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Domestic Prosecution of International Crimes in Kenya: A Critical Analysis

Research paper submitted in partial fulfilment of the requirements for the award of the LLM degree

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DECLARATION

I, Darleen Seda, declare that *"Domestic Prosecution of International Crimes in Kenya: A Critical Analysis"* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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DEDICATION

To the victims and survivors of the post-election violence of 2007/2008 in Kenya.

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Above all, I give thanks to God who made all this possible.

LIST OF ABBREVIATIONS AND ACRONYMS

AU	African Union
CAT	Convention Against Torture
CIPEV	Commission of Inquiry into the Post-Election Violence
DPP	Director of Public Prosecutions
ICA	International Crimes Act
ICC	International Criminal Court
ICD	International Crimes Division
ICESCR	International Convention on Economic, Social and Cultural Right
ICCPR	International Convention on Civil and Political Rights
JSC	Judicial Service Commission
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
KLR	Kenya Law Reports
MLA	Mutual Legal Assistance
NGO	Non-Governmental Organisation
ODM	Orange Democratic Movement
ODPP	Office of the Director of Public Prosecutions
PEV	Post-Election Violence
PNU	Party of National Unity
SGBV	Sexual and Gender Based Violence
SOA	Sexual Offences Act
TJRC	Truth Justice and Reconciliation Commission

UNSC	United Nations Security Council
UJ	Universal Jurisdiction

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Problem

The search for justice in Kenya following the (in)-famous post-election violence (PEV) that succeeded a fervently disputed presidential election has been ongoing for almost a decade. The violence attracted attention from the international community and was regarded as the worst in the history of the country. More than 1000 people were killed while more than 500,000 people were displaced from their homes.[1]

The political and humanitarian crisis necessitated intervention from the international community. The African Union (AU) commenced a mediation process between the antagonist political camps.[2] Eventually, the process resulted in the formation of a coalition government between the adversaries with equal sharing of power.[3] Most importantly, the mediators recommended the formation of two vital public commissions of inquiry. One of them was the Independent Review Commission which was mandated to investigate the 2007 presidential elections from various perspectives including the integrity of the whole process and to make findings and recommendations to improve the electoral process.[4] The other commission was the Commission of Inquiry into the Post-Election Violence (CIPEV) which, from a criminal and transitional justice perspective, is important for this discussion. The CIPEV (commonly known as

1 Human Rights Watch *High Stakes: Political Violence and the 2013 Elections in Kenya* (2013) 1.

2 The Party of National Unity (PNU) led by the former President of Kenya Mwai Kibaki while the other camp was the Orange Democratic Movement (ODM) which is still led by the former Prime Minister, Raila Odinga.

3 See the preamble of the schedule of section 9 of the National Dialogue and Reconciliation Act, No. 4 of 2008.

4 Government of Kenya *Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007* (2008) ix.

the "Waki Commission" (named after its chairperson former Court of Appeal Justice Philip Waki) was mandated to 'investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters.'[5]

In its findings, the CIPEV concluded, on the one hand, that ordinary offences under the Kenyan Penal Code were committed. On the other hand, it found that international crimes, particularly crimes against humanity, may have been committed during the PEV. This conclusion by the CIPEV was made on the basis of what was admitted to be thin evidence. Indeed, the Commission admitted in its final report that the evidence it had collected may 'even fall short of the proof required for international crimes against humanity'.[6] In essence, this was the first time in Kenya that individuals were accused of committing core international crimes.[7] As part of the response, the Commission recommended the establishment of a Special Tribunal to prosecute persons bearing the greatest responsibility for grievous crimes that were committed during the violence.[8] Sharp divisions emerged in political circles and beyond with some supporting the formation of the Special Tribunal while others proposed the intervention of the International Criminal Court (ICC).[9]

5 Government of Kenya *Report of the Commission of Inquiry into the Post-Election Violence of Kenya* (2008) vii.

6 CIPEV Report (2008) 17.

7 Kenya has however had prior experience prosecuting international crimes. The international crime of piracy was initially prosecuted under the Kenyan Penal Code but this changed when the relevant provision was repealed and reenacted under the Merchant Shipping Act, 2009.

8 CIPEV Report (2008) 472.

9 Kegoro G 'A General Update on Kenya's Search for Accountability for the Post-Election Violence' (available at *http://www.asf.be/wp-content/uploads/2012/10/Kenya-Situtation-Analysis.pdf* (accessed 20 March 2015).

Kenya is a state party to the Rome Statute having ratified it on 15 March 2005. It was, however, only after the PEV, that Kenya adopted implementing legislation[10] which gave Kenyan courts jurisdiction over international crimes committed by Kenyan nationals on its territory from 1 January 2009 when the ICC Statute took effect.

With this brief background, this paper analyses the efforts made by the Kenyan government in prosecuting international crimes in national courts. The study evaluates whether Kenya can prosecute international crimes, especially crimes against humanity that were committed during the PEV, by applying the International Crimes Act, given that concerns relating to retroactivity of laws could arise and whether it has the institutional capacity in place to try international crimes that may be committed on its territory in future.

Several other options have been propounded for prosecuting crimes against humanity that occurred during the PEV. One of them is prosecuting these crimes as ordinary (penal code) crimes without the label of "crimes against humanity' or "international crimes".[11] In essence, the various acts that constitute crimes against humanity under the Rome Statute are criminalized under the Kenyan Penal Code and other laws such as Sexual Offences Act (SOA). The other option, although not an alternative for Kenya, is prosecuting these crimes under the legal doctrine of universal jurisdiction where 'third states' exercise their right to prosecute on

10 Kenya domesticated the Rome Statute in January, 2009.
11 Werle G & Jessberger F *Principles of International Criminal Law* 3 ed (2014) 129.

behalf of the international community. This follows the understanding that certain crimes are universally condemned because of their gravity, therefore, characterized as so serious to warrant intervention from other forum states.[12] These options will be discussed in detail in chapter three and four of the paper.

While great attention has been directed towards those said to bear the greatest responsibility for committing atrocities during the PEV at the ICC, little is heard or said about the huge number of the 'foot soldiers'[13] who participated in the actual killings, mutilation, rapes, looting and other forms of crimes,[14] although in a situation of such widespread violence the probability of implicating hundreds and possibly thousands of foot soldiers should be quite high.

The study also evaluates the mandate and readiness of the International Crimes Division (ICD) in the High Court[15] vis-à-vis its mandate to prosecute the remaining cases of PEV and in addition deal with other international crimes.[16]

1.2 Problem Statement

The laxity of the Kenyan government to prosecute international crimes committed in the territory during the PEV needs to be critically addressed. For the main reason that Kenya is

12 Bassiouni MC 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice' (2000-1) 42 *Virginia Journal of International Law* 152.

13 These included ordinary citizens and the police who were massively implicated in CIPEV report as having contributed to many deaths during the violence period.

14 Kaguongo W & Musila G (eds) *Addressing Impunity and Options for Justice in Kenya: Mechanisms, Issues and Debates* (2009) 6.

15 See Section 8(2) of the Kenya International Crimes Act, 2008.

16 Government of Kenya *Report of the Committee of the Judicial Service Commission on the Establishment of an International Crimes Division in the High Court of Kenya* (2012) 4.

bound by international treaties and conventions that it has ratified (including the Rome Statute), the state binds itself to all aspects of the law unless it makes reservations from certain provisions.[17] With the ratification of the Rome Statute, Kenya is under an obligation to prosecute international crimes that were committed during the PEV. At the national level, the International Crimes Act which 'domesticates' the Rome Statute obligates Kenya to prosecute international crimes as well.[18] Whether or not there exits human resource – from the judiciary to law enforcement agencies – that is efficient and capable of trying perpetrators of crimes committed during the violence period is another question all together.

It is against this background that this paper critically evaluates and analyses the efforts undertaken by the Kenyan government to prosecute these crimes. The paper evaluates the approach that the Kenyan judiciary has relied on in prosecuting-and convicting- the few PEV cases tried to date. The paper also investigates whether Kenya has the institutional capacity and expertise to prosecute international crimes that may occur in future and whether the proposed ICD is feasible to undertake this mandate.

1.3 Significance of the Research

This research aims to contribute to the emerging body of literature on this subject specifically by analyzing decisions by Kenyan courts with regard to prosecuting crimes against humanity that were committed during the PEV. The study also aims to contribute to the understanding of

17 Fon V 'Treaty Formation and Reservations' in De Geest G (ed) *Encyclopedia of Law and Economics* 2 ed (2011) 14.

18 Section 3 of the Kenya International Crimes Act, 2008.

the nature and mandate of the ICD, as an accountability mechanism, with regard to the prosecution of international crimes, including those that were committed during the PEV.

1.4 Research Questions

This study seeks to answer the following questions:

1. To what extent has the Kenyan government met its obligations under international and domestic laws to prosecute crimes against humanity that occurred during PEV?
2. What are the options currently available to prosecute PEV crimes, including crimes against humanity and what challenges do such efforts face?
3. Are there accountability mechanisms that have been put in place to oversee the prosecution of international crimes that may be committed in future?

1.5 Research Methodology

This study mainly makes reference to case law that have emanated from the Kenyan courts. It closely reviews and analyses accessible judgements by Kenyan courts while identifying options that courts have taken in prosecuting crimes against humanity. By doing so, the study examines whether or not Kenya has met her obligations under international law. The study also relies on various institutional reports to deduce data especially on the number of cases that have since been prosecuted, leading to convictions and/or acquittals. This is because most of the reports prepared by the government including the Office of the Director of Public Prosecutions (ODPP) are not publicly accessible.

The study also relies on secondary literature relevant to the area of study with a view of developing defensible answers to the research questions. The secondary data include legal books, articles, academic commentaries, journals and previous studies done on the domestic prosecution of international crimes. To supplement materials obtained in the library, the study utilizes the internet for articles, commentaries and reports on the area of study.

Primary sources such as international law instruments in the area of duty to prosecute international crimes, particularly crimes against humanity, such as the ICC Statute, the ICGLR Protocol for the Prohibition and Punishment of the Crime of Genocide, Crimes against Humanity, War Crimes and All Forms of Discrimination are referred to. At the national level, relevant sections of the repealed constitution of Kenya of 1963, the Constitution of Kenya, 2010, the International Crimes Act and the Sexual Offences Act are reviewed.

1.6 Chapter Outline

The paper is divided into five chapters, each of which discusses a specific aspect of national prosecution of international crimes. The following is a breakdown of the chapters including a brief summary of what issues are discussed therein.

Chapter 1

This is the introductory chapter of the research paper and contains the background of the study, statement of the problem, the significance of the study and objectives of the study.

Chapter 2

This chapter gives the contextual background to the events that led to the PEV and crimes that were committed during the violence period. It also discusses how the Kenyan government responded to the situation in which the crimes were committed.

Chapter 3

This chapter conducts an in depth analysis of Kenya's obligation to prosecute international crimes. This is critical as it is aimed at creating a general understanding of the obligation of states under international law. The chapter evaluates decisions and approaches adopted by the Kenyan courts in prosecuting crimes against humanity that were committed during the PEV. The chapter also discusses the shift from retributive to restorative justice following the finding by a taskforce constituted by the Director of Public Prosecutions that most of the PEV cases are cannot be prosecuted for lack of evidence.

Chapter 4

This chapter is dedicated to the analysis of the ICD which is to be constituted to prosecute international and transnational crimes. The discussion in this chapter evaluates the mandate of this Division of the High Court[19] vis-à-vis the prosecution of crimes against humanity that were committed during the PEV. The chapter finally looks at the capacity of the ICD to prosecute international crimes, especially core international crimes, which may occur in future. It also

19 The High Court of Kenya has several divisions including Commercial and Admiralty, Constitutional and Judicial Review, Land and Environment, Criminal, Industrial and Environmental and Land Court.

briefly discusses the principle of universal jurisdiction assessing whether and how it can be deployed in the event that Kenya does not prosecute the international crimes.

