

# **EVALUATION OF KNOWLEDGE AND EXPERTISE IN INTERNATIONAL CRIMINAL JUSTICE IN KENYA**

## **BASELINE SURVEY REPORT**

DECEMBER 2011



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Rue de Namur 72  
1000 Bruxelles – Belgique  
Tel. +32 2 223 36 54  
[info@asf.be](mailto:info@asf.be)

[WWW.ASF.BE](http://WWW.ASF.BE)

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## **LIST OF ACRONYMS/ABBREVIATIONS**

<b>CPA</b>	Comprehensive Peace Agreement
<b>CBO</b>	Community Based Organizations
<b>CPA</b>	Comprehensive Peace Agreement For South Sudan
<b>CSO</b>	Civil Society Organizations
<b>IDP</b>	Internally Displaced Persons
<b>ICC</b>	International Criminal Court
<b>UN OCHA</b>	United Nations Office for Humanitarian Assistance
<b>UNHCR</b>	United Nations High Commission for Refugees
<b>HRFAR</b>	Human Rights First Association of Rwanda
<b>CHESO</b>	Children Education Society
<b>ACJP</b>	The African Centre for Justice and Peace
<b>ASADHO</b>	African Association for the Defence of Human Rights
<b>FHR</b>	Foundation for Human Rights Initiative
<b>PEV</b>	Post election violence
<b>UNDOC</b>	United Nations Drug control
<b>IBA</b>	International Bar Association
<b>ICJ</b>	International Commission for Jurists
<b>LSK</b>	Law Society of Kenya
<b>IMLU</b>	Independent Medico-legal Unit
<b>IPPG</b>	Interparty parliamentary group
<b>NCCK</b>	National Council of Churches
<b>KNDR</b>	Kenya National Dialogue and Reconciliation
<b>MP</b>	Member of Parliament
<b>NGO</b>	Non Governmental Organizations
<b>TOR</b>	Terms of reference
<b>TJRC</b>	Truth Justice and Reconciliation Commission
<b>KPTJ</b>	The Kenyans For Peace With Truth and Justice

## **1.1 EXECUTIVE SUMMARY**

Over the years, ASF has been involved in a number of activities aimed at ensuring the protection and promotion of human rights in select countries across the globe. In 2010, as part of its ongoing efforts to contribute towards greater accountability for gross human rights violations as well as redress for victims, the organization launched a new multi-country project entitled "*Promoting the Rome Statute System and enhancing the effectiveness of the ICC*" with the support of the European Commission and the MacArthur Foundation.

The countries covered under this project include Uganda, the Democratic Republic of Congo, Burundi, East Timor and Nepal. In addition, Burundi, Uganda and Colombia are to serve as the hub for activities involving regional networks for French and English speaking African countries and Latin America respectively. As such, Guatemala, Chad, Guinea, Kenya and Zimbabwe will participate in some of the activities conducted in the aforementioned countries.

This baseline study is part of a series of activities under this new ASF project. ASF realizes that over the years, other organizations have been engaged in projects of this nature, and therefore in a bid to avoid duplication of programs, it decided to carry out this study in order to identify the training needs of different stakeholders in the justice system. This comprehensive analysis therefore necessitated that ASF interacts with key stakeholders in the judiciary, civil society and the legal community.

Our findings reveal that the Kenyan authorities are reluctant to facilitate consensus and create instruments for the establishment of a Special Tribunal for Kenya. They also show little support for the International Criminal Court while a great majority of the population and most respondents are clearly in favor of the ICC process. Many CSOs and international organizations advocate in favor of the Court and support the process.

Even though the Kenyan judiciary is well equipped to try gross violations of human rights and judges and prosecutors have a good understanding of the Rome Statute, the Kenyan judicial system lacks substantive and procedural legal frameworks to bring authors of international crimes before national courts.

## **1.2 INTRODUCTION AND CONTEXT**

The Rome Statute, which established the International Criminal Court, is one of the most progressive international legal instruments as regards the protection of human rights. The statute came into force on 1<sup>st</sup> July 2002 following ratification by 60 countries. As of October 2011, 119 states are subject to the jurisdiction of the court.

The Rome Statute has finally created a comprehensive system of accountability for gross human rights violations committed by all persons regardless of their standing in society and notwithstanding domestic legal frameworks that grant them immunity from prosecution. Further, the legal provisions within the Rome Statute that provide for reparations for victims of human rights violations are unprecedented.

Unlike previous international tribunals and courts that also dealt with perpetrators of human rights violations, the International Criminal Court is a permanent criminal court.

Under Article 5 of the Rome Statute, its jurisdiction is limited to the most serious crimes that concern the international community as a whole. The same Article further provides that the Court's jurisdiction extends to trying perpetrators of crimes of genocide, crimes against humanity, war crimes and the crime of aggression as recently defined.

