in Chapter IV, below.

According to a news report, the police also drew up a list of 200 suspected organizers of election violence. Several of them were charged in court, but none was ever brought to trial and convicted.⁴²

The Department of Public Prosecutions Report of February 2009

The Kenyan government made some initial efforts to compile nationwide statistics on post-election violence cases, which could have fed into a special tribunal or other mechanism for justice. In June 2008 the attorney general instructed Director of Public Prosecutions Keriako Tobiko to appoint a team of State Counsel tasked with identifying all post-election violence cases that had been filed; determining which cases had already been concluded in the courts; and recommending follow-up for open cases.

Working alongside officials from the police Criminal Investigation Department, the team produced a report that listed cases resulting in convictions, cases resulting in acquittals, cases withdrawn by the attorney general’s office, cases pending before the courts, cases pending arrest of a known suspect, cases pending under investigation (in which no known

⁴¹ *Republic v. Francis Kipn’geno, Sammy Kosgei, Simon Ruto, Peter Biegon, Joseph Cheruiyot Sawe, Thomas Kiprotich, Peter Kipkoech Langat*, CR 86/08, Kericho Magistrate’s Court, file consulted by Human Rights Watch, May 13, 2011; Human Rights Watch interviews, Kericho, August 2011. The suspects accused of killing Dado were all acquitted; Sawe, accused of assaulting a local chief in a related incident, was convicted of assault, but was released after paying a fine.

⁴² These included ODM politician Jackson Kibor, who was charged in Nakuru with incitement, as discussed in chapter III below; then-Kapsabet mayor Michael Rono, councilors Paul Cheruiyot and Johnston Kirua and former councilors Ishmael Choge, Abid Keter, Richard Ruto and George Ruto, charged in Kapsabet with various property crimes; and former Moi university lecturer and businessperson Silas Simatwo, charged with financing attacks. Mukinda, “Police Won’t Free Suspects,” *Daily Nation*.

suspect has been identified), and inquests and inquiries. It forwarded its recommendations to Attorney General Wako, who in turn instructed Tobiko on what to do in each case: whether it should proceed to trial, be withdrawn and closed for lack of evidence, or be sent back to police for further investigations.

The report—produced in February 2009 but made public only after ICC prosecutor Moreno Ocampo submitted it to the ICC in November 2009 as part of his application for authorization to begin Kenya investigations—found that in “a very high number of cases,” after the filing of a complaint, there had been “no subsequent follow-up.”⁴³ Inquest files in all provinces “were far from complete in as far as investigations were concerned”; in some killings, inquest files were never opened.⁴⁴ The report recommended that the attorney general direct the commissioner of police to ensure that investigations be undertaken or completed within a given time frame.⁴⁵

As far as Human Rights Watch was able to ascertain, there was no follow-up to the report. It did not result in new investigations or prosecutions. Most cases were never “resubmitted” to the attorney general after “further investigations,” as directed by the attorney general in the report.⁴⁶

The attorney general’s office also made no effort to prioritize cases for investigation and prosecution. For instance, the report listed 3,325 files in Rift Valley province with no known suspects, most of which contained only the complainant’s statement. The director of public prosecutions, at that time subordinate to the attorney general, directed “that investigations be completed within 30 days and the files be re-submitted to the Attorney General for further directions.”⁴⁷ It is difficult to imagine how police in one province, unassisted, could investigate 3,325 cases within 30 days.

The report also made recommendations on judicial reform. It highlighted the need to “urgently address the issue of staff capacity in the Division of Public Prosecutions” and to

⁴³ Republic of Kenya, Department of Public Prosecutions, “A Report to the Hon. Attorney General by the Team on the Review of Post Election Violence Related Cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces” (“Report to the Attorney General, 2009”) Nairobi, February 2009, <http://www.icc-cpi.int/iccdocs/doc/doc786008.pdf>, p. 40.

⁴⁴ *Ibid.*, p. 40.

⁴⁵ *Ibid.*, p. 41.

⁴⁶ A subsequent March 2011 Department of Public Prosecutions report claims that country-wide, there have been 94 convictions for post-election violence; 57 acquittals; and 179 withdrawn cases (totaling 330); and at least 62 additional cases pending before the courts. Yet 350 “concluded cases” are listed in the February 2009 report. The two reports may be based on different sets of statistics, but the fact that there are fewer concluded cases listed in the 2011 report suggests a lack of progress.

⁴⁷ Republic of Kenya, Department of Public Prosecutions, “Report to the Attorney General, 2009”, p. 14.

improve terms and conditions for State Counsel in order to attract highly-qualified civilian prosecutors.⁴⁸ While there was little progress in the specific cases identified in the report, some steps have been taken toward implementing these recommended reforms, discussed in Chapter IX below.

Police Investigation of Sexual Offences

The Waki Report leveled harsh criticism at the Kenyan police for its failure to investigate rape and other sexual offences committed during the violence.⁴⁹ Dozens of women had filed rape complaints with the police, but the complaints had not led to a single known prosecution.⁵⁰ On October 17, 2008, two days after the Waki Report was published, the police announced it was forming a task force to investigate sexual offences related to the election violence.⁵¹ The task force was to include female police officers, as well as lawyers and counselors from the Kenyan chapter of the Federation of Women Lawyers (FIDA).

FIDA, which had documented gang rape by men in police uniform as well as by civilians during the post-election violence, withdrew from the task force in November 2008, after being excluded from its planning.⁵² According to a FIDA representative, “The task force was a response to the outcry over the fact that police were not doing anything about victims of rape. We heard we were to be part of the task force, but we asked the police repeatedly for meetings and they were never convened. There was no willingness to work with us.”⁵³

The task force’s subsequent work has not been widely publicized. A Kenyan women’s rights activist told Human Rights Watch, “They went around meeting a few victims, but it lacked credibility.”⁵⁴ A representative of a health center that treated sexual violence victims complained to the press that the task force simply wrote to the center requesting the names of victims, which would have constituted a violation of clients’ privacy. Staff wrote back to explain they could not grant that request, but proposed meeting to discuss strategies to get victims to come forward voluntarily. The police never responded.⁵⁵

⁴⁸ Republic of Kenya, Department of Public Prosecutions, “Report to the Attorney General, 2009”, p. 42.

⁴⁹ CIPEV, pp. 399-404.

⁵⁰ Human Rights Watch interview with Ann Njogu, Chairperson, Center for Rights Education and Awareness (CREAW), Nairobi, September 9, 2011.

⁵¹ Eric Kiraithe, “Police Task Force to Investigate Rape Cases During the Post-Election Violence,” Kenya Police, October 17, 2008, <http://www.kenyapolice.go.ke/News136.asp> (accessed September 1, 2011).

⁵² “Fida pulls out of probe team,” *Daily Nation* (Nairobi), November 13, 2008; Bornice Biomndo, “Police linked to poll chaos rapes,” *Daily Nation* (Nairobi), November 14, 2008, <http://www.nation.co.ke/News/-/1056/491190/-/tm24ji/-/index.html> (accessed July 20, 2011).

⁵³ Human Rights Watch telephone interview with a representative of FIDA, September 1, 2011.

⁵⁴ Human Rights Watch interview with Ann Njogu, September 9, 2011.

⁵⁵ “Gang rape during the poll crisis,” *Capital News* (Kenya), January 9, 2009, <http://www.capitalfm.co.ke/news/2009/01/12/gang-rape-during-the-poll-crisis/> (accessed September 1, 2011).

The task force also visited different locations in Eldoret in December 2008 to identify victims of sexual violence. An officer on the team testified, in one of the few rape cases subsequently brought before the courts, “We told the IDPs [internally displaced persons] that we were looking for victims who were defiled or raped.”⁵⁶ That particular case resulted in an acquittal.

It is not clear whether the task force’s work resulted in any convictions. The Department of Public Prosecutions’ March 2011 report to the Attorney General lists 49 alleged rape and defilement convictions, but the list is almost wholly inaccurate, as discussed below.⁵⁷

The task force’s investigation did, however, result in a list of 66 complaints, which police submitted to the director of public prosecutions in 2009. Most complaints involved rapes allegedly committed by members of the security forces. According to Director of Public Prosecutions Tobiko:

The police had recommended, in almost all these cases, closure for lack of evidence, because they said the complainants had taken too long to complain, and that there were difficulties in identification because these were strangers—many victims just talked about uniformed men. Most of the files [the police] sent us had nothing more than a statement from the complainant. A team from the Directorate of Public Prosecutions analyzed the files, together with the sexual offenses law. All of the files were sent back to the police last year for further investigation. We disagreed with their assessment that the files should be closed. In some cases, victims contracted HIV or were impregnated through the rape; some had torn clothing or underpants which were not subjected to forensic analysis; some had cell phones stolen during the assault and those cell phones could have been tracked. In some cases, spent cartridges were found in the area.... The files haven’t been sent back to us yet.⁵⁸

⁵⁶ *Testimony from C.I. Grace Mwangi*, Eldoret Magistrate’s Court, CR 5976/08, case file consulted by Human Rights Watch, Eldoret, May 24, 2011.

⁵⁷ “A Progress Report to the Hon. Attorney General by the Team on Update of Post Election Violence Related Cases in Western, Nyanza, Central, Rift-Valley, Eastern, Coast and Nairobi Provinces,” (“Progress Report to the Hon. Attorney General 2011”), March 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1062628.pdf> (accessed September 24, 2011), annex 3 to *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua arap Sang*, ICC-01/09-01/11, “Filing of Annexes of Materials to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute,” April 21, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1062623.pdf> (accessed September 24, 2011).

⁵⁸ Human Rights Watch interview with Director of Public Prosecutions Keriako Tobiko, Nairobi, September 22, 2011.

Although the Department of Public Prosecutions was correct to send the files back to the police for further investigations, it is inexplicable that the work of a task force established in 2008 has, three years later, amounted to no more than one report to the Department of Public Prosecutions in 2009; one response from the Department of Public Prosecutions in 2010; and no further results as of September 2011. To date, no member of the security forces has been charged for election-related sexual assault, although CIPEV evidence suggests that at least 26 percent of women raped during the post-election violence were raped by police officers.⁵⁹

Failure to Create a Special Tribunal

The Waki Report called on the government to establish a special tribunal, staffed by Kenyan and international judges, prosecutors and investigators, with the mandate to prosecute crimes committed during the post-election violence. It stipulated that PNU and ODM should sign an agreement within 60 days of the report's publication to create such a tribunal, and that within an additional 45 days, a statute to establish the tribunal should be adopted.⁶⁰

Upon publication of its report, the Waki Commission delivered its list of alleged perpetrators, together with supporting evidence against them, to the Panel of Eminent African Personalities, led by former United Nations Secretary General Kofi Annan. The panel was to safeguard this evidence pending the establishment of a special tribunal; if a tribunal was not created, the panel was to turn the names and evidence over to the ICC prosecutor.

Kibaki and Odinga signed an agreement to this effect on December 16, 2008, stipulating that a Cabinet Committee would draft a bill. But the cabinet subsequently failed to take steps to enact a tribunal.⁶¹ A last-minute bill to amend the constitution so as to provide for a special tribunal was proposed by Martha Karua, then Minister of Justice, in late January 2009. However, a group of parliamentarians led by Gitobu Imanyara objected to the bill, purportedly on the grounds that politicians would interfere with a local tribunal, and that it would be preferable to shift responsibility to the ICC.⁶² Civil society groups also voiced

⁵⁹ CIPEV, p. 24. The CIPEV received evidence that 82% of victims of sexual violence did not file reports with the police; in 32% of these cases, the reason given was that the police themselves were the attackers.

⁶⁰ *Ibid.*, pp. 472-475.

⁶¹ Republic of Kenya, State House, "Special Tribunal to Be Set Up," Nairobi, December 17, 2008, <http://www.statehousekenya.go.ke/news/deco8/2008171202.htm> (accessed July 20, 2011).

⁶² Gitau Warigi, "Local tribunal or The Hague?" *Daily Nation* (Nairobi), January 31, 2009, <http://www.nation.co.ke/News/-/1056/522542/-/u1tuco/-/index.html> (accessed July 20, 2011).

objections, including the concern that the tribunal would not be sufficiently shielded from political influence.⁶³

The bill was voted down in parliament on February 12, 2009.⁶⁴ Kibaki asked Annan to allow more time for Kenya to establish a special mechanism, and the Kenyan government continued to assure the ICC that it would set up a local tribunal or other domestic judicial mechanism by September 2009 or, if that proved impossible, would refer the situation to the ICC itself.⁶⁵

On July 9, frustrated with Kenya's delaying tactics, Annan handed over a sealed envelope containing Waki's list of suspects to the ICC prosecutor, stating that "Justice delayed is justice denied." Newly-appointed Justice Minister Mutula Kilonzo brought a new draft bill before the cabinet, which would have amended the constitution to create a special tribunal.⁶⁶ But on July 30, following a cabinet meeting that discussed options for accountability, the government issued an obfuscating statement that rejected both a special tribunal and a referral to the ICC, saying, "The cabinet on Thursday rejected a local tribunal and instead settled on Truth, Justice and Reconciliation Commission (TJRC) to deal with post-election violence perpetrators.... 'This does not in any way reduce its desire to punish impunity', stated the President."⁶⁷

Civil society groups protested that the cabinet's decision amounted to doing nothing.⁶⁸ One group described the decision as an "act of subverting justice and indicative of a country that is regressing into a failed state."⁶⁹ A Kenyan legal scholar characterized the justice debate as "held hostage to the personal and political agendas of those with

⁶³ "Establishing a Special Tribunal for Kenya and the Role of the International Criminal Court: Questions and Answers," Human Rights Watch, March 25, 2009, http://www.hrw.org/sites/default/files/related_material/2009_Kenya_SpecialTribunal_o.pdf.

⁶⁴ 101 MPs voted in favor of the bill, while 93 voted against it. The threshold of votes to amend the constitution is 65 percent.

⁶⁵ International Criminal Court, Office of the Prosecutor, "Agreed Minutes of the meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan government," The Hague, July 3, 2009, <http://www.icc-cpi.int/NR/rdonlyres/6D005625-2248-477A-9485-FC52B4F1F5AD/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf> (accessed September 26, 2011).

⁶⁶ This draft was largely prepared by civil society organizations. Human Rights Watch telephone interview with a representative of the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), September 2, 2011, and with Member of Parliament Hon. Gitobu Imanyara, Nairobi, September 9, 2011.

⁶⁷ Republic of Kenya, Office of Public Communications, "Cabinet Decides on TJRC," July 30, 2011, <http://www.communication.go.ke/media.asp?id=940> (accessed July 20, 2011).

⁶⁸ International Center for Policy and Conflict, "Open Letter to President Mwai Kibaki and Prime Minister Raila Odinga," August 5, 2009, http://www.icpcafrica.org/site/index.php?option=com_content&view=article&id=118:letter-to-prime-minister-and-president-tjrc-and-special-tribunal&catid=31:general&Itemid=46 (accessed September 7, 2011).

⁶⁹ David Ohito, "How Cabinet killed tribunal," *The Standard* (Nairobi), July 31, 2011, <http://www.standardmedia.co.ke/archives/InsidePage.php?id=1144020506&cid=4&> (accessed July 20, 2011).

power,” motivated “not by the imperative to do justice for victims but by the threat a particular approach could pose to political interests in the country.”⁷⁰

Yet another attempt to legislate a local tribunal, the Constitutional Amendment Bill—this time proposed by member of parliament (MP) Gitobu Imanyara, who had led opposition to the Karua bill—stalled in November 2009 when MPs failed to turn up in Parliament, effectively killing debate on the bill. At a scheduled parliamentary hearing on the proposed legislation on November 11, 2009, only 18 out of 222 parliamentarians were present.⁷¹

Due to Kenya’s failure to establish a local mechanism or to refer the situation to the ICC, on November 26, 2009, ICC prosecutor Luis Moreno Ocampo requested leave from the court to investigate crimes against humanity in Kenya.⁷² The court authorized the investigations on March 31, 2010. In December 2010, Moreno Ocampo announced that he would seek summonses against six principal suspects: William Ruto, Henry Kosgey, and Joshua arap Sang on the ODM side, and Francis Muthaura, Uhuru Kenyatta, and Hussein Ali on the PNU side. “Confirmation of charges” hearings, to determine whether the prosecutor has sufficient evidence for the cases to proceed were held in September and October 2011; decisions in the two cases were expected by January 2012.⁷³

In a statement that proved to mark the beginning of concerted efforts to evade the ICC’s jurisdiction, President Kibaki announced on December 15—immediately following Moreno Ocampo’s naming of the six suspects—that “the government is fully committed to the establishment of a local tribunal to deal with those behind the post-election violence, in accordance with stipulations of the new constitution.”⁷⁴ At this writing, no fresh steps had formally been taken toward establishing a tribunal.

⁷⁰ Godfrey Musila, “Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions,” *International Journal of Transitional Justice*, October 8, 2009, vol. 3, no. 3, p. 459.

⁷¹ “Kenya MPs were decisive in rejecting local court,” *Daily Nation* (Nairobi), April 10, 2011, <http://www.nation.co.ke/News/politics/MPs+were+decisive+in+rejecting+local+court+/-/1064/1142230/-/dhml7bz/-/index.html> (accessed July 20, 2011). In December, MPs again failed to show up in Parliament to vote on the bill, demonstrating a lack of appetite for justice. See Caroline Wafula, “Kenya MPs shun debate on tribunal bill,” *Daily Nation* (Nairobi), December 2, 2009, <http://www.nation.co.ke/News/-/1056/816280/-/vnj80e/-/index.html>.

⁷² “ICC: Prosecutor Seeks OK on Kenya Inquiry,” Human Rights Watch news release, November 26, 2009, <http://www.hrw.org/news/2009/11/26/icc-prosecutor-seeks-ok-kenya-inquiry>.

⁷³ “Kenya: Q&A on Pre-Trial Hearing in First ICC Case,” Human Rights Watch news release, August 30, 2011, <http://www.hrw.org/news/2011/08/30/kenya-qa-pre-trial-hearing-first-icc-case>.

⁷⁴ Republic of Kenya, Office of Public Communications, “Statement by His Excellency the President Hon. Mwai Kibaki,” December 15, 2011, <http://www.communication.go.ke/media.asp?id=1246> (accessed September 13, 2011).

The Department of Public Prosecutions Report of March 2011

In March 2011 the Department of Public Prosecutions compiled a second report for the attorney general on the status of post-election violence cases, to update the 2009 report. Research for the report was conducted under time constraints in order to submit the report as evidence in Kenya's admissibility challenge before the ICC. In all, the report found that as of March 2011 there had been 94 convictions for post-election violence.⁷⁵

It is evident that the report was compiled hastily, with little concern for accuracy. Such a report could potentially be a useful tool for a future special mechanism, or simply for tracking the status of cases in the ordinary courts with an eye to making recommendations for improvement. But the report is riddled with errors. Most glaringly, a number of cases included in the report have nothing to do with the election violence. Vaunting convictions in ordinary criminal cases as evidence of success in combating impunity for post-election violence is either intentionally misleading or is the unintended outcome of sloppy work. The actual number of known post-election violence convictions is significantly lower than the report indicated.

The prominently featured chapter on sexual and gender-based violence (SGBV) is particularly problematic. Rather than demonstrating the authorities' concern for sexual violence victims, it showcases the opposite: an absolute lack of effort to be accurate on sexual violence cases. Four cases on the list of 49 alleged SGBV convictions actually resulted in acquittals, according to the list itself.⁷⁶ Two of the alleged "convictions on gender-based post-election violence cases" on the list involve men who "had carnal knowledge with a sheep."⁷⁷

Human Rights Watch investigated 17 of the remaining cases, by consulting files and interviewing police and judicial officials. Researchers found that three other alleged convictions were in fact either acquittals or convictions on lesser or entirely different charges. One of those cases was the only clearly election related sexual assault case on the list, and it resulted in an acquittal on the sexual assault charges, the conviction being for

⁷⁵ "A Progress Report to the Hon. Attorney General 2011," March 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1062628.pdf>, p. 70-72. The convictions included 50 in the Rift Valley, 7 in Western province, 25 in Nyanza province, 5 in Coast province, and 7 in Nairobi. The report further found that 57 cases had been acquitted; 179 had been withdrawn; 21 were pending the arrest of known persons; and at least 62 were pending before the courts, while 3386 cases were "pending under investigation." Of inquest files, 3 had been finalized and closed; 74 were "pending investigations"; and for 16 additional inquests, in Western province, the status was unclear.

⁷⁶ *Ibid.*, p. 21, cases 37-40.

⁷⁷ *Ibid.*, p. 17, cases 13 and 17.

robbery with violence.⁷⁸ At least nine of the gender-based violence convictions appeared, upon consultation of the court files, wholly unrelated to the elections.⁷⁹ At least three of the file numbers on the list were wrong.⁸⁰ Based on this research, it is unclear whether there has been a single conviction for post-election related sexual and gender based violence.

Apart from the sexual violence cases, also counted as successful convictions in the report are the following, among many other questionable additions to the list:

- On January 31, 2011, Andrew Moeche Omwenga killed ODM member of parliament David Too and police officer Eunice Chepkwony in Eldoret. Omwenga turned himself in and was subsequently convicted of manslaughter. But organizations familiar with the case said it was unrelated to post-election violence, but was a crime of passion related to a love triangle involving the perpetrator and the two victims.⁸¹ The judge reached the same conclusion.⁸²
- On January 1, 2008, Ben Pkiech Loyatum, an Administration Police officer, shot and killed his neighbor Robert Bagwasi Onsarigo. Loyatum was convicted in October 2010. However, the source of the conflict seemed to be an unpaid debt. No evidence suggested that the killing was related to the election violence.⁸³
- The report includes cases involving incidents that took place well outside the time frame relevant to the election violence, including an assault in 2006.⁸⁴
- A case listed as “robbery with violence,” in which the accused were “sentenced to death” according to the report, turned out to be an attempted rape case in which the accused were acquitted.⁸⁵

⁷⁸ *Republic v. Mohammed Nyangala*, Kakamega Magistrate’s Court, CR 221/08, resulted in an acquittal. In *Republic v. James Mbugua Ndungu, Raymond Munene Kamau*, the accused were convicted of robbery with violence, but acquitted of attempted rape. In *Republic v. Joseph Omukhulo*, Butere Magistrate’s Court, CR 35/08, the accused was sentenced to one year for “indecent act,” not ten years for rape, as claimed in the Department of Public Prosecutions report.

⁷⁹ See Appendix I.

⁸⁰ Kakamega CR 107/08 was a robbery case; Kakamega CR 913/08 was a stealing case; Butere CR 90/08 was a gambling case.

⁸¹ Human Rights Watch interviews with representatives of ICJ-Kenya, Nairobi, May 6, 2011, and with a representative of the KHRC, Nairobi, August 2, 2011.