Chapter 5

This is the concluding chapter which sums up the discussions in the preceding chapters and makes recommendations on how best Kenya can be equipped in implementing its obligations under international and national law to prosecute international crimes.

CHAPTER TWO

THE POST-ELECTION VIOLENCE AND ATTEMPTS TO CRIMINAL ACCOUNTABILITY

2.1 Contextualizing the Violence

Electoral violence has become a common phenomenon during election cycles in Kenya since the re-introduction of multi-party democracy in 1991. Since the general elections held in 1992 following the transition to multiparty democracy, violence appears became a feature of Kenyan political life, and has mainly been used to remedy political and resource grievances which elections were unable to resolve.[20] Street protests in Kenya have especially during elections period been conceptualized as a legitimate form of political expression. However, the violence after the 2007 general elections was unprecedented in intensity and scope. Protests became a means of achieving governance where the ballot box failed. Unlike previous electoral violence, the 2007 PEV was widespread affecting all but two out of eight provinces in Kenya. Its impact was felt both in the urban and the rural areas. This was unlike in the past where the violence occurred in few counties mainly in the Rift Valley, Coast and Western provinces.[21]

During the electoral campaigns in 2007, it was reported that some isolated cases of violence claimed 70 lives and displaced 2000 people.[22] This 'trend' was almost similar to electoral violence documented in the past. A majority of the reported cases occurred during political rallies and were concentrated in small towns. The pre-electoral violence was manifested through the disruption of campaign rallies, violent treats against political aspirants, distribution of hate leaflets that warned of repercussions and direct violence on candidates and

20 KNCHR *The Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* (2008) 7.
21 CIPEV Report (2008) vii.
22 KNCHR (2008) 6.

supporters.[23] Campaign related ethnic violence was also reported in the former Rift Valley province as ethnic groups clashed within Molo, a district that reports cases of ethnic violence every election year as political rivalry and aggression is transferred to land ownership issues.[24] Since the great majority of deaths occurred in the Molo district and not across the country the election results had been perceived to be free and fair by international observers and by the media.

Things however took a turn for the worse immediately after the former president Mwai Kibaki (at the incumbent) was announced the winner of the presidential elections as the opposition party disputed the outcome of the presidential election. What precipitated the violence, it should be understood, was that a few hours before Mwai Kibaki was announced the winner, his political adversary who later became the prime minister, Raila Odinga had been leading in the tally of votes with a huge margin before the lead evaporated dramatically in the final hours before the announcement was made. Violence broke out following the announcement that Mwai Kibaki had won the presidential elections.

A cloud of tautness engulfed the country as allegations emerged that Mwai Kibaki's Party of National Unity had participated in massive rigging of the election.[25] The controversial utterances of the then electoral chief, Samuel Kivuitu, stirred more tensions when he publicly

23 Human Rights Watch *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance* (2008) 55.

24 Dercon S & Gutiérrez-Romero R 'Triggers and Characteristics of the 2007 Kenyan Electoral Violence' (2012) 40(4) World *Development* 733.

25 Al Jazeera 'Kenyan candidate's party alleges polls rigged' available at http://www.aljazeera.com/news/africa/2013/03/201337105449692445.html (accessed 6 May 2015).

declared Mwai Kibaki the winner but later stated that he was not sure if Kibaki won fairly as he had announced the results 'under pressure'.[26] Election observers, both domestic and international also backed the allegations of election fraud that led to Mwai Kibaki being announced the winner. These bodies unequivocally stated that the vote counting and tallying process, especially for the presidential elections was hugely flawed.[27] For these reasons, the public opinion of the electoral process shifted, and was perceived not to be transparent and therefore dishonest. This led to an uproar by the general public and civil society who among other things called for a ballot re-count. The Law Society of Kenya for example, called for Mwai Kibaki to step down arguing that he lacked legitimacy.[28]

Based on the reports of the election observers, the ODM, whose presidential candidate Raila Odinga had narrowly 'lost' the election consolidated its claim that the elections and subsequent victory had been 'stolen' from them. In case of a dispute, the repealed constitution provided for mechanisms for judicial redress. The constitution for instance gave the High Court the power to hear and determine questions of validity of presidential elections including whether a person was validly elected as President.[29] The ODM however publicly denounced the judiciary accusing it of bias and partiality and vowed not to use the courts to challenge the outcome of the

26 BBC 'Kenya's dubious election' available at http://news.bbc.co.uk/2/hi/africa/7175694.stm (accessed 6 May 2015).

27 Kenya Elections Domestic Observation Forum 2007; Kenya Human Rights Commission 2008; Kenyans for Peace with Truth and Justice 2008; Pan-African Parliament 2008; Republic of Kenya 2008b, pp. 115–138; East African Community Observer Mission 2008; European Union Election Observation Mission 2008; International Republican Institute 2008, pp. 31–34.

28 Law Society of Kenya 'Kenyan electoral crisis Press statement' available at *http://www.Marsgroupkenya.org/pdfs/2008/jan08/LSKSTATEMENT.pdf* (accessed 6 May 2015)

29 Section 10 of the repealed constitution of the Republic of Kenya, 1963

elections.[30] The ODM especially contended that the appointment of new judges a few days before the general election was done in "preparation for a biased consideration of the anticipated election petitions" and it was therefore "not possible to receive justice from a partisan judiciary that was known to subvert justice in electoral matters".[31] The party thus resolved to engage in mass action through demonstrations and protests countrywide. The main aim of using this strategy was to force Mwai Kibaki to step down and agree to a re-run.

The events succeeding the demonstrations were however bloody clashes between supporters of the two major political parties; PNU and ODM. These clashes spewed along ethnic lines as the PNU, the President's party had its stronghold in the GEMA communities (Kikuyu, Embu and Meru) in central, and parts of Eastern and Nairobi provinces while the ODM drew its support from majority of the other ethnic groups in Kenya based on the final tally in which it carried six out of eight provinces.[32]

2.2 Sporadic or Pre-meditated: Nature and Extent of the Violence

The Commission of Inquiry into Post-Election Violence concluded that nature of the 2007 PEV could be characterized to have been spontaneous, premeditated and state-directed. What started out as demonstrations to protest the outcome of the presidential results quickly escalated to massive bloodshed in most parts of the country. The widespread violence initially started with isolated cases of killings in different parts of the country but rapidly spiraled into

30 KNCHR (2008) para 60.
31 Materu S *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (2014) 50.
32 CIPEV Report (2008) 92.

sporadic widespread attacks against civilians along ethnic lines. Members of certain ethnic groups were targeted and killed based on their ethnic or political affiliations. Similarly, there were clashes between demonstrators of the two major parties and the Kenya Police who were accused of using live bullets on the demonstrators especially in Kisumu, Nakuru and Nairobi slum areas.[33]

The retaliatory attacks against specific groups of people and their property seemed to have been well organized. Well-known outlawed militia gangs such as the *Mungiki* were financed and organized by businessmen and elite politicians even before the elections.[34] The *Mungiki*, drawn mainly from the Kikuyu ethnic group, has a bad reputation for using brutal methods of terrorizing their victims. Non-Kikuyu gangs such as the 'Taliban' and 'Baghdad Boys'-mainly from the Luo community-and the Sabaot Land Defence Force from Mt Elgon were also responsible for some of the more organized violence.[35]

Initially, prior warnings were given to victim groups of persons to vacate certain geographic areas where they were deemed as 'strangers' or 'foreigners'.[36] Many of those deemed outsiders were born and raised in these areas, literally called these places 'home'. But because of the state of political affairs in the country at the time, they were deemed to be foreigners. Groups of young people were mobilized; there was acquisition and transportation of weapons

33 CIPEV Report (2008) 96.
34 Gettleman J 'Disputed Vote Plunges Kenya into Bloodshed' (2007) *New York Times* 31 December.
35 IRIN News, 'Kenya: Armed and Dangerous' available at www.irinnews.org/Report.aspx?ReportId=76896 (accessed 11 June 2015).
36 CIPEV Report (2008) 347.

to various parts of the country which were later used to commit crimes. Roads were barricaded in order to identify and attack or even kill travelers who belonged to 'enemy' communities. Tribal elders administered oaths to the youth in their respective communities who swore to fight and kill.[37] In the former Rift Valley for example, one of the provinces that was mostly affected by the electoral violence, homes and property belonging to non-locals (non-Kalenjins) was identified and marked for attacks and destruction.[38] Over 600,000 people were displaced, and property of unknown value, but reputed to be in billions of shillings was destroyed around the country.

2.3 Reasons for the Post-Election Violence

The root causes the PEV were generally an interplay between unresolved historical grievances and the immediate events of the outcome of the presidential results. Historical injustices relating to land distribution, socio-economic inequality, youth unemployment, impunity, weak public institutions, corruption, political elite wars and electoral systems that independence lacked accountability and impartiality are some of the root causes of Kenya's problems.[39] A history of economic marginalization and exclusion is a good example of an historical grievance that has led to the general perception shared among politicians and the general public that when the president originates from a certain ethnic group, the rest of the tribes will not access state resources and goods, including land.[40] Not only does the presidency secure benefits for its ethnic community but is also used as a defensive strategy to prevent other ethnic groups from

37 Materu S (2014) 51.
38 KNCHR (2008) para 224.
39 KNCHR (2008) para 69.
40 CIPEV Report (2008) 23.

accessing jobs, land and other entitlements.[41] Consequently, this has led to a tendency to engage in violence in order to obtain or retain political power because of fear of being subjected to marginalization of resources and benefits when other ethnic groups take power.

Therefore, the PEV must be understood from a historical background of marginalization and exclusion that has marked and poisoned political life in Kenya since colonial times. In sum, the presidential elections results served as a spur for an eruption of resentment and discontent due to the politics of dispossession with adverse effects such as youth unemployment, high poverty levels and landlessness and dispossession as vast fertile lands in the country belong to families of the political and business elite.

From this elucidation, the violence in the Rift Valley province which was then a stronghold of the ODM party, targeted members of the Kikuyu tribe (Mwai Kibaki's ethnic group) and others that supported his party as unwanted people in Rift Valley. As such, local leaders in the region used long-standing grievances pertaining to land as a basis for discriminating and attacking persons who were ethnically or politically affiliated to the president.[42]

The PNU party on the other hand mainly used the *Mungiki* to retaliate against people who were deemed to be ODM supporters. The *Mungiki* attacked 'enemy' communities mainly by

41 CIPEV Report (2008) 29.
42 CIPEV Report (2008) 32; Materu S *(2014)* 51.

forcefully circumcising Luo[43] men with machetes and broken bottles as well as beheading them.[44] The extent of organization in planning, preparation and instigating the violence could be deduced *inter alia* by the alleged recruitment of 300 new members into the *Mungiki* gang. According to intelligence reports cited by the CIPEV, local leaders and businessmen belonging to the Kikuyu ethnic group held fund-raising meetings in order to finance attacks against 'enemy' communities including the Kalenjin, Luhya and Luo.[45]

The police contributed greatly in claiming hundreds of civilian lives. The incumbent government led by Mwai Kibaki reacted to the public outrage following his 'contested' win and swearing in as president with banning all public demonstrations.[46] The ban was an outright violation of the repealed constitution and international law.[47] In the course of engaging with protesters, the police shot at unarmed protesters and by-standers including women and children. There was no initial attempt against using non-lethal force in situations where there was no clear threat to life or property.[48] This was evidently contrary to the principle function of police of maintaining law and order and ensuring safety of all persons. As such, the CIPEV in its findings concluded

43 Luo is an ethnic group in Kenya in which the ODM leader Raila Odinga belongs to. Culturally, Luo men do not circumcise and this was one way that the *Mungiki* militia group targeted and attacked them.