Kenya signed the Rome Statute on August 11<sup>th</sup>, 1999 but only ratified the international treaty on March 15<sup>th</sup> 2005. The International Criminal Act, which the Rome Statute into domestic law, was adopted on December 12<sup>th</sup> 2008, and took effect on January 1<sup>st</sup> 2009. Even though the Agreement on Privileges and Immunities has not yet been signed by Kenyan authorities, the Privileges and Immunities Act CAP 179 of the Laws of Kenya entered into force on September 6<sup>th</sup> 1970. The latter was amended in 2008 to include the following section:

“9A. The judges, officials and staff of the International Criminal Court, and any counsel, experts, witnesses and other persons required to be present at the seat of that Court, shall have the privileges and immunities set out in article 48 of the Rome Statute and the agreement on privileges and immunities contemplated in that article.”

Finally, Kenya publically rejected. It is now under great pressure from the USA to reconsider its position.

### **1.3 METHODOLOGY**

The baseline study was conducted in Nairobi. The following was undertaken:

- Documentary analysis of publications and relevant national legislation or draft legislation.
- Interviews and meetings with the main actors in this field such as lawyers, NGOs, legal consultants, officials of the judiciary, parliamentarians and international actors.

#### **1.3.1 Ethical Considerations**

All interviewees were contacted in advance of the field work and informed of the purpose of the mission. All information gathered in the field was treated as confidential and only used for the purposes of this report. In this report, names and identities of interviewees are given only in cases where ASF is of the opinion that it will not jeopardize their safety.

#### **1.3.2 Limitations of the study**

Firstly, there was a high likelihood of error resulting from the inability of respondents to give proper accounts of their past training given the passage of time.

Secondly, in comparative terms, the study is based on a small sample size that may not be truly representative of all stakeholders across the country. ASF made attempts to involve a great number of stakeholders in this study, but the majority did not respond.

While this does not significantly impair the study's findings, some issues would benefit from further investigation to obtain a more comprehensive understanding of the overall situation.

The small sample size is also a reflection of the minimal level of interest on issues of international criminal justice among some of the target groups including lawyers.



# **PART I: THE INTERNATIONAL CRIMINAL COURT IN KENYA. ANALYSIS OF THE CONTEXT.**

## **1. EVENTS OF 2007-2008**

Kenya gained independence from the United Kingdom in 1963. It is a sovereign republic, whose system of government is presidential.

In 2007, the Kenyan presidential elections opposed two candidates. On one side was Kibaki, candidate of the National Unity Party. On the other side was Odinga, candidate of the Orange Democratic Movement. Due to the delay in publishing the results of the elections, violence broke out resulting in 1133 death, 3561 injured, 117261 deprived of their possessions and 350 000 internally displaced people. Following the events, in February 2008, a commission of inquiry was established (Waki Commission) and concluded that the violence was in part spontaneous, but also planned and well-organized in part of the country.

In December 2008, Kenya committed to the creation of a special tribunal for the events that followed the elections, but on 12th February 2009, parliament voted against the adoption of statutes that would have achieved this. The Bill was rejected by 101 – 93 votes (145 vote being two thirds of the 222 required for a constitutional amendment). Among those who rejected the bill are Deputy Prime Minister and Minister of Finance Minister Uhuru Kenyatta and William Ruto, the then Minister for Agriculture<sup>1</sup>. They are now suspects before the ICC.

The main reason for rejecting the amendment was the parliament's fear that it would create a loophole enabling the Executive to interfere in the process of dispensing justice. Another key reason was that it did not provide for immunity and pardon (clemency).

In addition to this, the Council of Ministers took the initiative to secretly release all detainees suspected of involvement in the post-electoral violence. All charges against them were dropped<sup>2</sup>.

In August 2010, Kenya adopted a new constitution, which introduced judicial changes. Among them was the scrutiny of judges and magistrates as well as the nomination of the new President of the Supreme Court and a Prosecutor. In June 2011, the nomination of judges was followed by the vetting<sup>3</sup> of the Supreme Court, and the process completed by the Judicial Service Commission<sup>3</sup>.

## **2. THE INTERNATIONAL CRIMINAL ACT**

The first International Crimes Bill was published by the government in 2006. But the enactment of a new law on the crimes covered by the Rome Statute took place on December 12, 2008. The International Crimes Act took effect on January 1st, 2009.

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<sup>1</sup> <http://allafrica.com/stories>

<sup>2</sup> George Kegoro. "Vers la mise en place d'un système judiciaire national au Kenya". Coalition pour la Cour Pénale internationale. Nouvelles d'Afrique. Mars 2011. N°15

<sup>3</sup> USIP. Prevention newsletter, July 2011. p. 4

It confers jurisdiction on the High Court for crimes against humanity, war crimes and genocide. Regarding the definitions of these crimes, the Act refers directly to the definition provided by the Rome Statute.