⁸² Noah Chepleon, “Policeman Jailed for Ten Years Over MP’s Killing,” *Daily Nation* (Nairobi), October 29, 2009, <http://allafrica.com/stories/200910290723.html> (accessed November 27, 2011).

⁸³ *Republic v. Ben Pkiech Loyatum*, Eldoret High Court, HCCR 5/08. Case file consulted by Human Rights Watch, Eldoret, May 25, 2011. His appeal is currently in progress, filed at Eldoret Appeals Court as No. 389/10. The case is somewhat encouraging in that fellow police officers testified against Loyatum, demonstrating that police do not always cover up for their colleagues; but the same does not seem to hold true for cases that are in fact election-related.

⁸⁴ *Republic v. Nicholas Oyamo*, Eldoret Magistrate’s Court, CR 414/08, an assault case that filed in 2008, involving an incident that took place on April 28, 2006. Case file consulted by Human Rights Watch, Eldoret, May 24, 2011.

⁸⁵ *Republic v. John Kiragu and Another*, Naivasha Magistrate’s Court, CR 167/08. Case file consulted by Human Rights Watch, Naivasha, May 23, 2011.

- An assault case listed among the post-election violence convictions turned out to be a domestic violence incident, in which a man hit his ex-girlfriend during a dispute over money.⁸⁶

Of the convictions listed in the report that are in fact related to the violence, the majority were for minor offenses like “taking part in a riot” or “handling stolen property.” These convictions do not constitute credible evidence of the state’s attempt to deliver justice. Human Rights Watch looked for further evidence of convictions for serious crimes but found few. The only convictions Human Rights Watch identified for the serious crimes of murder and robbery with violence are discussed in Chapter VI, below.

Despite the sloppy nature of the report, its authors issued some worthy recommendations, including “continuous periodical review of these cases otherwise most files may lie unattended to without discovery thus denying the affected victims justice.” They recommended further review of cases with special attention to the Rift Valley.⁸⁷ The further review has not been undertaken.

Kenya’s Investigations of ICC Suspects

After ICC prosecutor Moreno Ocampo requested summonses for six suspects, factions within the Kenyan political elite initiated a campaign to circumvent the ICC. First, parliament moved to ask the government to withdraw from the Rome Statute, though the government did not act on the request.⁸⁸ Second, Kenya petitioned the United Nations Security Council to defer the ICC investigation for one year, on the grounds that ICC prosecutions were potentially divisive and could derail national reforms needed to pave the way for prosecutions in Kenya of the post-election violence.⁸⁹ The Security Council held informal consultations on the request, but came to no consensus that the cases threatened international peace and security.⁹⁰

⁸⁶ *Republic v. Lichuma Melchizedek*, Eldoret Magistrate’s Court, CR 457/08. Case file consulted by Human Rights Watch, Eldoret, May 24, 2011.

⁸⁷ “A Progress Report to the Hon. Attorney General 2011,” March 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1062628.pdf>, p. 77-78.

⁸⁸ Njeri Rugene, “Parliament pulls Kenya from ICC treaty,” *Daily Nation* (Nairobi), December 22, 2010, <http://www.nation.co.ke/News/politics/Parliament+pulls+Kenya+from+ICC+treaty/-/1064/1077336/-/6289v9/-/index.html> (accessed September 26, 2011).

⁸⁹ See Rome Statute of the International Criminal Court (Rome Statute), A/CONF. 183/9, July 17, 1998, entered into force July 1, 2002, art. 16. The article provides that a proceeding can be deferred if there is a threat to international peace and security.

⁹⁰ See “Observations and Recommendations on the International Criminal Court and the African Union,” Human Rights Watch news release, June 27, 2011, <http://www.hrw.org/node/99945>.

Third, Kenya filed an admissibility challenge before the ICC. It claimed that as a result of the adoption of its new constitution and other reforms, it was now capable of investigating the six suspects. However, the ICC rejected the challenge in May 2011, finding “no concrete evidence of ongoing proceedings before national judges” and holding that such a challenge could only succeed if the accused were facing similar charges in a national court at the time of the challenge.⁹¹

Kenya appealed the ICC’s decision, submitting new evidence claiming that fresh investigations into the six suspects were underway. According to the July 2011 submission, Kenyan police had interviewed 35 witnesses in the Rift Valley concerning the role of the six suspects in orchestrating violence, but had not yet found sufficient evidence to charge them before Kenyan courts.⁹² The ICC rejected the appeal in August.⁹³

These half-hearted efforts to pursue accountability in Kenya have translated into very little justice for victims. The specific weaknesses that plagued the few investigations and prosecutions that were brought forward are discussed below.

⁹¹ “ICC rejects Kenya’s admissibility challenge,” *The Hague Justice Portal Net*, May 31, 2011, <http://www.haguejusticeportal.net/eCache/DEF/12/758.html> (accessed September 13, 2011).

⁹² Letter from Francis Ndegwa Muhoro, Director of Criminal Investigations, to the Director of Public Prosecutions, July 1, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1093163.pdf> (accessed September 13, 2011), annex 1 to *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua arap Sang*, ICC-01/09-01, “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility,” July 4, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1093162.pdf> (accessed September 24, 2011).

⁹³ “Kenya: Q&A on Pre-Trial Hearing in First ICC Case,” Human Rights Watch news release, August 30, 2011, <http://www.hrw.org/news/2011/08/30/kenya-qa-pre-trial-hearing-first-icc-case>.

III. Government Prosecutions of “Priority” Cases and Other Serious Crimes: A Failure

Had Kenyan decision-makers truly intended to rely on the ICC or the proposed special tribunal to prosecute some election-related crimes, that would still not have explained away the striking absence of progress of cases in the ordinary courts.

While some cases crept forward in the ordinary courts, most never reached the courts at all. These included most of the government’s “priority cases,” in which the authorities were never able to identify or arrest suspects. No one has ever been arrested in the killings of Nahashon Mburu or District Irrigation officer Charles Keittany Korir, despite claims from former Police Commissioner Hussein Ali in March 2008 that investigations were complete “pending the arrest of suspects.”⁹⁴ Nor was anyone arrested in the burning of a house in Naivasha that killed 19 people; according to police, the house was burned by a mob and no witnesses were able to identify individual suspects.⁹⁵

Human Rights Watch conducted research into the prosecution of 76 cases that did reach the courts, most of them high-profile cases and cases involving serious crimes, in order to determine why so few of these cases resulted in convictions. The following section discusses the outcomes in some of these cases. Of these 76 cases, not one demonstrates any attempt to investigate those responsible for organizing and directing the violence, which should have been a top priority. None of the many local politicians suspected in the violence have been successfully prosecuted.

⁹⁴ Cyrus Ombati, “Kenya: Police Probe 9,000 Post-Election Violence Cases,” *The Standard* (Nairobi), March 21, 2008, <http://allafrica.com/stories/200803201131.html> (accessed September 13, 2011). In the Keittany Korir case, the March 2011 Department of Public Prosecutions report states, “The only identifying witness, Irene Korir Cheruto, has not recorded her statement due to resistance from her cousin, Mr. Japheth Tipis Cherotich, who vide his letter dated April 12, 2008, requested that the witness be allowed time to recover from the trauma.” “A Progress Report to the Hon. Attorney General 2011,” March 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1062628.pdf>, p. 32, with reference to Molo Cr. 711/34/08.

⁹⁵ Human Rights Watch interview with police official, Naivasha, May 23, 2011. The police case file number is Naivasha case No.764/41/08. This incident forms one part of the basis for charges sought by the ICC prosecutor against Francis Muthaura, Uhuru Kenyatta, and Mohammed Hussein Ali; see *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali*, “Document Containing the Charges,” August 19, ICC-01/09-02/11, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1207443.pdf> (accessed September 23, 2011), para. 70.

Acquittals and Withdrawals in Six High-Profile Cases

1. *Republic v. Stephen Kiprotich Leting & 3 Others (The Kiambaa Church Burning)*⁹⁶

On January 1, 2008, at least several hundred attackers set fire to the Assemblies of God church at Kiambaa farm in Eldoret, where Kikuyus were taking refuge from the violence. At least 28 were killed, and dozens more were injured.

The Criminal Investigation Department carried out prompt investigations, led by Superintendent of Police John Mwachai of CID's Nairobi branch. Police interviewed most of the Kiambaa survivors within a few weeks of the attack.⁹⁷ Based on the interviews, police opened a case file charging four suspects, Stephen Kiprotich Leting, Emmanuel Kiptoo Lamai, Clement Kipkemei Lamai, and Julius Nyongio Rono, with murder. Apparently, police were initially working from a list of about 20 suspects, and several others apart from the four charged were arrested in March 2008, but were released without charge.⁹⁸

Victims knew a number of their attackers, whom they described as a band ranging from several hundred to several thousand people, including some of their Kalenjin neighbors as well as persons brought in from elsewhere.⁹⁹ They found it difficult to understand why some suspects named in interviews with the police were never arrested. According to one victim, several suspects that she named fled the area at the time. However, she said, "When the others were acquitted, they came back. But the police never followed any others apart from the four who were taken to court."¹⁰⁰

On April 30, 2009, the Nakuru High Court acquitted the four following a trial.¹⁰¹ The judge found that Emmanuel Kiptoo Lamai, according to witness testimony, was helping people at the scene; no one who testified before the court had seen him involved in acts of violence. The prosecutor did not present a single witness to testify against Clement Kipkemei Lamai, and eventually conceded he had no evidence against him.¹⁰² Leting and Rono presented alibi defenses, which the prosecution failed to challenge; further, the judge found the witness testimony implicating Leting and Rono to be unreliable.

⁹⁶ *Republic v. Stephen Kiprotich Leting & 3 Others*, Nakuru High Court, HCCR 34/2008. Court file consulted by Human Rights Watch, Nakuru, August 22, 2011.

⁹⁷ Human Rights Watch interviews with Kiambaa survivors, Rironi IDP camp, April 26, 2011.

⁹⁸ *Republic v. Stephen Kiprotich Leting & 3 Others*, witness testimony.

⁹⁹ During Human Rights Watch interviews with Kiambaa survivors immediately after the attack, in January 2008, survivors also spoke of recognizing their neighbors among the attackers. See Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*, March 2008, <http://www.hrw.org/reports/2008/03/16/ballots-bullets>, p. 41.

¹⁰⁰ Human Rights Watch interview, Eldoret, May 26, 2011.

¹⁰¹ *Republic v. Stephen Kiprotich Leting & 3 Others*, judgment, April 30, 2009.

¹⁰² *Republic v. Stephen Kiprotich Leting & 3 Others*.

A lawyer interviewed by Human Rights Watch said the case was characterized by “shoddy investigations,” a statement echoed in the court’s judgment.¹⁰³ Police failed to get Kalenjin witnesses to testify. The judge pointed out that in addition to flawed evidence against the four suspects, the prosecution presented no theory concerning the planning of the attack, or how the suspects might have been involved in it. He noted:

At about 10:00 a.m. on 1/1/2008, the Church was raided by a gang of about 4,000 marauding youths whose faces were smeared with chalk and were armed with machetes, spears, arrows and bows and all manner of crude weapons. They slashed and hacked to death anyone they found outside the Church and set it on fire thus killing many more. This was obviously a planned attack. But there is not even a whiff of that plan in this case. There is no indication that the police ever investigated that aspect of the case and yet in my view, as I have said, that should have been the core of their investigations. We are told that up to 4,000 raiders attacked the Church and killed about 30 people, including the deceased in this case. We have only four suspects in court. Where are the others?¹⁰⁴

The rush to try the case may have inhibited efforts to arrive at a prosecution theory that explained how the attack was planned. One police officer testified that police recorded about 5,000 statements.¹⁰⁵ The two months between when the statements were taken and the opening of judicial proceedings may have been inadequate for police to sort through 5,000 statements, find corroborating evidence, and build a case.

For the Kiambaa survivors, the fact that no one has been convicted of the crime is an emblem of injustice. One victim said, “It seems as if the people of Kiambaa have been forgotten. As if the whole incident has been buried.”¹⁰⁶ Anthony Ng’ang’a, the chairperson of a group of displaced people from the Kiambaa survivors, told Human Rights Watch he found the accused’s certainty that they would be released to be suspicious: “You end up asking yourself, is it politics or is it justice, or what is going on? The suspects told us before the trial that they were sure they would be released and that we could not come

¹⁰³ Human Rights Watch interview with a lawyer, Nakuru, August 22, 2011; *Republic v. Stephen Kiprotich Leting & Three Others*, judgment.

¹⁰⁴ *Republic v. Stephen Kiprotich Leting & 3 Others*, judgment. A lawyer familiar with the case seconded this criticism, stating, “A thousand people don’t just wake up and decide to attack a church.” Human Rights Watch interview, Nakuru, August 22, 2011

¹⁰⁵ *Republic v. Stephen Kiprotich Leting & 3 Others*, testimony of prosecution witness 24, S.P. Prosper Bosire.

¹⁰⁶ Human Rights Watch interview, Rironi, April 26, 2011.

back to our land.”¹⁰⁷ One impact of the lack of justice is that many survivors are still afraid to return home; they recognize that their attackers remain in the area, enjoying complete impunity. While the Kiambaa church burning forms a part of the charges the ICC prosecutor is seeking against Ruto, Kosgey, and Sang,¹⁰⁸ these statements point to the importance of additional prosecutions in Kenya to target lower and mid-level perpetrators.

2. *Republic v. Jackson Kibor*¹⁰⁹

Jackson Kibor, an ODM politician, was arrested on February 20, 2008, and charged with incitement to violence. In a January 31, 2008, interview with the BBC, Kibor, recognized as an opinion leader in Eldoret, declared “war” against Kikuyus and promoted their removal from the area.¹¹⁰ Kibor was released on bond on February 28. The case was to proceed to trial, but on April 6, 2009, the attorney general’s office withdrew the charges.

The withdrawal of charges, known as a *nolle prosequi*, does not require any official justification from the state.¹¹¹ However, a lawyer in Eldoret told Human Rights Watch that the case was withdrawn in part because the prosecution never submitted into evidence the recording of the BBC interview.¹¹² A judicial official also told Human Rights Watch the withdrawal of the Kibor case was based on the absence of the BBC footage. He said the responsibility to obtain the footage lay with police investigators.¹¹³ However, Human Rights Watch found that the police did have access to the footage, which remained posted on BBC’s website throughout the period during which the Kibor case was in the courts.¹¹⁴ Director of Public Prosecutions Tobiko told Human Rights Watch the case was withdrawn because the British government did not respond to a request that the BBC journalist return to Nairobi to testify. He had not explored other possibilities for introducing the evidence,

¹⁰⁷ Human Rights Watch interview with Anthony Ng’ang’a, Rironi IDP chairperson, April 26, 2011.

¹⁰⁸ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua arap Sang*, ICC-01/09-01/11, “Document Containing the Charges,” paras. 81-86.

¹⁰⁹ *Republic v. Jackson Kibor*, Nakuru Magistrate’s Court, CR 96/08.

¹¹⁰ In Kibor’s words, “People had to fight Kikuyus because Kibaki is a Kikuyu.... We will not sit down and say one tribe lead Kenya. We will fight. This is a war. We will start the war. One tribe cannot lead the other 41 tribes. This is a war. Now we’re fighting for power.... We will not let [Kikuyus] come back again, because they are thieves. We will never let them come back.... We will divide Kenya.” A Kalenjin youth interviewed in the same broadcast, who confessed to participating in the Kiambaa church burning, told the journalist that perpetrators of violence were taking cues from the elders: “We as young men, our culture, we don’t go over what somebody ... an elder tells us. If the elder say no, we step down, but if our elders say yes, we will proceed.... I do it because it is something that has been permitted from our elders.” Pascale Harter, “Assignment,” *BBC World Service*, January 31, 2008.

¹¹¹ Criminal Procedure Code, *National Council for Law Reporting*, Chapter 75 of the Laws of Kenya, 2008, revised 2010, <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/CriminalProcedureCodeCap75.pdf>, section 82(1); Constitution of the Republic of Kenya, *National Council for Law Reporting*, 1963 (Amended through 2008), section 26(3).

¹¹² Human Rights Watch interview with a lawyer, Eldoret, May 27, 2011.

¹¹³ Human Rights Watch interview with a government official, May 2011 (date and location withheld).

¹¹⁴ Email communication from BBC to Human Rights Watch, July 19, 2011.

such as through a BBC official other than the journalist.¹¹⁵ Nothing in Kenya’s Evidence Act prevents the introduction of audio material in the absence of the person who recorded it.¹¹⁶

Kenyan law permits prosecutors to reinitiate cases that have been withdrawn due to lack of evidence—an option for the Kibor case, either under a special mechanism or in the ordinary courts.¹¹⁷

3. *Republic v. Edward Kirui*¹¹⁸

On January 16, 2008, a journalist from Kenya Television Network (KTN), while filming anti-Kibaki demonstrations in Kondele, a Kisumu neighborhood, captured footage of a police officer shooting two unarmed protestors, George William Onyango and Ismail Chacha. Both young men died as a result of the shootings.¹¹⁹

The footage was shown on KTN’s evening news. Police spokesperson Eric Kiraithe initially dismissed it as computer generated, equating it to a “Rambo movie.”¹²⁰ But when Onyango’s brother spoke out about the killing at a press conference, police were forced to take the matter more seriously. Police constable Edward Kirui was arrested on the basis that he was identified in the video.

The case went to trial in April 2008, and was concluded in February 2009. The prosecution presented eyewitness testimony from persons present at the crime scene who recognized Kirui as the shooter.¹²¹ Further, two police officers, including Chief Inspector Hansent Kaloki, the Officer Commanding Station at Kondele at the time of the shooting, testified that they recognized Kirui in the video footage. The KTN footage was presented in court as evidence.

However, on June 21, 2010, Kirui was acquitted. Kenyan civil society organizations have attributed the acquittal to police tampering with the evidence.¹²² According to testimony

¹¹⁵ Human Rights Watch interview with Keriako Tobiko, Nairobi, September 22, 2011.

¹¹⁶ Evidence Act, *National Council for Law Reporting*, Chapter 80 of the Laws of Kenya, revised 2009.

¹¹⁷ Criminal Procedure Code, section 82(1).

¹¹⁸ *Republic v. Edward Kirui*, Nairobi High Court, HCCR 9/08.

¹¹⁹ The KTN footage is available at <http://www.youtube.com/watch?v=vcJqA2bdlyc> (accessed July 18, 2011).

¹²⁰ Human Rights Watch interview with a lawyer, Kisumu, May 11, 2011.

¹²¹ *Republic v. Edward Kirui*, ruling. See also testimony of Prosecution Witness 1, http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=21176940175128656206330 (accessed July 18, 2011).

¹²² In a briefing paper circulated by ICJ-Kenya, the organization argued: “One critical question omitted by the judge is whether the prosecution was negligent. Why did they fail to see the obvious ‘mistake’? In any case, the prosecution’s case was based on the firearm! If this matter is to be put to rest and justice is to be served, these questions ought to be answered. Past experiences, and in particular this case, has proved that the police cannot be left to investigate themselves. It is only fair that an independent inquiry ought to be instituted, with a clear objective of answering the above questions. The aim

from the state firearms examiner, the bullets removed from Onyango's and Chacha's bodies were traced to an AK-47 rifle with the serial number 3008378; but police sergeant Isaac Serem produced in court a log book claiming that a rifle with the serial number 23008378 had been issued to Kirui on the day of the shootings.¹²³

According to ICJ-Kenya, the case is “a classic case of police officers tampering with the evidence in order to cover up for their colleague.”¹²⁴ One lawyer interviewed argued that rather than acquitting Kirui, the judge should have charged the police with contempt of the court and ordered investigations into the possible tampering with evidence.¹²⁵

*4. Republic v. Paul Kiptoo Barno, James Yutor Korir, and Isaiah Kipkorir Leting: The Killing of Benedict Omolo and Elias Wafula Wakhungu*¹²⁶

On January 1, 2008, police and a district administration official set off in a pickup truck to attempt to disperse violent mobs in the Cheptiret area of Eldoret. The group included the district officer of Kesses Division, Benedict Omolo; three police officers, Chief Inspector Elias Wafula Wakhungu, Administration Police officer Joseph Biwott, and Administration Police constable Job Kipkorir Yegor, who was serving as Omolo's driver; and National Security and Intelligence Service Officer Benjamin Koech. At Chebii Primary School, they confronted one such mob, which was blocking the road.

According to testimony presented in court, the mob attacked the vehicle. Police fired into the air, injuring a young man in the crowd, Thomas Tendeni, with a stray bullet.¹²⁷ The driver, Yegor, was struck by an axe and by arrows, but survived. Biwott was also assaulted with various crude weapons before running away. Koech managed to escape uninjured. Omolo and Wafula were mortally wounded by arrows and machetes. Yegor, Biwott, Omolo and Wafula were all robbed of their guns during the attack; attackers also stole Yegor's mobile phone.

would be to prosecute those responsible for any foul play if it is established that there was one.” ICJ-Kenya, “Republic v. Edward Kirui: A Classic Case of Evidence Tampering?” unpublished briefing paper, 2010.

¹²³ *Republic v. Edward Kirui*, ruling.

¹²⁴ ICJ-Kenya, amicus curiae brief submitted to the ICC, April 27, 2011, <http://212.159.242.181/iccdocs/doc/doc1064920.pdf> (accessed July 18, 2011).

¹²⁵ Human Rights Watch interview with a lawyer, Nairobi, May 3, 2011.

¹²⁶ *Republic v. Paul Kiptoo Barno, James Yutor Korir, and Isaiah Kipkorir Leting*, Eldoret Magistrate's Court, CR 387/08. Case file consulted by Human Rights Watch, Eldoret, May 23, 2011.

¹²⁷ *Ibid.* It was not clear whether the shooting of the young man precipitated the attack on the officials, or whether it occurred in the course of police response to the attack.

Later the same day, according to police testimony, the crowd handed over two of the stolen guns to “two Kalenjin police officers.”¹²⁸ The other guns were found on the roadside.¹²⁹

Three suspects were arrested. One, Paul Kiptoo Barno, was found in possession of Yegor’s missing phone. According to police testimony, the two other suspects were arrested because they were “among the group chasing the vehicle.”¹³⁰

Both the police investigations and the police prosecution case were riddled with holes. The two “Kalenjin officers” who retrieved guns from the crowd were never named during the trial or summoned to testify, and no evidence was presented to suggest police made any effort to identify those in the crowd who handed over the guns, nor did they take fingerprints.

Police were vague in their testimony as to the recovery of the mobile phone, explaining only that they “received information” that Barno had it. No fingerprints from the phone were presented in court, nor were records of its usage between January 1 and Barno’s arrest on February 17. Barno’s explanation, that he found the telephone on the ground, was never challenged. Police brought no witnesses to testify against the second and third accused, and no evidence was presented as to how they had been identified at the scene. According to police testimony, Tendeni, the man in the crowd who was shot, “recorded a statement but refused to come testify.” His statement was not presented in court and court records do not indicate that he was summoned to give evidence.

