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Violence in Kenya: Any Role for the ICC in the Quest for Accountability?

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Abstract

This article examines the violence that broke out in Kenya after the 2007 presidential elections. After weeks of fighting and the establishment of a coalition government made up of the incumbent president and the leader of the opposition, relative calm returned to the country. However, the government has been slow to implement the recommendations of the Commission of Inquiry into Post Election Violence (Waki Commission). One key suggestion the Waki Commission made was to call upon the Kenyan government to establish an independent Special Tribunal made up of domestic and international jurists to prosecute those responsible for the crimes committed during the violence. At the time of writing, the ICC Pre-Trial Chamber II had been assigned the matter to determine whether the Office of the Prosecutor could initiate investigations. This article argues that the crimes committed in Kenya during the post election violence do not meet the ICC threshold on jurisdiction and gravity, and do not have the essential legal attributes of genocide and crimes against humanity. However, the manner in which the ICC handles this situation has the potential to influence the way future crimes are tried; thus the ICC must ensure that impunity does not prevail over accountability.

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I. INTRODUCTION

Kenya, a country widely regarded by many as Africa's most stable nation, shocked observers in the unstable world of international politics when it was engulfed in post election violence. International crimes were deemed to have been committed during the violence which started after the 2007 elections. At the time of writing, the International Criminal Court (ICC) is set to commence investigation into the situation which has been assigned to the Pre-Trial Chambers.¹ The Chambers will decide whether there is a reasonable basis to authorize an ICC investigation into the crimes committed in Kenya. The Office of The Prosecutor's (OTP) action was prompted by a slow Kenyan governmental response despite the recommendations by the Commission of Inquiry into the Post election Violence (Waki Commission).² Though the ICC must ensure that impunity does not prevail over accountability, it is questionable whether the crimes will meet the court's threshold on jurisdiction and gravity. The paper examines the nature and gravity of the crimes committed in Kenya against the essential criteria of international crimes. Furthermore, it reviews obstacles in holding individuals accountability for the crimes.

A. Brief Historical and Political Background

Kenya once enjoyed the reputation of being one of the most stable African States. However, on December 27 2007, the date of the disputed presidential elections, that stable state suddenly erupted - with the violence commonly associated with African States. The factors that led to the violence are deeply rooted in the country's history. They had also been building up over the decades following the end of colonial rule. When Kenya gained independence in 1964, the British were anxious to prevent the Mau Mau revolt of 1952 – 1960 from affecting the politics of the new State and causing further violence. The election of Jomo Kenyatta to the Presidency kept this from happening.³ The Kikuyus, as one of the politically active tribes, were compensated in other ways.

The Kikuyus, with tacit government backing, spread beyond their traditional homelands and took possession of land they claimed was 'stolen' by

¹ The ICC The prosecutor intends to bring charges to those bearing the greatest responsibility for the crimes. Therefore, the court's President assigned the matter to Pre-Trial Chamber II. See "The Situation in the Republic of Kenya Assigned to Pre-Trial Chamber II"; Press Release November 6, 2009. Available at <<http://www.icc-cpi.int>>. Last visited November 8, 2009.

² The Commission was established in an agreement between the parties to the Kenyan National Dialogue and Reconciliation and the Panel of Eminent African Personalities led by H.E Kofi Annan. The commission was made up of two international members and three Kenyans. It was headed by Justice Philip Waki and mandated to investigate into the post election violence and to make recommendation. It delivered its report in October 2008 and gave the Kenyan government a three month deadline to set up the Special Tribunal which was one of its recommendations. Available from Office of Public Communications (Office of Government Spokesman) at <<http://www.communication.go.ke/media.asp?id=738>>

³ See generally, Kyle .K, *The Politics of the Independence of Kenya* (Macmillan Press, 1999). See also Ogot .B.A, "The Decisive Years 1956-63" in Ogot .B.A & Ochieng W.R (eds.) *Decolonization & Independence in Kenya 1940-1993* (Athens: Ohio University Press 1995) p. 67.

the departing colonists.⁴ Other tribes, such as the Kalenjins, resented the Kikuyus for inheriting their land following the withdrawal of the British.⁵ For instance, the Kalenjins had supported Mr. Odinga because he had promised to change the structure of the Kenyan government to a quasi federal system. The Kalenjins were the main perpetrators of violence against the Kikuyus in the Rift Valley.⁶ Instituting the structural changes proposed by Mr. Odinga would have given the Kalenjins the control they craved over land and the Kikuyu settlers. As in other parts of Africa, Kenya's leaders (from Kenyatta to Kibaki - and Odinga) are not versed in political ideology but excel by exploiting ethnic politics. The political class, skilled in the act of tribal manipulation, has deeply polarized Kenya by elevating ethnic favouritism over performance and merit. Consequently, most Kenyan citizens still have their tent of loyalties pitched towards their tribes rather than the country. Is it any wonder then, why civil disobedience to protest alleged rigged elections escalates into ethnic violence of brutal proportions?

B. Background to the Violence

The December 27 elections yielded no surprises. The polls had predicted the Orange Democratic Movement (ODM), a party led by Mr. Raila Odinga and supported by three of Kenya's largest tribes, would win the election.⁷ These expectations were fulfilled with the parliamentary elections. However, it was not unexpected that the incumbent President, Mwai Kibaki, would strive to hold onto power at any costs. The result of the parliamentary elections was not disputed by and party. But Kibaki was evidently unwilling to relinquish the presidency. On December 30, 2007 soon after Kenya's Electoral Commission (ECK) had declared Kibaki winner of the elections, its respected chairman, Mr. Samuel Kivuitu, admitted the irregularities and claimed he was pressured into announcing the results.⁸ The growing feeling of frustration in Kenya over the manipulated elections ignited the flames of ethnic violence that claimed hundreds of innocent lives. Although the initial outburst of violence protested against the government and Mr. Kibaki, in particular, it rapidly transformed into an intertribal conflict.