Article 27 of the Rome Statute related to the issue of immunity is not transposed into domestic law<sup>4</sup> but the new constitution provides immunity for the Head-of-State with the exceptions of cases brought before the ICC.

As the Act is not retroactive, mid and low level perpetrators cannot be tried under this Act. However they can be tried under the existing penal code for crimes such as murder, arson and rape. Pending cases have not led to any convictions and investigations have proven *'to be shoddy'*. Also, the question of personal immunity of the incumbent Head of State is still controversial in light of customary international law. The Act should be amended to state that all persons, irrespective of their rank or official capacity, are criminally liable for offences under the Act and are therefore subject to the jurisdiction of the Court.

### **3. NATIONAL LEGISLATION**

#### **a) Witness Protection Act**

Since the start of the investigations by the ICC, amendments have been made to the Witness Protection Act to create an independent and autonomous Witness Protection Unit.

The recent posting of information about protected witnesses on the popular website Twitter has sparked concern about the risk of divulgation of confidential material by means of social media. A user published the names of protected witnesses due to testify in cases against those accused of orchestrating the post-election violence in Kenya in 2007 and early 2008.

#### **b) The Privileges and Immunities Act CAP 179 of the Laws of Kenya**

This Act of Parliament consolidates the law on diplomatic and consular relations by giving effect to certain international conventions<sup>5</sup>.

On 15<sup>th</sup> October 2010, legal notice No 170 granted immunities and privileges to the ICC and all its employees under the fourth schedule of the Act, which covers organizations, their employees and families hence domesticating the Agreement on the Privileges and Immunities of the International Criminal Court.

#### **c) The Power of Mercy Act (No 21 2011)**

Article 133 of the Kenyan constitution states: *"On petition of any person, the president may exercise a power of mercy in accordance with the advice of the Advisory Committee..."* and *"may grant a free or conditional pardon to a person convicted of an offence."*

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<sup>4</sup> Open Society Foundations. Putting complementarity into practice : Domestic Justice for International Crimes in DRC, Uganda and Kenya. 2011

<sup>5</sup> Laws of Kenya CAP 179

The Power of Mercy Act commencement date is September 5<sup>th</sup> 2011. It sets out the composition, functions and powers of the Advisory Committee on the Power of Mercy, the duration of the Power of Mercy and other miscellaneous provisions.

Section 19 is very clear as to who may petition: "any person". The Power of Mercy Act does not contain any restrictions except in respect of persons who are on probation or serving a suspended sentence, and under section 21, a person who was sentenced to death or life and has served at least five years. It further states that the committee can determine if there is a need to contact the victim, in which case reasonable efforts shall be made to notify the victim. This begs the question whether a person tried under the ICA 2008 would be eligible for a pardon.

#### **4. Kenyan cases before the ICC**

There are currently 2 cases with 6 suspects before the Pre Trial Chamber of the ICC. Summonses to appear were issued to Francis Kirimi Mathaura, Uhuru Mauigai Kenyatta, Mahammed Hussein Ali, William Somoiei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang on March 8, 2011.

On March 31st 2010, investigations of crimes committed in the aftermath of the elections were opened by the ICC on request of the Prosecutor. But in March 2011, as a consequence of the decision of the ICC to issue the above summonses to appear, Kenya considered establishing a national judicial system to try acts of violence committed during the elections of 2007 and 2008<sup>6</sup>. On March 31st 2011, Kenya, with the support of the AU<sup>7</sup>, introduced a request before the ICC to contest the jurisdiction of the Court over this matter. Kenya argued that it has implemented reforms to process these cases.

By April 8 2011 all suspects had appeared before the Court. Confirmation of charges took place during the first and third week of September 2011. The particularity of this case is that there are as many suspects from Orange Democratic movement (ODM) as Party of National Unity (PNU), the two main political parties. Two of the suspects are prominent politicians who command large followings within their respective region and have both indicated their intention to run for presidency in the elections to be held in 2012. They also represent two large ethnic groups.

#### **5. Kenya's cooperation with the ICC**

In August 2010, the President of Sudan Omar El Bashir, who faces war crimes charges under an ICC warrant, was invited for the promulgation of Kenya's new constitution. It caused consternation among invited diplomats and drew widespread criticism.