A further problem lies in the investigating officer’s choice of charges to file. The immediate handing over of the guns, along with the context of the attack, makes clear that the attack was not intended as a robbery. It should have been qualified as murder, which would have resulted in the case being prosecuted before the High Court by a State Counsel rather than police prosecutors, who have significantly less training.

An Eldoret lawyer who had followed the case told Human Rights Watch, “The case was poorly prosecuted... the evidence lacked corroboration. For instance, the police did not get a statement from the fellow who reported to them that the suspect had the victim’s

¹²⁸ Testimony of Chief Inspector Charles Mutua, *Republic v. Paul Kiptoo Barno, James Yutor Korir, and Isaiah Kipkorir Leting*.

¹²⁹ *Ibid.*

¹³⁰ Testimony of Police Superintendent Sammy Musyoka, then Division Criminal Investigations Officer for Nandi North, *Republic v. Paul Kiptoo Barno, James Yutor Korir, and Isaiah Kipkorir Leting*.

phone.”¹³¹ A magistrate confirmed that the acquittal was the result of “shoddy investigations.”¹³²

All three suspects were acquitted in September 2008. The magistrate ruled that of the 16 witnesses produced by the prosecution, none of them produced evidence linking the accused to the deaths of Omolo and Wafula. She faulted the prosecution for bringing the matter to court without carrying out proper investigations.¹³³

*5. Republic v. Francis Kipn'geno and Others: The Killing of Administration Police Officer Hassan Omar Dado*¹³⁴

On January 31, 2008, a mob attacked the administrative and police offices in Ainamoi, a small town outside of Kericho. The attack immediately followed news of the killing of Ainamoi Member of Parliament David Too, shot in Eldoret the same day in an incident wrongly interpreted by Too's supporters as an election-related assassination.¹³⁵

The initial motive of the attackers, according to a lawyer familiar with the case, may have been to steal guns from the armory located within the district offices. However, police responded by firing on the crowd, killing at least one member of the mob and injuring others.¹³⁶ In response, the mob set upon an Administration Police officer at the scene, Hassan Omar Dado. They chopped him to pieces with machetes and torched his remains, leaving his body burned beyond recognition.¹³⁷ The attackers also injured another police officer, Paul Chumo, and the local chief, Richard Bett. They burned down the district office, damaged other administration buildings, and stole one firearm from Chumo.

Suspects were arrested on February 6. According to a lawyer, police simply rounded up those who were hospitalized after being shot during the confrontation. They were charged with robbery with violence, although, as in the case above, a murder charge may have been more appropriate and may have allowed for a stronger prosecution. When the case went to

¹³¹ Human Rights Watch interview with a lawyer, Eldoret, May 27, 2011.

¹³² Human Rights Watch interview with a judicial official, Eldoret, May 24, 2011.

¹³³ Article reproduced on the website of Mars Group, a Kenyan organization, untitled and undated, http://www.marsgroupkenya.org/multimedia/cache/cache_c21f969b5f03d33d43e04f8f136e7682_288ac3476540ab94152fdbc0ccbo2662 (accessed November 2, 2011).

¹³⁴ *Republic v. Francis Kipn'geno and Others*, Kericho Magistrate's Court, CR 86/08. Case file consulted by Human Rights Watch, Kericho, May 13, 2011.

¹³⁵ Human Rights Watch interview with a lawyer, Kericho, August 24, 2011.

¹³⁶ Sollo Kiragu, Cosmas Butunyi, Barnabas Bii and Kennedy Masibo, “Ten die in protests over shooting of Ainamoi MP,” *Daily Nation* (Nairobi), February 4, 2008, <http://allafrica.com/stories/200802040114.html> (accessed November 2, 2011); “Lynch mob hacks Kenyan policeman to death,” *The Times Online*, February 2, 2008, <http://updatesonkenya.blogspot.com/2008/02/breaking-news-progress-on-peace-talks.html> (accessed November 2, 2011).

¹³⁷ *Republic v. Francis Kipn'geno and Others*.

trial, the prosecutor presented no evidence to link any of the suspects to the killing of Dado, the assault on Chumo, or the theft of his firearm. Only one suspect was convicted, Joseph Cheruiyot Sawe, based on evidence that he had assaulted Richard Bett. He was convicted of simple assault and was released after paying a fine. An Ainamoi resident interviewed by Human Rights Watch questioned the light sentence, noting that Bett suffered a serious machete wound and had developed epilepsy as a result of his injuries.¹³⁸

6. The Killing of Father Michael Kamau

Father Michael Kamau, a Kikuyu priest, was killed by a mob armed with bows and arrows at Muserechi, in Eldama Ravine district, on January 26, 2008. His killing shortly followed that of District Officer Charles Keittany Korir in Molo on January 22, for which no one was arrested. According to a police officer,

Kikuyus were suspected. Between the 22nd and the 26th, another woman and her sons, Kikuyus, were killed on Eldoret-Nakuru Highway as vengeance for [Korir's killing]. No one was killed in this area before. If it was just about politics, they would have killed many more people, but the killing of the priest, like the lady, was about revenge.¹³⁹

According to police investigations, Father Kamau was giving a lift to two Kikuyus seeking to flee the North Rift. His vehicle arrived at a road block, where the assailants checked their identification papers. When the assailants saw that Kamau and his passengers were Kikuyus, they started shooting them with arrows. Kamau was killed, while one passenger escaped; the other was seriously injured and hospitalized for a year. Both passengers later told police they could not identify the assailants.

Police arrested 17 men who were manning a roadblock in the area where Father Kamau was killed. However, they were unable to provide evidence linking any of the 17 to the murder. The attorney general's office withdrew the case on the basis of lack of evidence.¹⁴⁰

Acquittals and Withdrawals in Other Serious Cases

Most other serious cases, including murder, robbery with violence, and rape, also resulted in acquittals.

¹³⁸ Human Rights Watch interview, Ainamoi, August 26, 2011.

¹³⁹ Human Rights Watch interview with a police official, Rift Valley province, April 28, 2011.

¹⁴⁰ Ibid.

In several rape cases acquittals hinged on identification. Such was the case in *Republic v. Erick Kibet Towett and Simion Kipyegon Chepkwony*, in which the suspects were accused of gang rape and robbery with violence in Kericho District on December 31, 2007. Because the rape victim did not provide the names of any suspects in her first statement to the police, and only named them in a later statement, the judge ruled that the identification process was unclear.¹⁴¹

Similarly, in *Republic v. Julius Cheruiyot Kogo*, a rape case in Eldoret, the court acquitted the accused because when the victim first reported the rape, she did not provide the suspect's name.¹⁴² The victim told Human Rights Watch that she knew the suspect by appearance, only learning his name later, and that she could have identified him if a line-up had been held. She did not understand why he was not convicted. Her father told Human Rights Watch, "We can't return to Nandi now, because there is no justice. How can we live with the people who did this?"¹⁴³

No security officers were charged with rape, despite numerous attempts by victims to report such rapes.¹⁴⁴ Police spokesperson Kiraithe told the media that "a lot of allegations during that period against security personnel were mere propaganda."¹⁴⁵

Few murder cases made it to the courts. One that did was *Republic v. Abraham Karonei and Robert Kamaiyo Tanui*. The suspects were accused of killing Evanson Ndungu Karanja, a Kikuyu who had run for councilor in Kesses Division. Karanja was attacked by a mob armed with clubs, arrows, and spears on December 31, 2007. Neighbors took Karanja, still alive but severely injured, to a police camp, where he died during the night. After his family brought the body home the following day, the house was set on fire, and Karanja's body burned. Despite eyewitness testimony placing both suspects at the scene of the killing, they were acquitted, in part because police failed to tender evidence—including DNA tests, although they had been carried out—documenting the cause of death and the victim's identity.¹⁴⁶

¹⁴¹ *Republic v. Erick Kibet Towett and Simion Kipyegon Chepkwony*, Kericho Magistrate's Court, CR 66/08. Case file consulted by Human Rights Watch, Kericho, May 13, 2011.

¹⁴² *Republic v. Julius Cheruiyot Kogo*, Eldoret Magistrate's Court, CR 5976/08. Case file consulted by Human Rights Watch, Eldoret,

¹⁴³ Human Rights Watch interviews with a rape victim and her father, Langas, October 19, 2011.

¹⁴⁴ Human Rights Watch interview with Ann Njogu, September 9, 2011.

¹⁴⁵ "Rights Groups Accuse Kenya Police of Raping Women in 2007," *Voice of America*, May 15, 2009, <http://www.voanews.com/english/news/a-13-2009-05-15-voa27-68801252.html> (accessed September 12, 2011).

¹⁴⁶ *Republic v. Abraham Karonei and Robert Kimaiyo Tanui*, Eldoret High Court, HCCR 15'B/2008. Court file consulted by Human Rights Watch, Eldoret, May 27, 2011; Human Rights Watch interview with an Eldoret-based lawyer, Eldoret, May 27, 2011.

In Nakuru district, a murder case, *Republic v. Peterson Geteri and Three Others*, was withdrawn with no explanation.¹⁴⁷ Peterson Geteri, Denis Moranga Nyambune, Stephen Onserio Nyawaya (alias Kinyaga), and Dominic Mogaka Ondera, all apparently Kisiis, were charged with killing James Kigen, a Kalenjin, in Barina sub-location on January 17, 2008. The killing followed lootings of Kisi houses by Kalenjin mobs. According to a local chief, the perpetrators may have suspected Kigen of having been involved, although when the police investigated the case they did not find any looted property in Kigen's possession. The attackers caught up with him as he was walking home from a local bar. They killed him with machetes, slicing most of the flesh off his leg.¹⁴⁸

The four suspects were arrested on the basis of eyewitness testimony, and the Nakuru High Court began hearings in the case in April 2008. Several witnesses testified. However, in the middle of the prosecution case, the attorney general ordered that the charges be withdrawn.

Kigen's brother told Human Rights Watch, "I went once to testify about the post-mortem which I had observed. The rest of the hearings I didn't hear about, and then ... I was astonished to see the accused walking around. I never got an explanation." Kigen's family also never received the compensation that the government provided to some victims of post-election violence.¹⁴⁹

In Kitale, two robbery with violence cases were brought before the court, but one was withdrawn because the complainants failed to appear in court; the other, a mob attack, resulted in an acquittal due to lack of specific evidence against the two suspects who had been apprehended.¹⁵⁰

Convictions in High-Profile and Serious Cases

The refrain often heard from Kenyans frustrated with ongoing impunity is that "No one has been convicted in Kenya for post-election violence." This is not quite true; there have been at least six successful convictions for relatively serious crimes, in some cases due to solid police investigations and assiduous work on the part of prosecutors. But convictions are

¹⁴⁷ *Republic v. Peterson Geteri & 3 Others*, Nakuru High Court, HCCR 12/08. Court file consulted by Human Rights Watch, Nakuru, April 29, 2011.

¹⁴⁸ Human Rights Watch interview with area chief, Barina, October 19, 2011.

¹⁴⁹ Human Rights Watch interview with victim's brother, Barina, October 19, 2011.

¹⁵⁰ *Republic v. David Temoi alias Kangata, Moses Sigoe Cheptot*, Kitale Magistrate's Court, CR 958/08, and *Republic v. David Ndiema and 8 Others*, Kitale Magistrate's Court, CR 248/08. Court files consulted by Human Rights Watch, Kitale, October 21, 2011.

few and far between, serving as the exception that proves the rule. The only serious crimes for which Human Rights Watch was able to document convictions are the following.¹⁵¹ Most involve ODM-affiliated suspects, and one of two murder convictions is for the killing of police officers. PNU-affiliated suspects, and police officers whom themselves committed crimes, are largely absent from the short list of convictions.

*1. Republic v. Robert Kipngetich Kemboi and Kirkland Kipngeno Langat: The Killing of Police Officers Peter Githinji and David Odhiambo*¹⁵²

In one of the few post-election violence-related murder cases that resulted in a conviction, Robert Kemboi and Kirkland Langat were convicted in the murder of two police officers, Peter Githinji and David Odhiambo in Bureti district, on December 31, 2007.

Githinji and Odhiambo were escorting the vehicle of a private citizen, Paul Kirui Wachira, from Kisii to Kericho when they encountered a mob at Roret, a trading center in Bureti. The mob stoned the vehicle and its passengers. Wachira was knocked unconscious. Githinji and Odhiambo were killed, their firearms stolen in the course of the attack.

Two suspects—Kemboi and Langat—were caught the following day. They were part of a mob that attempted to attack the home of local politician Richard Cheruiyot. Cheruiyot’s supporters caught four members of the mob and locked them in a room in Cheruiyot’s compound. After Cheruiyot released them, he found one of the stolen firearms stashed in the room, leading to the arrest of two of the men who had been confined there. A mobile phone belonging to Wachira was also traced to Kemboi. Kemboi did not offer a reasonable explanation as to how he had come into possession of the phone.

The judge found that circumstantial evidence, based on links between the two suspects and the guns and cell phone taken from the scene, was sufficient to convict them of murder, and sentenced them to death. President Kibaki subsequently converted all death sentences to life imprisonment.¹⁵³ An appeal filed by the accused is pending before the Appeals Court at Nakuru.

¹⁵¹ Human Rights Watch researchers did not have the capacity to investigate all crimes prosecuted in courts throughout Kenya. Specifically, we have not been able to investigate claims in the Attorney General’s report that incidents of sexual violence resulted in convictions in locations outside the thirteen jurisdictions visited by Human Rights Watch researchers. However, the fact that many of the sexual violence cases we investigated in the jurisdictions we focused on proved not to be related to post-election violence raises questions about the inclusion of these cases in the list.

¹⁵² *Republic v. Robert Kipngetich Kemboi and Kirkland Kipngeno Langat*, Kericho High Court, HCCR 24/08, now filed as Criminal Appeal 310/09 at Nakuru Court of Appeals. Court file consulted by Human Rights Watch, Nakuru, August 22, 2011.

¹⁵³ Human Rights Watch opposes the death penalty under all circumstances.

2. *Republic v. John Kimita Mwaniki*¹⁵⁴

The June 2011 conviction of John Kimita Mwaniki of murder stands out as the only election-related murder conviction of a Kikuyu. The murder for which Kimita was convicted was committed on November 27, 2007, and the case does not figure on the various police and Department of Public Prosecutions lists. However, the murder took place in the context of pronounced pre-election violence between Kikuyus and Kalenjins in Molo, Rift Valley province, where at least 10 people were killed in the lead-up to the elections. Kimita was convicted of being part of a group that killed Rose Chemutai and two five year old boys, Reuben Kipn'geno and Shadrack Kipkoech. Witnesses testified that they saw Kimita with a gun during the attack, accompanied by other men wielding machetes. Two victims died from gunshot wounds, while the third died from a cut to the head. The accused provided contradictory testimony regarding his alleged whereabouts the day of the attack. He was convicted and sentenced to 30 years in prison. He has since appealed his conviction; appeal proceedings are ongoing at this writing.

3. *Republic v. Charles Kipkumi Chepkwony*¹⁵⁵

While not a high-profile case, this is one of only three known convictions for the serious crime of robbery with violence. Chepkwony was convicted in May 2009 of being part of a group that attacked Wilson Soi Wanyama and his family and stole their cattle in Kipkelion District on January 28, 2008. At trial, Wanyama, who was shot with an arrow during the attack and survived, and several other family members testified that they had recognized Chepkwony, a neighbor, among the mob. Chepkwony's appeal was dismissed in November 2010.¹⁵⁶

4. *Republic v. James Mbugua Ndungu and Raymond Munene Kamau*¹⁵⁷

During the post-election violence, groups of men carried out a series of sexual and gender-based attacks. Some groups were attacking and undressing women who wore trousers (rather than skirts). The men carrying out such attacks may have been affiliated with Mungiki, whose traditional ideology, by some accounts, included a prohibition on women wearing trousers.¹⁵⁸

¹⁵⁴ *Republic v. John Kimita Mwaniki*, Kericho High Court, HCCR 24/08.

¹⁵⁵ *Republic v. Charles Kipkumi Chepkwony*, Kericho Magistrate's Court, CR 101/08, appealed at Nakuru Appeals Court as HCCR A30/09. Court file consulted by Human Rights Watch, Kericho, May 13, 2011.

¹⁵⁶ Human Rights Watch interview with registry staff, Nakuru Appeals Court, Nakuru, August 22, 2011.

¹⁵⁷ *Republic v. James Mbugua Ndungu and Raymond Munene Kamau*, Naivasha Magistrate's Court. Police file 764/44/08 consulted by Human Rights Watch, Naivasha, October 18, 2011.

¹⁵⁸ L. Muthoni Wanyeki, "Lessons from Kenya: Women and the Post-Election Violence," *Feminist Africa*, Issue 10, August 2008, <http://www.feministafrica.org/uploads/File/Issue%2010/standpoint%202.pdf> (accessed November 23, 2011).

In Naivasha, two men, James Mbugua Ndungu and Raymond Munene Kamau, were convicted of robbery with violence—but acquitted of attempted rape—in a case in which they were charged of removing a woman’s trousers, touching her genitals, and stealing her money. The judge ruled that there was no evidence they had intended to rape the victim.

*5. Republic v. Willy Kipngeno Rotich and 7 Others*¹⁵⁹

In the only other conviction Human Rights Watch identified for robbery with violence, the crime in question was less serious than many that took place during the post-election violence. Willy Kipngeno Rotich and seven other men were convicted of robbing cash and other property from a victim in Sotik, while threatening to use violence. The suspects were known to the complainant and his wife, and were arrested immediately after the incident. Human Rights Watch was unable to ascertain their sentence based on the court file.

6. Republic v. Peter Ochieng

According to a police prosecutor interviewed by Human Rights Watch, in Nakuru, Peter Ochieng, a Luo, was convicted of grievous harm and sentenced to ten years imprisonment. He was accused of setting fire to his wife, a Kikuyu, during the post-election violence. His wife survived the attack.¹⁶⁰

Cases Pending Before the Courts

Few significant post-election violence cases remain pending before the courts. Human Rights Watch was able to identify two pending murder cases related to the post-election violence, one pending inquest, and one pending rape case, although there may be other pending cases in jurisdictions where Human Rights Watch did not conduct research.

Republic v. Joseph Lokuret Nabanyi is a murder case pending before the Nakuru High Court. The suspect was charged with being part of a mob that stoned to death Zezia Wangui Karanja, an elderly Kikuyu woman, on January 28, 2008.¹⁶¹ Several prosecution witnesses have testified; at this writing the case was scheduled for its next hearing on November 30, at which the final prosecution witness was scheduled to testify.¹⁶²

¹⁵⁹ *Republic v. Willy Kipngeno Rotich and 7 Others*, Sotik Magistrate’s Court, CR 8/08. Court file consulted by Human Rights Watch, Sotik, August 24, 2011.

¹⁶⁰ *Republic v. Peter Ochiengo*, Nakuru Magistrate’s Court, CR 4001/08. Human Rights Watch interview with a prosecutor, Nakuru, October 24, 2011, and follow-up telephone interview, November 24, 2011.

¹⁶¹ *Republic v. Joseph Lokuret Nabanyi*, Nakuru High Court, HCCR 40/08. Court file consulted by Human Rights Watch, Nakuru, August 22, 2011.

¹⁶² Human Rights Watch telephone interview with a prosecutor, November 24, 2011.

A murder case in Timbaroa, *Republic v. Peter Kepkemboi*, also remains pending.¹⁶³ Kepkemboi is accused of being part of a group that shot Kamau Kimani Thiongo, a Kikuyu, in the head with an arrow. The prosecution finished its case in October 2011 and was awaiting a ruling, due November 25, on whether the defense has a case to answer. The prosecutor spoke highly of the police investigations into this case, including their role in seeking an order to exhume the body, which had been buried without a post-mortem.¹⁶⁴

In Molo, there is a pending inquest into the killing of Nahashon Mburu, who was killed with an axe on January 9, 2008, an incident that triggered a series of further killings in Molo. Four eyewitnesses have testified in court that the man wielding the axe was Thomas Belsoi.¹⁶⁵ Belsoi has not, however, been formally charged with the crime, and hearings are ongoing.¹⁶⁶

Another murder case included in the Department of Public Prosecutions list is *Republic v. James Omondi Odera and Three Others*, regarding the killing of newly elected ODM Member of Parliament Melitus Mugabe Were, shot in Nairobi on January 29, 2008. Were was the first leading politician to die amid the post-election violence, and ODM immediately called the killing a political assassination.¹⁶⁷ However, a prosecutor involved with the case said there was no evidence that the killing was related to the elections, and Human Rights Watch consultation of the court file suggested the killing was related to an attempted robbery or a deal gone wrong.¹⁶⁸

¹⁶³ Human Rights Watch interview with a police official, Rift Valley, April 28, 2011.

¹⁶⁴ Human Rights Watch interview with a prosecutor, Nakuru, October 24, 2011.

¹⁶⁵ Belsoi is included in a list of suspected perpetrators prepared by the quasi-governmental Kenya National Commission on Human Rights (KNCHR). According to the list, annexed to KNCHR's 2008 report on post-election violence, Belsoi "hosted raiders [at Sirikwa Farm] and provided support to them. He provided storage for guns and other logistics including binoculars that led to the killings of 20 Kikuyu young men." KNCHR, "On the Brink of a Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence," August 15, 2008, p. 211.

¹⁶⁶ Molo Magistrate's Court, Inq. 4/08. Case file consulted by Human Rights Watch, October 19, 2011.

¹⁶⁷ "Annan leads Kenya crisis talks," *BBC News*, January 29, 2008, <http://news.bbc.co.uk/2/hi/africa/7214558.stm> (accessed September 12, 2011).

¹⁶⁸ Human Rights Watch telephone interview with a representative of the State Law Office, November 24, 2011; *Republic v. James Omondi Odera & 3 others*, Nairobi High Court, HCCR 57/08. Court file consulted by Human Rights Watch, November 23, 2011. Five suspects were charged with murder in March 2008, although the charges against one suspect were subsequently dropped. The case went to trial in 2009. However, the suspects' defense attorney failed to appear in court on several occasions, and in October 2010, after five prosecution witnesses had already been heard, the defense attorney was eventually replaced with another court-appointed attorney. The case re-started in January 2011, with some of the same witnesses heard a second time. In November 2011, once again halfway through the prosecution case, the judge, N.R.O. Ombija, declared a mistrial and withdrew from the case due to "misgivings in certain aspects of this case," forcing it to start over once again with a new judge.