C. Kenya's International Obligations

Like most dualist States, Kenya's Constitution is superior to international law within its sovereign territory. Article 3 of its Constitution specifies that the

⁴ Norman Miller & Rodger Yeager, *Kenya: The Quest for Prosperity* (2nd ed.) (Boulder: Westview Press 1984) at pp 48 - 50.

⁵ Miller & Yeager, *ibid*.

⁶ See the Waki Report, *supra* note 2, at pp 37-161; see also Makau Mutua, 'Kenya at the Brink of Collapse', *Globe Newspaper* (Boston, United States of America) January 30, 2008. Available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/01/30/kenya_at_the_brink_of_collapse

⁷ Gérard Prunier, 'Kenya Roots of Crisis'; available at http://www.opendemocracy.net/article/democracy_power/kenya_roots_crisis. Assessed January 12, 2008.

⁸ *Financial Times*, "Startled Powers Seek Deal to Stem Violence"; January 1, 2008. Available at <http://www.ft.com/>

Constitution is the supreme law of the land and that any law inconsistent with it would to the extent of the inconsistency be void.⁹ Thus any international treaty to which Kenya is a party must conform to the Constitution. Thereafter the Kenyan Parliament enacts an implementing legislation which incorporates the treaty into Kenyan law and is therefore enforceable in Kenya.¹⁰ The courts, as the enforcement organ of the state, do not consider themselves bound by treaty obligations until the implementing legislation is enacted. Currently, the Office of the Attorney-General screens all international treaties ratified by Kenya before they are incorporated by legislation.¹¹ This serves to assess whether the treaty contains any provision inconsistent with the Kenyan Constitution. If any provision of the treaty conflicts with the constitution, Kenya would either make a reservation to the treaty or change the domestic law to make it consistent with the constitution.¹²

Kenya has ratified and even incorporated relevant human rights and international humanitarian law (IHL) treaties. It may be useful to know that Kenya, on September 20 1966, ratified the 1949 Geneva Conventions. It followed this up on 23 February 1993 by ratifying the Additional Protocols of 1977. The Convention was then made effective and enforceable in Kenya when the parliament passed The Geneva Conventions Act, 1968 (Cap. 198). The Act incorporates into Kenyan law several provisions of the Conventions, particularly the criminalization and punishment of serious violations of the principles of IHL, which is the crux of the Geneva Conventions. However, the country has not yet incorporated the Additional Protocols through legislation. Thus, the provisions of the Protocols cannot be internally enforced in Kenya.¹³ Kenya has also ratified the Rome Statute of the International Criminal court, which principally implements the violations of IHL, genocide and crimes against humanity. Furthermore, Kenya recently enacted the International Crimes Act 2008.¹⁴ This Act empowers Kenya's domestic courts to prosecute criminals for international crimes. Because Kenya is a state party to the Rome Statute, the ICC should have jurisdiction over issues discussed in this essay.

The crimes committed during the post election violence ought to be prosecuted by Kenya or alternatively, ICC if Kenya is unable or unwilling prosecute. Kenya's ratification of the ICC Statute establishes the court's *ratione personae* jurisdiction. However, its *ratione materiae* jurisdiction can only be established if the crimes committed in Kenya are shown to be international crimes. The question is whether the crimes meet the Court's threshold on

⁹ The Constitution of Kenya, Volume 4, Laws of Kenya [LawAfrica Publishing (K) Ltd, 2005], at 5451-5537.

¹⁰ For a general reading on the concept (Dualism): see Aust .A, Modern Treaty Law and Practice (Cambridge: Cambridge University Press, 2007), at 187 & 188.

¹¹ See the ICRC General Comment on Kenya; International Humanitarian Law National Implementation. Available at < <http://www.icrc.org>>

¹² ICRC, *ibid*.

¹³ *Ibid*; see also Aust .A, *supra* note 10.

¹⁴ International Crimes Act, 2008. Assented by the Kenya Parliament on December 24, 2008. Available online at <http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf>. Last Accessed on October 16, 2009>.

substance and gravity.

II. CATEGORIZING THE CRIMES

1000 individuals were killed and 500 displaced in the post-election violence. It is thus apparent there were serious crimes committed in Kenya.¹⁵ However, the issue is whether the crimes have the attributes of the “most serious crimes of concern to the international community”.¹⁶ The ICC only has the jurisdiction to try the perpetrators of crimes deemed to be so serious that they concern not just the society where they were committed but the entire-world community. The four broad categories of crimes that make up the court’s jurisdiction *ratione materiae* are genocide, crimes against humanity, war crimes and aggression.¹⁷ It is important to note that there must be the existence of armed conflict in order for war crimes and aggression to be committed. As there was no armed conflict in Kenya, war crimes and aggression will not be reviewed in this paper.¹⁸ The question of whether the crimes committed in Kenya meet the gravity and have the attributes of genocide and crimes against humanity will now be examined.

A. Genocide

Although the violence in Kenya was brutal, whether it was of such gravity as to constitute the crime of genocide is doubtful. Though the Kikuyus were the dominant tribe in Kenya, they often resided in areas dominated by other tribes.¹⁹ The post-election crisis was an opportunity for tribes such as the Kalenjins to repossess their ancestral land, which the Kikuyus inherited following the British withdrawal in 1964.²⁰ There were claims of genocide and the United Nations Special Adviser on the Prevention of Genocide was quick to send a representative to observe the situation.²¹ The UN measure was intended to prevent an outbreak of genocide. It was hoped the global attention would deter the leaders of all the sides from committing serious crimes such as genocide.

Genocide originally emerged as a sub category of crimes against humanity

¹⁵ See the United Nations Office for the Co-ordination of Humanitarian affairs (OCHA) available at <<http://ochaonline.un.org/>>; see also the KENYA OCHA Kenya website for updates on Kenya humanitarian crisis. The figure used in this essay was derived from the data made available by OCHA Kenya its weekly humanitarian update Vol. 7, 23 – 27 February 2008; available at <<http://www.reliefweb.int/rw/rwb.nsf/db900SID/KHII-7CAA76?OpenDocument&RSS20=02-P>>.

¹⁶ See Art. 5 (10) The Rome Statute of the International Criminal Court (1988), United Nations Treaty Series, vol. 2187, p. 3. Also available at <<http://www.icc-cpi.int>>.