The Kenyan government explained its failure to arrest Sudan's president by reference to strategic interest in the country and the region. Richard Onyonka, Assistant Foreign Minister, said that arresting Omar El Bashir might have adversely affected peace in Sudan:

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<sup>6</sup> George Kegoro. "Vers la mise en place d'un système judiciaire national au Kenya". Coalition pour la Cour Pénale internationale. Nouvelles d'Afrique. Mars 2011. N°15

<sup>7</sup> CICC, Pour la Coalition mondiale, le Kenya et l'Union Africaine devraient soutenir leur engagement à la justice. La société civile est déçue par la décision prise par le 16<sup>ième</sup> sommet de l'Union Africaine. 7 février 2011

"Apart from being an immediate neighbor, Sudan's stability is vitally linked to Kenya's continued peace and well being."<sup>8</sup>

As State party to the Rome Statute, Kenya has a duty to arrest President Bashir of the Republic of Sudan. At State level, the enforcement of international criminal law remains complicated<sup>9</sup>. Nevertheless, on 28th November 2011, the High Court of Kenya issued a warrant to arrest against President Omar El Bashir should he set foot in Kenya. Sudan's Foreign Ministry dismissed the ruling as politically motivated, and said it would not affect the country's relations with Kenya. It claimed that the decision was adopted in reaction to Kenya's domestic disputes and its relations with the ICC rather than the situation in Sudan. The ministry said in a statement that it believed activists were disappointed by the ICC's "failure" to apprehend suspects and Bashir's successful visits abroad had pushed the court into making a "political decision"<sup>10</sup>. However, immediately following that statement, Sudan recalled its Ambassador from Kenya and expelled the Kenyan Ambassador, giving him 72 hours to leave Khartoum, and announced a ban on flights to and from Kenya. Trade, security and regional interest are reported to be in jeopardy. The Inter Governmental authority on Development (IGAD), a regional body, warned of "*great risks if Kenya carries out the order*".

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<sup>8</sup> <http://www.guardian.co.uk/world/2010/aug>

<sup>9</sup> (<http://www.globalpolicyjournal.com/blog/16/09/2010/kenya-icc-friend-or-foe>)

<sup>10</sup> <http://www.reuters.com>

## PART II: SURVEY OF THE KNOWLEDGE OF TARGETED GROUPS AND BENEFICIARIES OF THE ROME STATUTE SYSTEM AND THE ICC

### 1. LAWYERS

<b>Amount of participants</b>	7 from Nairobi. 2 of them also work for NGO's (Kituo cha Sheria and International Commission of Jurists)
<b>Knowledge of the Rome Statute and the ICC system</b>	<ul style="list-style-type: none"> <li>▪ Very satisfactory = 6</li> <li>▪ Satisfactory = 1</li> <li>▪ Not satisfactory = 0</li> </ul>
<b>Knowledge of the right of victims to participate in the proceedings</b>	<ul style="list-style-type: none"> <li>▪ Very satisfactory = 4</li> <li>▪ Satisfactory = 3</li> <li>▪ Not satisfactory = 0</li> </ul>
<b>Participation in activities promoting the Rome Statute</b>	<ul style="list-style-type: none"> <li>▪ Yes = 3 (project for the implementation of the Rome Statute, critics of the international crimes bill 2008, civic education on ICC)</li> <li>▪ No = 3</li> <li>▪ No answer = 1</li> </ul>
<b>Trust in the Kenyan judicial system</b>	<ul style="list-style-type: none"> <li>▪ Trust = 4 (The newly constituted Supreme Court, judicial reforms and a new Chief Justice in accordance with the constitution show that we are on the right track)</li> <li>▪ Do not trust = 3 (<b>impossible to try and convict politicians and the wealthy</b>, due to political patronage and the desire to protect suspects, and the fact that the judiciary is not yet fully autonomous, though with the current reforms there could be hope)</li> </ul>
<b>Trust within the International Criminal Court</b>	<ul style="list-style-type: none"> <li>▪ Trust = 7</li> <li>▪ Do not trust = 0</li> </ul>
<b>Existence of international crimes perpetrated in Kenya which could be brought either before national courts</b>	ICC <ul style="list-style-type: none"> <li>▪ Yes = 7</li> </ul>

<b>or the ICC</b>	<ul style="list-style-type: none"> <li>▪ No = 0</li> <li>▪ No answer = 0</li> </ul> <p>Domestic courts</p> <ul style="list-style-type: none"> <li>▪ Yes = 4</li> <li>▪ No = 2</li> <li>▪ No answer = 1</li> </ul>
<b>Litigation experience involving grave violation of human rights</b>	<ul style="list-style-type: none"> <li>▪ Yes = 4 (child rights, extra judicial execution and torture by police and military)</li> <li>▪ No = 3</li> </ul>
<b>Understanding of international criminal law</b>	<ul style="list-style-type: none"> <li>▪ Bad = 0</li> <li>▪ Average = 2</li> <li>▪ Good = 3</li> <li>▪ Excellent = 2</li> </ul>
<b>Needs</b>	<ul style="list-style-type: none"> <li>▪ They need the international community to help them restore their judicial system and public confidence in their judiciary.</li> <li>▪ There should be proper channels to report these crimes. There should also be civic education about these crimes.</li> </ul>

Lawyers who participated in this survey are well aware of the Rome Statute and the International Criminal Court. Over 50% of them already have experience in dealing with grave violations of human rights. They trust the ICC system and closely follow the cases of the six Kenyans currently being tried by the Court. None of them represents the victims in these two cases. Most of them believe that some of the cases could be tried by domestic courts; however, they do not trust the national judicial system although they believe that the recent reform will greatly improve it.