A rape case, *Republic v. Paul Muigai Mwihi*, was also pending as of this writing. Mwihi was charged with being part of a group that gang raped a woman in Nakuru district and assaulted her husband with machetes during the election violence.¹⁶⁹

¹⁶⁹ *Republic v. Paul Muigai Mwihi*, Nakuru Magistrate's Court, CF 7202/08. Case file consulted by Human Rights Watch, April 29, 2011. The case stalled after the magistrate was transferred in the midst of the trial and the accused demanded a new trial. At this writing, the Court of Appeal was hearing submissions as to whether the magistrate should be recalled to Nakuru to hear the remainder of the case. Human Rights Watch interview with a police prosecutor, Nakuru, October 24, 2011.

IV. Weaknesses in Investigations and Prosecutions

The case [for the killing of Benedict Omolo] was thrown out because of shoddy investigations. So many things were missing. For most of the PEV [post-election violence] cases that is the problem. But poor investigations are not just a problem in PEV cases.... The investigating officers [IOs] are not well-trained. They don't know the ingredients of a crime.... In many cases, IO's are compromised [bribed], and they claim the witnesses can't be found. The IO's then go to the state counsels and tell them the case has to be withdrawn pending investigations.

... There was a problem of a lack of witnesses, or that witnesses relocated.... Some could not be found. But the police usually didn't even try to trace them.

There are cases where IOs don't even show up in court, and the prosecutor tells me "I have no witnesses." So what do you do? Sometimes you know you're releasing the wrong person, but you've given the prosecutor three chances, and the file and the witnesses are not there.

—*Magistrate in Eldoret*¹⁷⁰

The investigation and credible prosecution of crimes committed during mass atrocity poses challenges for any jurisdiction. The judicial system may be overwhelmed by the number of crimes. It may lack specialized laws and expertise to deal with international crimes or even serious ordinary crimes committed on a mass scale. And the political will to address these challenges and bring to justice those responsible for mass atrocity is often lacking.

Human Rights Watch examined 76 cases brought before Kenyan courts, including the majority of the serious cases listed in the March 2011 Department of Public Prosecutions report, as well as a few cases not in the report for which initial information was provided by other sources. At least 20 of those cases sourced from the report were clearly not related to the post-election violence; for another nine, any relation to the post-election violence was unclear from information available to Human Rights Watch. Of the remaining 47 cases that were clearly or likely related to the post-election violence, 16 resulted in acquittals; 16

¹⁷⁰ Human Rights Watch interview, Eldoret, May 24, 2011.

were withdrawn; one was closed pending the arrest of a suspect; and one was “dismissed” (it was unclear whether this was an acquittal or a withdrawal). Five were pending before the courts as of November 2011. Only eight had resulted in convictions. These files encompass the majority of serious crimes listed within the March 2011 Department of Public Prosecutions report, as well as several petty crimes, including stealing and incitement to violence. Human Rights Watch researchers consulted the case files and interviewed lawyers, judges, police officers, and Kenyan civil society activists familiar with the cases. Researchers also interviewed dozens of other victims whose cases stalled at the police investigations stage, never reaching the courts.

Based on this research, Human Rights Watch has identified a number of across-the-board weaknesses in Kenya’s policing and judicial systems that contributed to a low rate of convictions. These include poor police investigations, inaccurate or incomplete qualification of charges, an ailing police prosecutorial system, and overburdened state counsel. Other factors include interference by politicians, affecting police, prosecutors, and defense lawyers; judges’ errors in evaluating evidence; and the lack of a viable witness protection system. In addition, the absence of adequate legal frameworks and expertise to prosecute at least some of the post-election violence as “international” crimes (such as crimes against humanity), discussed below, may have been a factor in the limited number of cases targeting those who organized the violence.

Many of these problems are not unique to the investigation and prosecution of post-election violence; they inhibit access to justice for a broad spectrum of crimes. Some of these issues are being addressed by a series of reforms driven by the National Accord and Reconciliation Act and the new constitution, while others remain unaddressed.

Poor Investigations by Police

Poor investigations were the principal explanation cited by interlocutors as to why post-election violence cases failed to advance.

Problems with police investigations often began the moment that victims filed complaints. The Waki Commission heard shocking testimony such as: “In some cases police just told complainants they should be grateful that they are alive and forget what happened.”¹⁷¹ Other victims, particularly of sexual violence, were turned away from police stations if they could not identify the perpetrator by name.¹⁷²

¹⁷¹ CIPEV, p. 394.

¹⁷² CIPEV, p. 400.

Where police arrested suspects, they often conducted no further investigations to seek witnesses. One defense lawyer, who won acquittals for a number of his clients, told Human Rights Watch, “All the [prosecution] witnesses were police officers. They didn’t do any investigations to get evidence.”¹⁷³ Another confirmed, “Most of the cases were acquitted because there were no investigations.”¹⁷⁴

The police’s apparent inability to carry out successful investigations is partly due to a lack of trust on the part of the population. This is particularly acute in areas where police are perceived as a branch of the ruling party. A senior police official in Kisumu told Human Rights Watch, “Here in Western and Nyanza [provinces], people don’t give information about crime. People are used to being in the opposition, and they receive government officials negatively.”¹⁷⁵

Human Rights Watch spoke to some victims who believed that police failed to investigate cases because they were not impartial.¹⁷⁶ A police officer in the Rift Valley, who shared this view, told Human Rights Watch, “Most police here at that time came from the area. They had ethnic solidarity with the accused. Some were sent to the scene of a crime where one of their own had committed a crime, and didn’t do anything.”¹⁷⁷ Worse, police in some cases may have informed alleged perpetrators that victims had filed complaints against them. One victim told Human Rights Watch that he was threatened with a hammer by a Mungiki member, known to him by name, in Njoro. After he reported the incident at the Njoro police station, he said, he learned from friends that the police had informed the Mungiki member of the complaint, without taking action to investigate it. He concluded: “In Kenya I have lost trust in the justice system. You take someone to court and then he comes back to threaten you.”¹⁷⁸

Human Rights Watch also found cases in which police appeared to conduct minimum investigations. In a Kericho gang rape and assault case, a police officer testified that a desire to “avoid confrontation” led to only two alleged perpetrators being arrested, despite the fact that others were named by the victims:

¹⁷³ Human Rights Watch interview, Rift Valley Province, April 2011.

¹⁷⁴ Human Rights Watch interview with a Kenyan lawyer, Eldoret, May 23, 2011.

¹⁷⁵ Human Rights Watch interview with a senior police official, Kisumu, May 12, 2011.

¹⁷⁶ Human Rights Watch interview, Rironi, April 26, 2011.

¹⁷⁷ Human Rights Watch interview with a police official, Rift Valley, April 28, 2011.

¹⁷⁸ Human Rights Watch interview, Rift Valley province, May 25, 2011.

We had other names but I was instructed to arrest only the two... even arresting the two suspects was a problem for us because the villagers were preventing us from arresting anybody. We had to sneak off the two accused whom we managed to lay hands on. We never went back to arrest more. There was violence all over the district.... We avoided confrontation with the villagers because of the post-election violence.¹⁷⁹

Although the trial took place a year after violence subsided, police never went back to carry out further arrests.

In the absence of a complaint, police were particularly negligent in their duty to carry out assiduous investigations even if an obvious crime had been committed.¹⁸⁰ Attorney General Amos Wako promised that investigations would be carried out based on the conclusions of the Waki report.¹⁸¹ However, the report resulted in no new investigations. One police official told Human Rights Watch that the police needed official complaints in order to open investigations and could not rely on the Waki report, reflecting an inaccurate understanding of police responsibilities.¹⁸²

In other cases the police simply appear incompetent. For instance, in two gang rape cases, police failed to organize “identification parades” (or line-ups).¹⁸³ Kenyan legal precedent suggests that convictions are much more difficult to win when an identification parade is not held.¹⁸⁴

Even in fairly simple theft cases related to the election violence, police often failed to compile sufficient proof. In a theft case in Mombasa, a witness told the Waki Commission that although he provided police with video footage showing identifiable individuals looting his shops, the suspects were never arrested.¹⁸⁵

¹⁷⁹ Testimony of police constable Anthony Muregi, *Republic v. Erick Towett and Simion Kipyegon Chepkwony*.

¹⁸⁰ CIPEV, p. 394.

¹⁸¹ *Ibid.*, p. 396.

¹⁸² Human Rights Watch interview with police official, Mombasa, May 26, 2011.

¹⁸³ In *Republic v. Erick Towett and Simion Kipyegon Chepkwony*, a gang rape victim did not initially provide names of perpetrators to police, but provided them in a later statement. Because she was never asked to do an identification parade, the judge questioned the accuracy of her identification of her assailants. Court file consulted by Human Rights Watch, Kericho, May 13, 2011. In *Republic v. Julius Cheruiyot Kogo*, Eldoret Chief Magistrate’s Court, CR 5976/08, a gang rape victim was taken by police to a town where she told them an alleged perpetrator lived. She spotted the perpetrator on the street and pointed him out to police. However, a judge acquitted the suspect, stating in the ruling that the Investigating Officer should have conducted an identification parade. Court file consulted by Human Rights Watch, Eldoret, May 24, 2011.

¹⁸⁴ Human Rights Watch interview with a lawyer, Eldoret, May 27, 2011.

¹⁸⁵ CIPEV, p. 232.

One police officer told Human Rights Watch that poor investigations were often the result of a lack of resources, such as dedicated vehicles for investigators.¹⁸⁶ Several police and judicial officials also stressed the need for an adequate forensics laboratory for DNA testing. Currently, all DNA testing is done at the government chemist, an office which lacks trained personnel and technical equipment and is plagued by backlogs.¹⁸⁷

In at least one arson case, prosecution could not proceed because police never turned over their investigation file to the prosecutor.¹⁸⁸

Inaccurate or Incomplete Qualifications of Charges

Police are responsible for filing charges against suspects, which requires knowledge of the criminal code. It also entails a strategy of listing less serious charges to fall back on in case the evidence is insufficient to win a conviction on the most serious charges. Unfortunately, many in the police are not up to the task, in part because of inadequate training. According to an Eldoret police official, “It’s a blame game between the courts and police. Sometimes the police lay the wrong charge and the court dismisses the case. Police are supposed to put alternative charges for every case. We try to train investigators on this. Investigators are trained, but it may not be enough.”¹⁸⁹

In some cases, the charges filed were insufficient given the gravity of the crime. This was most problematic in “robbery with violence” cases. Inexplicably, several killings related to the election violence, including the killings of Benedict Omolo and Elias Wafula in Eldoret and the killing of Hassan Omar Dado in Kericho, were qualified solely as “robbery with violence” despite clear indications that the killings were intentional and should have been qualified as murder. The mistake is not inconsequential: murder cases are prosecuted by trained lawyers before the High Court, whereas most robbery with violence cases are tried by insufficiently trained police prosecutors before magistrate’s courts.

Another problem in the filing of charges is that charges were sometimes only brought against one alleged perpetrator, even when witnesses named multiple suspects. In a robbery with violence case in Kericho, Charles Kipkumi Chepkwony was convicted in 2009 on charges of attacking Wilson Soi Wanyama in 2008. But another suspect named by at

¹⁸⁶ Human Rights Watch interview with a police official, Rift Valley, April 28, 2011.

¹⁸⁷ Human Rights Watch interview with a lawyer, Nakuru, April 26, 2011, and with civil society organizations and Keriako Tobiko, Nairobi, September 22, 2011.

¹⁸⁸ *Republic v. Augustine Cheruiyot Kemboi alias Siret, Michael Kemei Samoei alias Kamau, Willy Kipkoech Terer alias Mwalimu, and Simon Kimeli Langat*, Kitale Magistrate’s Court CR 172/08. Court file consulted by Human Rights Watch, Kitale, October 21, 2011.

¹⁸⁹ Human Rights Watch interview with a police official, Eldoret, May 26, 2011.

least two witnesses was not arrested, and as far as can be ascertained from court records, police prosecutors never requested a warrant for his arrest.¹⁹⁰

Cases that are Pending Arrest of Known Suspect

Dozens of cases remain classified as “pending arrest of known suspect.” Both Department of Public Prosecutions reports indicate that the team received incomplete information from police on the progress in such cases. Local human rights organizations told Human Rights Watch that they suspected police made little effort to arrest these suspects, some of whom made themselves scarce in 2008, just after committing acts of violence, but many of whom may have since returned to their homes.¹⁹¹

Ailing Police Prosecutorial System, Overburdened State Counsel

The police prosecutorial system in Kenya constitutes a major obstacle to justice. As of June 2011 Kenya had only 83 civilian prosecutors nationwide, compared to 360 police prosecutors.¹⁹² Police prosecuted the majority of cases—those heard at the magistrate court level—whereas civilian prosecutors, who are trained lawyers, generally only tried high court cases. Director of Public Prosecutions Keriako Tobiko has recognized the magnitude of this problem, pointing out that police prosecutors “do not have the requisite legal training to handle complex cases.”¹⁹³ Legal training for police prosecutors currently consists solely of a few modules taught in the police academy.¹⁹⁴ In terms of formal education, some police prosecutors have completed no more than a Standard 7 (the seventh year of primary school).¹⁹⁵

The effect is inadequate representation of complainants. In court, police prosecutors often fail to present the evidence required to prove a charge beyond a reasonable doubt. Human Rights Watch found several cases, including cases of serious crimes such as assault, in which police prosecutors failed to secure the presence of key witnesses—including fellow police officers—in court.¹⁹⁶ In some cases police prosecutors failed to produce any

¹⁹⁰ *Republic v. Charles Kipkumi Chepkwony*.

¹⁹¹ Human Rights Watch interview with a representative of the Center for Human Rights and Democracy, Eldoret, May 26, 2011.

¹⁹² Ramadhan Rajab, “Police Prosecutors to Be Phased Out, Says DPP Tobiko,” *Nairobi Star* (Nairobi), June 28, 2011, <http://allafrica.com/stories/201106290130.html> (accessed November 2, 2011).

¹⁹³ Judie Kaberia, “Police prosecutions soon obsolete,” *Capital FM* (Kenya), June 27, 2011, <http://www.capitalfm.co.ke/news/Kenyanews/Police-prosecutions-soon-obsolete-13376.html> (accessed June 29, 2011).

¹⁹⁴ Human Rights Watch interview with a police prosecutor, Eldoret, May 27, 2011.

¹⁹⁵ *Ibid.*

¹⁹⁶ In *Republic v. Shaban Cheruiyot Ruto*, Eldoret Magistrate’s Court, CR 460/2008, a woman was assaulted by a man who cut her in the face, taunting her, as per her testimony, that “there was no government in force.” Despite consistent victim and eyewitness testimony, a judge acquitted Ruto because the police prosecutor had failed to produce both the Investigating Officer and a clinical officer who had treated the victim at a health center. The court also only did its job halfway: it produced

witnesses to the court, including the complainant.¹⁹⁷ They also inadequately prepared the evidence, resulting in contradictory testimony. In Kericho, a suspect was acquitted of malicious damage to a house because a police inspector who took photos of the damaged house testified in court that he had taken the photos on January 28, while the victim testified that the damage did not occur until February 9.¹⁹⁸ A stealing case in Eldoret was also lost because prosecution witnesses provided conflicting dates of the offense to the court.¹⁹⁹ Other cases were withdrawn due to police prosecutors' carelessness, as in two theft cases in Eldoret and Sotik where charges were withdrawn after the prosecutors misplaced the police file.²⁰⁰

The shortage of trained civilian prosecutors means that while one set of cases is prosecuted poorly in the Magistrate's Courts, another set of cases—the most serious cases, mostly murder—is handled by overburdened state counsel. State counsel have a much higher level of training than their counterparts in the police prosecution service. However, like police prosecutors, they do not have the time or resources to carry out their own investigations, relying exclusively on the police file which is an obstacle to justice.²⁰¹ Their workload inhibits efficacy: according to one lawyer, “They don't even have time to go through the [police] files unless it's a sensational case.”²⁰²

The training of additional civilian prosecutors is an urgent priority to meet Kenya's justice needs. It is unclear, however, whether it is a priority for the country's political class. Director of Public Prosecutions Tobiko told Human Rights Watch he has requested additional funding for the chronically underfunded State Law Office, and is awaiting a response.²⁰³ According to an Eldoret lawyer, “Replacing police with lawyers has not taken off. The major hindrance is political. Our politicians don't want change. They want the

a warrant for the Investigating Officer, who still failed to appear, but it did not produce a warrant for the clinical officer. See also *Republic v. Kennedy Kosgei and Ann Kilimo*, Eldoret Magistrate's Court, CR 265/08, in which the suspect was acquitted of housebreaking, stealing and arson because the prosecution failed to avail the Investigating Officer (or any other witnesses, apart from the complainant). Court files consulted by Human Rights Watch, Eldoret, May 24, 2011.

¹⁹⁷ See, for instance, *Republic v. Barnabas Tiony*, Eldoret Magistrate's Court, CR 537/08, an arson case that resulted in an acquittal because of the absence of witnesses. Court file consulted by Human Rights Watch, Eldoret, May 24, 2011.

¹⁹⁸ *Republic v. Charles Kipkumi Chepkwony*.

¹⁹⁹ *Republic v. Joseph Anzimbo*, Eldoret Magistrate's Court, CR 383/08.

²⁰⁰ *Republic v. David Korir and Josephat Kiptanuito*, Eldoret Magistrate's Court, CR 237/08 and *Republic v. Charles Kiplangat Ngeny, Betty Chepkemoi, and Joseph Kiprotich*, Sotik Magistrate's Court, CR 53/08. Court files consulted by Human Rights Watch, Eldoret, May 26, 2011, and Sotik, August 24, 2008.

²⁰¹ Human Rights Watch interview with a lawyer, Rift Valley Province, April 2011.

²⁰² *Ibid.*

²⁰³ Human Rights Watch interview with Keriako Tobiko, Nairobi, September 22, 2011.

police to remain as it is so that they can get away with things.”²⁰⁴ The burden rests on politicians to demonstrate otherwise.

Lack of Witness Protection

The lack of a functioning witness protection system is a fundamental obstacle in the search for justice for post-election violence. Given the number of suspected perpetrators who occupy influential positions in the state apparatus, including police and politicians, witnesses have a reasonable fear of repercussions for giving testimony. As the International Center for Transitional Justice’s (ICTJ) former Kenya Director Njonjo Mue put it, Kenya is plagued by “the history of our criminal justice system where witnesses to historic events such as these keep disappearing.”²⁰⁵

Since 2006, Kenya has made progress in developing legislation on witness protection, but the legislation has not translated into action. One such legislation is the Witness Protection (Amendment) Act of 2010, which created a Witness Protection Agency, improving on a 2006 act by making the agency fully independent of the attorney general’s office. Its mandate is “to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their cooperation with prosecution or other law enforcement agencies.”²⁰⁶

The law is well crafted, and the agency it proposes has far-reaching powers. But the government has allocated only a fraction of the funding requested by the agency, not even enough to cover basic operations.²⁰⁷ To one lawyer, this is evidence of a lack of political will: “Even now, the Witness Protection Act only exists on paper. Only the government can

²⁰⁴ Human Rights Watch interview, Eldoret, May 27, 2011.

²⁰⁵ Nzau Musau, “Anxiety Builds Up Over Ocampo Witnesses,” *The Star* (Nairobi), May 7, 2011, <http://allafrica.com/stories/201105100734.html> (accessed June 9, 2011). Both the German and British ambassadors in Nairobi have publicly expressed concerns about Kenya’s inability to protect witnesses in sensitive cases. Speaking of intimidation of witnesses, British Ambassador Robert Macaire told *The Star*, “Such attempts to pervert the course of justice are very serious, and it’s an indictment of the Kenyan state that they are unable to stop them.... If the Kenyan state wishes to demonstrate that it has the capacity to try such cases on its own soil, then it also needs to show that it can robustly stamp out such attempts at intimidation and corruption.”

²⁰⁶ The Witness Protection (Amendment) Act, No. 16 of 2006, 2010, art. 5. Under article 6 the agency is empowered by law to protect witnesses through strategies including physical and armed protection; relocation; change of identity; and any other measure necessary to ensure the safety of the protected person.

²⁰⁷ The Institute for Security Studies (South Africa) has noted, “In the greater scheme of things, government cannot argue that it does not have a sufficient pool of funds to commit to witness protection. Donors have been waiting keenly to support the programme on condition that government first displays the will to make a success of the programme by providing a sizeable portion of the funding requested by the Agency.” Nompumelelo Sibalukhulu, “Lack of Political will Undermines Witness Protection in Kenya,” *Institute for Security Studies*, March 31, 2011, <http://www.polity.org.za/article/lack-of-political-will-undermines-witness-protection-in-kenya-2011-03-31> (accessed June 10, 2011).

put it into effect, but the government is guilty as hell. There is a deliberate attempt to cushion some people who are high up—so the government may keep delaying implementation of this act.”²⁰⁸

In order to address post-election violence within the Kenyan judicial system, funding the Witness Protection Agency is an obvious priority. But many Kenyans question the agency’s ability to adequately protect witnesses at all, given Kenya’s history of attacks on witnesses that are attributed to the very security agencies that in principle should play a role in protecting them.²⁰⁹ The police commissioner sits on the agency’s board; while the board need not be privy to sensitive information held by the agency, one civil society activist questioned the wisdom of any role for the police commissioner in witness protection, given the number of cases likely to arise involving police as perpetrators.²¹⁰

Absent a credible witness protection program, many victims and witnesses fear repercussions for testifying in post-election violence cases. One lawyer explained: “People are afraid to testify... [they fear they] will be abducted. The police don’t do anything to protect witnesses.”²¹¹ In Kisumu, the father of two victims of police shootings told Human Rights Watch that while he would be willing to testify, “Others would be afraid to come and testify because they are afraid they could be killed.”²¹²

Potential witnesses were concerned not only for their physical security but also for their economic security. A local government official whose brother was killed by police said that although he would be willing to testify before a special mechanism, he would fear the consequences: “If you’re a civil servant you’re not supposed to accuse the government of anything. The following day you might get a letter and be told that you’ve been sacked.”²¹³

Law Enforcement Officials under Political Pressure

The police, the attorney general’s office, and local state prosecutors all succumbed to political pressure in their treatment of post-election violence cases.²¹⁴ A defense lawyer

²⁰⁸ Human Rights Watch interview with a lawyer, Kisumu, May 10, 2011.

²⁰⁹ For instance, as noted above, police were suspected in the killings of Oscar Kamau King’ara, John Paul Oulu and Bernard Kiriinya. See also Nzau Musau, “Anxiety Builds Up Over Ocampo Witnesses,” *The Star* (Nairobi), May 7, 2011, <http://allafrica.com/stories/201105100734.html> (accessed June 9, 2011).

²¹⁰ Human Rights Watch interview with a representative of Release Political Prisoners, Nairobi, May 4, 2011.

²¹¹ Human Rights Watch interview with a lawyer, Eldoret, May 23, 2011.