¹⁷ Ibid.

¹⁸ This assertion is based on reports which make it clear that the violence did not involve any military activity. It also did not involve armed dissidents or rebels. It was a civil disobedience spurred on by the manipulated election results and subsequently became violent. See also the Waki Report, *supra* note 2.

¹⁹ Prunier, *supra* note 7.

²⁰ Prunier, *ibid*.

²¹ ‘UN Genocide Adviser Urges End To Violence in Kenya, Sends Staffer There’; available at <<http://www.un.org/apps/news/story.asp?NewsID=25425&Cr=kenya&Cr1=>>>.

but subsequently acquired its own self-determining status and elements.²² The crime can be described as the deliberate killing, destruction or extermination of a group or members of a group.²³ The deliberate killing, destruction or extermination must be made with the intent to destroy the very existence of that group.²⁴ In the post-election Kenyan violence, all the major ethnic groups perpetrated violent crimes against each other, especially in areas where they were in numerical advantage. Nevertheless, it is debateable whether there was a deliberate plan or intention by any of the ethnic groups to exterminate the other(s) from existence. There are two crucial elements to genocide. Firstly, the crime must have been committed against the victims solely because they were members of a particular national, ethnic, racial or religious group. Secondly, the crime must have been carried out with the intention of destroying that group.²⁵ The events in Kenya will now be examined whether they were committed with the intent to destroy the victims as members of any of the four protected groups.

i. *The Intention to Destroy Members of a Group*

The post election violence in Kenya shows that the victims were targeted because they were members of an opposing ethnic group. However, the crimes were not substantial to be categorised as genocide. The term 'substantial' is used to refer to the number of victims, the conduct and the pattern of attacks. It appears that the number of victims must be substantial for it to be categorised as 'a crime of crimes'.²⁶ However, the number of victims is not the qualifying element of genocide. The trial chamber of the International Criminal Tribunal for Rwanda (ICTR), in the *Akayesu case*,²⁷ held that it would be genocide if any of the offending acts was carried out against one member of a group. The ICC adopts this position by providing that the victim can be 'one or more persons'.²⁸ However, the ICC has a pragmatic threshold for gravity which is aimed at limiting the court's docket to the most serious cases. It must be noted that the ICC threshold on gravity was not meant to be a conceptual criterion for the crime. The subject of gravity is wider than the number of victims. The victims of the violence in Kenya may have been targeted as members of an ethnic group but was the intention of the perpetrators to totally or partially destroy the group? The basis of the crime is the special intention to destroy the group.

Genocide has been deemed "the crime of crimes". This may be due to its requirement for special intent on the part of the perpetrator to totally or partially

²² Whitaker Report, *supra* note 39, at 29.

²³ Art. 2 Convention for the Prevention and Punishment of the Crime of Genocide (1948) United Nations Treaty Series vol. 78; Art. 6 Rome Statute, *supra* note 16.

²⁴ *Prosecutor v. Krystic*, Case No. ICTY-98-33-T (Trial Judgment, August 2, 2001) at 590; available at <<http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>> Last Assessed on February 12 2009.

²⁵ *Kristic case*, *ibid.*; see also ICC Elements of Crimes (2000), ICC-ASP/1/3(part II-B), adopted September 9, 2002 by the Assembly of States Parties. Available at <<http://www.icc-cpi.int>>

²⁶ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Trial Judgment September 2 1998); available at <<http://www.un.org/ictv/>>

²⁷ *Akayesu case*, *ibid* at para 521.

²⁸ , Arts. 6(a)(i); 6(b)(i); 6(c)(i); 6(d)(i); 6(e)(i), ICC Elements of Crime, *supra* note 24.

destroy the victims as a group. The perpetrator must intend the consequence of his actions beyond a doubt. This standard is higher than a requirement for Knowledge, by the perpetrator, of the likely consequence of his actions.²⁹ The perpetrator's negligence would not meet the standard; however a deliberate omission would suffice as a clear intention to destroy the group.³⁰ The existence of a plan or policy to commit the crime would be persuasive to prove genocidal intent but it is not a legal requirement.³¹ The plan's usefulness would be in its evidential value in determining the state of the perpetrator's mind if it can be shown that he knew or participated in the plan or policy.³²

The ICC general provision on intent is lower than the special intent required for the crime of genocide. Article 30 of the Rome Statute tends towards a knowledge-based approach that requires the perpetrator's awareness of the consequences of his act. Article 30 also allows the judges to make such a determination of intent.³³ Although some of the attacks in Kenya showed traces of this special intention, most of the attackers did not demonstrate the intention to destroy "the very existence" of their victims' ethnic groups.³⁴ Most of the attacks were sporadic, desperate and arose from frustration but grew in intensity. Though it appears from the findings of the Waki Report there was evidence of some organisation or plan - the question is whether the evidence points to the existence of a plan to destroy any of the ethnic groups.

ii. *Significant part of a Group [meaning of "in part"]*

In order for a crime to be categorised as genocide, it must meet the objective and subjective elements of the crime. There is no doubt the objective elements are evident in the Kenyan crisis. One crucial element of the crime of genocide is the intention of the attacker to destroy the victim based on his membership in a particular group. The court would determine whether the intention of the attacker was the total or partial destruction of the ethnic group when evaluating crimes such as the mass murder of Kikuyus in a church in Eldoret. The UN

²⁹ Mettraux, Guénaél, *International Crimes and The Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005) at 212 -213; see also *Prosecutor v. Krstic*, Case No. IT-98-33-A (Appeal Judgment April 19, 2004).

³⁰ Mettraux, *ibid.*, at 210; William A. Schabas, *Genocide in International Law : The Crime of Crimes* (New York : Cambridge University Press, 2000) at 227; *Krstic Appeal Judgment*, *ibid.*

³¹ *Prosecutor v. Jelusic*, ICTR Appeal Judgment July 5, 2001, Case No. ICTY -95-10-A at para 48; See also *Krstic Case*, *supra* note 28, at para 225.