## 2. Civil Society Organization

<b>Amount of participants</b>	2 (area of intervention = Nairobi, Baringo and West Pokot and Countrywide)
<b>Knowledge of the Rome Statute and the ICC system</b>	<ul style="list-style-type: none"> <li>▪ Very satisfactory = 1</li> <li>▪ Satisfactory = 1</li> </ul>

	<ul style="list-style-type: none"> <li>▪ Not satisfactory = 0</li> </ul>
<b>Knowledge of the right of victims to participate in the proceedings</b>	<ul style="list-style-type: none"> <li>▪ Very satisfactory = 0</li> <li>▪ Satisfactory = 0</li> <li>▪ Not satisfactory = 1</li> <li>▪ No answer = 1</li> </ul>
<b>Participation in activities promoting the Rome Statute</b>	<ul style="list-style-type: none"> <li>▪ Yes = 1 (A seminar organized by Kenyans for Justice and Development on 12<sup>th</sup> January 2011. I was a moderator for one of the sessions. I also travelled to Addis Ababa, Ethiopia, at the end of January for the African Union Summit where Kenya was lobbying African states to support its quest for a deferral.)</li> <li>▪ No = 1</li> <li>▪ No answer = 0</li> </ul>
<b>Trust within the Kenyan judicial system</b>	<ul style="list-style-type: none"> <li>▪ Trust = 0</li> <li>▪ Do not trust = 2 (little political will: justice is still elusive and judicial decisions are sold to the highest bidder. The new constitution promised hope for better institutions but as of now, doubts remain)</li> </ul>
<b>Trust in the International Criminal Court</b>	<ul style="list-style-type: none"> <li>▪ Trust = 2</li> <li>▪ Do not trust = 0</li> </ul>
<b>Existence of international crimes perpetrated in Kenya which could be brought either before national courts or the ICC</b>	<p>ICC</p> <ul style="list-style-type: none"> <li>▪ Yes = 2</li> <li>▪ No = 0</li> <li>▪ No answer = 0</li> </ul> <p>Domestic courts</p> <ul style="list-style-type: none"> <li>▪ Yes = 1</li> <li>▪ No = 1</li> <li>▪ No answer = 0</li> </ul>

<b>Litigation experience involving cases of grave violation of human rights</b>	<ul style="list-style-type: none"> <li>▪ Yes = 1</li> <li>▪ No = 1</li> </ul>
<b>Understanding of International criminal law</b>	<ul style="list-style-type: none"> <li>▪ Bad = 1</li> <li>▪ Average = 0</li> <li>▪ Good =1</li> <li>▪ Excellent = 0</li> </ul>
<b>Needs</b>	<ul style="list-style-type: none"> <li>▪ No answer given</li> </ul>

The two CSO participating in this survey have some good basic knowledge of the Rome Statute system. One of them showed great interest in the survey by consulting reference material before completing the questionnaire. None of them has experience relating to victims' rights.



## CONCLUSION

Our findings reveal that more outreach and training are necessary in order to ensure that all stakeholders embrace the Rome Statute system and understand its vital role in building a nation where perpetrators of gross human rights violations are brought to justice and held accountable. In addition, there is still a need to create a platform through which these stakeholders can advocate key legislative and judicial reforms to ensure that there is an effective legal regime and practice aimed at protecting the rights of victims of gross human rights violations and the provision of effective redress.

### Key findings :

- i. Lack of political will to facilitate consensus and build confidence in the legal framework and instruments establishing a Special Tribunal for Kenya led to the defeat of the Constitutional Amendment Bill, 2009, in Parliament. Lack of accountability is one of the most enduring legacies of impunity.<sup>11</sup>
- ii. The political class does not support the ICC process whereas the majority of Kenyans do.
- iii. Support for the ICC process continues to grow. Sixty five percent of the respondents were satisfied with the ICC. Those who are satisfied with the ICC perceive it as the only means to get justice for victims of the post-election violence and end impunity in Kenya. Lack of movement in prosecuting powerful persons as well as low-level perpetrators since the post-election violence suggests that the ICC continues to capture the public imagination about what should be done to fight impunity at all levels:<sup>12</sup>
- iv. CSOs and international organizations actively support the ICC process for the six suspects currently tried by the Court.
- v. The Kenyan judiciary is adequately equipped to handle crimes that constitute gross violations of human rights.
- vi. The substantive and procedural legal frameworks to try such crimes do not exist.
- vii. Lawyers, judges and prosecutors have a good understanding of the Rome Statute.
- viii. There is a need for capacity building at all levels in respect of international criminal justice and the procedure of the ICC as well as the legal regime that governs the Court.
- ix. There is a need to develop capacity to prosecute mid level and low level perpetrators as the limitation of the ICC is statutory and it can only prosecute those who bear the greatest responsibility.
- x. A special tribunal must still be set up to try the other perpetrators of PEV.