²¹² Human Rights Watch interview, Kisumu, May 9, 2011.

²¹³ Human Rights Watch interview, Western province, May 12, 2011.

²¹⁴ One state prosecutor, asked by a Human Rights Watch researcher whether he was subjected to political pressure to drop certain cases, responded simply, “Of course.” Human Rights Watch interview with a state prosecutor, date and location withheld.

said he and his colleagues also experienced pressure: “There was pressure from both sides. As defense counsel, we were getting threats from the security forces. There was pressure at the national level for convictions, and pressure at the local level for acquittals.”²¹⁵ In the North Rift, it seems, the pressure at the local level won the day—though it was not exclusively local, but compounded by national pressure, including from Prime Minister Raila Odinga.²¹⁶ A Kalenjin elder in Eldoret confirmed, “If someone ‘up there’ calls the [local police chief], the person is released.”²¹⁷

In various locations, political pressure led police to free suspects. Former Nyanza Provincial Police Officer Grace Kaindi testified before the Waki Commission that after she arrested several Kisiis suspected of assaulting ODM politicians in the lead-up to the elections, Police Commissioner Ali phoned and instructed her to free them.²¹⁸ In Nakuru, the Officer Commanding Station (OCS), Mohamed Bakuli, ordered the release of a chief, who had been arrested after threatening to attack police officers who were carrying out another arrest.²¹⁹ According to a Nakuru lawyer, Bakuli himself had received instructions from a former MP to release the chief.²²⁰ An Eldoret police official explained, “Political interference is there—especially in a place like this. Politicians will remove you [if you don’t handle a case as they want].”²²¹ In Sotik, one Kalenjin resident told Human Rights Watch, “I went to a meeting in Litein with councilors who were inciting people to kill Kisiis. Those councilors were arrested and taken to court, but later released.”²²² The Waki report found police released them because of a “rowdy crowd” outside the police station.²²³

The failure to successfully prosecute a single one of the many local politicians suspected of being involved in the violence is also indicative of political pressure. There was no shortage of accusations against local political power brokers of both parties following the violence. Most such well-protected individuals were never investigated or arrested. Kericho area residents told Human Rights Watch that a then district commissioner of a nearby district himself shot and killed several young men who were protesting, but that

²¹⁵ Human Rights Watch interview with a lawyer, Eldoret, May 27, 2011.

²¹⁶ A lawyer in Kericho told Human Rights Watch, “Some [magistrates] let cases go even when there was evidence. Some prosecutors were failing to bring sufficient evidence. There was political pressure. People came to Raila and said ‘We went to the streets because of you.’” Human Rights Watch interview, Kericho, May 13, 2011.

²¹⁷ Human Rights Watch interview with a Kalenjin elder, Eldoret, May 27, 2011.

²¹⁸ CIPEV, p. 134.

²¹⁹ *Ibid.*, p. 111.

²²⁰ Human Rights Watch interview, Nakuru, April 28, 2011.

²²¹ Human Rights Watch interview with a police official, Eldoret, May 26, 2011.

²²² Human Rights Watch interview, Sotik, August 23, 2011.

²²³ CIPEV, p. 457.

there were no investigations into his alleged role in the killings.²²⁴ Similarly the Waki report gives evidence according to which a member of parliament from Coast Province “funded the youth to loot and burn all businesses belonging to non ODM members.” As far as Human Rights Watch could ascertain, this claim was never investigated.²²⁵

In the rare cases in which local politicians were arrested, such as Farouk Kibet in Eldoret and David Manyara in Nakuru, they were promptly released.²²⁶ Manyara, a former MP, was arrested on April 19, 2008, alongside prominent businessman Zakayo Maina, and accused of sponsoring Mungiki activities during the violence.²²⁷ Police requested they be bonded to keep peace. When their lawyers indicated they would object in court to the detention of their clients without sufficient evidence, Manyara and Maina were freed, after two days in custody.²²⁸ The case remained open for several months but was eventually withdrawn.²²⁹ Oddly, according to a lawyer, the Manyara file has disappeared from the Nakuru courts.²³⁰

The government’s reluctance to prosecute Mungiki members may be linked to the complicity of senior Kikuyu politicians with Mungiki, as alleged in the ICC case against Uhuru Kenyatta, Francis Muthaura, and Hussein Ali. In 2009, Attorney General Wako withdrew charges against Mungiki leader Maina Njenga for the killings of 29 people (unrelated to the post-election violence), just three days after Njenga threatened to publish an affidavit that “would bare all and include names of senior people in government” who allegedly had dealings with Mungiki.²³¹

²²⁴ Human Rights Watch interviews, Kericho and Litein, August 24, 2011.

²²⁵ CIPEV, p. 225; Human Rights Watch telephone interview with a Mombasa-based civil society organizations, October 2011.

²²⁶ In Eldoret, a magistrate told Human Rights Watch that a case in which Farouk Kibet and three other ODM councilors were accused of incitement to violence was subsequently withdrawn due to political interference; Human Rights Watch interview with a magistrate, Eldoret, May 24, 2011. The KNCHR report on the post-election violence includes a list of over 30 local politicians suspected of inciting violence. KNCHR, “On the Brink of a Precipice,” pp. 176-194.

²²⁷ Francis Mureithi and David Macharia, “Two Arrested On Mungiki Funding Claims,” *Daily Nation* (Nairobi), April 21, 2008, <http://allafrica.com/stories/200804210218.html> (accessed September 16, 2011). Kenya National Commission on Human Rights listed Manyara among those “adversely mentioned” by witnesses who provided testimony for the commission’s August 2008 report. KNCHR, “On the Brink of a Precipice,” p. 225.

²²⁸ Human Rights Watch interview with a lawyer, Nakuru, April 28, 2011; Francis Mureithi, “Manyara Freed in Mungiki Case,” *Daily Nation* (Nairobi), April 22, 2008, <http://allafrica.com/stories/200804212058.html> (accessed September 16, 2011).

²²⁹ Human Rights Watch interview with a lawyer, Nakuru, April 28, 2011; Cyrus Ombati, Titus Too, Jane Akinyi, Willis Oketch, Karanja Njoroge and Anderson Ojwang’, “Amnesty: Police Speak,” *The Standard* (Nairobi), June 24, 2008, http://kenyanzuri.blogspot.com/2008_06_24_archive.html (accessed September 16, 2011).

²³⁰ Human Rights Watch interview with a lawyer, Nakuru, April 28, 2011.

²³¹ Patrick Nzioka, “Mungiki man issues ultimatum to Wako,” *Daily Nation* (Nairobi), October 20, 2009, <http://www.nation.co.ke/News/-/1056/674898/-/uo1qob/-/index.html>; Muchiri Gitonga and Peter Leftie, “Mungiki leader set free,” *Daily Nation* (Nairobi), October 23, 2009, <http://www.nation.co.ke/News/-/1056/676374/-/uo31ch/-/index.html>.

Political pressure in addressing the post-election violence played out on a scale larger than that of individual cases. Before the 2010 constitution was promulgated, the attorney general's office had ultimate control over initiating and ending prosecutions. The attorney general had the authority to require police to carry out investigations into any alleged offense. He also had the authority to withdraw any prosecution initiated by police, a provincial state law office, or private citizens, in a motion known as a *nolle prosequi*, and was not required to provide any explanation. This power, in the hands of a political appointee, was easily abused to protect impunity. Indeed, Wako, who served from 1991 to 2011, has a long history of withdrawing cases against politically powerful individuals.²³²

In mid-2008, Wako ordered the withdrawal of dozens of post-election violence cases, without any explanation. Most cases involved suspects who were in custody, and most alleged perpetrators were Kalenjin or Luo. Many were for minor crimes that did not involve physical violence against other persons, such as rioting or looting, but more serious cases, including at least one robbery with violence case, were also among those withdrawn. According to a Kericho lawyer, the cases were withdrawn not for lack of evidence, but for political reasons, including a PNU decision to extend an olive branch to ODM in the name of national reconciliation.²³³ A member of the Waki Commission told Human Rights Watch of a cabinet meeting held in June 2008 at which a "secret decision" was made to release ODM suspects.²³⁴ Victims in the cases, evidently, had no say in this political decision.²³⁵

Judges' Errors in Evaluating Evidence and Premature Dismissal of Charges

Those interviewed by Human Rights Watch on the lack of convictions for election violence were less likely to fault the judiciary than they were to fault police investigators and prosecutors. However, the judiciary is not exempt from criticism in its handling of certain cases.

In an Eldoret stealing case, a magistrate acquitted a suspect simply because the two eyewitnesses provided different dates in their testimony as to when the theft took place. The acquittal reflects the poor preparation of cases by police prosecutors, but that alone

²³² See, for instance, AfriCOG, "Poisoned Legacy," August 2011.

²³³ Human Rights Watch interview with a lawyer, Kericho, August 24, 2011.

²³⁴ Human Rights Watch telephone interview with a member of the Waki Commission, September 5, 2011.

²³⁵ The 2010 constitution no longer permits the attorney general to withdraw cases. Cases may be withdrawn by the Director of Public Prosecutions only with the authorization of the court. Constitution of the Republic of Kenya, *National Council for Law Reporting*, 2010, art. 157(8).

should not necessarily have resulted in an acquittal; the magistrate could have sought clarification as to the date from the witnesses or the prosecutor.²³⁶

Even where evidence presented by police or state counsel was insufficient, the courts rarely, if ever, exercised their prerogative to order further investigations.²³⁷ For instance, the judge in the Kiambaa church burning case complained that police did not seem to carry out investigations into the planning of the attack. But he did not summon any perpetrators mentioned by witnesses who had not already been arrested, or any additional witnesses who might shed light on the issue.

In a Nakuru murder case, *Republic v. Bernard Kibet Bii, Matthew Kipsang Chirchir, and Kennedy Sayayo Rungera*, a judge dismissed the charges when the witnesses failed to appear in court on the second hearing date.²³⁸ According to a lawyer familiar with the case, this was inappropriate, as the judge never even summoned the police, who are responsible for ensuring that witnesses appear in court. The judge also did not take into account the difficulty of securing transport for witnesses, particularly in the immediate aftermath of the post-election violence, when hundreds of thousands of Kenyans were displaced. According to the lawyer, the case should be reopened and earnest efforts undertaken to seek the witnesses.²³⁹

Similarly, a judge in Naivasha acquitted the suspect in an attempted rape case because after three adjournments, the police file had not been presented in court. There was no evidence in the file to suggest that the judge had summoned the investigating officer or his or her immediate superior to determine the whereabouts of the file.²⁴⁰

Corruption

Several sources told Human Rights Watch that corruption was also at play in the issuing of *nolle prosequi*, with one lawyer claiming that at a location in the Rift Valley, “*nolles* were on sale, 50,000 [Kenyan shillings] per *nolle*.”²⁴¹ A police official and a magistrate in Eldoret also pointed to corruption as a factor that may have inhibited successful police

²³⁶ *Republic v. Joseph Anzimbo*.

²³⁷ Human Rights Watch interview with a lawyer, Rift Valley Province, April 2011, and with a senior judicial official, Nairobi, August 2, 2011. See Criminal Procedure Code, Chapter 75, art. 144 and 150 (on the court’s power to summon witnesses).

²³⁸ *Republic v. Bernard Kibet Bii, Matthew Kipsang Chirchir, and Kennedy Sayayo Rungera*, Nakuru High Court, HCCR 21/08. Court file consulted by Human Rights Watch, Nakuru, October 24, 2011.

²³⁹ Human Rights Watch interview with a lawyer, Nakuru, October 24, 2011.

²⁴⁰ *Republic v. Jonathan Moody William*, Naivasha Magistrate’s Court, CR 19/08. Court file consulted by Human Rights Watch, Naivasha, October 24, 2011.

²⁴¹ Human Rights Watch interview with a lawyer, Rift Valley province, April 28, 2011.

investigations.²⁴² However, none of these sources were able to point to specific post-election violence cases that were blocked due to bribery or other forms of corruption. Their allegations point to a need for further investigations as to the role of corruption in post-election violence cases, and its role in the criminal justice system more generally.

Absence of Legal Framework and Expertise to Prosecute International Crimes

Kenya ratified the Rome Statute in 2005. But at the time of the post-election violence in 2007-2008, ICC crimes—that is, crimes of genocide, war crimes, and crimes against humanity—had not yet been criminalized in national legislation, and therefore could not be prosecuted as such in Kenyan courts. One of the more positive developments to emerge from debate around the creation of a special tribunal was the passage of the International Crimes Act (ICA), 2008, which made these ICC crimes triable offenses in Kenya. The ICA explicitly integrates into Kenyan law provisions of the Rome Statute related to command responsibility, a principle by which those in a position of authority who should have known of crimes committed by those under their command, and who failed to prevent these crimes or ensure their prosecution, are themselves criminally liable.²⁴³

The act came into operation on January 1, 2009. The Kenyan constitution at the time prohibited in section 77(4) the retrospective application of criminal law, meaning no person could be convicted for conduct that did not constitute a crime at the time it was committed, known as the principle of *nullum crimen*. It is unclear whether this would have prohibited use of the International Crimes Act, however, given that ICC crimes were clearly crimes under international law, if not under national law, during the post-election violence period.²⁴⁴ The International Covenant on Civil and Political Rights, to which Kenya is a party, makes clear that the principle of *nullum crimen* is not violated where conduct constituted a crime under either national or international law at the time it was committed.²⁴⁵ The new Kenyan constitution, promulgated in August 2010, follows this approach.²⁴⁶

²⁴² Human Rights Watch interviews, Eldoret, May 23 and May 26, 2011.

²⁴³ Rome Statute, art. 28.

²⁴⁴ Given that Kenyan law includes customary international law, and that customary international law prohibits these same crimes, it is also arguable that in fact these crimes were crimes under national law at the time of the post-election violence, notwithstanding the absence of legislation to this effect. See discussion in Kenyans for Peace, Truth & Justice, “The Post-Elections Violence in Kenya: Seeking justice for victims,” July 2010, http://www.iccnw.org/documents/SeekingJusticeforVictims_KPTJ_Jul2010.pdf (accessed September 24, 2011), pp. 9-10.

²⁴⁵ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 15(2).

²⁴⁶ Constitution of the Republic of Kenya, 2010, art. 50(2)(n), “Every accused person has the right to a fair trial, which includes the right ... not to be convicted for an act or omission that at the time it was committed or omitted was not—(i) an offence in Kenya; or (ii) a crime under international law.”

This would appear to clear the way for use of the International Crimes Act now to prosecute crimes against humanity or other ICC crimes dating to the post-election violence period. But the absence of these crimes in national law over the course of 2008 coincided with the most concerted efforts to bring accountability. This deprived police and prosecutors of a key tool, particularly with regard to investigation of high-level perpetrators. Even as of 2011, most police investigators and prosecutors have received no training on the International Crimes Act, inhibiting their ability to make use of it in newly filed cases.²⁴⁷

Serious crimes committed during mass atrocity may be tried as ordinary crimes, for example, by bringing multiple charges of murder or rape. But this often does not adequately capture the conduct and level of responsibility of those involved in their commission. Large-scale rights violations are generally characterized by a division of labor between planners and implementers, as well as a structure designed to make connections between these two levels difficult to pinpoint.²⁴⁸ Prosecuting these violations as crimes against humanity, for example, which requires evidence of a widespread or systematic attack conducted pursuant to a state or organization policy, can expose the criminal structure that led to mass violations and lead to additional prosecutions of others in that structure. Failure to do so can lead to impunity for those most responsible at the top.

²⁴⁷ Human Rights Watch interview with a prosecutor, Nakuru, October 24, 2011.

²⁴⁸ Office of the United Nations High Commissioner for Human Rights (OHCHR), "Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives," <http://www.ohchr.org/Documents>.

V. Impunity for Police Shootings and Misconduct

During the post-election violence police fatally shot at least 405 people.²⁴⁹ Hundreds of other Kenyans were shot by police but survived.²⁵⁰ With the exception of the convictions of Ben Pkiech Loyatum and Andrew Moeche Omwenga, discussed above—cases apparently unrelated to the election violence—no one has been convicted for the shootings.

Shootings by police took place throughout Kenya in areas viewed as ODM strongholds, including in Eldoret and surrounding towns in the North Rift; Kericho and surrounding towns in the South Rift; throughout Nyanza and Western provinces; in Mombasa town; and in informal settlements in Nairobi.²⁵¹ Human Rights Watch researched the shootings in January 2008 and collected testimony to the effect that police had instituted a “shoot to kill” policy, authorizing indiscriminate firing on protestors.²⁵² Police acknowledged that the shootings did occur, but denied that a “shoot to kill” policy existed.²⁵³ However, the notion of individual blame has never been tested by police investigations and prosecutions of individual perpetrators among the security forces, an omission that diminishes the credibility of police protestations of institutional innocence.

²⁴⁹ CIPEV, p. 417. Human Rights Watch also found that police beat to death one young man in Roret; this raises the possibility that police may be behind other non-shooting deaths that have not yet been brought to light. Human Rights Watch interview with Bol Ruto, father of victim, Roret, August 23, 2011. Ruto learned from eyewitnesses that his 18-year-old son, Godfrey Langat, fell down when being chased by police at a protest in Roret in January 2011. He was then beaten to death with rifle butts by Administration Police officers. Ruto filed a complaint, but there was never any follow-up. In Kericho at least one youth, and possibly more, died after falling into a sewage treatment pool while fleeing police gunfire. While police might not be criminally liable for such deaths, the incidents were never investigated. Human Rights Watch interviews with a victim’s family members, Kericho, August 26, 2011, and telephone interview with Kericho District Commissioner Samuel Njora, September 1, 2011. Njora said the incidents were not investigated because victims did not file complaints; nor did police search the sewage treatment facility to determine whether there were bodies within. He asked rhetorically, “When people are killing women and children, do you go looking for the bodies of criminals?”

²⁵⁰ Human Rights Watch interviews with gunshot victims and their lawyers, Nyanza province, Western province, Rift Valley province, Coast province, and Nairobi, May 2011. CIPEV found that 557 people were treated by hospitals for gunshot wounds during the post-election violence; there was no evidence that any of them had been shot by persons other than the police. CIPEV, pp. 384-385.

²⁵¹ The majority of Nairobi residents live in informal settlements or “slums,” the largest being Kibera. Many residents of informal settlements supported ODM in the 2007 elections. Though Kisumu and Kibera have received widespread media attention as sites of police shootings, in fact, the province most affected by police shootings was the Rift Valley, where 170 people died of gunshot wounds. CIPEV, p. 390.

²⁵² Human Rights Watch, *Ballots to Bullets*, p. 25. Similarly, Agence France Presse interviewed a police commander who reportedly said, “There are four categories of people who will face tough police action: Those looting property, burning houses, carrying offensive weapons, barricading roads. We have orders to shoot to kill these categories of people if they are caught in the act.” “Kenya police ordered to ‘shoot to kill’ to stem clashes,” *AFP*, January 30, 2008, http://www.newssafety.org/index.php?option=com_content&view=article&id=7764:Kenya%20police%20ordered%20to%20shoot%20to%20kill%27%20to%20stem%20clashes&catid=357:kenya-security&Itemid=100228 (accessed July 20, 2011). See also CIPEV, p. 383.

²⁵³ CIPEV, p. 386. A medical examiner in Kisumu documented 50, rather than 48, fatal police shootings.

Most shootings were unlawful under both Kenyan and international law.²⁵⁴ A large number of gunshot victims during the post-election violence were shot in the back, while running away from police or from rioting.²⁵⁵ According to Kenya's Police Act, police may use arms "against any person who by force prevents or attempts to prevent the arrest of himself or another person" but arms may not be used under those circumstances "unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise prevent the rescue or, as the case may be, effect the arrest"—not the case in many of the election violence shootings.²⁵⁶ Further, Kenya's law is overly broad: shooting a suspect simply because a police officer cannot otherwise "effect the arrest" is prohibited under United Nations standards.²⁵⁷

Many victims filed complaints with the police after shootings, while others, reluctant to complain to the same institution that was perpetrating abuses, took their complaints to local administrative officials, members of parliament, NGOs, or others whom they thought could assist them in accessing justice. A lawyer in Kericho, where most police shooting victims were Kalenjin, explained to Human Rights Watch that after police fired on unarmed protestors, killing at least seven, few were willing to file complaints. The lawyer explained, "They [the police] were so hostile that the local community could not make any reports. They would be told, 'You are the perpetrators.'"²⁵⁸

Refusal to Take Reports

Difficulty in accessing justice for police shootings began as soon as victims attempted to file complaints. Many such victims were turned away, as Human Rights Watch documented in Sotik, Litein, Kisumu, Vihiga, Eldoret, Mombasa, and Nairobi. The problem was also documented by the Waki Commission.²⁵⁹

In Kisumu, Daniel Ishuga Indimuli attempted to file a report after police shot two of his children, including an 11-year-old girl. He said, "I went to the police and said 'The police

²⁵⁴ CIPEV, p. 418.

²⁵⁵ *Ibid.*, pp. 387, 418.

²⁵⁶ Police Act, *National Council for Law Reporting*, Chapter 84 of the Laws of Kenya, 1988, revised 2010, <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/POLICEACT.pdf> (accessed June 21, 2011), art. 28. The revised law and the previous law do not differ as to this provision.

²⁵⁷ OHCHR, "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials," adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www2.ohchr.org/english/law/firearms.htm> (accessed November 2, 2011), art. 19.

²⁵⁸ Human Rights Watch interview with a lawyer, Kericho, August 24, 2011.

²⁵⁹ CIPEV, p. 421.

killed my child.’ They said ‘The police don’t kill people.’ They refused to write a statement. When I insisted, they said ‘If you continue to play around, you could be shot, too.’”²⁶⁰

Ishuga waited two years, and then returned to the police in 2010 when he learned that neighbors had received compensation for their losses. He explained that his children had been killed by police, on two separate occasions during the post-election violence, and that further, his properties had been looted by mobs of civilians. Rather than filling out separate incident reports for the three separate incidents, police listed all incidents on a form titled “Properties Stolen or Destroyed.” The form listed a number of household items that had been looted, such as a bed, chairs, and utensils. Toward the bottom of the list of missing items, the police also noted “Two children.”²⁶¹ The police carried out no further investigations.

Also in Kisumu, police shot 18-year-old Michael Otieno in the leg during protests on January 17. Complications led to the amputation of Otieno’s left leg below the knee. When he was finally discharged from hospital two years later, he attempted to make a police report. According to Otieno,

I went to make a report in Kondele when I got out of the hospital. The OCS [Officer Commanding Station] told me that he can’t deal with a case like this. He refused to take a report. I had brought my documents from the hospital. The OCS didn’t even read my documents; he said “These kinds of cases I can’t do.”²⁶²

Gregory Ngoche was shot by police while sitting in his yard on January 17. Protests were underway in the street outside and he was hit by what he believes was a stray bullet. He explained to Human Rights Watch: “The first police officer in the station refused to take the report, but the OCS came in and ordered him to take it.”²⁶³ Although Ngoche finally managed to make a complaint, no further action was taken by the police.