44 CIPEV Report (2008) 102; KNCHR (2008) para 201.

45 CIPEV Report (2008) 105; KNCHR (2008) para 204.

46 Human Rights Watch (2008) 24.

47 Section 5 of the Public Order Act of Kenya, 1950, as amended 1997 provides that those wishing to demonstrate must notify the police and the police can reject the request on the grounds of public order, but no law permits the authorities to impose a blanket ban on public assembly. Under, international law, the International Covenant on Civil and Political Rights, which Kenya ratified in 1972 states that a state may only impose restrictions on the right to peaceful assembly that are strictly necessary to maintain public order. This rules out widespread, nationwide bans on demonstrations.

48 Human Rights Watch (2008) 25.

that 80% of all deaths through gunshots in Nyanza and Western provinces (opposition zones that supported the ODM party) were caused by the police.[49]

In fact, the CIPEV and other international human rights bodies made serious allegations against the police force in relation to the way they handled the PEV. First, there was an apparent shoot-to-kill order that was being implemented; second, the police did not act on prior intelligence they had received on certain planned attacks; third, there seemed to be politicized commands which entailed inaction by the police when pro-government protesters engaged in criminal activity.[50]

All in all, the extent of damage of the physical violence was appalling. The violent attacks on civilians is reported to have claimed the lives of 1,133 people. 3,000 people were reportedly raped and over 600,000 were displaced. Furthermore, 3,561 incidents of grievous bodily injuries and 117,216 incidents of destruction of properties, including 41,000 houses were documented.[51]

2.4 The Mediation Process

The hard political stands between the ODM and PNU party leaders led to further deterioration of the humanitarian crisis in Kenya. Not even calls for peace by the international community were effective. In response, the African Union spearheaded a mediation process led by the

49 CIPEV Report (2008) 342-343.
50 CIPEV Report (2008) 421-422*; Human Rights Watch (2008)* 25-26
51 CIPEV Report (2008) 346.

Panel of African Eminent Personalities under the chairmanship of the former UN Secretary General Kofi Anan. The Panel had the responsibility of helping the parties to the conflict ensure that an escalation of the crisis was avoided and that the opportunity to bring about sustainable peace was seized as soon as possible. While there is an explicit provision within the Charter of the United Nations against interference in the domestic affairs of member states except when enforcing measures outlined under Chapter VII, the African Union through its Constitutive Act adopted a wider range of options from mediation to the use of force in certain circumstances.[52]

The Panel worked within a framework called the Kenya National Dialogue and Reconciliation (KNDR) which involved negotiations and agreements that would lead to long-term peace, stability, justice and reconciliation.[53] On 1 February 2008, the two competing political formations signed the KNDR Agreement which basically provided a roadmap and timelines to guide the Panel in discharging their mandate.[54] This was a landmark event that saw the beginning of the first national political dialogue. Essentially, this meant that 'Kenya as a nation would enter another challenging process: the creation of a new era of democratic and transparent leadership, anchored in transitional justice with national healing and reconciliation as prerequisites for sustainable peace and nation building.'[55]

52 Lindenmayer E & Kaye JL *A Choice for Peace? The Story of Forty -One Days of Mediation in Kenya* (2009) 7.
53 Materu S (2014*)* 56.
54 KNDR Annotated Agenda and Timetable available at *http://www.dialoguekenya.org/Agreements/1%20February%202008%20Annotated%20Agenda%20for%20the%20Kenya%20Dialogue%20and%20Reconciliation.pdf* (accessed on 16 June 2015).
55 Machakanja, P 'National Healing and Reconciliation in Zimbabwe: Challenges and Opportunities' (2010) 1 *Institute for Justice and Reconciliation* 16.

The KNDR Agreement settled on four agenda items which included immediate ceasefire of the violence that would lead to restoration of fundamental human rights; addressing the humanitarian crisis; overcoming the political crisis and finding long-term solutions that would help address past historical injustices, promote cohesion and accountability as well as promote institutional and constitutional reform.[56] To stop the violence and deteriorating humanitarian crisis, the panel of mediators suggested that the two antagonists reach a political compromise. This proposal was accepted by both parties who later signed an agreement to form a coalition government.[57]

To create a suitable platform for peace and reconciliation, the two contenders agreed on a power sharing deal. This agreement led to the amendment of the constitution to create political offices of prime minister and two deputies.[58] To this end, the agreement that was reached by both Mwai Kibaki and Raila Odinga to form a coalition government was not a sufficient step towards a sustainable peaceful environment but it was undeniably an important one. The dynamics and extent of the violence could have otherwise spread much further with probability of escalating from Kenya to the rest of the region. This would have led to devastating consequences to the continent especially the Eastern bloc because of the economic role that Kenya plays in the region.

56 Mutuku M 'Towards National Dialogue, Healing and Reconciliation in Kenya' Policy Brief No. 5 (2013) 1.

57 Kenya National Dialogue and Reconciliation (2008a) Agreement on the principles of partnership of the Coalition Government available at *http://www.dialoguekenya.org/Agreements/14%20February%202008-Agreement%20on%20the%20Principles%20of%20Partnership%20of%20the%20Coalition%20Government.pdf* (accessed on 5 July 2015).

58 The Constitution was amended through the National Accord and Reconciliation Act of 2008 where Raila Odinga became the Prime Minister and Mwai Kibaki remained the president.

2.5 Attempts of Criminal Accountability

As part of the short term solutions to the political violence, both parties recognized the need to achieve "sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights." To realize this, it was paramount that an impartial, effective and speedy investigation be carried out to bring to justice those found guilty of gross violation of human rights. The parties further recognized that to further solve the crisis, reconciliation and healing was important and this "required the identification and prosecution of perpetrators of violence."[59]

The coalition government thus established three independent commissions with different mandates. These were the Commission of Inquiry into the Post-Election Violence in Kenya (CIPEV), the Truth, Justice and Reconciliation Commission (TJRC) which was mandated to among other things establish 'an accurate, complete and historical record of violations and abuses of human rights and economic rights' and investigate gross human rights violations and violations of international human rights law and abuses which occurred during the PEV,[60] and the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 which was mandated to investigate all the aspects of the 2007 general elections with particular emphasis on the presidential elections and outcome.

59 KNDR 'Agenda Item 3 How to Solve the Political Crisis' Nairobi, February 14, 2008, available at http://www.dialoguekenya.org/docs/14_Feb_08_TsavoAgreement.pdf, para 3 (accessed on 15 June 2015).

60 Section 5 of the Truth. Justice and Reconciliation Commission Act No. 6 of 2008

CIPEV was mandated: '(i) to investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 presidential election; (ii) to investigate the actions or omissions of state security agencies during the course of the violence and make recommendations as necessary; and (iii) to recommend measures of a legal, political or administrative nature, as appropriate, including measures to bring to justice those persons responsible for criminal acts.'[61]

In its findings, the CIPEV concluded that crimes under the Penal Code were committed. From the evidence gathered, the Commission stated that it was not in a position to firmly conclude that crimes against humanity were committed but there was strong indication that the crimes may have been committed.[62] The Commission thus called for further investigation to be conducted 'especially concerning those who bore the greatest responsibility for the post-election violence'.[63] This position was confirmed by the ICC's Pre-trial Chamber in its decision to authorize the prosecutor to investigate, leading to the indictment of six Kenyans for crimes against humanity.[64]

The CIPEV must have come to the conclusion that the other two core crimes under the jurisdiction of the ICC, genocide and war crimes were not present in the context of the electoral violence. In fact, the word 'genocide' or 'war crimes' do not appear in the CIPEV Report. The

61 Kenya GN No. 4474, Vol. CX-No. 41, 23 May 2008.
62 Materu S (2014) 61; CIPEV Report (2008) 17.
63 CIPEV Report (2008) 17.
64 Decision of the Pre-Trial Chamber II in *Situation in the Republic of Kenya- Request for Authorisation of an Investigation Pursuant to Article 15* Case No. ICC-01/09-03.

CIPEV recommended the establishment of a special tribunal that would oversee the investigation, prosecution of crimes against humanity.[65] In the event that the tribunal was not established with set deadlines or was subsequently subverted, CIPEV called for the situation to be referred to the ICC. The CIPEV was conversant with the fact that previous ethnic and electoral violence has been documented in the past.[66] The causes of this sort of violence, which began in 1992 with the first multi-party elections, have always been known to the authorities based on official reports of past commissions of inquiry. It is in these reports that some prominent individuals have been identified publicly as being responsible for the violence. However, there has been no serious effort made by any government to punish perpetrators of violence or to address the plight of their victims. To avoid this trend of impunity, the CIPEV provided strict deadlines for the implementation of its recommendations. It stated that in the event of non-compliance with its proposal to create the special tribunal, a list of those considered to bear the greatest responsibility of the crimes committed during the political violence should be forwarded to the International Criminal Court.[67]

2.6 End of the Beginning: The Special Tribunal

Deliberations on the formation of the special tribunal began a few days after the CIPEV's final report was made public. The proposal of a hybrid tribunal seemed to be an effective way to end the culture of impunity and promote criminal accountability. Hybrid courts are a fairly new phenomenon in the international criminal justice system. They are essentially meant to address

65 CIPEV Report (2008) 472.
66 See commissions of inquiry that have been formed and their subsequent reports since 1992.
67 CIPEV Report (2008) 472-275.

the limitations of both domestic and international criminal justice, that it has been described, a design to 'right-size international criminal justice.'[68]

Numerous attempts to enact legislation to create the domestic criminal accountability mechanism was however done half-heartedly and ended up being an exercise in futility. This however is not to suggest that nothing was done: the International Crimes Act had been enacted in December 2008. This law that incorporates the Rome Statutes into national law was proposed to provide for key aspects of the special tribunal which would be created by a separate law.

The Bill on the Special Tribunal was sharply opposed by majority of parliamentarians for various reasons. Some of them criticized the lack of independence of the Special Tribunal from the executive. They argued that certain loopholes in draft legislation such as possibility of presidential pardon would render the criminal accountability effort insignificant.[69] Predictably, some MPs feared that the Special Tribunal would actually be so effective that even they, or their close allies, ran a high risk of being 'victims' of the justice system.[70] Another group also opposed the legislation because they felt the government was not giving them adequate time to debate the bill. [71] As Musila noted, "political elites, in particular those reported to be on the

68 Dougherty B 'Right -sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone' (2004) 80(1) *International Affairs* 321.

69 Brown S & Sriram CL 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya (2012) 111 *African Affairs* 249.

70 Brown S & Sriram CL (2012) 252.

71 Musila, GM 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions' *IJTJ* 3(2009) 452.

list of accused prepared by the CIPEV Commission, vacillated between the various options, unsure which would safeguard their own agendas: trials in The Hague or local trials; trials before the Special Tribunal or national courts; and/or the TJRC."[72]

After subsequent attempts, the idea of forming a special tribunal was abandoned. Instead, the government decided to try suspects in the regular domestic courts after reforming the judiciary and the police. The calling for reforms was meant to heighten public confidence in these institutions. This was however a long shot because it was common knowledge that the Executive had influence on both bodies. Furthermore, the police were implicated in many inquiries including CIPEV, of causing hundreds of deaths-many through extra judicial killings.

The idea behind this option was to keep at bay the involvement of the ICC. It was nevertheless too late as all this time, the Hague based court was monitoring the situation. Kofi Annan, the chief mediator in the national dialogue process eventually handed the sealed envelope with an unknown number of suspects to the then Prosecutor of the ICC, Luis Moreno-Ocampo. Shortly afterwards, the Prosecutor initiated a *proprio motu* investigation into the Kenyan situation in accordance with Article 15(3) of the Rome Statute.[73]

72 Musila GM (2009) 450.

73 This was the first time that the ICC's chief prosecutor invoked his right to initiate an investigation without a prior referral from the UNSC or a State Party to the Rome Statute.