### Recommendations :

- i. Lawyers who have been identified by this survey have a great understanding of international criminal law and the Rome Statute system. They should be asked to join the regional network.
- ii. The findings of this baseline study also reveal that the different stakeholders have varying training needs and therefore under the new ICC project, the regional network should be tailored in order to suit each category of professionals.

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<sup>11</sup> <http://kenyapolitical.blogspot.com/2009/02/ndungu-wainaina-foreign-umpire>

<sup>12</sup> The Kenya National Dialogue And Reconciliation (Kndr) Monitoring Project South Consulting Review Report

- iii. After each meeting of the regional network, online material should be provided to, among others, the various online legal resource centers both in Kenya and in the East African regional societies such as the East African Law Society.
- iv. Grassroots organizations and other stakeholders should benefit from the experience of the regional network in assisting victims exercise their rights.
- v. There should be concerted action with national NGOs that have demonstrated a working relationship with CBO and other grassroots organizations, especially at the epicenters of PEV, to build the capacity of CBOs.
- vi. Other CBOs should be independently identified and their involvement in ICC activities should also be identified.

## ANNEXES

### ANNEX 1. TERMS OF REFERENCE



#### TERMS OF REFERENCE – BASELINE STUDY

PROJECT: “*Promoting the Rome Statute System and enhancing the effectiveness of the ICC*”  
Kenya

#### I. CONTEXT

ASF has recently launched the project entitled *Promoting the Rome Statute System and enhancing the effectiveness of the ICC*, mainly thanks to the financial support of the European Union<sup>13</sup>. The objective of the project is to contribute to a greater accountability for human rights violations and redress for victims.

More specifically, the project seeks to strengthen the International Criminal Court (ICC) and the Rome Statute System, notably by:

1. Raising awareness and knowledge among the target groups and beneficiaries about the ICC as well as the opportunities and challenges of complementarity under the Rome Statute.
2. Support for the enactment of implementation legislation for the Rome Statute and the Agreement on Privileges and Immunities in those target countries having ratified one or both instruments, including the DRC, Chad and Guinea (who have yet to enact implementation legislation), Colombia (where an international cooperation bill is expected to be tabled), and in Uganda (where the status of the newly enacted ICC bill remains unclear).
3. Support for domestic investigations for international crimes in line with the principle of complementarity and international standards in the DRC, Colombia and Uganda and other target countries where such crimes occur.
4. Promote the ratification of the Rome Statute (Nepal, Zimbabwe and Guatemala) and the Agreement on Privileges and Immunities of the International Criminal Court (in the above mentioned countries as well as in Burundi, Guinea, Chad, Kenya, and East Timor, which have not ratified the APIC).
5. Providing legal assistance and representation of victims seeking to exercise their right to participation and redress in proceedings before national courts and the ICC.

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<sup>13</sup>The targeted countries in the project are mainly the Democratic Republic of the Congo, Uganda, Burundi, Colombia, East Timor and Nepal. Other countries – in which neither ASF nor its partner LWBC have permanent missions will participate in certain activities. This is the case of Guatemala, Chad, Guinea, Kenya and Zimbabwe.

In order to develop strategies and tools that will meet the needs, it is necessary to be aware of the situations that prevail in each country of intervention<sup>14</sup> and to identify the constraints and priorities of target groups and beneficiaries. In order to do so, a baseline study will be produced and will serve as a reference point for the implementation of the project

### **OBJECTIVES OF THE STUDY**

The objective of the Baseline Study is to allow for the correct implementation of the project and to maximize its positive effects.

The study will therefore focalize on the following specific objectives to be met:

1. Examination of the prevailing situations in the areas of intervention by evaluating the situations related to the problems that underlie the logic of intervention;
2. Identify the relevant indicators from the information collected in the field with the purpose of strengthening the follow-up and evaluation process of the project;
3. Use the results to establish assessment criteria for the selection of up to 8 lawyers who will take part in the first round of the regional workshop;
4. Incorporate the results of the analysis in the formulation of the programmes of the regional networks and workshops and select up to 8 lawyers who would participate in the regional network;
5. Use the results of the study to fix benchmarks and indicators for the follow-up and evaluation of specific activities.