³² *Jelusic case*, *ibid.*, at para 48; *Prosecutor v. Clement Kayishema & Obed Ruzindana*, Case No ICTR-95-1-T (1999 Trial Judgment) at paras 91, 94, 276, 528-545; *Prosecutor v. Jean Kambanda*, Case No ICTR-97-23-S (1998 Trial Judgment) at para 16. Available at www.icttr.org

³³ The Rome Statute, *supra* note 16; See also *Elements of Crimes*, Introduction to Article 6 Genocide, *supra* note 24, at par. 4.

³⁴ Some of the attacks, like the attack of the church in Eldoret, show signs of the intent to destroy the group and it lines up with the judicial stand of the ICTY in the *Krstic case*. The court in that case held that the killing of a group in a small geographical area would be genocide if done with the intent to destroy them as part of the group. On the other hand, there was no plan to exterminate that group in Eldoret. The attack was an isolated attack and not a reflection of the trend of the attacks in Kenya.

General Assembly has classified ethnic cleansing as a form of genocide.³⁵ Additionally, the German Constitutional Court held that ‘systematic expulsion can be a method of destruction and therefore an indication, though not the sole substantiation, of an intention to destroy’.³⁶ In order to classify a crime of mass killing or expulsion as genocide, there must be a deliberate plan to carry out the act as a way of destroying that group. The crisis in Kenya shows that the objective elements of the crime of genocide were clearly visible but there was no indication of the intention to destroy the very foundation of the ethnic group.

The object of the special intent in the act of genocide must be the total or partial destruction of any of the protected groups. The two dominant approaches in the interpretation of the intention to destroy the group “in part” are the quantitative and qualitative approaches. The negotiating history of the Genocide Convention reveals little regarding the intent of the drafters on the meaning of “in part”. However, a commentator opined that it should signify the intention to destroy a significant number of the protected group.³⁷ Proponents of the quantitative approach have used a numerical approach to determine when the partial destruction of a group is substantial.³⁸ The partial destruction must be of a significant number of members of the group to qualify. The determination as to whether a significant part of a protected group was targeted for destruction is a sophisticated issue that should not be determined using mathematical formula.³⁹ The opposite view is to apply the quality of the victims within the group to determine the intention of the perpetrator to achieve a partial destruction of the group. The rationale behind this approach is that the significance of the quality of those destroyed (for instance, leaders or men) should be determined by the impact of their loss on the group.⁴⁰ A more acceptable formulation is the application of both the quantitative and qualitative approaches. In the *Jelisić* judgment, the ICTY declared that it must be the intent of the perpetrator to destroy a significant portion of the group from either a quantitative or qualitative standpoint”.⁴¹ The combined approach appears to maintain the balance without diluting the threshold on the intention to destroy a part of the protected group.

It is doubtful that the crimes committed in Kenya pass the thresholds on the special elements of genocide. However, if they are considered to have the elements of genocide, the next challenge would be ascertaining whether they meet ICC’s standard of gravity. The question of gravity, as noted earlier, is not an

³⁵ See UN General Assembly Resolution, UN Doc. S/RES/771 (1992); ‘The Situation in Bosnia & Herzegovina’ GA Res 46/242.

³⁶ Cited in A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) at p. 100.

³⁷ Nehemiah Robinson, *The Genocide Convention: A Commentary* (1998).at 63; ILC Commentary, 89.

³⁸ The United States of America in the Genocide Convention Implementing Act (the Proximare Act) 1988 at para 1093(8) define substantial to mean “such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity...”

³⁹ Benjamin Whitaker, Revised and Updated Report on the Questions of the Prevention and Punishment of the Crime of Genocide, (1985). par 29; Lawrence J. LeBlanc, *The United States and the Genocide Convention* (1991). at 48.

⁴⁰ *Prosecutor v. Sikirica et al* (Case No IT-95-8-I) Judgment on Defence Motion to Acquit, 3 September 2001, at par. 80; *Kristić Appeal Judgment*, supra note 28, para 13.

⁴¹ *Jelisić*, supra note 30, at para 82; Whitaker Report, supra note 40, at 29.

additional element of the crime of genocide. It was devised as a method of restricting the number of cases before the court to enable it concentrate on the most heinous crimes. The ICC Prosecutor noted in a policy paper that his office would consider four factors when determining the gravity of a crime.⁴² The determining factors are the scale, impact and nature of the crime as well as the manner of their commission.⁴³ Of these four factors, it is the impact of the crimes that may perhaps compel the ICC's action.⁴⁴ As considered above the scale, nature and manner of the crimes in Kenya may not substantiate being categorised as international crimes. However, the impact of the ICC and Kenyan government's failure to prosecute would encourage impunity.

B. Crimes Against Humanity

The crime against humanity is the other category of international crime which may have been committed during the post election violence in Kenya. It may seem that most of the concepts behind this category of crimes are drawn from either basic Human Rights principles set out in various international human rights instruments or international humanitarian law principles.⁴⁵ Crimes against humanity cover a wide variety of crimes most of which are ordinary human rights violations or domestic law crimes within the sovereign authority of a state.⁴⁶ It is therefore necessary to examine whether the crimes committed during the Kenya crisis have the essential attributes of crimes against humanity.

i. From Nuremberg to the ICC: Origin and Progress of Crimes Against Humanity

Crimes against humanity are motivated by discrimination (of any sort) and have not been covered by any multilateral treaty.⁴⁷ Neither of the two international military tribunals in Nuremberg and Tokyo set out the basis of the crime against

⁴² ICC Policy Paper on the Interests of Justice, September 2007, ICC-OTP-2007 at p. 5. Available at <<http://www.icc-cpi.int>>

⁴³ See ICC Policy Paper, *ibid.*

⁴⁴ The impact of not prosecuting the crimes rather than the impact of the crimes on the victims would weigh high on the ICC Office of the Prosecutor list of priorities. The Prosecutor declared, after the meeting with senior officials from Kenya, that all sides agree that impunity is not an option and prosecution would prevent new violence in the 2012 election. See 'Minutes of the Meeting Between the Prosecutor and the Delegation of the Kenyan Government', July 3, 2009. Available at <<http://www.icc-cpi.int>> for more on the court and Kenya.