Conclusion

This chapter has provided a brief background surrounding the PEV. It has analysed by contetualising the violence, which started out as sporadic and turned out pre-meditated. It has also discussed, in brief, the root causes of the PEV which mainly included unresolved historical marginalization and exclusion. The chapter has also deliberated on the mediation process, which was a regional response by the AU, and the attempts to criminal accountability which eventually failed leading to the intervention of the ICC.

CHAPTER THREE

OPTIONS FOR JUSTICE: PROSECUTING POST-ELECTION VIOLENCE CRIMES

3.1 Introduction

While a lot of attention has been focused on the Hague-based trials, there has been little focus on the jurisprudence emanating from national prosecutions of international crimes in Kenya. Although it is settled that international crimes should be prosecuted pursuant to international law, it still remains contentious what body of substantive law should be used.[74] It has been argued that the main sources of the duty to prosecute international crimes do not expressly obligate states to do so, while at the same time, state practice on the duty to prosecute remains inconsistent.[75]

States have a duty under customary international law duty to prosecute crimes that have been committed within their territory.[76] This follows from the binding nature it has on states, based on *opinion juris* and general state practice.[77] The obligation of a state to prosecute and punish also emanates from treaty law to which the state is a party. Crimes against humanity however does not have its own treaty unlike war crimes (Geneva Convention, 1949) and genocide (Genocide Convention, 1948) that obligates states to prosecute and punish these crimes.[78]

74 Edelenbos C 'Human rights violations: A duty to prosecute?' (1994) 7 *Leiden Journal of International Law* 5.

75 Orentlicher DF 'Settling accounts The duty to prosecute human rights violations of a prior regime' (1991) 100 *Yale Law Journal* 2537; Jackson MM 'The customary international law duty to prosecute crimes against humanity: A new framework' (2007)16 *Tulane Journal of International & Comparative Law* 117-124.

76 N. Roht-Arriaza, 'Amnesty and the International Criminal Court' in D Shelton (ed), *International Crimes, Peace and Human Rights* (2000) 78.

77 Article 38(1) (b) Statute of the International Court of Justice on sources of international law.

78 Werle G & Jessberger F (2014) 79; Tomuschat C 'The Duty to Prosecute International Crimes Committed by Individuals', in HJ Cremer et al (eds) *Festschrift Steinberger* (2002) 342.

However, the Preamble of the ICC Statute emphasizes the need that 'the most serious crimes of concern to the international community as a whole must not go unpunished and…their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.'[79] It further goes on to provide that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[80] This provision includes crimes against humanity which the ICC has jurisdiction over. The Rome Statute mandates the ICC to try and prosecute individuals who bear the greatest responsibility for international crimes.[81] In principle, national courts have the right and duty to investigate and prosecute international crimes that have occurred on their territory. By operation of the principle of complementarity under the ICC Statute, the Hague-based court is in essence, a 'court of last resort'.[82] The ICC therefore, only intervenes where a state party is unwilling or unable to prosecute international crimes.[83]

Even then, the ICC aims at prosecuting those who bear the greatest responsibility for the crimes. Prosecutions at the national level are therefore necessary not only to promote criminal accountability but also to prosecute mid-level and lower-level perpetrators as positive complementarity to the ICC. As party to the Rome Statute, Kenya is under an international obligation to prosecute and punish crimes against humanity that were committed during the

79 ICC Statute, Preamble 4.
80 ICC Statute, Preamble 6.
81 The language 'those who bear the greatest responsibility' is not used in the Rome Statute (See Article 1). Office of the Prosecutor has however interpreted its mandate to relate to prosecuting those who bear the greatest responsibility thereby aligning ICC practice with the ad hoc tribunals.
82 Article 1 of the ICC Statute, 2002.
83 Preamble of the ICC Statute, 2002 and Article 17 (1) (a) on issues of admissibility where a State is unwilling or genuinely incapable of carrying out investigations and subsequent trials.

PEV. While the ICC intervened in the Kenyan situation due to unwillingness to prosecute, the duty to prosecute still lies on Kenya to investigate, prosecute and punish perpetrators of the violence.

3.2 Weighing Punishment and Peace: The Peace versus Justice Debate

The peace versus justice debate mirrors the accountability versus reconciliation. Many post-conflict countries emerging from authoritarian regimes prefer less politically divisive measures, such as truth commissions, reparations and even amnesty, instead of accountability measures that would hold violators of human rights atrocities accountable.[84] While 'political reconciliation involves taking the first steps to achieve the higher goal of sustainable peace', it is also true that 'justice and reconciliation are inherently and inextricably linked'.[85]

Justice through criminal accountability is legally and morally justified. Legally, criminal trials are supported by customary international law and treaty law which imparts a duty upon states to prosecute crimes committed on their territory.[86] Morally, criminal accountability is justified on grounds that a person's human rights should be respected and where violated, his inherent dignity should be restored. Proponents of criminal accountability, which the author agrees with, argue that failure to hold perpetrators of violence accountable is tantamount to fostering a culture of impunity and it is only when justice is pursued through the courts that the rule of law

84 JA McAdams (ed) '*Preface' in Transitional justice and the Rule of Law in New Democracies (1997)* xii.

85 Villa-Vicencio C 'Reconciliation' in Villa-Vicencio C & Doxtader **E** (eds.) *Pieces of the Puzzle: Keywords in Reconciliation and Transitional justice* (2004) 3-4.

86 Orentlicher D (1991) 2540.

will be held.[87] Supporters of restorative justice argue that criminal accountability is inadequate because commission of atrocities will never end thus punishment of human rights violators is unbeneficial to the society.[88] The actual impact and normative value of criminal trials has been questioned by restorative justice supporters. Victims of human rights atrocities and society as a whole have decried the achievement of criminal justice and expressed their dissatisfaction especially where convictions of lesser crimes are secured.

A society that is transitioning from a repressive regime or conflict eventually decides the appropriate accountability mechanism that is customised to its special circumstances. There is however a need to create a legacy in which the rule of law is respected and upheld. It is necessary that a reliable system of dealing with human rights violations is established. Failure to enforce the law eventually affects the public's perceptions towards the capability of a state to hold accountable those who perpetuate human rights atrocities. As Van Zyl asserts 'prosecution can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms and begin the process of reforming and rebuilding trust in government institutions'.[89] Nevertheless, justice can be based on *retribution* or on *restoration* by emphasizing on repairing relations between individuals and communities.[90] At the end of day,

87 Sadat LN *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) 74.

88 Farer TJ 'Restraining the Barbarians: Can International Criminal Law Help? (2000) 22(1) *Human Rights Quarterly* 90.

89 Teitel R 'Transitional justice genealogy' 16 (2003) *Harvard Human Rights Journal* 40.

90 Sanam NA, Conaway CP & Kays L 'Transitional Justice and Reconciliation' available at www.huntalternatives.org/download/49_transitional_justice.pdf (accessed 1 October 2015).

victims need the most personal kind of justice because it is them who have experienced the brunt of the violence in a very tangible fashion.[91]

This debate was present in Kenya as well. During the mediation process, one of the agendas included the formation of the TJRC as a restorative justice mechanisms. Majority of Kenyans insisted on retributive justice but at the same time agreeing that Kenya needed to heal and live in peace. As this chapter will illustrate, both retributive and restorative justice mechanisms were used as a response to the PEV.

3.3 Options for Prosecuting International Crimes in Kenya

3.3.1 The International Crimes Act, 2008.

Kenya domesticated the ICC Statute in 2008 through the International Crimes Act. The law however became operational on 1 January, 2009 after the PEV had ended. Concerns surrounding the application of the law retroactively in prosecuting and punishing perpetrators of the post-election violence emerged in political and legal circles. The PEV occurred when Kenya was still under the repealed (independence) constitution of 1963. Being the supreme law then, the constitution stipulated an absolute prohibition of retroactive laws. It dictated that for a person to be prosecuted and punished for a criminal offence, the offence should be prescribed in written law as being an offence at the time of commission and the punishment of the same offence clearly stated.[92] It was therefore difficult to prosecute perpetrators of the PEV with crimes against humanity because at the time of the violence, there existed no law that

91 Kaguongo W & Musila G (2009) 11.
92 Section 77 of the repealed Constitution of Kenya, 1963.

defined the crime and subsequently no punishment was prescribed in any written law including the Penal Code. Essentially, relying on the International Crimes Act would have been an outright violation of the principle of *nullum crimen, nulla poena sine lege*.[93] This principle prohibits two main elements of the trial process; prosecution and punishment. It prohibits the punishment of a conduct which has not been clearly defined by law and was not a crime at the time of occurrence while also prohibiting imposing a penalty that was not defined or which is heavier than that which had been defined by law at the time the alleged crimes were committed.[94] In addition, the repealed constitution provided for the principle of *sine lege scripta*, meaning that besides a crime and penalty being clearly defined in a law, the law had to be written law.[95]

Debates have surrounded the issue of whether the right to protection from retroactivity is absolute or whether it can be qualified depending on the circumstances of the case.[96] The Nuremberg trials, for example, illustrate how the Tribunal allegedly applied rules retroactively, with the prosecution basing charges on the defendants on the said rules.[97] In this context, it seems that the right to protection from retroactivity can be qualified depending on the circumstances. Schabas thus states that, *"Morality can have no special exemption for those who "commit the oldest sins in the newest kind of ways".*[98] The principle of retroactivity has to be

93 Okuta A, 'National Legislation for Prosecution of International Crimes in Kenya' *JICJ* 7 (2009) 1074.
94 Boot M *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002) 90-93.
95 Persak N *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts* (2007) 119.
96 Allan J *The Vantage of Law: Its Role in Thinking about Law, Judging and Bills of Rights* (2013) 13.
97 Tomuschat C 'The Legacy of Nuremberg' *JICJ* 4(2006) 835-837.
98 Schabas GWA (2003) *The Abolition of Death Penalty in the International Law* (2003) 65.

understood in a way that allows for prosecutions of the core crimes regardless of whether these crimes were criminal under national law. This is not a violation of the principle of legality but rather an adequate interpretation of it, in view of its serving function relative to basic human rights.

The new constitution, which came into force on 27 August 2010, adopts a different formulation akin to Article 15 of the ICCPR in relation to retroactive laws. Article 50(2) (n) of the Constitution provides a constitutional justification, and thus overrides any opposition of prosecution of crimes against humanity. In respect to prosecuting crimes under international law, Article 50 (2) (n) of the constitution provides that '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…a crime under international law'.[99] At the time of the PEV, crimes against humanity were not crimes under Kenyan law but were crimes under international law.[100] Indeed, if it is conceded that the ICA codifies crimes that existed in international law at the time of their commission in Kenya in 2007 and 2008, and that Article 50(2) (n) effectively melts retroactivity objections based on when the crimes were committed, then the ICA comports with the constitution and should stand the test of scrutiny based on a retroactivity challenge. In any case, section 7 of the Sixth Schedule of the Constitution provides that laws existing on the date the constitution came into effect (August 27, 2010) should be 'construed with such alterations, adaptations, qualifications and exceptions necessary to bring

99 Article 50 (2) (n) (ii) of the Constitution of Kenya, 2010.
100 Bassiouni MC *Crimes against humanity in international criminal law* (1999) 94.

it into conformity with the constitution'. It seems therefore that when the ICA is read together with Art 50(2) (n) and section 7 of the Sixth Schedule of the Constitution, objections relating to legality (retroactivity) of the ICA are dispensed with.