### **I. EXPECTED RESULTS**

- Identification of the legislative framework and reforms (background reforms and procedural reforms) and any changes that may be necessary for the administration of justice in the international crimes justice area;
- Identification of government policy and that of its international partners (ratification of the Rome Statute, APIC, implementing legislation, effective application of ratified legal documents);
- Identification of national and international actors involved in the capacity-building, raising awareness and advocacy for the fight against impunity of serious crimes, to provide effective reparation for victims and to promote the Rome Statute System;
- Identify activities carried out by members of LSK and other legal professionals in Kenya in the area of international criminal law, including advocacy, monitoring and evaluation of domestic proceedings involving international crimes and measure the level of synergy within these networks;
- Identify the strengths and weakness of past activities and future plans;
- Evaluation of the knowledge and expertise and the level of engagement of lawyers working in the area of international criminal law, human rights and the fight against impunity.

### **II. METHODOLOGY**

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<sup>14</sup> With the exception of the DRC where this study already exists considering the continuity of previous actions put in place by ASF since 2002 in that country.

The baseline study is produced through mapping, surveys and consultations, investigations and consultation meetings with target groups and stockholders from all the countries involved in the activity.

*To that effect, the following will be carried out:*

- A documentary review of relevant studies, reports and other publications as well as national legislation;
- Interviews with key actors in the justice sector and the repression of international crimes (lawyers' associations, national and international experts);
- A survey on the points of view and priorities of target groups;
- The research on the national context and on the legislative and institutional framework:
  - Status of the ratification procedures for the Rome Statute and the APIC (ways to succeed, existing initiatives, key actors, political and legal obstacles, etc.), main actions to ensure state cooperation with the ICC and the effectiveness of the principle of complementarity;
  - Status of implementation of the Rome Statute (existing implementing legislation, legislative reforms on the background and procedure, necessary changes in the administration of justice, and relevant government policies and those of their international partners on this issue) ;
  - Compliance of the implementing legislation with the Rome Statute and international standards, and existence of national legislation that impedes the prosecution of international crimes within the domestic judicial system and to cooperate with the ICC (amnesty laws, immunities, prohibition of extradition, etc.);
  - Examination of domestic proceedings on international crimes (pre-judicial phase, judicial phase and execution of judgments) and the conformity of procedures with principles of law and equitable process ;
  - Legal framework and recourse mechanisms for victims of international crimes (the possibility to participate in criminal proceedings and obtain reparation).
- Proceeding to the identification of relevant actors and identification of their needs:
  - Mapping national civil society organizations that work on issues related to the ICC (specifying the activities carried out, their capacities and limitations when carrying out activities) and evaluation of their needs ;
  - Identifying priorities in terms of awareness-raising of (opinion leaders and parliamentarians) and capacity building (of magistrates, police officers, military personnel and authorities on their obligations under the Rome Statute) ;
  - Knowledge and expertise of lawyers, actors of the justice sector on issues related to international criminal law and the Rome Statute System;
  - Capacity level of civil society organizations to conduct awareness raising activities and advocacy, assistance to victims and improvement of their right to participate in proceedings and to obtain reparation;
  - Existence of initiatives in favor of capacity building (beneficiaries, subjects covered) and assistance to victims (modus operandi and identification of target groups), impact and limitations of these activities.

- Existence of follow-up and evaluation activities of the proceedings before national courts on international crimes.

### **III. OUTPUTS**

- Provide the final proposition including the methodology used, the questionnaires, the framework for the sample and a calendar (for approval by the CR/CP)
- Prepare a preliminary report and a final report within the time line incorporating the feedbacks from the Project and Regional Co-ordinators. The final report must include:
  - Recommendations on needs and priorities of the target groups
  - Recommendations on the selection of potential participants of regional networks.
  - Recommendations principal challenges to the implementation of the activities.
  - Complete collection of data (electronic and hard copies) obtained through surveys.

### **IV. CHRONOLOGY**

The study should be concluded by August 2011.

**ANNEX 2. QUESTIONNAIRES**



*« Promoting the Rome Statute System and enhancing the effectiveness of the ICC »*  
**Baseline Study**

- Name of respondent:
- Contact information:
- Name of the institution / organisation:
- Type of institution / organisation:
- Function within the institution / organisation:
- Geographical area of intervention:
- Date and place:

**I. Knowledge of the International Criminal Court**

1. What do you know about the Rome Statute and the International Criminal Court?
  - a) Creation :
  - b) Who can be tried before the ICC (jurisdiction)?
  - c) Who can exercise the jurisdiction of the ICC?
  - d) Who decides to judge a person?
  