⁴⁵ Whitaker Report, *ibid.*, at pp. 64 & 65; Professor Cassese further clarified the difference between the 2 sources of the crime against humanity. Noting that those concepts of the crime against humanity derived from international humanitarian law are those committed during times of war or armed conflict. While those concepts derived from human rights principles are those crimes committed in times of peace. Cassese, *supra* note 36, at 64-65.

⁴⁶ At least at first instance and may be subject to appeal to the regional human rights courts. The argument here is that such are domestic law violations and as such are within the internal affairs of that state.

⁴⁷ Timothy L.H. McCormack, Crimes Against Humanity, in *The Permanent International Criminal Court: Legal and Policy Issues* 176-202 (Peter Rowe & Eric Donnelly Dominic McGoldrick ed., 2004). at p. 180.

humanity. The Nuremberg Charter required a connection between the offending acts to war and added the discriminatory *animus*.⁴⁸ The context of the Nuremberg tribunal influenced the connection to war but this was not included in the Tokyo tribunal.⁴⁹ It has been noted that, before the advent of the ad hoc tribunals, there had been no clarification of the substantive threshold in the essential elements of the crime.⁵⁰ Despite the substantive clarifications of the concept by the tribunals (from Nuremberg to the ad hoc international criminal tribunals), there has been no global multilateral treaty definitions of the concept before the Rome Conference.⁵¹ The increase in the prosecution of international crimes through the ad hoc tribunals and some national courts has helped in clarifying the concept despite their contextual limitations and differences. An aggregate of the substantive standards applied by the tribunals and national courts have been mostly established by the ICC Statute.

ii. *Widespread or Systematic*

The element that elevates an offence from an ordinary crime to a crime against humanity is its connection to a widespread or systematic attack against a civilian group that the victim is a part of. The mental element required for the crime is a combination of the usual intention to commit the offence and the perpetrators awareness that the offence is part of a widespread or systematic attack.⁵² The perpetrator does not have to know the details or characteristics of the attack, nor share in the purpose, motive.⁵³ At the early stages of a widespread or systematic attack, the knowledge of the perpetrator could be proved by evaluating whether his act was intended to further the attack.⁵⁴

One of the most significant elements of the crime against humanity is that it must be widespread or systematic attack. At the Rome negotiations there was a divide between states in support of the use of the disjunctive nature of the widespread or systematic test and those in opposition to it.⁵⁵ The proponents of the disjunctive argument asserted that the court ought to be reflective of customary law and not restrict the law which was constantly applied by international tribunals in Yugoslavia and Rwanda.⁵⁶ The states opposed to the

⁴⁸ See Art. 6(b) Constitution of the International Military Tribunal (Nuremberg Charter) 1945. Available at <<http://avalon.law.yale.edu/imt/imtconst.asp>>; accessed on August 10, 2009; see also Cassese, *supra* note 36, at 68.

⁴⁹ Art. 5(c) Charter of the International Military Tribunal for the Far East. Available at <www.icwc.de/fileadmin/media/IMTFE.pdf>

⁵⁰ Robert Cryer, Hakan Friman Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University Press, 2007). at 187.

⁵¹ McCormack, *supra* note 48, at 180.

⁵² Cryer et al, *supra* note 51.

⁵³ *Prosecutor v. Blaskic*, Case No. IT-95-14-T (Trial Judgment, March 3, 2000) at para 251; *Prosecutor v. Kunarac et al.* ICTY Case No. IT-96-23-T & IT-96-23/1-T (Appeal Judgment June 12, 2002) para 102; ICC Elements of Crimes, General Introduction, *supra* note 24, at para. 2 & 3.

⁵⁴ ICC Elements Introduction, *ibid.*, at para. 2.

⁵⁵ See McCormack, *supra* note 48, at 186-188; Cryer et al, *supra* note 51, at 194-195.

⁵⁶ McCormack, *ibid.*, at 186; *Akeyesu case*, *supra* note 26; *Prosecutor v. Musema*, Case No ICTR-96-13-A Trial Chamber (January 27, 2000) at para 204.

disjunctive application of the criteria argued that it would incorrectly include widespread but unconnected crimes if not made conjunctive.⁵⁷ The question of the widespread and/or systematic nature of the crimes in Kenya will take a more significant meaning when discussing the ICC approach to the argument.

iii. *The Requirement for 'Policy' in the ICC Statute Definition of Crimes against Humanity*

The debate on whether widespread and systematic are disjunctive or conjunctive attributes of the definition of the crime at the Rome conference was resolved by adding a compromise clause. The compromise clause was the inclusion of a qualifying requirement to the disjunctive test.⁵⁸ It is likely to add another dimension to the Kenya debate. The compromise required the attack to be more than one act committed in furtherance of a state or organizational policy.⁵⁹ This ensured the preservation of the customary threshold with policy requirement which is a lower threshold than systematic.⁶⁰ The policy would be determined by the way in which the attack was carried out against the victim(s). This requirement by the ICC may make it problematic for the court to convict a person of crimes against humanity in a situation, where it is difficult to prove the existence of policy. The act may still fall under a crime against humanity under customary international law which does not require that criteria.

The crystallization of the concept of crimes against humanity has helped close the gap between crimes committed during an armed conflict and crimes committed during times of peace (including the different forms of disturbances which would not be classified as conflicts). It has also set a clear threshold for the prosecution of the crime. The contemporary understanding of the crime is different from 60 years ago when it was introduced by the Nuremberg Charter. The ICC Statute was not codifying customary law principles regarding crimes against humanity; therefore the differing standards applied by states are allowed.⁶¹ The International Crimes Act includes customary international law in its definition of Crimes against Humanity.⁶² It also requires that the crimes be interpreted strictly as provided by the Rome Statute.⁶³ Consequently, a Kenyan court can determine an offending act to be a crime against Humanity with or without the element of state or organizational policy.

The Waki Commission found that the crimes were spontaneous but gradually

⁵⁷ United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Vol. III, at 353 (1998).; United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Vol. II, at 154-157 (1998); Cryer et al, supra note 51, at 196.