3.3.2 Customary International Law

Although not codified in its own treaty, crimes against humanity had long before been recognised as crimes under customary international law having acquired a *jus cogens* status and constituting it as *obligation erga omnes*.[101] Accordingly, these crimes are non-derogable and there exists a duty on every state to prosecute them without limitations. The position of international law vis-à-vis Kenyan law is espoused under Article 2(5) and (6) of the constitution. General rules of international law, treaties and conventions ratified by Kenya all form part of the law of Kenya.[102] This is a shift from the previous constitutional order where international law had to be domesticated through legislation for it to become law in Kenya.[103]

To prosecute directly under customary international law, two fundamental conditions have to be met. One, customary international law must be recognised and be applicable in the prosecuting state.[104] Secondly, domestic legislation of the prosecuting state must allow for the application of unwritten criminal law provisions.[105] Article 2(5) of the constitution satisfies the first criterion. On the second criterion, Article 50(2) (n) of the constitution, unlike the repealed

101 Bassiouni MC (1999) 63.
102 Articles 2(5) and (6) of the Constitution of Kenya, 2010.
103 Orago NW 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) (3)13 AHRLJ 416.
104 Bassiouni MC (1999) 99.
105 Kreicker H 'National Prosecution of International Crimes from a Comparative Perspective: The Question of Genocide' 5 (2005) *International Criminal Law Review* 321.

constitution, does not provide for the principle of *sine lege scripta*. However, the Interpretation and General Provisions Act[106], although not used in interpreting the constitution as is it is not a written law for purposes of the Act, defines an offence as 'a crime, felony, misdemeanor or contravention or other breach of, or failure to comply with, *any written law*, for which a penalty is provided'[107]. Essentially, a person can only be prosecuted if the offence, whether under Kenyan or international law, is criminalised under a written law. This argument pre-supposes that the use of customary international law as unwritten law, to prosecute PEV cases, is a violation of the strict legality principle which requires written and clearly defined legal norms.

Arguably, the absence of domestic legislation at the time an international crime was committed does not change its *jus cogens* nature and all the law (ICA) does is to effect mechanisms to enable national courts to act on behalf of the international community. The Convention on the non-applicability of Statutory limitations to War Crimes and Crimes Against Humanity seems to justify this position by calling on states to remove all constitutional and statutory impediments to the prosecution of these crimes irrespective of the place they were committed.[108]

The repealed constitution, which was valid during the PEV, would not have permitted the use of customary international law to prosecute and punish perpetrators of the PEV. The current constitution, however, permits the application of customary international law to prosecute and

106 Chapter 2, Laws of Kenya.
107 Section 3 of the Interpretation and General Provisions Act, 2008 (1983).
108 See Articles 1 and 4 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity http://www1.umn.edu/humanrts/instree/x4cnaslw.htm (accessed 9 October 2015).

punish the crimes as it forms part of Kenyan law. If it is conceded that the ICA codifies these customary norms relating to crimes against humanity and other core crimes, and that Article 50(2) (n) effectively melts retroactivity objections based on when the crimes were committed (2008 and 2009) and the coming into effect of ICA, then this law comports with the constitution and should stand the test of scrutiny based on a retroactivity challenge.

3.3.3 Prosecuting PEV Crimes as Ordinary Crimes

Perhaps with the foregoing challenges and presumed uncertainties relating legality objections against ICA, the government of Kenya opted to prosecute the PEV crimes not as international crimes but ordinary crimes under the Penal Code.[109] This approach is not new as elsewhere, crimes under international law have often been prosecuted under domestic criminal law using the ordinary crimes approach.[110] Essentially, the ordinary crimes approach relies on domestic criminal law for prosecution. Most of the individual acts of crimes against humanity espoused under article 7 of the Rome Statute are predicate offences under the Kenyan penal code.

Prosecuting these offences under the penal code however means that they lack the necessary contextual element needed to elevate them to international crimes.[111] The definitions of the predicate offences under the penal code lack the necessary and important contextual element of the crime against humanity. This entails the elements of attack on a civilian population (the civilian population here being the object of the crime), widespread or systematic attack

109 Chapter 63, Laws of Kenya.
110 Werle G & Jessberger F (2014) 130-133.
111 Materu S (2014) 90.

character and the policy element required under the Rome Statute.[112] This contextual element thus makes the crime not only affect the individual victim but the international community as a whole.[113] Nonetheless, international law does not discredit prosecution of international crimes as ordinary crimes. In fact, this approach is 'acceptable to the ICC as long as the aim and ultimate result of relying on such approach is to genuinely punish those who bear greatest responsibility for the crimes under the ICC's jurisdiction.'[114]

3.4 Analysis of Domestic Prosecutions of PEV Crimes

According to the review report of the DPP of 2013 referred to in this study, more than 4000 cases reviewed for possible prosecution are not prosecutable either as ordinary crimes or international crimes because of lack of sufficient evidence. The report was presented to the president but has not been made public.[115] This makes it rather difficult to ascertain the exact number of cases that have so far been prosecuted as well as the number of convictions and acquittals. According to the DPP report of 2012, out of 6,081 PEV cases, approximately 500 had been prosecuted, resulting in 258 convictions.[116] The report also revealed that 152 cases were on murder, 4 of which proceeded to prosecution resulting in 2 convictions.[117] The veracity of

112 Werle G & Jessberger F (2014) 334-345.
113 Werle G & Jessberger F (2014) 333.
114 Materu S (2014) 93.
115 The report was prepared by a multi-agency task force formed by the DPP with representation from the State Law Office, Ministry of Justice, Kenya Police, Witness Protection Agency and the DPP.
116 Most PEV cases cannot be prosecuted – Tobiko' *The Star Newspaper* 6 February 2014 available at http://www.the-star.co.ke/news/article-153986/most-pev-cases-cannot-be-prosecuted-tobiko (accessed on 30 March 2015).
117 Nichols L *The International Criminal Court and the End of Impunity in Kenya* (2015) 97.

these reports is however difficult to ascertain. Thus, reliance has been made on various institutional and NGOs reports that had access to court files.[118]

Strikingly, the 152 cases are of low-levelled perpetrators who directly participated in the violence. From these available facts, it can be concluded that the government's performance in prosecution is not satisfactory. One, because the number of cases that have been prosecuted does not equate to the magnitude and intensity of the PEV. Second, it is clear that there is no effort by the government to prosecute mid and high-level perpetrators, especially the masterminds of the violence and police officers who were involved in shoot-to-kill orders. The accessible cases are discussed below.

3.4.1 Convictions

In *Republic v Peter Kipkemboi Rutto*[119] the accused was charged with murder contrary to sections 203 and 204 of the Kenyan Penal Code. He was charged for killing the deceased during the post-election violence. The prosecution presented evidence showing that the accused was part of a group of armed attackers who went about destroying houses and properties, injuring and killing members of the *Kikuyu* community. The court noted that the accused was part of a group of 'raiders set out to execute an unlawful common purpose, which was attacking another community…due to ethnic differences…arising from the disputed results of the 2007 general elections'. He was found guilty of murder and sentenced to life imprisonment.

118 Human Rights Watch (2011).
119 Murder Case 118 of 2008; eKLR (2012).

In *Republic v Mosobin Sot Ngeiwa & Another*[120], the two accused persons were charged with murder under section 203 and 204 of the Kenya Penal Code. The court noted that the accused persons were part of a group of raiders who 'acted with a common intention to cause destruction, injure and/or kill' members of the *Luhya* community[121]. The court seemed to take note of the systematic nature of attack against this community. The accused were found guilty of murder and sentenced accordingly. The accused have since appealed this decision. The case is still ongoing at the Court of Appeal in Eldoret.[122]

In *Republic v John Kimita Mwaniki*[123], the accused was charged with 3 counts of murder "jointly with others not before court". The court noted that from the evidence presented before it, the accused was a "leader of the attackers, or that he played a leading or most prominent role…while his other foot soldiers did the actual damage of inflicting injuries upon the three deceased".[124] The court in making a determination relied on section 21 of the Penal Code which provides that 'when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence'.[125] The accused was convicted for murder and sentenced to 30 years imprisonment without an option for parole for the first 20 years.

120 Criminal Case No. 19 of 2008; eKLR (2012).
121 eKLR (2012) 5.
122 Crim. Appeal NO 105/2013(R) Mosobin Sot Ngeiywa & Another Vs Republic.
123 Criminal Case No. 116 of 2007; eKLR (2011).
124 eKLR (2011) 19.
125 Section 21 of the Kenyan Penal Code, Cap 63, Laws of Kenya.

All the three cases show that the accused persons were part of a larger group who were out to implement a certain cause. They all show that there was planning and organisation involved with the last case showing that there was even a leadership role. The prosecution satisfied the courts in all the 3 cases that the accused persons all had *mens rea* to kill their victims. In addition to that, the courts were convinced that all the accused jointly committed the crimes as they were part of a larger group. The penal code in section 21 creates criminal liability for participating in a common plan involving a larger group that have a joint common intention to commit a crime.

3.4.2 Acquittals

In as much as they are a handful of reported convictions[126], the majority of the cases prosecuted led to acquittals. An analysis of the reported cases demonstrate that lack of sufficient evidence was the main challenge in prosecuting post-election violence cases. For instance, the court in *Republic v Robert Kiprotich Leting & 3 Others*[127] blamed "shoddy police investigations" as the main cause of acquittals of perpetrators. The court held that the law required that the prosecution prove its case beyond reasonable doubt for an accused to be

126 The three cases illustrated above are the only to been reported in the Kenya law database. However, in 2011, Human Rights Watch conducted a survey on the number PEV related cases that were investigated and prosecuted. In a report dubbed, 'Turning Pebbles: Evading Accountability for Post-election Violence in Kenya', Human Rights Watch documented cases which they had access to court files. These cases include; *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; *Republic v. Charles Kipkumi Chepkwony*, Kericho Magistrate's Court, CR 101/08, appealed at Nakuru Appeals Court as HCCR A30/09; *Republic v. James Mbugua Ndungu and Raymond Munene Kamau*, Naivasha Magistrate's Court. Police file 764/44/08; *Republic v. Peter Ochiengo* , Nakuru Magistrate's Court, CR 4001/08; *Republic v. Willy Kipngeno Rotich and 7 Others*, Sotik Magistrate's Court, CR 8/08 and Republic v. Joseph Lokuret Nabanyi, Nakuru High Court, HCCR 40/08.

127 *Republic v. Kiprotich Letting & 3 Others* (2009) eKLR.

convicted. While delivering his judgement, Justice Maraga, opined that "out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person".[128] Leting and Rono presented alibi defenses, which the prosecution failed to challenge. The four accused persons, who were charged with 7 counts of murder that took place in a church were therefore acquitted, the court having found no linkage evidence between the accused and the murders.

Similarly, in the case *of Republic v Edward Kirui*[129], the accused, a police officer was charged with 2 counts of murder. The accused was caught on video shooting the deceased persons during demonstrations in the post-election violence. The prosecution availed witnesses who were able to positively identify him. All evidence adduced in court placed the accused at the scene of shooting and more so, the prosecution witnesses positively identified him. However, the court found the accused not guilty on the basis that "prosecution did not produce before court the rifle …or make any attempt to link that firearm to the accused" hence failing to prove that the fatal bullets came from the accused's gun. The Attorney General appealed this decision on grounds that the trial judge failed to state which charge the accused was acquitted on in contravention of section 163(3) of the Kenyan Criminal Procedure Code (CPC).[130] Eventually, the Court of Appeal ruled that there was a mistrial in respect to the second charge and ordered the accused face a re-trial.[131] Although this case appeared to be that of an

128 *Republic v. Kiprotich Letting & 3 Others* (2009) eKLR 11.

129 Criminal Case No 9 of 2008; eKLR (2010).

130 Section 163(3) of the CPC provides that "In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

131 As at writing of this paper, the trial of the accused is ongoing and the accused is out on bail. See Criminal Case No. 96 of 2014.

acquittal in the beginning, it seems that wheels of justice are turning in favor of the victims of the crimes and it is only when the final judgment is made can an informed conclusion be made.