In Sotik, such stories were also common.²⁶⁴ One man told Human Rights Watch:

²⁶⁰ Human Rights Watch interview, Kisumu, May 9, 2011.

²⁶¹ Police Abstract 26/1/10; OB 63/26/1/2010, from Kisumu Police Station, viewed by Human Rights Watch on May 9, 2011.

²⁶² Human Rights Watch interview with Michael Otieno, Kisumu, May 12, 2011.

²⁶³ Human Rights Watch interview with Gregory Ngoche, Nyanza province, May 10, 2011.

²⁶⁴ Human Rights Watch interview, Sotik, August 23, 2011.

I live in Chebilat Manaret town. On January 13, 2008, I was shot in the leg by the police.... My house is on the roadside. Police were shooting at the crowd, but they shot me directly. They were Kenya Police from Sotik police station. The one who shot me is called Waweru. The other police, who took me to the hospital, said “Waweru shot you.”

I came to the police station here and made a report after two months in hospital. I also went to KNCHR in Nairobi to report. After one year, I went back to the police station to ask for the [Occurrence Book] number.... The officer refused to give it after I told him it was about me being shot by Waweru. He told me to come back the next day, and then told me my complaint was lost. He told me I could make another statement, but I didn’t, because I felt it wouldn’t help.²⁶⁵

One man, shot in the arm during the violence by a police officer whom he recognized, tried to file a complaint at three different area police stations. Each station told him that they “were not dealing with” this kind of case, sending him on to other stations. Finally, he was able to record a statement. Police later told him that the inspector who shot him had been transferred. The inspector was never arrested or charged with the shooting.²⁶⁶

Many victims of rape at the hands of the police reported police failure to take their statements.²⁶⁷ A woman who was raped by a police officer in Nairobi told the Waki Commission that when she went to Kilimani police station to file a report, police officers told her she was to blame for the rape.²⁶⁸

Failure to Investigate Complaints

Even where police did receive written statements from victims of police shootings, they did not appear to undertake any subsequent investigations.

In Vihiga, Western province, one woman heard from witnesses that a female police officer in Mbale had shot her husband six times in the head and neck. Only one female officer was working in Mbale at that time, leaving no question as to the perpetrator’s identity. The victim’s widow told Human Rights Watch, “I told the police that my husband was shot by

²⁶⁵ Human Rights Watch interview with Dennis Kuna Ngetich, Sotik, August 24, 2011.

²⁶⁶ Human Rights Watch interviews, location withheld, May 2011.

²⁶⁷ Human Rights Watch interview with Ann Njogu, September 9, 2011.

²⁶⁸ CIPEV, p. 401.

that lady. They wrote it down. The OCS [in Mbale] was there when we gave the report. They said ‘Wait for investigations.’ But they didn’t do investigations.”²⁶⁹

The brother of a fatal police shooting victim in Chavakali, also in Western province, told Human Rights Watch that when he reported the case to the police, the OCS at Mbale said, “Your brother wanted to loot, and that’s why we killed him.”²⁷⁰ Though an inquest file was opened into the killing, police later told the victim’s brother that the file had been closed.

A Kisumu police official told Human Rights Watch that some guns were taken by CID for ballistics examination.²⁷¹ It is not clear whether the tests ever took place or what results emerged. Police made no efforts to ensure that hospitals treating gunshot victims systematically preserved bullets, which would have allowed for ballistics examination on a wide scale. Most victims interviewed by Human Rights Watch said that police and hospital personnel never explained to them the benefits of guarding bullets that were removed from their bodies, or from the bodies of their family members.²⁷² Some police officers, for instance in Litein, collected bullets themselves from bodies during post-mortem examinations, but they were never used in investigations to determine responsibility for the shootings.²⁷³ Those officers should be made to account for the bullets’ whereabouts.

Failure to Conduct Internal Investigations

Due to public pressure following the televised shootings of George William Onyango and Isaiah Chacha in Kisumu, police established a committee to carry out an inquiry into excessive use of force by police during the post-election violence.

Police spokesperson Kiraithe told Human Rights Watch in February 2008 that police had opened investigations into the conduct of 142 officers.²⁷⁴ But if this was the case, few were charged. Human Rights Watch found no evidence of election violence-related court cases against police, with the exception of Kirui. By October 2008, according to the Waki report, “apart from the ubiquitous inquest files, no internal investigations into the conduct of police officers were being undertaken or contemplated.”²⁷⁵

²⁶⁹ Human Rights Watch interview, Chavakali, May 12, 2011.

²⁷⁰ Ibid.

²⁷¹ Human Rights Watch interview with a senior police official, Kisumu, May 12, 2011.

²⁷² Human Rights Watch interviews in Nairobi and Kisumu, May 2011.

²⁷³ Human Rights Watch interviews with families of gunshot victims, Litein, August 23, 2011.

²⁷⁴ Human Rights Watch interview with police spokesperson Eric Kiraithe, Nairobi, February 20, 2008.

²⁷⁵ CIPEV, p. 404. CIPEV received this information from the police.

Some semblance of an internal investigation took place in Kisumu. According to the former head of the Western Kenya Law Society (WKLS), “Senior police officers came to investigate. WKLS met with them, but we never saw them again and just got stonewalling from the [Provincial Criminal Investigations Officer] when we asked about their findings. It was not a serious investigation; it was a reaction to public outrage. I don’t think any report was written.”²⁷⁶

Other lawyers in Kisumu, who represented dozens of victims of police shootings, expressed surprise that they were never contacted by the police, given that they could have availed witnesses to provide testimony regarding police behavior. As one lawyer in Kisumu put it, “I saw absolutely no activity from the committee.”²⁷⁷

Beyond Kisumu, most of the police officers interviewed by Human Rights Watch were themselves unaware of any internal investigation. A high-ranking police official who had worked in Western Province during the violence told Human Rights Watch, “I don’t know whether that inquiry ever happened. In Western, no one came around to interview police about who used excessive force.”²⁷⁸ Police shot dead at least 74 people in Western province.²⁷⁹

Reasons for Lack of Accountability for Police Abuses

The glaring absence of investigations into police shootings is not surprising. Until the passage of a new law in November 2011, which has not yet been implemented, Kenya had no measures in place to ensure police oversight, nor provisions to permit civilian prosecutors to conduct their own investigations into crimes attributed to police officers.

In the absence of an oversight mechanism, police accountability has always been elusive in Kenya. As one lawyer told Human Rights Watch regarding the post-election violence, “The question is whether the police can be left to investigate themselves.”²⁸⁰ The answer appears fairly clear. Another lawyer, working on a police torture case unrelated to the post-election violence, lamented: “The police are investigated by police, they are prosecuted by police ... so it is very unlikely that it will result in a conviction.”²⁸¹

²⁷⁶ Human Rights Watch interview with Isaac Okero, advocate, Kisumu, May 11, 2011.

²⁷⁷ Human Rights Watch interviews with lawyers, Kisumu, May 10 and 11, 2011.

²⁷⁸ Human Rights Watch interview with a senior police official, May 2011 (date and location withheld).

²⁷⁹ CIPEV, p. 390.

²⁸⁰ Human Rights Watch interview with a lawyer, Kisumu, May 10, 2011.

²⁸¹ Human Rights Watch interview, Nairobi, May 19, 2011.

Interviewed by Human Right Watch, the police found numerous justifications for the lack of accountability. One Kisumu police official said that a serious internal inquiry into police conduct during the elections “wouldn’t help the morale of the force.”²⁸² Another police officer claimed that where no complaint was filed by a victim, police had no obligation to conduct investigations, even in the face of indisputable evidence that civilians were being shot by the police in large numbers:

Why should I investigate myself if the family comes and takes the body from the mortuary but doesn’t complain? ... If there is no complaint, we look at it as a closed case. We know we can investigate, but if no one is knocking on the door, we won’t open it. The police thought they were right [in shooting protestors].²⁸³

This officer recognized that an oversight mechanism would be a positive step forward in countering police impunity.

The failure to investigate police shootings also derives from the fact that particular officers suspected of unlawful use of force were sometimes highly influential. Human Rights Watch received several reports that the then-provincial police officer of Coast Province, King’ori Mwangi, personally shot at least two men in Mombasa, killing one. A witness saw Mwangi fire on a pickup truck that was carrying a group of youths. According to the witness,

We heard someone saying, “Shoot, shoot.” He was very close and I heard him say it. It was calm because at the junction there were armed police. The junior police shot in the air. The senior officer [King’ori] shot at the pickup. King’ori took a few steps towards the direction of the vehicle. When [a youth in the pickup truck] turned to see King’ori he was shot in the head.... Before the shootout I had seen King’ori before, more than twice.²⁸⁴

The victim was 25 year old Muzamil Abubakar Kato. In the same incident, another man was shot in the hand—also by Mwangi, according to a witness—and lost his thumb.²⁸⁵

Kato’s family filed a complaint at Changamwe police station in January 2008.²⁸⁶ However, when NGOs later attempted to trace the complaint in order to assist the victims in seeking

²⁸² Human Rights Watch interview with a senior police official, Kisumu, May 12, 2011.

²⁸³ Ibid.

²⁸⁴ Human Rights Watch interview, Mombasa, May 24, 2011.

²⁸⁵ Human Rights Watch interviews, Mombasa, May 24, 2011.

justice, they were told either that the police Occurrence Book could not be located or that there was no record of the case in the Occurrence Book.²⁸⁷ Criminal Investigation Department officers came to Mombasa in July 2008 to investigate the case and called in witnesses for questioning.²⁸⁸ However, no arrests followed the investigations.

Representatives of a Kenyan NGO went to the provincial police headquarters in September 2010 and attempted to file a complaint on behalf of the victims, but they were told by a police official that he could not record a statement against a fellow officer of the same or higher rank.²⁸⁹

NGOs that attempted to investigate this case were told by a Kenyan police official that Mwangi was “kingmaker” within the police force, and that the police official could therefore provide no information regarding the status of the complaint filed against him.²⁹⁰ Mwangi was appointed deputy director of police reforms within the Kenya Police in 2010, over the objections of three Kenyan human rights organizations that cited his role in the Mombasa shootings.²⁹¹

Other officers cited by victims and witnesses were mid-level commanders who may wield significant influence within the force. Mid-level commanders named in interviews with Human Rights Watch who should be investigated include those who were in the following posts of Officer Commanding Station during the election violence, among others: the OCS of Kericho,²⁹² the OCS of Langas,²⁹³ and the OCS of Sotik.²⁹⁴

Civil Cases for Police Shootings: Failure to Pay Compensation

In light of the authorities’ failure to bring criminal charges against the police, many surviving victims decided to pursue civil charges. Courts in both Nairobi and Kisumu, confronted with overwhelming evidence that police were responsible for unjustified use of

²⁸⁶ Human Rights Watch interviews, Mombasa, May 24, 2011.

²⁸⁷ Human Rights Watch interviews, Mombasa and Nairobi, May 24 and May 27, 2011.

²⁸⁸ Human Rights Watch interviews, Nairobi and Mombasa, May 23 and May 24, 2011.

²⁸⁹ Human Rights Watch interview, Nairobi, May 23, 2011.

²⁹⁰ Human Rights Watch interview with an NGO representative, Nairobi, May 6, 2011.

²⁹¹ ICJ-Kenya, Kenyans for Justice and Development (KEJUDE), and Genesis for Human Rights Commission Mombasa (GHRC), “We condemn the culture of impunity where seniority grants immunity,” Press Statement, September 25, 2011, on file with Human Rights Watch.

²⁹² Human Rights Watch interview with a Kericho resident, August 22, 2011.

²⁹³ Human Rights Watch interviews, Eldoret, May 2011.

²⁹⁴ Human Rights Watch interview with a victim’s family member, Sotik, August 23, 2011.

force, ruled in favor of the plaintiffs in at least 19 such cases, resulting in material awards. But the government has refused to pay up.

When the government is ordered to pay compensation in a civil case, the lawyer for the complainant draws up a “certificate of order” and submits it to the attorney general’s office. The attorney general should, in turn, advise the office of the president of the obligation to pay compensation. But Section 21 of the Government Proceedings Act suggests courts can take no further action to enforce judgments against the government.²⁹⁵

The failure to pay reflects a blatant refusal to provide justice to post-election violence victims and demonstrates the extent of impunity in Kenya. As one lawyer put it, “Once you get the judgment, there’s not much else you can do.”²⁹⁶ Another lawyer, working with clients in Kibera who were shot by the police, agreed: “The government always has impunity when it comes to compensation.... [In] enforcing a judgment against the government, most of the time you run into walls.”²⁹⁷ One lawyer has written to the Chief Justice to file a constitutional challenge to Section 21, noting that a similar law was ruled unconstitutional in South Africa.²⁹⁸

A case in point is that of Peter Omari Ogenche, shot in the Kibera settlement in Nairobi. Police from Kilimani Police Station shot Ogenche on December 29, 2007, as he returned to his house from a public toilet. The bullet lodged in Ogenche’s spine. He is now a paraplegic.²⁹⁹

With legal assistance, Ogenche sued the attorney general’s office. The High Court of Kenya in Nairobi found the government liable for the near-fatal shooting. Its 2010 judgment called the shooting “unprovoked, reckless, and an act of impunity on the part of the police officers.” It noted that Ogenche, 27 years old at the time of the shooting, “has a permanent residual disability at 100% according to the Workman’s Compensation Act.” The judgment observed that there was no dispute over the fact that police shot Ogenche. An occasional

²⁹⁵ Government Proceedings Act, Chapter 40 of the Laws of Kenya, section 21(4), reads that “no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.” Some victims and lawyers are challenging this section in court.

²⁹⁶ Human Rights Watch interview with advocate Joseph Musomba, Kisumu, May 10, 2011.

²⁹⁷ Human Rights Watch interview with attorneys at the Kibera Centre for Legal Aid and Human Rights, Nairobi, May 19, 2011.

²⁹⁸ Human Rights Watch interview with advocate Joseph Musomba, Kisumu, October 31, 2011. See *Nyathi v. Member of the Executive Council for the Department of Health Gauteng and Another (CCT 19/07) [2008] ZACC 8*, Constitutional Court of South Africa, <http://www.saflii.org/za/cases/ZACC/2008/8.pdf> (accessed November 24, 2011).

²⁹⁹ Human Rights Watch interview with Peter Omari Ogenche, Kibera, May 22, 2011.

laborer who washed cars for a living, Ogenche recognized the vehicle from which he was fired on; he had washed it on several occasions. His father and several friends witnessed the immediate aftermath of the shooting and saw the police, their guns, and Ogenche's body lying nearby on the ground. A police officer who served as the only defense witness did not contest that police from Kilimani Police Station shot Ogenche. He could not provide evidence that police officials had undertaken investigations to determine which officers were responsible for the shooting. The court awarded Ogenche 5.4 million Kenyan shillings (US\$60,000) in damages.³⁰⁰ But at this writing, Ogenche has not yet been paid. He continues to suffer pain and is unable to afford basic medication.

In Kisumu, victims faced similar situations. Nicholas Odhiambo was near Kisumu on December 31, 2007, when he saw a police car that he said was marked "999," normally used as an ambulance. Police alighted and began shooting; and a bullet grazed Odhiambo's head. He told Human Rights Watch, "I went to court. I was told that the judgment arrived, and that the court ordered a 160,000 Kenyan shillings payment [US\$1,778], last year. But up to now, the government hasn't paid that money."³⁰¹

One Kisumu lawyer told Human Rights Watch he alone handled 19 election-related cases in which the government had failed to pay court-ordered compensation. The total amount owed by the Kenyan government to victims he represented, as of August 2011, stood at over 5 million Kenyan shillings (US\$55,556).³⁰²

³⁰⁰ Judgment, dated June 10, 2010, in High Court of Kenya at Nairobi, Civil Case No. 196 of 2008; copy on file with Human Rights Watch.

³⁰¹ Human Rights Watch interview with Nicholas Odhiambo, Kisumu, May 12, 2011.

³⁰² Communication from Joseph Musomba to Human Rights Watch, August 25, 2011.

VI. Status of Reforms, Steps Required, and the Case for a Special Mechanism

If there's not a special tribunal, I don't think there will ever be any justice.

—*Lawyer in Kisumu*

International law imposes upon nations the responsibility to prosecute international crimes and other serious violations of human rights law that amount to criminal acts.³⁰³ Major changes are needed to Kenya's justice system in order for Kenya to effectively meet this obligation to its citizens.

Kenya has initiated a series of reforms which, if properly implemented, may address some shortcomings found in the approach to justice for post-election violence over the past four years. Some reforms are a result of commitments made as part of Kenya's National Accord and Reconciliation Act, signed in February 2008 to stop the violence, while others are related to Kenya's new constitution, voted by referendum in August 2010.

But institutional changes alone will not deliver reform. A revolution in political attitudes at the highest levels in the Kenyan government is required.

A lawyer who had won acquittals for his clients in a number of post-election violence cases, asked whether the reforms underway would allow for successful prosecution of post-election violence in the Kenyan courts in the near future, responded skeptically:

It is nonsense.... The status quo remains. The courts are corrupt. The courts are overburdened. Judicial personnel is lacking; we have one-third of what's required.... The registries are congested, and the registrars are not trained.

The police situation is even worse. One police officer is serving 1,000 people. Both the numbers and the training are issues. In many cases they don't even know the ingredients of an offense. The moment that someone has given a statement, it [the investigation of a case] ends there.³⁰⁴

³⁰³ See Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/node/84264>, pp. 10-14.

³⁰⁴ Human Rights Watch interview with a lawyer, Nakuru, April 28, 2011.

Police Reforms

Key to improving transparency and accountability in the police is police vetting and the removal of obstructive personnel. Oversight mechanisms, including mechanisms that make it easier for civilians to file complaints about police conduct, are also needed. Some of these reforms are underway. The former police commissioner was transferred to the Postal Service in September 2009. In May 2009 the government established a National Task Force on Police Reform.³⁰⁵ Its November 2009 report was followed by the creation in January 2010 of a Police Reforms Implementation Committee, mandated to translate the task force's key recommendations into law and policy.

In August 2011 parliament passed the National Police Service bill. The bill replaces the Police Commissioner with an Inspector General, who will oversee both the Kenya Police and the Administration Police, previously separate bodies. The bill also addresses police conduct, including a provision that regulates the use of force.³⁰⁶

The passage of the National Police Service bill was followed in September with a second bill to create a National Police Service Commission. The commission will have a civilian board, including two retired senior officers, and will make appointments, promotions, transfers, and dismissals from the police force. The commission will be empowered to receive complaints from the public and to recommend remedies or to refer such complaints to the proposed Independent Policing Oversight Authority, the Kenya National Human Rights and Equality Commission, the Director of Public Prosecutions, or the Ethics and Anti-Corruption Commission.³⁰⁷ A bill to establish an Independent Policing Oversight Authority, as recommended by the task force, was passed in November 2011.

The new laws will also create a Directorate of Criminal Investigations (DCI), to replace the Criminal Investigation Department. The DCI will have its own dedicated staff, a shift from past policy under which any police officer, including those with low rank and little formal

³⁰⁵ The task force, composed of 18 civilians, including foreign experts, issued 200 recommendations, including for the establishment of an Independent Policing Oversight Authority, empowered to investigate allegations of any unlawful behavior by a member of the police or by a police body. United Nations General Assembly, Human Rights Council, Seventeenth session, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns," April 26, 2011, A/HRC/17/28/Add.4, p. 9.

³⁰⁶ National Police Service Commission Bill, *Parliament of Kenya*, 2010, art. 41. The law sets forth that "a Police officer may use force and firearms, if and to such extent only as is necessary."

³⁰⁷ "Civilian team to promote or dismiss police officers," *Daily Nation* (Nairobi), June 25, 2011, <http://www.nation.co.ke/News/Civilian+team+to+promote+or+dismiss+police+officers+/-/1056/1189004/-/uvscyoz/-/> (accessed June 27, 2011).

education, could investigate complaints.³⁰⁸ If its staff is provided sufficient training and resources, the quality of investigations may improve.

Police vetting is also planned. Vetting of senior officers was initiated in May 2011 with the goal of evaluating professionalism, integrity, track record, and psychological fitness in order to inform decisions on promotion, demotion, redeployment, or dismissal of police officers.³⁰⁹ The process was suspended after vivid objections from civil society that stakeholders in the police reform process were not consulted and that the vetting was being carried out by the police themselves. Questioning the constitutionality of the process, the Kenyan National Commission on Human Rights argued that “Police cannot possibly vet themselves and achieve desirable results.” The KNCHR encouraged a transparent process, as seen in the nomination of judicial personnel, discussed below.³¹⁰ Police vetting is to resume once the National Police Service Commission is in place.³¹¹

The police reforms, if fully implemented, may contribute to accountability for the 2007-2008 post-election violence in several ways. First, victims of police violence who were afraid to bring their complaints before the police—as well as those who did file complaints, but received no response—will be able to file complaints before a new, independent, civilian board. Second, the vetting process should be conducted in a manner that allows for civilian input, with space for citizens to bring forward complaints concerning the behavior of individual officers during the election violence period.

Worryingly, the police seem at times unwilling to recognize the need for reform, and closed to external recommendations. A piece published on the Kenya Police website in June 2011 made the claim, apparently in response to recommendations from the Special Rapporteur on extrajudicial, summary or arbitrary executions, that “the international community cannot add sustainable value to any country’s law enforcement unless that country is willing to become a colony.”³¹² Such views from the police are of great concern—especially given that the police regularly request training and material support from the international community—and threaten to undermine the success of reforms.

³⁰⁸ National Police Service Commission Bill, 2010, arts. 25-29.

³⁰⁹ Angira Zaddock, “Saitoti allays fears on police vetting,” *Daily Nation* (Nairobi), June 20, 2011, <http://www.nation.co.ke/News/politics/-/1064/1178652/-/7sr7vj/-/index.html> (accessed June 27, 2011)

³¹⁰ KNCHR, “KNCHR Statement on Ongoing Police Vetting,” June 10, 2011, on record with Human Rights Watch.

³¹¹ Bernard Momanyi, “Anxiety over Police Vetting,” *The Standard* (Nairobi), September 7, 2011, <http://www.standardmedia.co.ke/InsidePage.php?id=2000042298&cid=658&story=Anxiety%20over%20police%20vetting> (accessed September 14, 2011).

³¹² “A View on Hooliganism,” Kenya Police, “News,” June 21, 2011, <http://www.kenyapolice.go.ke/News144.asp> (accessed June 21, 2011). The author is not identified.