⁵⁸ Art. 7(2) (a) Rome Statute, supra note 16.

⁵⁹ Rome Statute, *ibid*.

⁶⁰ Cryer, supra note 51, at 196; *Prosecutor v. Tadic*, Trial Chamber II, May 7, 1997, at para 653-5; Darryl Robinson, Defining "Crimes Against Humanity" at the Rome Conference, *American Journal of International Law* 93 (1999): 43-57., at 48; McCormack, supra note 48, at 186-9.

⁶¹ Art. 10 Rome Statute, supra note 16.

⁶² See Art. 7 of Kenya's International Crimes Act, 2008.

⁶³ The Act in Art 7(c) provides that the interpretation of the crimes shall be in line with Art. 22 of the Statute which, in turn, requires that an international crime must be strictly construed.

became organized. It claimed that politicians and local businessmen participated in organizing some of the attacks.⁶⁴ Some were retaliatory attacks and had led to fears of ethnic war. These crimes are clear human rights violations and the U.N investigators appropriately reminded authorities in Kenya of its duty to respect its international human rights obligations.⁶⁵ The ICC Pre-Trial Chamber II will have to determine whether the Kenyan violence meets the criteria its requirements on gravity before authorising the OTP to open investigations.⁶⁶ The essence is a dire need for judicial accountability which would clarify the crimes on the basis of evidence before the court.

III. OBSTACLES TO HUMANITY

The ongoing situation in Kenya may lead to two choices both of which are fraught with challenges. The decisions and actions of the Kenyan government and the ICC Prosecutor's office would lead to either accountability for the crimes committed in January 2008 or impunity. However, if the accountability is due to Kenya's unwillingness to prosecute the perpetrators of the crime, any prosecution before the ICC may be a test of the court's complementarity concept. If Kenya is unwilling to prosecute the crimes the price for impunity may be a recurrence of violence after the next elections and international sanctions. The country faces internal political and structural challenges if it initiates an impartial prosecution of the perpetrators of the crimes.

A. Kenya's Steps Towards Impunity

The Kenyan government has failed to carry out the reforms necessary to prevent future conflicts and has been slow to act in prosecuting the perpetrators of the post election violence. The effort of the Waki Commission and H.E. Kofi Annan (Former UN Secretary General) coerced the Kenya government to take steps that may either lead to accountability or impunity.⁶⁷ The government, in establishing the Truth, Justice and Reconciliation Commission (TJRC) in October 2009, may either delay judicial accountability or entrench impunity. The government appears to be progressing towards impunity by repeatedly delaying implementation of the recommendations of the Waki Commission. The Commission released its report in October 2008 and gave the Kenyan government until January 30, 2009 to comply with its proposals, one of which was to establish an independent Special Tribunal.⁶⁸ The Parliament instead voted

⁶⁴ Waki Report, *supra* 2, at pp 66-265.

⁶⁵ See U.N Rights Investigators Condemn Kenya Violence'; available at <<http://www.un.org/apps/news/story.asp?NewsID=25425&Cr=kenya&Cr1=>>>; see also <http://uk.reuters.com/article/homepageCrisi/idUKLo4694231._CH_.242020080104>

⁶⁶ See above for a discussion of the factors used by the ICC in determining the gravity of a crime.

⁶⁷ The Waki Commission did not reveal the names of those suspected to be most responsible for the crimes but sealed the list and placed it in the trust of the AU Panel of Eminent Persons who in turn were to hand it to the special tribunal to prosecute the crimes and in the event of no such tribunal to hand the list to the ICC for further investigation. Kofi Annan handed over the sealed envelope to the ICC Prosecutor on July 9, 2009.

⁶⁸ See Waki Report, *supra* note 2.

against establishing the Special Tribunal in February 2009.⁶⁹ Despite the government's actions, Kofi Annan decided to extend the deadline by another six months. The government, at the end of the six months, sent delegates to the ICC to explain the steps it planned to take to ensure accountability.⁷⁰ The visit may have been to stall any action by either Mr Annan or the ICC and to show that the Kenyan government was interested in justice.

Further indications that the Kenyan government may be progressing towards impunity became apparent after its senior officials visited the ICC. The transmission of the sealed envelope containing the names of those recommended by the Waki Commission to be investigated revealed the government's role in impeding accountability. By the end of July, the government of Kenya held a cabinet meeting at which it considered whether to withdraw from the ICC, refer the situation to the ICC, set up the Special tribunal, or prosecute the suspects using its High courts.⁷¹ It decided to reform its domestic courts and ensure prosecutions for the crimes as well as establishing a Truth Justice and Reconciliation Commission (TJRC). In October 2009 the Kenyan government established a TJRC and pledged to reform the judiciary so as to be better equipped to handle subsequent prosecutions.⁷² It is possible the government may be divided and hence delaying action by appearing to act. It declared that "(o)n the issue of the Trial of perpetrators of post-election Violence, the Grand Coalition Government opted to accord priority to reconciliation while leaving the door open for the suspects bearing the greatest responsibility over the post-election violence to be tried by the International Criminal Court."⁷³ This may either be a deliberate strategy to ensure impunity or an indication of its inability to prosecute those most responsible for the violence.

The ICC has declared interest in co-operating with the TJRC while prosecuting those with the greatest responsibility for the crimes. The three pronged strategy of combating the situation through the ICC, TJRC and Kenya's domestic court system may be plausible.⁷⁴ If the Pre-trial Chambers finds grounds to permit the OTP to open investigations on the matter, this may compel Kenya to commence domestic prosecutions. The ICC would depend on Kenya acting in good faith in the domestic prosecutions. The ICC system is modelled to enable the court to prosecute those most responsible and allow the national court (if capable) to prosecute the remaining offenders. Therefore it is important for

⁶⁹ See The Kenya Parliament website for a record of parliamentary votes on Bills such as The Special Tribunal for Kenya Bill. Available at <<http://www.bunge.go.ke/parliament/downloads/Tenth%20Parl%201st%20Session/Bill%20Tracker%202008-2009.pdf>>

⁷⁰ See Office of the Prosecutor (OTP), Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and the Delegation of the Kenyan Government. Available at <<http://www.icc-cpi.int>>.