In *Republic v Erick Kibet Towett and Simion Kipyegon Chepkwony*[132], the accused persons were charged with rape in Kericho District on December 31, 2007. The rape victim however did not know the accused by names and could therefore not provide the names of any suspects in her first statement to the police. She was able to name them in a later statement on learning their names. The judge however ruled that the identification process was unclear and therefore acquitted the accused.

As is the case for cases that resulted in convictions, there are an equally small number of cases that resulted in acquittals which speaks to the rather dismal number of PEV cases overall, and demonstrates the laxity on the part of the prosecution and by extension the lack of political will to prosecute PEV cases, particularly those involved in orchestrating the violence, and security forces who were heavily incriminated in the CIPEV and TJRC reports. The DPP's conclusion that it would be impossible to prosecute PEV cases for evidentiary reasons[133] presents a rather dim picture of the prospects of future prosecution of PEV cases. It is unlikely that new evidence will emerge, in part because of the lapse of time: memories of those that witnessed crimes fade, and some could have died. There is high probability that documentary and forensic evidence

132 Criminal Case no. 66/08. See Human Rights Watch (2011) 38.

133 Daily Nation 'PEV victims get Sh10bn fund' available at http://www.nation.co.ke/news/PEV-victims-get-Sh10bn-fund/-/1056/2667062/-/114lb3g/-/index.html (accessed 22 September 2015).

may have been destroyed. There is also a high likelihood that witnesses are unlikely to come forward, or may recant their testimonies for fear of reprisals.

In sum, it is a valid concern to ask whether Kenya has the capacity and expertise to prosecute international crimes and whether political will exists given that ordinary crimes have been treated with minimal seriousness. Prosecuting international crimes means that prosecutors will have an added task of proving contextual elements required under international law. As it stands, most prosecutors in national courts are police officers who have limited domestic legal knowledge.[134] The ODPP has a department for economic. International and emerging crimes which is divided into Counter Terrorism Division, Extradition, MLA and International Cooperation Division and Piracy and Maritime Division.[135] These divisions however have no mandate over core international crimes proscribed under the Rome Statute. There has nevertheless been an ongoing process of hiring more state counsels with a goal of replacing all police prosecutors with lawyers.[136] Even so, lack of capacity and expertise to prosecute international crimes remains a pertinent challenge.

3.5 Prosecuting High Ranking Officials

As emphasized in the study, there is no record of any high-ranking officials who have been investigated or prosecuted for masterminding the PEV. This is despite reports by various

134 Mwalili JJ 'The Role and Function ff Prosecution in Criminal Justice' available at www.unafei.or.jp/english/pdf/RS_No53/No53_23PA_Mwalili.pdf (accessed 31 September 2015).

135 ODPP website available at *http://www.odpp.go.ke/index.php* (accessed 2 October, 2015).

136 Mbote PK & Akech M 'Kenya: justice sector and the rule of law' (2011) The Open Society Initiative for Eastern Africa.

institutions adversely mentioning individuals in the political and business sphere as having orchestrated the violence.[137] This raises major concerns about the willingness of the government to bring to justice such perpetrators. Following the withdrawal of charges against the current president Uhuru Kenyatta before the ICC, because of lack of sufficient evidence, the question of whether he may still be charged under domestic law is important. This follows the position that withdrawal of charges does not amount to an acquittal.[138] In addition, prosecution under domestic law following withdrawal of charges before an international tribunal does not violate the principle of double jeopardy. Article 143 (4) of the Kenyan constitution makes this a possibility. It provides that;

> "The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity".[139]

This option is however farfetched for obvious reasons. It is almost certain that the Kenyan government would not subject the president to criminal proceedings during or after his tenure. If the vigor with which the government is presently fighting the ICC, even with threats to pull

137 The Kenya National Human Rights Commission, Kenyan Commission of Inquiry into the Post-Election Violence and the Truth Justice and Reconciliation Commission are examples of institutions which prepared reports that recommended investigation and prosecution of 'adversely mentioned' persons including present and current serving politicians and business persons who allegedly planned and organized the violence.

138 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta available at *http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx* (accessed on 1 October, 2015).

139 Article 143(4) of the Constitution of Kenya, 2010.

out of the Rome Statute is anything to go by, it only confirms that domestic prosecutions of high-ranking officials remain a fantasy.

3.6 Institution of Private Prosecutions

Following the laxity in prosecution and inadequate investigations of the PEV, victims of the violence, with the help of civil society and local NGOs have resorted to institute civil proceedings against the government. Constitutional Petition No. 122 of 2013 is an example of such cases. In this case, a group of PEV victims together with a number of civil society organizations filed a petition in the Constitutional and Human Rights Division of the High Court of Kenya seeking to compel the government to address the sexual and gender based violence (SGBV) that occurred during the PEV. The petitioners claim that the government violated various domestic and international laws including the old and new constitutions, ICCPR, ICESCR, and CAT in failing to properly train and prepare police to protect civilians from sexual violence. The police, the petition explains, refused to document and investigate claims of SGBV, leading to obstruction and miscarriage of justice. Furthermore, the petitioners claim that the government denied emergency medical services to victims during the violence period and thereafter failed to provide necessary care and adequate compensation. Among other things, the petitioners pray that the government publicly acknowledge and apologize to the victims for their failure to protect them during the violence period.; provide appropriate compensation, including psycho-social, medical, and legal assistance to the survivors; investigate the sexual violence and prosecute those who are responsible; and establish a special team within the office of the DPP which will include international staff to ensure credible and independent investigations and prosecutions.

Victims of the violence have now taken it upon themselves to institute private civil proceedings against the government to seek justice. This only goes to show the government's non-commitment in respecting and protecting rights of its citizens. The burden of initiating proceedings has shifted to victims and survivors of the violence who have taken it upon themselves to seek justice against the government.

3.7 Has Kenya Met its Obligations to Prosecute under International Law?

Kenya opted to prosecute PEV cases as ordinary crimes under the penal code as this was thought to be more feasible in securing convictions than prosecuting international crimes, including crimes against humanity, which are difficult to investigate and prosecute.[140] From the analysis however, the number of prosecutions leave alone convictions, has fallen short of expectations. Heller argues that "proving a crime against humanity not only requires investigators to tie the perpetrator to the underlying act, it also requires them to develop evidence (1) that the victim was a civilian and not a combatant; (2) that the underlying act was part of a widespread or systematic attack on civilians; (3) that the widespread or systematic attack involved a course of conduct involving multiple crimes against humanity; (4) that the multiple crimes against humanity were committed pursuant to a state or organisational policy; and (5) that the perpetrator knew of the widespread or systematic attack."[141] Prosecuting these

140 Okuta A (2009) 1068.

141 Heller KJ 'A Sentence-Based Theory of Complementarity' (2012) 53(1) *Harvard International Law Review* 102.

offences as ordinary crimes was necessary to achieve deterrence and provide the victim with a measure of satisfaction while demonstrating the state's abhorrence to crime.[142]

The feasibility of securing convictions by taking the ordinary crimes approach has not been useful. The number of prosecutions (and convictions obtained) so far does not substantiate the magnitude of the violence that was witnessed. Notably, the few cases that have been prosecuted, and the handful that have led to convictions, have been those of low-level perpetrators. The quality of prosecutions has been marred by sloppy investigations and treated with the inadequate seriousness it ordinarily deserves. Whether it is a question of lack of willingness to perform proper investigations or whether the police lack the required expertise and capacity is another question. Since most of the crimes that prosecuted were minor offences, and a few, serious offences, the argument that the police lack expertise and capacity cannot stand. The quality of their investigations did not meet the legal standards prescribed under Kenyan law. The prosecutions have not met international standards as well. The admissibility test of the ICC requires that states parties investigate and prosecute persons bearing the greatest responsibility for international core crimes. To date, no individual has been prosecuted for planning, instigating or financing the PEV. The Pre-Trial chamber noted that "in determining the existence of an investigation…the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps".[143]

142 Sanders J & Hamilton VL (eds) *Handbook of Justice Research in Law* (2007) 10.
143 *Muthaura Appeal* ICC, Appeals Chamber, Case No ICC-01/09-02/11-274.

In sum, the prosecutions carried out by the Kenyan government cannot be equated as inaction. However, the minimal effort to investigate and prosecute the PEV cases is not enough, in domestic and international standards. The claim by the government that initiating criminal proceedings against high-profile politicians is undesirable because it poses a danger to peace and stability in the country[144] only goes to show that the government is making all efforts to shield persons who orchestrated the PEV from criminal responsibility.

3.8 Non-retributive Options of Justice for PEV

3.8.1 The TJRC and its Role in Accountability

The Truth, Justice and Reconciliation Commission of Kenya (TJRC) was established pursuant to the TJRC Act that came into operation in 2009 as a response to the post-election violence.[145] The TJRC was mandated to inquire into gross abuse of human rights, which included, disappearances, torture, sexual violations, murder and extrajudicial killings between the period of 12 December 1963 and 28 February 2008.[146] The Commission was formed as part of the four main agendas under the KNDR Agreement.[147] The TJRC was seen to be a less controversial transitional justice measure than criminal prosecutions.[148] The Commission was primarily a restorative justice mechanism, hence had no prosecutorial powers. However, part of its mandate was to recommend prosecutions depending on the evidence available.[149]

144 Hansen TO 'Transitional Justice in Kenya? An Assessment of the Accountability Process in light of Domestic Politics and Security Concerns' (2011) 41 *California Western International Law Journal* 1.

145 Truth, Justice and Reconciliation Commission Act No. 6 of 2008.

146 Section 2(1) of the TJRC Act.

147 KNDR Annotated Agenda and Timetable available at *http://www.dialoguekenya.org/Agreements/1%20February%202008%20Annotated%20Agenda%20for%20the%20Kenya%20Dialogue%20and%20Reconciliation.pdf* (accessed on 16 June 2015).

148 Asaala E 'Exploring transitional justice as a vehicle for social and political transformation in Kenya' (2010) *10 AHRLJ*l 377.

149 Section 5(d) of the TJRC Act.

The recommendations proposed by the Commission in its final report, including prosecution of individuals who allegedly committed gross human rights violations are binding. The TJRC, amidst challenges and controversies during its tenure, handed in its final report to the President on May 21, 2013 after four years of work. The final report implicated high-ranking officials in past and present governments as well as senior military and police officers.[150] The Commission, among other things, recommended that the Director of Public Prosecutions investigate the adversely mentioned persons, against whom the report finds "ample evidence capable of sustaining prosecution."[151]

While the TJRC Act sought to increase chances of implementation of the Commission's recommendations by including the requirement of the formation of an implementation committee and submission of bi-annual reports to Parliament by the Minister of Justice, with any reasons for non-implementation, Parliament is yet to debate on the report. In fact, Parliament passed the Truth, Justice and Reconciliation (Amendment) Act of 2013, which essentially gives it power to alter the recommendations of the TJRC report. The Act calls for the implementation of the TJRC report to be done in accordance with recommendation of the National Assembly, upon their 'consideration' of the report.[152] The amendments, which alter the TJRC report, will therefore affect the implementation of Commission's recommendations, especially those on prosecution.

150 Final Report of the TJRC Volume VI.
151 Final Report of the TJRC Volume VI.
152 Section 3 of the TJRC (Amendment) Act, 2013.

Following the adverse mention of high-level perpetrators, some of the mentioned individuals rushed to court in attempt to have their names expunged from the report.[153] Two years after the final report was handed to the president, no individual mentioned in the final report has been investigated or prosecuted. This only goes to show the unwillingness and lack of political will by the government to implement the TJRC report in its original state, and also, to investigate and prosecute persons who hold the greatest responsibility of crimes committed during the post-election violence.