Judicial Reforms

Kenya has made notable progress in judicial reform. The 2010 constitution called for the establishment of a Judicial Service Commission, composed of the attorney general, three judges, two advocates, and one person named by the Public Service Commission.³¹³ The purpose of the Judicial Service Commission is to “ensure and enhance the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice,” including through nominating and vetting judges. In May 2011, following a historically transparent process in which candidates were interviewed on live television, the Judicial Service Commission nominated a new chief justice, Dr. Willy Mutunga, and deputy chief justice, Nancy Baraza. Both are widely recognized as reformers whose track records suggest a willingness to tackle corruption, political influence, and inertia in the judiciary head-on.³¹⁴

A recommended reform was that the director of public prosecutions (DPP) be made independent of the attorney general. Formerly, the attorney general, a political appointee, had little incentive to pursue cases that could threaten political interests. Under the new constitution, the DPP is independent, with the power to direct the inspector general of the National Police Service to carry out investigations.³¹⁵ Keriako Tobiko, who has been DPP since 2002, was appointed in 2011 for a new eight year term. However, in violation of the constitution, Kibaki and Odinga set up a closed nomination panel, with Tobiko emerging as the only candidate; this sharp contrast with the transparency around other judicial nominations was criticized from a number of quarters, including by the Justice Minister.³¹⁶ The Constitution Implementation Oversight Committee approved the nomination, but recommended that various allegations of wrongdoing be investigated. Such investigations have not yet been initiated.³¹⁷

Further reforms underway include the establishment of a Supreme Court and the vetting of all Kenyan judges.

Other urgent reforms have not yet been initiated. Most important is the recruitment of civilian prosecutors. The DPP has recognized the inadequacy of police prosecutors, and

³¹³ Constitution of the Republic of Kenya, 2010, art. 171.

³¹⁴ Human Rights Watch interviews with Kenyan civil society organizations, Nairobi, May 2011.

³¹⁵ Constitution of the Republic of Kenya, 2010, art. 157(4).

³¹⁶ Martin Mutua, “Nominees: Tobiko's approval divides MPs,” *The Standard* (Nairobi), June 13, 2011, <http://www.standardmedia.co.ke/InsidePage.php?id=2000037039&cid=4> (accessed August 8, 2011).

³¹⁷ “The trouble with Tobiko,” *Africa Confidential*, vol. 52, no. 13, pp. 4-5.

has outlined plans to train and hire more professional civilian prosecutors.³¹⁸ However, these plans were not included in the government budget for 2011-2012, calling into question Kenya's political will to fully professionalize its prosecutorial service. If not infused with resources, the State Law Office may also suffer desertions following a call from the judiciary in September 2011 for the recruitment of 160 new magistrates; several state counsel told Human Rights Watch they were vying for the more highly-paid positions in the magistracy.³¹⁹

The Case for a Special Mechanism³²⁰

The Kenyan police and judicial system have shown themselves to be unprepared or unwilling to investigate, prosecute, and adjudicate serious election-related crimes. Despite the reforms, it will take at least several years to address the multiple institutional weaknesses that have hindered successful prosecutions.

To effectively widen accountability, it will be necessary to establish special mechanisms within the Kenyan judicial system to address cases of post-election violence, using the International Crimes Act and other Kenyan laws. These special mechanisms—including a dedicated bench or division within the High Court, a special prosecutor or dedicated units within the Directorate of Public Prosecutions, a dedicated unit within the Directorate of Criminal Investigations, and a dedicated cell within the Witness Protection Agency—should feature carefully vetted and recruited Kenyan and international personnel.³²¹

For police crimes, including the hundreds of shootings and dozens of rapes by police, a unit within the special investigative team should be specifically empowered to investigate such crimes.

Efforts are needed to enhance the expertise among police, prosecutors, and judges required to successfully prosecute international crimes, including substantive knowledge of the Rome Statute, the different modes of liability, and relevant defenses. Without this

³¹⁸ Tobiko told participants at a training in June 2011, "Ninety percent of prosecution works in this country in the lower court is handled by police prosecutors. They do not have the requisite legal training to handle complex cases." Tobiko further stated that Kenya currently has only 83 civilian prosecutors and 108 support staff, with a need of 1000 professionals in each category. Judie Kaberia, "Police prosecutions soon obsolete," *Capital FM* (Kenya), June 27, 2011, <http://www.capitalfm.co.ke/news/Kenyanews/Police-prosecutions-soon-obsolete-13376.html> (accessed June 29, 2011).

³¹⁹ Human Rights Watch interviews, Rift Valley Province, September 2011.

³²⁰ For the sake of simplicity, we adopt the widely-used term "special mechanism" in this report, although what may be required to ensure accountability is the establishment of several separate but interlinked "special mechanisms."

³²¹ Prosecutions could be led by the Director of Public Prosecutions, who could appoint a team of Kenyan and international staff; alternatively, Parliament could establish a Special Prosecutor position.

expertise the Kenyan judicial system will be left without an important tool for capturing all modes of criminal conduct witnessed during the post-election violence and bringing to account those responsible at the top.

The police prosecutorial system remains a serious obstacle to justice. In the absence of a special mechanism, benefiting from the presence of international prosecutors to complement the skills of some of Kenya's best state counsel, it is difficult to envision how each individual jurisdiction in Kenya will muster the human resources required to successfully prosecute election violence cases. Haphazard prosecutions on a jurisdiction-to-jurisdiction bases, in Kenya's 17 High Court stations and sub-registries of the High Court and its 105 magistrates' courts, based on investigations by at least 85 police divisions throughout the country, are unlikely to yield knowledge about the organization of crimes.

Indeed, once established, the first task of the special prosecutor or prosecutorial team should be to devise a strategy to prioritize cases, to ensure investigations and prosecutions encompass links between the planning of crimes at high levels and the carrying out of crimes locally, and to determine which cases are to be heard through these specially established mechanisms and which cases, if any, can proceed through the ordinary courts. The investigation and prosecution of post-election violence cases could be centralized. The International Center for Transitional Justice has recommended strategic litigation in response to post-election violence cases, "combin[ing] cases that together expose the organizational systems and leaders responsible for planning, authorizing and executing atrocities."³²²

There are additional reasons why prosecution of post-election violence requires an institution with a national strategy. Evidence collected by the Waki Commission and by human rights organizations suggests that in a number of cases, crimes may have been planned in one jurisdiction and perpetrated in another, or that perpetrators may have traveled from one jurisdiction to another in order to commit crimes. Further, witnesses and victims have traveled, especially those who became internally displaced during the

³²² International Center for Transitional Justice, "Creating a Feasible Domestic Mechanism for Justice and Accountability for Post-Election Crimes in Kenya," March 2011, p. 8. ICTJ warns against the risks of illuminating individual low-level crimes without a centralized mechanism to prosecute crimes that may have been organized at a high level. Citing the example of Colombia, ICTJ writes, "Even though some 40,000 [cases] have been completed... there has been no use of aggregate data and system analysis. The criminal justice system's interventions have therefore been fragmented. Despite criminal responsibility in related to many different crimes being established, the structures of the different criminal apparatus responsible for crimes stay uncovered," p. 9.

violence.³²³ No system is currently in place to facilitate police and prosecutorial outreach to witnesses and victims who have left their jurisdictions.

One parliamentarian has recently called for a Special Tribunal Division within the High Court, but has suggested the division could be entirely staffed by Kenyans.³²⁴ While an all-Kenyan special mechanism would be preferable to no such mechanism at all, previous Kenyan truth seeking and quasi-judicial bodies, including the Akiwumi Commission, the Waki Commission, and the TJRC, have included international personnel out of the recognition that their inclusion provided some guarantee of political neutrality. The Akiwumi Commission, for instance, was headed by a Nigerian judge.

An international presence would also strengthen the capacity of the mechanism. International personnel could bring knowledge of the prosecution of international crimes in other jurisdictions. In addition to foreign judges, foreign prosecutors and investigators would help make up for the current lack of capacity found within the Kenyan police. The same would likely be true for foreign witness protection experts, given that Kenya's Witness Protection Agency is not yet operational. Defendants before the special bench or division charged with international crimes should also have access to both Kenyan and foreign counsel. A lawyer in Eldoret suggested, "It will be necessary to have international personnel in the special tribunal, for purposes of experience—like in the Waki Commission. And the international personnel there had no local political interest."³²⁵

Kenyan civil society organizations have recently refocused their efforts on advocating for the establishment of a special mechanism. When a new bill for a special mechanism next comes up for consideration—one that has the backing of civil society organizations and victims' groups—Kenyan lawmakers should recall President Kibaki's December 15, 2010, promise that justice would be delivered through a local tribunal and should pass the bill without delay. Kenya's international partners will also have an important role to play, first, in maintaining pressure on the Kenyan government to make good on Kibaki's promise, and, second, once these special mechanisms are created, to support their rapid operationalization.

Establishing such special mechanisms may take time. In the meantime, the Kenyan police should publicly inform all victims of violence that they can still come forward to file complaints, or—as in the many cases of victims who filed complaints in 2008 and never

³²³ Human Rights Watch interview with a lawyer, Eldoret, May 23, 2011.

³²⁴ Human Rights Watch interview with member of Parliament Gitobu Imanyara, Nairobi, September 9, 2011.

³²⁵ Human Rights Watch interview with a lawyer, Eldoret, May 27, 2011.

heard from the police again—check the status of complaints filed and provide complementary evidence.

Non-Judicial Accountability

Judicial accountability for post-election violence is essential and non-negotiable; not only is it required by international law, but Kenyan citizens believe prosecutions are necessary in order to move forward and prevent future violence. Judicial accountability can and should be complemented by other, non-judicial measures to ensure accountability, and the government should step up efforts to ensure the successful implementation of such measures, while bearing in mind that they cannot serve as a substitute for prosecutions.

The Truth, Justice and Reconciliation Commission

The Office of the United Nations High Commissioner for Human Rights has argued that “the right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right.”³²⁶

In November 2008 President Kibaki signed into law a bill establishing a Truth, Justice and Reconciliation Commission. The TJRC’s mandate includes investigating human rights violations committed between 1963 and February 28, 2008, when the National Accord and Reconciliation Act was signed. Kenyan human rights organizations were initially deeply critical of the law establishing the TJRC; it provided vaguely-defined “conditional amnesties” for some human rights abuses, and that it did not clearly oblige the attorney general to prosecute crimes on the basis of its recommendations. Others worried that the two year time period provided to the TJRC to operate was insufficient given its broad mandate: to address gross human rights abuses committed throughout Kenya between 1962 and 2008.³²⁷

In violation of the Truth, Justice and Reconciliation Act (2008), the government released only a small portion of the budget that had been allocated to the commission, demonstrating a lack of political will to ensure its effective functioning. A TJRC official told Human Rights Watch, “Politicians wanted to weaken the TJRC so that it can’t produce a report. Most politicians don’t want this process, because it’s catching up with them.... The

³²⁶ OHCHR, “Promotion and Protection of Human Rights: Study on the Right to the Truth,” E/CN.4/2006/91, February 8, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go6/106/56/PDF/Go610656.pdf?OpenElement> (accessed November 27, 2011).

³²⁷ Ndung’u Wainaina, “The inadequacies of truth and justice commission law,” *Daily Nation* (Nairobi), February 6, 2009, <http://www.nation.co.ke/oped/Opinion/-/440808/525658/-/item/0/-/5sb63fz/-/index.html> (accessed July 20, 2011).

Treasury says they don't have enough money. So you have to work at half your capacity."³²⁸ Eventually the government released additional funds to the TJRC in early 2011, though only half of what the TJRC had requested, allowing it to begin public hearings in April 2011.³²⁹

As of this writing, the TJRC is carrying out ongoing public hearings, including in areas heavily affected by the post-election violence. It intends to conclude public hearings through March 2012, and to release its report by the end of May. Several civil society organizations warmed to the TJRC after observing its role as a platform for victims to openly denounce perpetrators.

The TJRC is mandated, in its final report, to recommend prosecutions for offences that qualify as gross human rights violations and reparations for victims.³³⁰ The law establishing the commission requires the government to implement its recommendations.³³¹ It is too early to tell whether the government will comply with this requirement. The TJRC can contribute to Kenya's truth-seeking and healing process, but it is no substitute for judicial accountability.

Reparations and Compensation

United Nations guidelines recommend that states "provide effective remedies to victims [of gross violations of human rights], including reparation."³³² There is no comprehensive reparations policy for victims of human rights violations in Kenya.³³³ The TJRC can recommend reparations to individual victims or to victim groups, and the government is obligated to abide by its recommendations. However, victims have yet to benefit from any

³²⁸ Human Rights Watch interview with a TJRC official, Nairobi, August 17, 2011. See the Truth, Justice and Reconciliation Act, 2008.

³²⁹ Ibid.

³³⁰ Truth, Justice and Reconciliation Commission, "Mandate and Activities," <http://www.tjrkenya.org/index.php/about-tjrc/mandate-and-activities> (accessed May 26, 2011).

³³¹ The Truth, Justice and Reconciliation Committee Bill, 2008, section 49(2).

³³² 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 ("Basic Principles and Guidelines", adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, <http://www2.ohchr.org/english/law/remedy.htm> (accessed November 27, 2011).

³³³ Reparations are based on the principle that following a serious human rights violation, war crime, or crime against humanity, states should ensure that measures be taken to repair the harm done to victims, including through restitution, which is meant to "restore the victim to the original situation" before the violation was committed; compensation "for any economically assessable damage" that is "proportional to the gravity of the violation"; and rehabilitation, which "should include medical and psychological care as well as legal and social services." See Simon Robins, "To Live as Other Kenyans Do": A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations," ICTJ, July 2011, <http://ictj.org/sites/default/files/ICTJ-Kenya-Reparations-Demands-2011-English.pdf> (accessed November 27, 2011), p. 8. The UN guidelines suggest that "States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations." "Basic Principles and Guidelines," art. 16.

such reparations. Civil society organizations have called for a more comprehensive national reparations policy, which the TJRC may recommend in its final report, but which should be undertaken even in the absence of such a recommendation.³³⁴

In the immediate aftermath of the violence, the government distributed small compensation packages to many victims, ranging from 10,000 to 25,000 Kenyan shillings (approximately US\$115 to US\$280).³³⁵ However, other victims slipped between the cracks and did not receive even that small sum. The non-uniformity of the compensation, which both victims themselves and the organizations working with them see as favoring Kikuyu victims, has created confusion and tension.³³⁶

The government has provided no specific reparations in terms of medical assistance.³³⁷ Hundreds if not thousands of victims continue to suffer from injuries incurred during post-election violence, and have had no forum to request medical reparations from the government. In Litein, Human Rights Watch interviewed Leonard Koech, a 26-year-old who was shot in the head by police during riots on February 5, 2008. The bullet remains lodged in Koech's skull, impairing his mental functions. Koech told Human Rights Watch:

I was at work as a shoe shiner. That morning, it was calm. But then violence started, and I was taking my properties to safety. Immediately I was shot by an [administration police] officer. I collapsed and was taken to Litein hospital. I was shot in the temple. My eye came out of its socket. It was put back at the hospital.

The bullet is in the top left of my head. Doctors told me "If the bullet is removed, you will die." The veins are itching at times. At times my eye stands still and it doesn't move. I have pain in my head. I can't see out of my left eye—I'm totally blind in that eye. Medication is expensive and I can't afford it, although the hospital told me to take medication. Also I have memory loss—I can be told something today in the evening, but the next

³³⁴ Views expressed by civil society organizations at a conference attended by Human Rights Watch, Naivasha, August 25-26, 2011; ICTJ, "To Live as Other Kenyans Do," July 2011, pp. 57-60.

³³⁵ According to the Ministry of State for Special Programmes, 25,000 Kenyan shillings were paid to those whose houses had been burned or destroyed, while 10,000 Kenyan shillings were given to those whose homes were looted, in order to replace basic household effect. "Progress Report on IDP Resettlement," on file with Human Rights Watch. But Human Rights Watch also found that some other victims received compensation, including some victims of police shootings in Kisumu.

³³⁶ Human Rights Watch interview with IDP Network chairperson Patrick Githinji, Nakuru, October 24, 2011.

³³⁷ "Basic Principles and Guidelines," art. 21.

day I forget. I still work as a shoe shiner. But sometimes I come to work and I forget that I'm at work.

I received no compensation. I never recorded any statement with the police. After I was discharged, I was afraid to go to the police station, so I couldn't record a complaint.

I want assistance for medication and check-ups. I want all those perpetrators to be prosecuted so that we can avoid this happening again.³³⁸

Koech's case points to the need for an urgent reparations program, as recommended by the ICTJ.³³⁹ But his testimony also demonstrates that reparations alone would not be enough. The victims of the post-election violence continue to call for justice.

³³⁸ Human Rights Watch interview with Leonard Koech, Litein, August 23, 2011.

³³⁹ ICTJ, "To Live as Other Kenyans Do," July 2011, p. 59.

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Appendix I: Case Studies by Human Rights Watch by Jurisdiction

This appendix documents the 76 cases that Human Rights Watch researched in 11 jurisdictions throughout Kenya. Human Rights Watch was unable to consult the several thousand post-election violence files listed in the March 2011 Department of Public Prosecutions report. Instead, we focused on some of the most serious crimes in Kenya's Criminal Code: murder, robbery with violence, rape, attempted rape, defilement, and assault causing actual bodily harm. In some cases, wrong information on case numbers provided by the Department of Public Prosecutions report or other sources led us to consult case files for minor charges; when that occurred, we included those cases in our study as well. For a number of cases on the Department of Public Prosecutions list, upon consultation of the file, there was no evidence that the crime was related to the post-election violence; that is indicated in this chart. In a few cases on this list, Human Rights Watch was unable to physically consult the case file, but received detailed information from police, judicial officials, or other sources.

This list includes cases heard at both High Courts (case numbers prefaced with "HCCR") and Chief's Magistrate's Courts (case numbers ordinarily prefaced with "CR", omitted here).

The information in this appendix is on the public record. However, in order to protect victims' privacy, we only include the names of victims who lost their lives in the violence. Further details on most cases, including the police case number, the Occurrence Book (OB) number, the location of the incident, and the names of defense lawyers, prosecutors, and judges or magistrates who handled the cases, are on file with Human Rights Watch.

Bungoma (One court case researched)

Case Number	Accused	Charge	Outcome/Comments
25/08 (Appeal 9/10, Bungoma High Court)	Callistus Kuloba, Jentrix Nandako Wangala, Robina Nanyama Manyonge, James Wafula Khamala	Handling stolen goods (generator)	Khamala convicted in 2010, sentenced to seven years, reduced to three years on appeal; Wangala and Manyonge sentenced to probation; Kuloba acquitted. <i>Case number wrongly listed in the Department of Public Prosecutions report as 5/08. Incident appears related to PEV.</i>

Butere (Two court cases researched)

Case Number	Accused	Charge	Outcome/Comments
35/08	Joseph Omukholo Renja	Rape; alternative charge of indecent act	Acquitted of rape; convicted of indecent act, sentenced to 1 year. <i>Sentenced wrongly listed as 10 years in the Department of Public Prosecutions report. Not related to PEV.</i>
21/08	Bonface Anyembe Kweyu	Shopbreaking	Convicted in April 2009; sentenced to three years. <i>Incident appears related to PEV.</i>

Eldoret (22 court cases researched)

Case Number	Accused	Charge	Outcome/Comments
HCCR 15B/08	Abraham Karonei alias Kipketer Kemboi Chokoro, Robert Kimaiyo Tanui alias William Siginet aka Kamua	Murder of Evanson Ndungu Karanja	Acquitted on October 14, 2010. <i>File indicated poor police investigations. Incident clearly related to PEV.</i>
Unknown	17 people	Murder of Father Michael Kamau	Withdrawn. <i>Suspects were arrested because they were manning a roadblock near where Kamau was killed. There was no evidence linking them to the murder and they were released. Incident clearly related to PEV.</i>
HCCR 5/08 (Appeal 389/10 at Eldoret Appeals Court)	Ben Pkiech Loyatum (police officer)	Murder of Robert Onsarigo	Convicted; appeal in progress. <i>Not related to PEV.</i>
387/08	Paul Kiptoo Barno, James Yutor Korir, and Isaiah Kipkorir Leting	Robbery with violence (causing death of District Officer Benedict Omolo and Chief Inspector Elias Wafula)	Acquitted. <i>File indicated poor police investigations and prosecution. Incident clearly related to PEV.</i>

167/08	Isaac Ngetich Timpolo	Robbery with violence	Acquitted of robbery with violence; convicted of simple robbery, sentenced to five years <i>Incident appears related to PEV; opportunistic robbery carried out in context of chaos.</i>
5976/08	Julius Cheruiyot Kogo	Gang rape	Acquitted on July 13, 2009. <i>Judge ruled that victim's identification of accused was questionable.</i> <i>Incident clearly related to PEV.</i>
178/08	Sammy Navidali, Moses Mbakz, Kennedy Kipsoi	Gang rape	Convicted, sentenced to 10 years <i>Human Rights Watch was unable to consult file but received details from police. Unclear whether incident is related to PEV. Accused are Luhya and Kalenjin; complainants are two Kalenjin teenage girls.</i>
414/08	Nicholas Oyamo	Assault causing actual bodily harm	Withdrawn <i>Complainant withdrew charges.</i> <i>Not related to PEV; incident took place in 2006.</i>
460/08	Shaban Cheruiyot Ruto	Assault	Acquitted on March 6, 2009 <i>Police and court errors: Clinical officer did not appear in court to produce exhibit (no warrant issued by court); investigating officer also did not appear despite warrant.</i> <i>Incident clearly related to PEV.</i>
391/08	Stephen Maina	Assault	Convicted, sentenced to one year <i>Conflict between landlord and tenant, both apparently Kikuyu.</i> <i>Likely not related to PEV.</i>
457/08	Lichuma Melchizedek	Assault	Convicted, sentenced to pay 20,000 Kenyan shillings (roughly US\$215) fine <i>Dispute between former boyfriend and girlfriend over money</i> <i>Likely not related to PEV.</i>
52/08	Francis Fwamba Barasa	Arson, stealing	Withdrawn. <i>Investigating Officer, Police Constable. Wambua, failed to appear in court.</i> <i>Incident clearly related to PEV.</i>
101/08	Erick Kipsoge Torgon, Stanley Torkiptoo Torgon, Philip Kiptunui Torgon, Bernard Wekesa Chebunga	Arson	Withdrawn in July 2009. <i>Withdrawn at complainant's request; no reason given.</i> <i>Incident appears related to PEV.</i>