⁷¹ See the Cabinet Press Statement, available at <<http://blog.marsgroupkenya.org/?p=1076>>

⁷² See Kenya Cabinet Press Statement of October 5, 2009; see also Reliefweb, Press Statement on Agenda 4 Reforms Meeting by President Mwai Kibaki and Prime Minister Raila Odinga. Available at <<http://www.reliefweb.int/rw/rwb.nsf/db900sid/SODA-7WJLSD?OpenDocument>>. Assessed October 14, 2009.>

⁷³ See Press Statement, *ibid*.

⁷⁴ See Office of the Prosecutor (OTP), Press Release: ICC-OTP-20090930-PR456 (September 30 2009), "ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya". Available at <<http://www.icc-cpi.int>>.

the domestic system to be effective to prosecute the rest of the suspects who usually out number the few leaders who are tried by the international institution. The failure of Kenya to prosecute the remaining persons will lead to the sort of impunity which has occurred in Sierra Leone and Rwanda (to an extent). Furthermore, its co-operation with the TJRC would ensure independence and impartiality of that body by preventing governmental interference. Conversely, the ICC action on the matter may be a feasibility test for the complementary relationship between the court and national states, despite Kenya's pledge to cooperate.⁷⁵

B. A Test for The Complementarity Concept?

In order for the ICC to commence investigations into the violence, the pre-Trial Chambers would need to determine whether the substance or gravity of the crimes meet its Statutory threshold. The Kenyan government has pledged to cooperate with the court. It has also been dithering to implement the recommendations of the Waki Commission. These contradictory actions of the government indicate a divided camp. It may be that some within the Grand Coalition Government want the ICC to initiate investigations while some others oppose any judicial action. While one cannot predict the future, a situation may arise that would challenge the ICC complementarity concept. This is highly unlikely but a possible outcome of the Kenyan government's contradictory actions.

One scenario which may lead to a challenge of the concept would be one in which the Kenyan government decides to perpetuate impunity in the guise of prosecution. The possibility of this has been indicated by the establishment of the TJRC. It may follow the steps of Sudan, for instance, and set up the special tribunal or try the perpetrators in its domestic courts. The Rome Statute requires the OTP to inform Kenya if it opens investigations on the matter. Thereafter, Kenya has one month within which to inform the court that it is investigating or has investigated the persons.⁷⁶ At this point the prosecutor may defer to Kenya's investigation for an initial period of six months with the possibility of a review.⁷⁷ Any prosecution by Kenya's domestic court would be scrutinised by the ICC under the complementarity principle.

Kenya may decide for political reasons to protect those suspected of the crimes (or some of them) and initiate prosecution designed to acquit them. This is a possibility given the number of leading politicians alleged or suspected to have been involved in the violence. Such an action by the Kenyan government may bring up a new issue that will test the complementarity concept of the ICC. The Statute requires national implementation of its provisions and action by

⁷⁵ Office of the Prosecutor, "Kenyan authorities committed to cooperate as ICC Prosecutor informs them that in December he will request ICC Judges to open an investigation into post-election violence". Report of November 6, 2009. Available at <<http://www.icc-cpi.int>>.

⁷⁶ Art. 18(2) Rome Statute, *supra* note 16.

⁷⁷ Art. 18(1)-(3) Rome Statute, *ibid.*; see also ICC Press Release, *supra* note 1.

states.⁷⁸ It empowers the court to determine when a state is “unable” or “unwilling” to prosecute an international crime. The court would assess Kenya’s proceedings to determine whether:

1. The proceedings were intended to shield the suspects from justice; or
2. There was unjustifiable delay which would be inconsistent with the intent to bring the suspects to justice; or
3. The proceedings lacked the independence and impartiality required for fairness in judicial process.⁷⁹

The court must pay attention to the principles of due process recognized by international law when assessing Kenya’s proceedings.⁸⁰ The OTP may request documents of the proceedings in the Kenyan court.⁸¹ The purpose of the ICC provisions is to limit the number of cases before the court.⁸² Therefore, the standard of the due process principles recognized by international law that would form the basis of the court’s assessment ought to be examined.

C. Reconciling the Due Process Principle with Diversities in National Criminal Procedures

Although there are general guidelines on the standard expected in international criminal prosecutions, there are no specific rules on the due process requirements in such trials.⁸³ It is nevertheless essential for proceedings in the prosecution of atrocities which affect the whole of humanity to have similar thresholds. The ICC Statute requires a determination on the procedural standards of national courts in proceedings involving international crimes. The court determines the unwillingness of a state to prosecute by assessing its proceedings on the balance of due process principles recognized in international law.⁸⁴ General guidelines on due process requirements in the prosecution of international crimes have evolved with the development of the law. They are traceable to the core treaties of international humanitarian law and human rights law as well as the general principles of criminal law applied in most states.

The international humanitarian law treaties which provided for individual criminal responsibility also required that the trial of such persons be done in

⁷⁸ See for instance Art. 88 of the Rome Statute, *ibid.* Under the Law of Treaties State parties to a treaty are expected to implement its provisions under the norm of *pacta sunt servanda* which was codified by the Vienna convention on the Law of Treaties (1969), United Nations Treaty Series vol. 1155, especially at Art. 26.

⁷⁹ Art. 17(2) (a) - (c) Rome Statute, *ibid.*

⁸⁰ Art 17(2) Rome Statute, *ibid.*

⁸¹ See Art 19(11) Rome Statute, *id.* Kenya may request that the documents transferred to the Prosecutor be made confidential.

⁸² See Art 10 Rome Statute, *id.*; see also United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Vol. III, 353 (1998)., at 225.

⁸³ Goran Sluiter, The Law of International Criminal Procedure and Domestic War Crimes Trials, *International Criminal Law Review* 6 (2006): 605-635., at 606 & 629; Cassese, *supra* note 37, at 389.