3.8.2 Reparations

Even with the widespread nature of the post-election violence, the high number of deaths and nature of destruction of property that was witnessed, the few cases that have been charged before domestic courts is disproportionate. As noted above, hopes of any further prosecutions were thwarted when on March 25, 2015, the Director of Public Prosecution handed to the president a report that concluded that more than 4000 post-election violence related cases could not be prosecuted.[154] The DPP cited insufficient evidence to institute criminal proceedings in the cases due to 'resource constraints, the inability to identify perpetrators, witnesses' fear of reprisals and the lack of technical and forensic capacity'.[155]

153 Daily Nation 'Jubilee leaders plot to clear their names from TJRC report' available at *http://www.nation.co.ke/news/politics/Jubilee+leaders+plot+to+clear+their+names+from++TJRC+report+/-/1064/1958078/-/569dhn/-/index.html* (accessed on 22 September 2015).

154 Kenyan President and Chief Justice apologise for Past Injustices available at *https://thehaguetrials.co.ke/article/kenyan-president-and-chief-justice-apologize-past-injustices-0* (accessed 29 March 2015).

155 Capital News 'Uhuru apologises for past atrocities much to Kiplagat's delight' available at *http://www.capitalfm.co.ke/news/2015/03/uhuru-apologises-for-past-atrocities-much-to-kiplagats-delight-2/* (accessed on 24 September 2015). The DPP's report has still not been made public.

Following this conclusion by the DPP, the President announced the establishment of a Kenyan Shillings 10 billion (USD 100million) 'restorative justice' fund to assist victims of the post-pastrestorative fund is lauded, it should remain complementary to criminal justice and not a replacement. Kenya still has an obligation both under international law and domestic law to ensure that crimes are investigated and those found responsible prosecuted and punished.

Conclusion

The efforts made by the Kenyan government to prosecute post-election violence cases as ordinary crimes are nothing to write home about. Different political regimes have continuously shown unwillingness to bring to justice those who bear the greatest responsibility for crimes that were committed during the violence period. There seems to be a deliberate effort to shield these persons from criminal accountability. The inadequacy in investigations by police and a distinct lack of political will continue to be the greatest challenge in prosecuting the post-election violence cases. Accountability is vital not only for the past but for the future. Without it, chances of recurrence of conflicts and repetition of violence remain high. In addition, initiatives pursuing peace and justice should not be made distinct but should work together. Peace achieved by ignoring justice is short-lived and the cycle of violence continues unabated.

CHAPTER FOUR

ENFORCING INTERNATIONAL CRIMINAL JUSTICE

The two options available for the prosecution of PEV crimes – the ICC and national courts – have been discussed in the preceding chapter. Other than these two, it is important to explore other mechanisms beyond these two. This chapter will discuss two more options; universal jurisdiction and the establishment of the International Crimes Division in the High Court of Kenya.

4.1 Universal Jurisdiction and the Fight against Impunity

Universal jurisdiction is a concept that is recognized under customary international law. This jurisdiction is based solely on the nature of the crime and can be exercised by third states to prosecute and punish perpetrators of heinous international crimes regardless of the place of commission of the crime, the nationality of the victim or the perpetrator.[156] Universal Jurisdiction offers a practical response to prosecution of international crimes since the state prosecuting such crimes acts as a guardian of international law and an agent of the international community. Hence, the court in Israel pointed out in the *Eichmann* case that:

> *"The abhorrent crimes defined in this law are not crimes under Israel law alone. These crimes which struck out the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself (delictajurigentium). Therefore, so far from the international law negating or limiting the jurisdiction of countries with respect*

157 Meron T 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554.

to such crime, international under the doctrine of universal jurisdiction, a state may "define and prescribe punishment for any offence recognized the community if nations as having universal concern". Significantly, universal jurisdiction applies only to those crimes that the international community has universally condemned an also agreed, as procedural matters deserve to be made universally cognizable."[157]

The first basis for a trigger of universal jurisdiction is to establish that a crime qualifies as a crime under international law.[158] As discussed before, CIPEV concluded that crimes against humanity were committed during post-election violence. The Pre-trial chamber of the ICC confirmed that crimes against humanity were committed in Kenya during the post-election violence.[159] It is on this basis that third states, may invoke universal jurisdiction against perpetrators believed to have played a role in the commission of the violence.

The interplay between politics and justice is however a major challenge to universal jurisdiction.[160] However, universal jurisdiction can play a major role in prosecution of post-election violence, especially those who planned, financed and organized the violence.

158 See generally *Supreme Court of Israel Attorney General of Israel v. Eichmann* (1962) 36 International Law Report 277-304.

159 Hans M 'Providing for uniformity in the exercise of universal jurisdiction: Can either the Princeton Principles on Universal Jurisdiction or an International Criminal Court accomplish this goal?' 15 (2002) *Transnational Law* 357.

160 ICC-01/09-01/11 *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and ICC-01/09-02/11 *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta.*

161 See generally Human Rights Watch 'The case against Hissène Habré, an 'African Pinochet' February 11, 2009 for an exhaustive account of the case.

Currently, there is limited hope that domestic courts will ever exercise jurisdiction over persons who have been mentioned in various reports as bearing the greatest responsibility over crimes against humanity that were committed during the post-election violence. Universal jurisdiction can also be a viable option in prosecuting persons whose charges before an international tribunal have been withdrawn as in the case of President Uhuru Kenyatta. Politics would however be the greatest challenge just as in many UJ cases. So far only western courts (Belgium, Spain, France, Sweden, Canada and Germany) have exercised UJ in respect of crimes committed in places such as Rwanda and Democratic Republic of Congo. In contrast, very few African states, including South Africa have prosecuted crimes under UJ.

Universal jurisdiction hence can play an important role of curbing impunity and ensuring that there is no safe haven for those responsible for the heinous crimes committed during the electoral violence of 2007 thus bringing justice to victims of the post-election violence. Any person implicated in the violence, either visiting or residing in a state that has adopted legislation providing for universal jurisdiction may initiate proceedings for crimes against humanity under the laws of the forum state.

4.2 The International Crimes Division (ICD)

The enforcement of international criminal justice in Kenya has been a slow journey. After domestication of the Rome Statute through the International Crimes Act (ICA), the Judicial Service Commission (JSC) considered operationalizing the ICA by creating an International

Crimes Division (ICD) that would deal with the crimes proscribed therein.[161] In this respect, on 9th May, 2012, the JSC appointed a committee with a precise mandate to study and make recommendations on the feasibility of establishing a special division, in the High Court of Kenya.[162]

The proposal to form this special division came at a time when many were aware that the Rome Statute obligates states parties to punish international crimes and that the ICC could only handle a few of the post-election violence cases with a main focus on those believed to bear the greatest responsibility for perpetration of crimes under international law. In conceptualizing the establishment of this court, the Chief Justice urged members of the Committee to consider expanding the jurisdiction of the court to accommodate not only international crimes but transnational crimes.[163] The main issues that informed the work of the Commission were 'the need to uphold access to justice for the victims of the violence committed during 2007-2008, as well as the emergence of crimes that are of an international and transnational nature.'[164]

4.2.1 Proposed Structure of the ICD

4.2.1.1 Legal Framework

According to the JSC report, the ICD would be formed on the legal basis of the Kenyan Constitution, which establishes the High Court of Kenya and confers it with unlimited original

163 The JSC was established by Article 171 of the Constitution of Kenya, 2010 and carries out its functions in accordance to the provisions of the Constitution and the Judicial Service Act No. 1 of 2011.

164 JSC 'Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in The High Court of Kenya' (2012) 4.

165 JSC Report (2012) 35.

166 JSC Report (2012) 7.

jurisdiction in civil and criminal matters[165]; section 8(2) of the International Crimes Act, which, confers on the High Court jurisdiction to try persons responsible for international crimes proscribed therein, committed locally or abroad by a Kenyan, or committed in any place against a Kenyan[166]; and section 5 of the Judicial Service Act, which gives the Chief Justice administrative power to exercise general direction and control over the Judiciary including creating the ICD.[167]The JSC report also recommends that the ICD formulate special rules of procedure, practice and evidence in its operations and conduct of trials in accordance with international standards of the ICC and international tribunals.[168]

4.2.1.2 Jurisdiction

Although the initial purpose of establishing the ICD was to operationalize the International Crimes Act through prosecuting pending post-elections crimes, the JSC heeded the call of the Chief Justice and expanded the jurisdiction of the court to not only prosecute international crimes proscribed under section 6 of the ICA but also transnational crimes.[169] Thus, the proposed court will have jurisdiction over crimes against humanity, war crimes, genocide, human trafficking, terrorism, cyber laundering, piracy and money laundering and any other international crimes as may be proscribed under any international instrument that Kenya is a party to.[170]

167 Article 165 (3) of the Constitution of Kenya, 2010.
168 See section 8 of the International Crimes Act, 2008.
169 Section 5 (2) (a) and (b) of the Judicial Service Act, No. 1 of 2011 as read with Article 161(2) (a) of the Constitution of Kenya, 2010.
170 JSC Report (2012) 100.
171 JSC Report (2012) 43.
172 JSC Report (2012) 44-70.

4.2.1.3 Prosecutions

The recommendations on prosecution are very contentious. The JSC report recommends the establishment of an independent prosecution unit within the office of the DPP to deal exclusively with international crimes. At the same time, the report also recommends that Parliament should enact new legislation to provide for 'a special prosecutor who shall be responsible for prosecution of cases that fall within the jurisdiction of the ICD'.[171] The two recommendations are however contradictory. If an independent prosecution unit were to be formed within the DPP's office, the DPP would still head the unit.[172] Thus, it would not be viable to enact legislation to appoint a special prosecutor under Article 157 (12) of the Constitution of Kenya.[173] Since the unit would be within the DPP's ambit, it would be sufficient to attach well trained experts in international criminal justice who would be able to prosecute international crimes effectively. In fact, the DPP has publicly shared his reservations on the creation of the ICD altogether. He argued that instead of creating a new court, existing institutions including courts should be strengthened.[174] He however changed tune later on when he supported the creation of the court but opposed the appointment of a special prosecutor. He pointed out that constitutionally, the power to prosecute criminal cases belongs to his office, and to set up a rival prosecution mechanism would contravene these arrangements.[175] Although Article 157 (12) of the Constitution gives Parliament power to confer prosecutorial powers to another

173 JSC Report (2012) 153.

174 DPP can appoint a special prosecutor under Article 157 (9) of the constitution, 2010 which provides that "The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions".

175 Article 157 (12) of the Constitution gives Parliament the authority to enact legislation conferring powers of prosecution on authorities other than the DPP.

176 Daily Nation 'JSC to decide fate of international court plan' February 10, 2014.

177 Daily Nation, Queries over demand for special high court division' February 9, 2014; Article 156 (6) of the Constitution gives the DPP mandate to exercise State powers of prosecution.

authority, the appointment of the special prosecutor through enactment of a new legislation may actually face challenges because of lack of political will which has become the major obstacle in prosecuting international crimes in Kenya.

4.2.2 Capacity of the ICD to Try PEV Cases

As stated above, the initial purpose of setting up the ICD was to prosecute the remaining post-election violence crimes. The special division in the High Court would have jurisdiction to try crimes against humanity, war crimes and genocide as proscribed under section 8(2) of the International Crimes Act, therefore would stand supreme over other courts in this regard. Thus, the JSC recommends that where criminal proceedings relating to an international crime are pending before other courts, one of the following options should be taken; a) the ICD may formally request the court to defer its jurisdiction or, b) the court in which the matter is being heard may refer the case to the ICD and where such request or referral is made, the proceedings in the other courts shall be terminated and the ICD will then take over the same and assume exclusive jurisdiction.[176]

As illustrated in chapter 3, all cases prosecuted cases in the domestic courts have been prosecuted as ordinary crimes under the Penal Code. There is no reference whatsoever to any proceeding relating to an international crime with regard to the post-election violence. Therefore, if the ICD decides to prosecute post-election violence as international crimes, especially crimes against humanity, (considering the position of the DPP with regard to inability

178 JSC Report (2012) 71.

to prosecute the remaining post-election violence cases), it will have to circumvent retrospectivity issues as discussed earlier. This is assuming that that the court will have the required expertise and resources to collect sufficient evidence to prosecute the post-election violence crimes as international crimes. This is in light of the fact that many of the offences committed during violence period would not meet the required threshold for crimes against humanity since existing files were not prepared with an eye on prosecuting the offences as international crimes.