2. How do you know the ICC?
  
3. Can you explain the difference between a war crime, a crime against humanity and a crime of genocide?
  
4. Do you know the persons who are currently being tried before the ICC and the reasons why they are being prosecuted?
  
5. Do you know how the ICC works? (constitutive organs)

What is the functions of :	
The Office of the Prosecutor	
The Office of Public Counsel for the Defence	
The Office of Public Counsel for Victims	
The Trust Fund for Victims	
Victims Participation and Reparation Section	

6. Are there persons who cannot be judged before the ICC (exemption from criminal responsibility)? If so, who are they and why?
7. Are military commander and other hierarchical superior responsible before the ICC for crimes committed by their subordinates?
8. Are the persons who have committed crimes under the jurisdiction of the ICC under an order from a government or a superior criminally responsible?
  - a) Yes or no?
  - b) If not, in which cases are they exonerated from their criminal responsibility?

## **II. Knowledge of the Rome Statute System:**

9. What does the principle of complementarity described by the Rome Statute mean?
10. Can the ICC and domestic tribunals have concurrent jurisdictions over a case? Justify your response.
11. Has Kenya ratified the Rome Statute?
  - a) Yes or no?
  - b) If so, when?
12. Enumerate the obligations of a State Party to the Rome Statute :
13. In your opinion, what is your level of satisfaction in terms of Kenya's respect for its obligations under the Rome Statute?
 

Not at all satisfactory       Satisfactory       Very satisfactory
14. What are the necessary measures to be taken in order to ameliorate Kenya's respect for its obligations under the Rome Statute?
15. Has Kenya adopted legislation to facilitate the application of the Rome Statute by domestic jurisdictions?
  - a) Yes or no?
  - b) If so, which ones? When?
16. Which are the competent jurisdictions to try international crimes in Kenya?
17. Are there any other organs/institutions linked to the litigation of international crimes?
18. Are there any cases in Kenya that have been or could be tried before the ICC?
  - a) Yes or no ?
  - b) If so, name which ones and justify your response.
19. Are there cases in Kenya under the jurisdiction of the ICC that have been or could be tried before domestic jurisdictions?
  - a) Yes or no?
  - b) If so, name which ones and justify your response.



### III. Knowledge of victims' right to participate in proceedings and their accessibility:

20. What are the rights of victims provided under the Rome Statute?
21. How can a victim of an international crime participate in proceedings:
- Before the ICC?
  - Before domestic jurisdictions?

### IV. Identification of needs:

22. Have you or your law firm been or are currently involved in some way in matters of legislation for international crimes in Kenya?
- Yes / No
  - If so:
    - Describe the role played by your office or structure
    - What are the achievements of your office/structure as of today?
    - What has your specific role been?
    - What challenges have you faced?
    - What are your needs in order to respond to the current challenges?

23. What is your level of knowledge and comprehension of international criminal law?

Bad  Average  Good  Exceller

What are your shortcomings?

24. Have you ever participated in capacity-building activities linked to the Rome Statute and international justice or to contribute to the promotion of the Rome Statute System and the work of the ICC?
- Yes /no?
  - If so, specify: What type of activities? In what capacity (trainer / participant / moderator) / Who organised the activity / The main objective of the training/ The topics dealt with/ What were the socio-professional categories of the beneficiaries? Strengths and weaknesses of the training activity?
  - Do you (still) have needs to satisfy? Specify the form (training/technical support/workshops) and the content (relevant topics)

25. Which are the areas of the country where training activities should take place?

26. Have you already had an experience dealing with criminal cases on serious violations of Human Rights?
- Yes / No
  - If so: How many years of experience do you have in this area ? How many cases have you worked on? (specify the cases).

### V. Expectations

27. What are your expectations and needs in the area of justice linked to international crimes?
28. Do you trust the ICC will fulfill these expectations? Why?
29. Do you trust the justice system of Kenya will fulfill these expectations? Why?

30. What are the obstacles found by the justice system of Kenya to prosecute and try the cases related to serious violations of human rights (structural obstacles and cyclical obstacles)? How do you think these can be resolved?
31. Do you believe it is possible to expect a high level of criminal responsibility for serious violations of human rights and reparation for victims thanks to the Rome Statute System?
32. What are the priorities linked to the promotion of a high-level criminal responsabilisation for serious crimes such as those under the jurisdiction of the ICC in Kenya?
33. Do you consider that the majority of actors of the justice sector in Kenya are familiar with the ICC and the Rome Statute?
34. Do you know any NGOs (international and national) and other institutions that are active in this area in Kenya?
- a) Yes / No
  - b) If so, which are the main organisations and what activities are they involved in?
35. Do you believe the work of the ICC has had an impact on Kenya?  
If so, to what level: political / institutional system, on the rights of victims and/or at the community level? Explain.