537/08	Barnabas Tiony	Arson	Acquitted in September 2008. <i>Prosecution did not bring any witnesses to court, including the complainant. Incident appears related to PEV.</i>
6035/08	David Mwaura Karanja	Sexual harassment	Acquitted on September 2, 2009. <i>Complainant, an internally displaced person allegedly harassed by the accused at Eldoret Showground IDP camp, did not appear in court. Incident appears related to PEV.</i>
265/08	Kennedy Kosgei and Ann Kilimo	Housebreaking and stealing, arson	First accused acquitted; warrant in effect for second accused. <i>Prosecution failed to call any witnesses other than the complainant—including the Investigating Officer. Incident appears related to PEV.</i>
383/08	Joseph Anzimbo	Stealing	Acquitted. <i>Judge acquitted accused because two prosecution witnesses gave different dates of the offense. Incident appears related to PEV.</i>
484/08	Appollo Nyachon Otieno	Stealing	Acquitted on April 27, 2009. <i>Police did not produce evidence to demonstrate that the metal doors found with the accused were same as those stolen. Incident appears related to PEV.</i>
237/08	David Korir and Josephat Kiptanuito	Stealing	Withdrawn. <i>Police file “could not be found” by police prosecutor. Incident appears related to PEV.</i>
392/08	Joseph Mukuha Mwangi	Stealing	Withdrawn. <i>Complainant withdrew charges; reason unknown. Theft of sheep; accused and complainant both apparently Kikuyu; likely unrelated to PEV.</i>
33/08	Geoffrey Muloli, Fredrick Imoli Shitemi, Morris Okindi Shitemi, Jane Nafula, Florence Kage	Housebreaking	Withdrawn. <i>Withdrawn by complainant; reasons unknown. Incident appears related to PEV.</i>
34/08	Juliet Kahindi Kayugira with others	Housebreaking	Withdrawn (due to death of the accused in custody). <i>Incident appears related to PEV.</i>

Kakamega (Four court cases researched)

Case Number	Accused	Charge	Outcome/Comments
223/08	Paul Shiali Ashirikwa	Defilement of a person with a mental disability	Convicted. <i>Not related to PEV.</i>
42/08	Vincent Owiti Mbayachi	Defilement	Convicted, sentenced to 14 years. <i>Not related to PEV.</i>
221/08	Mohammed Nyangala	Incest (rape of his daughter)	Acquitted. <i>The Department of Public Prosecutions report erroneously lists this case as a conviction. Not related to PEV.</i>
17/08	Silas Lusiri	Attempted defilement	Acquitted. <i>Not related to PEV.</i>

Kericho (Eight court cases researched)

Case Number	Accused	Charge	Outcome/Comments
HCCR 24/08 (formerly Buret Inq. 2/08; Appeal 310/09, Nakuru Appeals Court)	Robert Kipngetich Kemboi and Kirkland Kipngeno Langat	Murder of PC Peter Githinji and APC David Odhiambo (both police officers)	Convicted, sentenced to death; appeal in progress. <i>Incident clearly related to PEV.</i>
86/08	Francis Kipn'geno, Sammy Kosgei, Simon Ruto, Peter Biegon (<i>charges later withdrawn against him</i>), Joseph Cheruiyot Sawe, Thomas Kiprotich, Peter Kipkoech Langat	Robbery with violence (causing death of Administration Police Commissioner Hassan Omar Dado)	Acquitted, 1 April 2009; Sawe convicted of assault. <i>File indicates poor police investigations. Incident clearly related to PEV.</i>
66/08	Erick Towett and Simion Kipyegon Chepkwony, alias Saddam	Robbery with violence, gang rape	Acquitted. <i>Judge ruled that victim's identification of accused was questionable. Incident clearly related to PEV.</i>
87/08	Gideon Kibet Ruto	Robbery with violence	Withdrawn. <i>Reasons for withdrawal unclear; according to one lawyer, may have been "part of a political deal." Incident clearly related to PEV.</i>
10/08 (Appeal 30/09, Nakuru Appeals Court)	Charles Kipkumi Chepkwony	Robbery with violence	Convicted in May 2009, sentenced to death; appeal rejected. <i>Incident clearly related to PEV.</i>

95/08	Wesley Kipsang Korir	Robbery with violence	Withdrawn. <i>Prosecutor produced no witnesses in court, including complainant.</i> <i>Incident appears related to PEV.</i>
280/08	Harrison Kimutai Soi	Assault causing actual bodily harm	Case closed pending arrest. <i>Accused jumped bail.</i> <i>Unclear from file whether incident was related to PEV.</i>
11/08	Samwel Nyangaresi	Preparation to commit a felony	Case closed pending arrest. <i>Accused jumped bail.</i> <i>Incident appears related to PEV.</i>

Kitale (Five court cases researched)

Case Number	Accused	Charge	Outcome/Comments
958/08	David Temoi alias Kangata, Moses Sigoe Cheptot	Robbery with violence, arson	Withdrawn in December 2008. <i>Complainants did not appear in court.</i> <i>Incident appears related to PEV.</i>
248/08	David Ndiema Kiptarus, alias Kirui, and 8 others	Robbery with violence	Acquitted. <i>Evidence did not demonstrate that the two accused— a police officer and home guard present during a mob attack—were themselves involved in the attack. Judge ruled that the incident was wrongly charged as robbery with violence.</i> <i>Incident clearly related to PEV.</i>
814/08	Madan Arunga	Defilement	Convicted, sentenced to life imprisonment; appeal pending. <i>Human Rights Watch was unable to consult the file, which was in court when researchers visited Kitale.</i> <i>Unclear whether the incident was related to PEV.</i>
172/08	Augustine Cheruiyot Kemboi alias Siret, Michael Kemei Samoei alias Kamau, Willy Kipkoech Terer alias Mwalimu, Simon Kimeli Langat	Arson (2 counts); breaking into building and committing a felony; entering a dwelling-house with intent to commit a felony; burglary	Withdrawn. <i>Police file never received by police prosecutor.</i> <i>Incident appears related to PEV.</i>
105/08	Michael Nyarkinyi, Francis Cheptai Simatwa	Arson (9 counts)	Withdrawn. <i>The prosecutor moved to consolidate nine cases of arson and then asked to withdraw the case.</i> <i>Incident appears related to PEV.</i>

Molo (Four court cases researched)

Case Number	Accused	Charge	Outcome/Comments
Inq. 4/08	Thomas Belsoi (not formally charged)	Inquest into death of Nahashon Mburu	Pending before Molo Magistrate's Court as an inquest; no criminal charges filed. <i>Incident clearly related to PEV.</i>
219/08	Dedan Rop and Charles Ngeno	Arson, stealing	Acquitted on September 14, 2009. <i>Prosecution witnesses contradicted their earlier statements and were treated as hostile witnesses. Unclear from file whether incident was related to PEV.</i>
102/08	Bernard Sabastian Nyaikara	Stealing	Convicted, sentenced to fine of 5,000 Kshs (approximately US\$550) and 3 months in jail. <i>Not related to PEV.</i>
213/08	Sammy Mbuthia, James Mzungu	Office breaking and stealing	"Dismissed" according to court file. <i>Judge cited conflicting testimony by prosecution witnesses, as well as "police failure."</i> <i>Unclear from file whether incident was related to PEV.</i>

Mombasa (Two court files researched)

Case Number	Accused	Charge	Outcome/Comments
295/08	Alex Chita Ngoji	Stealing	Convicted, sentenced to four months community work. <i>Not related to PEV.</i>
17/08	Wycliffe Walter Nyawar Owuor	Incitement to violence	According to court file, warrant for arrest of suspect issued in August 2008; no further information in file. According to the Department of Public Prosecutions report, "case to be withdrawn for lack of evidence" as of March 2011.

Nairobi (Two court files researched)

Case Number	Accused	Charge	Outcome/Comments
HCCR 9/08	Edward Kirui, police constable	Murder of George William Onyango and Ismail Chacha	Acquitted. <i>Organizations that followed the case attributed the acquittal to tampering with evidence. Clearly related to PEV.</i>
HCCR 57/08	James Omondi Odera & 3 others	Murder of Melitus Mugabe Were	Pending before the court. <i>Not related to PEV.</i>

Naivasha (Four court files researched)

Case Number	Accused	Charge	Outcome/Comments
211/08	James Mbugua Ndungu, Raymond Munene Kamau	Robbery with violence, attempted rape	Convicted of robbery with violence only, sentenced to life imprisonment; acquitted for attempted rape. <i>Incident clearly related to PEV.</i>
167/08	John Kiragu Wanjiru, David Ekai, Paul Maina Kamau, and Silas Korogoi	Attempted rape	Acquitted on April 13, 2010. <i>Judge found that perpetrators attempted to unzip victim's trousers, but found no evidence of attempted rape.</i> <i>Incident clearly related to PEV.</i>
204/08	Peter Kinywa Gichini	Defilement	Convicted, sentenced to community service. <i>Not related to PEV.</i>
19/08K	Jonathan Moody William	Attempted rape	Acquitted on March 28, 2008 <i>Judge acquitted because after three adjournments, the police file not presented in court.</i> <i>Unclear whether incident was related to PEV due to lack of information in court file.</i>
77/08	Sospeter Ndungu Wanjiru	Assault	Convicted, sentenced to one year probation. <i>The Department of Public Prosecutions report erroneously lists this case as 19/08 and as a case of defilement committed by an army officer. The case number, the crime, and the accused are all inaccurate. 19/08 was a housebreaking case. Tracing the case by the victim's name, we found this was a case of simple assault committed by a civilian.</i> <i>Not related to PEV.</i>
167/08	John Kiragu Wanjiru, David Ekai, Paul Maina Kamau, and Silas Korogoi	Attempted rape	Acquitted on April 13, 2010. <i>Judge found that perpetrators attempted to unzip victim's trousers, but found no evidence of attempted rape.</i> <i>Incident clearly related to PEV.</i>

Nakuru (13 court cases researched)

Case Number	Accused	Charge	Outcome
HCCR 34/08	Stephen Leting, Emmanuel Kiptoo Lamai, Clement Kipkemei Lamai, Julius Nyogio Rono	Murder of Joseph Kimani Karugu, Mitati Rubia, George Miriu, James Mwirigi Mbugua, Peter Mwangi, Margaret Wanjiru Mburu and Simon Gatimba Mburu.	Acquitted. <i>Incident clearly related to PEV.</i>
HCCR 116/07	John Kimita	Murder of Reuben Kipn'geno, Shadrack Kipkoech, Rose Chemutai	Convicted, sentenced to 30 years in prison; appeal in progress. <i>Incident clearly related to PEV.</i>
HCCR 40/08	Joseph Lokuret Nabanyi	Murder of Zezia Wangui Karanja	Pending before court. <i>Incident clearly related to PEV.</i>
HCCR 21/08	Bernard Kibet Bii, Matthew Kipsang Chirchir, and Kennedy Sayaro Rungera	Murder of Joseph Maruti	Withdrawn on July 24, 2008. <i>Accused discharged after witnesses did not appear for two hearings. Incident clearly related to PEV.</i>
HCCR 12/08	Peterson Geteri, Denis Moranga Nyambune, Stephen Onserio Nyawaya (alias Kinyaga), and Dominic Mogaka Ondera	Murder of James Kigen	Withdrawn on July 31, 2008. <i>No explanation for the unusual step of withdrawing a case mid-trial. Incident clearly related to PEV.</i>
HCCR 118/08	Peter Kepkemboi	Murder of Kamau Kimani Thiongo	Pending before court. <i>Court was scheduled to rule on prosecution case on November 25, 2011. Incident clearly related to PEV.</i>
96/08	Jackson Kibor	Incitement to violence	Withdrawn on April 6, 2009. <i>Police failed to obtain audio evidence from BBC or witness testimony. Incident clearly related to PEV.</i>
536/08	Jane Kigen Juma and Philemon Kipchumba	Robbery with violence (causing death of one male victim)	Withdrawn (Kigen Juma); acquitted (Kipchumba). <i>The Department of Public Prosecutions report erroneously lists as a murder case and claims it was pending before courts in 2010. However, it was closed in 2009. Human Rights Watch did not consult the file, but received information from a lawyer. Incident clearly related to PEV.</i>

182/08	Daniel Moyi Makhopo and Dominic Malika Cheteri	Robbery with violence	Acquitted on July 20, 2011. <i>Judge found identification of accused not strong enough, despite identification parade. Incident clearly related to PEV.</i>
7202/08	Paul Muigai Mwhia	Gang rape	Pending before court. <i>Incident clearly related to PEV.</i>
4001/08	Peter Ochieng	Grievous harm	Convicted, 10 years. <i>Court file not seen by Human Rights Watch; information from police sources. Incident appears to be related to PEV.</i>
A/CR 4/08 (Children's Court)	Leleu Lengabatiti ("Lelewi")	Defilement	Convicted, sentenced to life imprisonment; appealed. <i>Nakuru Children's Court subsequently lost the file for two years and the appeal stalled. Only after Human Rights Watch's inquiry into the case was the file located. According to registry officials, the appeal will now proceed. Not related to PEV.</i>
1592/08	Margaret Wanjiru Mbugua	Arson	Withdrawn. <i>Witnesses never testified. Unclear whether incident was related to PEV.</i>

Sotik (Five court files researched)

Case Number	Accused	Charge	Outcome/Comments
Unknown; police number provided by the Department of Public Prosecutions report is 801/54/08	Peter Chepkwony	Robbery with violence	Acquitted (according to the Department of Public Prosecutions report). <i>Human Rights Watch sought file at Sotik Magistrate's Court and was informed the case does not exist.</i>
8/08	Willy Kipngeno Rotich and seven others (also listed as Phillip Kipng'eno and Others)	Robbery with violence	Convicted. <i>Incident appears related to PEV.</i>
51/08	Bernard Muindi	Arson	Pending before court, according to the Department of Public Prosecutions report. <i>File not seen by Human Rights Watch; Sotik court says it could not be found.</i>

553/08	Jackson Kibet and three others	Stealing	Pending before court. <i>Court file not seen by Human Rights Watch; information received by a lawyer.</i> <i>Unclear whether incident was related to PEV.</i>
53/08	Charles Kiplangat Ngeny, Betty Chepkemoi, Joseph Kiprotich	Stealing from a locked motor vehicle	Withdrawn in January 2010. <i>Prosecution did not have a police file or any witnesses.</i> <i>Unclear whether incident was related to PEV.</i>

Webuye (Three court files researched)

Case Number	Accused	Charge	Outcome/Comments
1217/08 (Appeal 66/2009, Bungoma High Court)	Nicholas Misiko Alfayo	Defilement	Convicted, sentenced to life imprisonment; appealed. Outcome of appeal unknown. <i>Not related to PEV.</i>
81/08 (Appeal 93/2008, Bungoma High Court)	Anthony Musasia Lubanga	Defilement	Convicted in October 2008, sentenced to life imprisonment; appealed. Outcome of appeal unknown. <i>Not related to PEV.</i>
25/08 (Appeal 66/2008, Bungoma High Court)	Peter Ondu Mukhabui	Rape	Convicted, sentenced to 15 years; appealed. Outcome of appeal unknown. <i>Not related to PEV.</i>

Appendix II: Letter to Commissioner Matthew Itere

HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300
Fax: 917-591-3452

AFRICA DIVISION

Daniel DeBevoise, Executive Director
Rosa Polgal, Deputy Director
Aloys Habimana, Deputy Director
Jon Elliott, Advocacy Director
Siphokazi Mthethi, South Africa Director
Marie Barnett, Senior Researcher
Kaitlin Condon, Fellow
Cassius Burke, Senior Researcher
Martina Erasmus, Associate
Neela Ghoshal, Researcher
Thomas Gilchrist, Assistant Researcher
Eric Gattschew, Researcher
Charlene Herry, Johannesburg Manager
Leslie Haskell, Researcher
Johanna Herry, Senior Researcher
Lindsay Hutchinson, Associate
Thuliso Kwanabale, Senior Researcher
Leslie Laikow, Senior Researcher
Rachel Nicholson, Associate
Ben Ransaupe, Researcher
Lisa Rinik, Researcher
Ida Sawyer, Researcher
Carina Tertakova, Senior Researcher
Annelie Van Woudenberg, Senior Researcher
Janine Vermeulen, Associate
Matthew Wells, Fellow

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June 7, 2011

Matthew Itere
Commissioner of Police
Kenya Police Headquarters
Vigilance House, Harambee Avenue
Nairobi, Kenya

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Re: Criminal Investigations Department Review of Post-Election Violence Cases

Dear Commissioner:

I wish to thank you for your efforts in the investigation of the post-election violence cases. As you are aware, Human Rights Watch is in the process of conducting an impartial research study on the same subject. I am now writing to request relevant information for our research about police investigations into post-election violence cases undertaken by the Criminal Investigations Department.

In recent months, Human Rights Watch examined victims' access to justice for the 2007-2008 post-election violence. We have been interviewing police, judicial officials, lawyers and victims and reviewing court files across Kenya to find out what steps have been taken to hold those responsible for crimes committed during the post-election violence to account.

Our preliminary findings indicate that more cases related to serious crimes have gone forward than is often acknowledged, but these cases have rarely involved senior politicians or police use of excessive force. We recognize that the Criminal Investigations Department (CID) has, in the last few months, initiated a process of reviewing cases that are pending under investigation, and that police intend to conduct further investigations into some of these cases. We encourage the police in its endeavors to further pursue accountability for perpetrators of serious crimes.

On the basis of our research, Human Rights Watch intends to issue a report that will document the cases that have been investigated and prosecuted successfully as well as the difficulties that many victims still face in accessing justice. We will also make recommendations to the government of Kenya about the most effective way to identify, investigate and prosecute cases.

Furthermore, we wish to engage in a constructive dialogue with the police in order to ensure that our recommendations are as relevant and our conclusions as reflective of the situation faced by the police as possible. To that end, we would like to seek information from your commission about the status of the ongoing cases and investigations, and to obtain relevant specific details on a number of questions below. The questions below primarily refer to CID.

1. We have obtained information from police officials and others that certain post-election violence files are currently with CID headquarters in Nairobi.

How many post-election violence cases are currently under review at CID?

2. The most recent Attorney General's report, dated March 2011, lists 3386 crimes that are pending under investigation, 21 cases that are pending arrest of a known suspect, and 90 pending inquests. In some cases, investigations made good headway but eventually stalled; in others, the files contain nothing more than an initial Occurrence Book report. A list of this length would pose serious challenges to the police force, and requires some degree of prioritization. Human Rights Watch has come to learn, through the course of our research, that a number of cases on the Attorney General's list are unrelated to the post-election violence, although they may have occurred during the same time period.

Are police or judicial officials currently analyzing court files in order to determine which of the cases are actually related to post-election violence?

How are cases prioritized for further investigation? For instance, is CID prioritizing the most serious crimes; those that appear to involve high-profile perpetrators; those that appear the most "investigable," in terms of accessing witnesses and/or documentary evidence; or based on another set of priorities?

Will CID be sending teams from Nairobi headquarters to conduct further investigations, or will they be carried out by local police?

3. The Waki Commission reported that 404 persons were fatally shot by the police during the post-election-violence. It also found that in some parts of Kenya, police failed to assist victims based on their ethnic group.

In 2008 the government announced that the police would conduct an internal inquiry into police conduct during the post-election violence. However, no police officers were prosecuted on the basis of those investigations.

What did the internal police inquiry consist of, and what were its results? Would CID be able to share the report with Human Rights Watch?

How many incidents were recorded of the use of firearms by police in efforts to quell the post-election protests? How many of those incidents were found to be unlawful?

Did the inquiry examine claims that certain police officers had failed to protect victims of certain ethnic groups? What were its findings?

Has any police officer faced disciplinary measures for the post-election violence, and of what nature?

Among the files currently under review at CID, are there any cases of alleged shootings by police officers? Apart from Edward Kirui, who was acquitted in 2010, have any police officers

been questioned about their role in alleged shootings? Have any victims of police shootings been contacted to provide evidence?

5. In October 2008 the police established a task force to identify sexual and gender-based violence cases related to the post-election violence.

What was the outcome of that task force's work? Have any prosecutions followed?

6. None of the dozens of victims interviewed during Human Rights Watch's research in April and May 2011 reported being approached by the police in recent months in order to provide testimony that might assist in investigations.

Does CID intend to undertake new outreach to victims in order to assist with investigations?

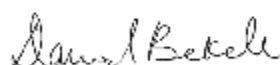
7. For various reasons a number of cases were not reported to the police during the post-election violence, including lack of confidence in the police as well as displacement and general lack of access to the police due to the chaos. Some cases that were not reported to the police were instead reported to other official bodies, including the Waki Commission and the Kenya National Commission on Human Rights.

Is CID investigating cases documented in the Waki report and the Kenya National Commission on Human Rights report, even in the absence of a complainant?

We thank you very much for your attention and your cooperation. A response received by July 10 can be incorporated into our final report. Please send your response to Jamie Vernaelde, Associate in the Africa Division, by email to jamie.vernaelde@hrw.org; by fax to +1-202-612-4333; or by courier to ACS Plaza, 1st Floor, Lenana Rd, Nairobi, Kenya. We would also be interested in setting up a meeting in Nairobi between one of our researchers and the appropriate official within the police force in order to further discuss these questions, and will be in touch with you to request a meeting.

We hope that our forthcoming recommendations on accountability for post-election violence prove to be of use to the police and that we can continue to work together in ensuring access to justice for the victims.

Yours sincerely,



Daniel Bekele
Director, Africa Division
Human Rights Watch

“Turning Pebbles”

Evading Accountability for Post-Election Violence in Kenya

Four years after the onset of Kenya’s 2007-2008 post-election violence, the government has done little to ensure justice for victims. It has failed to ensure the prosecution of perpetrators in all but a handful of the 1,133 or more killings committed during the violence, which pitted ruling party supporters and the police against armed groups linked with the opposition. Victims of rape, assault, arson, and other crimes similarly await justice. The International Criminal Court has opened cases against six high-profile suspects, but hundreds of other perpetrators of serious crimes continue to evade accountability.

This report, based on interviews with victims, police officers, defense and prosecution lawyers, and judicial officials and analysis of 76 court files, documents the difficulties faced by election violence victims in obtaining access to justice in Kenya. It identifies the principal weaknesses within the criminal justice system that have contributed to the paltry number of convictions, including police officers’ unwillingness to investigate and prosecute their colleagues; the generally poor quality of investigations; weaknesses within the police prosecution system; political influence and corruption that subverts the judicial process; and the absence of an operative witness protection system.

Human Rights Watch calls on the government of Kenya to establish a special judicial mechanism within the Kenyan justice system to investigate and prosecute the most serious election-related crimes. The government should also urgently fund the Witness Protection Agency and fast-track reforms to improve the quality and the independence of policing and prosecutions.

Providing redress for victims of post-election violence is a requirement, not an option. Nearly four years after the violence, victims have been waiting for justice for far too long.

Peter Omari Ogenche was shot in the back by police in Kibera, Nairobi, during the post-election violence. He is now paralyzed from the waist down and suffers severe pain. Ogenche won a civil suit against the government, but the government has failed to pay the court-ordered compensation.

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