In sum, charges of international crimes could thus be reserved for senior government officials and other who played a role in planning and organising the violence, while the majority of perpetrators who committed the actual crimes could still be charged with ordinary crimes under the Penal Code.

4.2.3 Challenges Facing the Proposed ICD

With the conclusion by the DPP that most of the PEV cases are not prosecutable, and with the creation of a Kshs. 10 billion victims reparations fund by the President, the initial purpose of creating the ICD seems to be lost. Since the proposal was made to create the special division in 2012, there have been contradicting reports as to its establishment.[177] There is still lingering uncertainty as to whether the court will prosecute PEV. Some argue that it is pointless to create

179 Wayamo 'International and Organised Crimes Division (ICD) of the Kenyan High Court' available at http://www.wayamo.com/?q=projects/international-and-organised-crimes-division-icd-kenyan-high-court (accessed on 11 October, 2015).

the court if most of the cases cannot be prosecuted for lack of sufficient evidence. Either way, the court will face challenges in its operation.

4.2.3.1 Lack of Political Will

The limited number of domestic prosecutions of crimes and even fewer number of convictions have mostly been attributed to lack of proper investigations or a jaded approach to prosecution. So far, there has been a clear lack of political will to prosecute crimes that occurred during the violence period and especially of high-levelled perpetrators who planned and organised the crimes. The creation of the ICD will not fix this reality. Political will is an essential ingredient to the efficient operation of the ICD. Political will includes uncompromised support from the Kenyan government in terms of funding and equipping the ICD. The Chief Justice acknowledged that one of the greatest challenges in establishing and operationalising the ICD would be the issue of resources.[178]

4.2.3.2 Lack of Independence and Inadequate Expertise

Should the ICD be established system as a special division in the High Court, it would need to be independent from external influence at the same time maintaining consistent contact with other institutions of government to ensure proper and effective means of discharging justice. In this regard, the proposal by the JSC for the appointment of a special prosecutor may achieve this. The major challenge with taking this route is that Parliament will need to enact legislation to this effect under Article 157 (12) of the Constitution conferring power to another authority.

180 Speech by Willy Mutunga, Chief Justice of Kenya on the critical updates on the establishment of an international crimes court in Kenya, April 30, 2013.

Political will and commitment to see justice done are needed for this to take effect. Although the office of the DPP is constitutionally independent, the DPP may interfere in politically sensitive cases and claim prosecutorial authority under Article 156(6) of the Constitution.

Similarly, the ICD should be equipped with adequate expertise not only at the adjudication level, but at prosecutorial and investigatory level. As illustrated, reliance on the police and DPP in the investigation and prosecution of PEV crimes have proved ineffective if the numbers of prosecutions and convictions are anything to go by. Therefore, there needs to be reforms in the police sector in order to have a dedicated team that has capacity in discharging its mandate.

4.2.3.3 Withdrawal from the Rome Statute

Tied to the challenge of political will is the threat by Kenyan politicians to withdraw from the Rome Statute following the cases before the ICC of the Deputy President, William Ruto and President Uhuru Kenyatta (before withdrawal of his case).[179] The huge amount of effort that was put into trying to stop the cases of the two individuals only goes to show the attitude and level of non-commitment that the government and politicians generally have towards international criminal justice. The formation of the ICD is heavily reliant of the International Crimes Act. If at all calls of withdrawing from the Rome Statute persist and is actually achieved, the future of the ICD will be left uncertain.

181 The latest calls to pull out of the ICC was in September, 2015. See Daily Nation 'Leaders renew calls for Kenya to withdraw from Rome Statute' available at

4.3 Way forward

The proposal made by the JSC to create a permanent division in the High Court to cater for international and transnational crimes may prove useful. However, it should be noted that the establishment of the court will not be a solution to overcoming institutional barriers for the successful prosecution of crimes under the court's jurisdiction. It is important that the capacity of the court is strengthened and its independence respected in order to promote accountability. This requires commitment and political will and more importantly an assurance that justice will be served regardless of role or position of an individual.

In addition, the ICD should make a genuine effort to prosecute high-level perpetrators especially those who have been named in various reports as playing a major role in planning and organising the violence. The essence of the ICD should be target those who planned, organised and financed the PEV bearing in mind the systematic and widespread nature of the violence. This would allow for a thorough account of the PEV. In addition, it will also create a historical narrative of the violence which is an essential aspect of reconciliation and healing.

It is also particularly important that special measures be taken to secure the independence and impartiality of other institutions that will be working with the court. The police and office of the DPP are referred to in this respect.

Conclusion

In sum, the establishment of the ICD is a step in the right direction for justice and reparation for victims of international crimes. However, without the requisite political, technical and financial

support, it has the potential to fail. The government should be its number one supporter, if not for any other reason, to show its citizenry, especially victims of the PEV, its commitment to promote accountability to perpetrators of international crimes, including crimes against humanity.

The legitimacy and credibility of the ICD will depend on its level of independence and impartiality; respect to fair trial standards and the ability to convict a reasonable number of perpetrators, especially the organisers and planners and its ability to deter future international crimes.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The PEV put Kenya in a precarious position where it is expected to demonstrate its commitment in fighting impunity. Kenya missed an opportunity to create a Special Tribunal that would have overseen the prosecution of the PEV crimes, including crimes against humanity. Because of the unwillingness shown by the government, the ICC intervened under Article 17 of the Rome Statute.

By virtue of being a member of the international community and subject to international law, Kenya is under a duty to prosecute international crimes that have been committed in territory. Kenya domesticated the Rome Statute through the International Crimes Act in 2008. This would have been the most effective option of prosecuting crimes against humanity that were perpetrated during the violence period. However, an alternative interpretation of Article 50(2) of the Constitution as read together with section 7 of the Seventh Schedule of the Constitution may melt down the retrospectivity claims and enable the PEV cases to be prosecuted as international crimes.

The study has shown that Kenya therefore opted to prosecute the offences as ordinary crimes under the penal code. Domestic courts have prosecuted many minor offences and few serious crimes including murder. What remains clear however is that those targeted for prosecution remain to be low-level perpetrators. Even so, many of the cases that have been prosecuted have led to acquittals because of inadequate investigations. The DPP in a move to dispel any

hopes of further prosecutions conceded that it would be difficult to prosecute the remaining cases because resource constraints, inability to identify perpetrators, and lack of technical capacity. High- level perpetrators, including the planners, organisers and financers still remain unprosecuted. There seems to be a deliberate effort to shield these group of perpetrators from criminal accountability.

As a transitional justice tool, the TJRC was created as a less controversial measure. Among other things, the Commission recommended further investigations and prosecution of persons believed to been masterminds of the PEV. Two years after the Commission handed its report to the president, none of those who were mentioned in the report have been prosecuted. This only goes to show the extent of non-commitment by the government to prosecute these individuals.

The proposed establishment of the ICD by the Judicial Service Commission in 2012 is yet to come into fruition. The initial plan was for the court to prosecute PEV but with the conclusion by the DPP that it would be difficult to prosecute these offences, it is yet to be seen whether the court, if established, would still have jurisdiction over these cases. As it stands, the court has jurisdiction over the core international crimes proscribed under the International Crimes Act and other transnational crimes. Either way, the proposal for the formation of the ICD remains is necessary and highly significant in the prosecution international crimes committed in Kenya. If established, this court would not only serve to prosecute perpetrators of international

crimes but would also restore faith in the judiciary as a means of ending a culture of impunity that is deeply rooted in Kenya.

Overall, this study concludes that even though Kenya has taken minimal efforts to prosecute PEV as ordinary crimes under the penal code, it should not disregard its obligations under international law to prosecute international crimes, including crimes against humanity, which occurred during the PEV. The effort to prosecute low-leveled perpetrators are an indication that the government has no intention to concretely investigate those who were responsible for the PEV. It only perpetuates the idea that the government is "doing something". The Kenyan government should show commitment in prosecuting the masterminds of the PEV, not just for criminal accountability but also for truth and healing of the country. With the foregoing, the study makes the recommendations below.

5.2 Recommendations

i. The Establishment of the ICD

As a minimum, Kenya is required to put in place measures at the domestic level to ensure those who bear the greatest responsibility for the most serious violations, amounting to crimes against humanity, be prosecuted, and if found guilty, punished. In this respect, it is recommended that the ICD be set up as soon as possible. The support of the Kenyan government to this court, in terms of funding, political will and non-interference, is paramount. The establishment of the court does not need new legislation since it could be done administratively by the Chief Justice through section 5 of the Judicial Service Commission Act. To avoid political interference, which has so far played a huge role in prosecuting PEV, it is

recommended that the ICD be established through a legislation as opposed to an administrative action. In this way, investigations and prosecutions will be insulated from external interference, at the same time regulating the qualifications of persons appointed as prosecutors.

ii. Prosecuting International Crimes

Once established, the ICD should endeavour to prosecute the remaining PEV cases both as ordinary crimes and international crimes. Parliament could amend the International Crimes Act to apply retrospectively. Political will is essential for this to happen and it is further recommended that politics should be put aside for the sake of promoting accountability and getting justice for victims of the PEV.

If amending the ICA proves impossible because of lack of political will, it is recommended that the court adopts the broad interpretation of Article 50 (2) (n) of the constitution as read together with section 7 of the Sixth Schedule of the constitution to prosecute the PEV as international crimes. In this way, the ICD should concentrate on prosecuting persons mentioned in various reports including CIPEV and the TJRC reports as bearing the greatest responsibility for the commission of PEV crimes.

It is also recommended that the ICD be equipped with staff that are knowledgeable in international criminal law and specifically in prosecuting international crimes. The appointment of these personnel should not be restricted to Kenyan nationals. International staff may be

included in all relevant levels, including the investigatory, prosecutorial and adjudication level. This is following the reality that most, if not all, the existing PEV files were not prepared with the intention of prosecuting international crimes. The files, if used in the current state, will likely prove insufficient to get convictions of international crimes.

iii. Enacting Appropriate Legislation

For effective investigations and prosecutions, however, the ICD should be equipped with enough resources and technical expertise. It is recommended that Parliament adopts legislation establishing a special prosecutor in accordance with article 157 (12) of the Constitution of Kenya. The special prosecutor should work independently of the DPP, and should be granted all the necessary powers to effectively prosecute the PEV crimes, both as ordinary crimes and international crimes. In the case that this fails, it is recommended that the DPP appoints a special prosecutor under Article 157 (9) of the Constitution but ensure the necessary required independence.

iv. Equipping Police with Technical Expertise

Currently, the National Police Service are mandated to investigate crimes that have been committed in Kenya. However, from the analysis of the cases, it is quite clear that the police conduct inadequate investigations that cannot hold a conviction, leading to a lot of perpetrators walking free. It is for this reason that the Kenyan government should invest in reforming the police service in terms of capacity building and equipping them with the technical expertise to conduct thorough and impartial investigations.

v. Implementation of the TJRC Report

It is also recommended that the Kenyan government implement the TJRC report considering its recommendations are binding in nature. The government should therefore establish through legislation, the independent Committee for the Implementation of the Recommendations of the TJRC, in accordance with the recommendations of the TJRC Report. In addition, the government should ensure that the recommendations in respect to further investigations and prosecutions are fully implemented without fear or favour of shielding the mentioned perpetrators from criminal accountability.

In sum, until the ICD and the special prosecutor come to existence, redress for the PEV should continue through other measures including civil and constitutional suits against the government while regional and international judicial bodies should hold the government accountable for its laxity in properly addressing the PEV cases.

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