⁸⁴ Art. 17(2) Rome Statute, *supra* note 16.

fairness.⁸⁵ The humanitarian principles also set a threshold of fairness in criminal proceedings which would prevent a miscarriage of justice and protect the rights of the accused.⁸⁶ The fundamental rights provided in various human rights treaties guarantee a standard of fair trial in criminal proceedings.⁸⁷ The 1966 International Covenant for Civil and Political Rights (ICCPR) provided principles of fair trial which should be the minimum guarantees applicable in criminal proceedings.⁸⁸ The essence of these principles is that the considerations of justice and fairness are applied on behalf of the public, the victims and the accused.

The procedural thresholds for international criminal prosecutions would include general principles of criminal law which are extrapolated from the nations of the world. Some of the general principles have been included in the core human right treaties noted above. They share the same objective which is to maintain fairness in the administration of justice.

It does not appear that the ICCPR minimum guarantees of due process have been generally accepted by states as the threshold for criminal proceeding.⁸⁹ Some of the principles have been recognized in international criminal proceedings under the fair trial and general principles of criminal law.⁹⁰ The international community has, in establishing the ad hoc tribunals, affirmed that the fundamental objectives behind the principles are the considerations of justice and fairness.⁹¹ The full list of principles set out in the ICCPR has not been applied as the basic minimum standards in criminal proceedings by various countries

⁸⁵ See for instance the Geneva Conventions I - IV (1949), United Nations Treaty Series vol. 75, which deal with international armed conflict between states and therefore it is expected that the concerned states would only be responsible for the criminal prosecution of individuals for breach of the convention principles when that state is an occupying power or such individuals are under its control as prisoners of War. It also provides for fair trial guarantees for internal conflicts in its Common Article 3.

⁸⁶ See Art 16 Nuremberg Charter, supra note 49; see also Geneva Conventions I – IV, *ibid*.

⁸⁷ See note 17, especially Art. 14 & 15 of International Covenant on Civil and Political Rights (ICCPR, 1966) United Nations Treaty Series, vol. 999; p. 171; Arts 10&11 Universal Declaration of Human Rights (1948); Arts 6 & 7 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950) United Nations Treaty Series vol. 213; Arts 8 & 9 American Convention on Human Rights (AMHR, 1969) United Nations Treaty Series vol. 1144; Art. 7, African Charter on Human and Peoples' Rights (ACHPR, 1981) Vol. 1520 United Nations Treaty Series; *Barayagwiza v. The Prosecutor*, Appeals Chamber, case No. ICTR-97-19-AR72 (3 November 1999), at para 40; ICC Appeals Chamber, *Situation in the Democratic Republic of Congo (ICC-CPI-20060714-150, 13 July 2006) Decision on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's Decision Denying Leave to Appeal*, at para 38.

⁸⁸ Art. 14 ICCPR (1966), *ibid*.

⁸⁹ Art. 14 ICCPR, *ibid*.; There were reservations to Art. 14 of the ICCPR by several states including United States of America, United Kingdom, Netherlands, Barbados, Belgium, France, New Zealand and Australia etc.

⁹⁰ Cryer et al, supra note 51; see the Rules of Procedure and Evidence of the ICTY, ICTR, SCSL & ICC; See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), Presented 3 May 1993 (S/25704), at para 106-109. Available at www.un.org.

⁹¹ See UNSC Resolution 955 (8 November 1994) S/RES/955(1994) at para 6; Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (13 February 1994), S/1995/134 at para 35; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), Presented 3 May 1993 (S/25704) at para 131.

and the international tribunals.⁹² The principles set out in the human rights treaties, of which the ICCPR has the most universal application, maybe deemed as general principles. However, the principles have not been completely accepted as the minimum threshold for fair trial by some states. The African Charter on Peoples and Human rights, for instance, has a smaller set of principles which it did not set as the threshold for its state parties.⁹³ The cultural, economic and ideological differences between states have led to the huge reservations to Article 14 of the ICCPR.⁹⁴

The thresholds on the general principles of due process recognized in international law have not been set in stone. The international criminal tribunals and the ICC have generally included principles that the international community consider crucial to the administration of justice and fairness. A set of general principles extracted from the application of the international tribunals and the ICC in their rules of procedure and statutes indicate the trend towards a threshold in international criminal procedures.⁹⁵

The ICC may evaluate the proceedings in Kenya on the two objectives - consideration of justice and fairness of the process. The court will determine whether Kenya's process meets the two objectives by considering it against the three factors laid out in the statute.⁹⁶ It is unlikely that Kenya would shield the perpetrators of the crimes from justice by making the trials a charade. This may lead to an ICC determination of Kenya's unwillingness to prosecute the crime. However, as improbable this scenario may be, it would lead to a stronger jurisprudence on the complementarity concept that is yet to be tested by states in different ways.

IV. CONCLUDING THOUGHTS

The essence of international criminal law is to punish the perpetrators of crimes that threaten the peace and security of the world. Peace has always been the ultimate goal of the international community. The ICC prosecutor intends to initiate investigations *proprio motu* subject to the Pre-Trial Chamber's authorisation. Kenya has pledged to cooperate with the court. It remains to be seen whether the chamber will authorise the OTP to investigate and initiate prosecutions. The court may be hard-pressed to establish its jurisdiction *ratione materiae* or convict the perpetrators on the basis of the law and the evidence. Notwithstanding the challenges of prosecuting the crimes, the ICC has an obligation to ensure that impunity does not prevail in Kenya. Ultimately, by

⁹² Several reasons account for this, for instance, the differences between countries applying different approaches to criminal law such as common and civil law approaches to criminal proceedings which determine whether certain principles are acceptable or not (e.g. the issue of trial in absentia).

⁹³ See Art. 7, which contains only five principles unlike the sixteen principles in Art 14-15 of the ICCPR, nine principles in ECHR and thirteen principles in Art 8 of the ACHR.

⁹⁴ See supra note 88 for Status of the ICCPR and reservations to Art. 14. See also note 90, for a short list of some of the countries who expressed reservation to the article of the ICCPR.

⁹⁵ Cassese, supra note 36, at 389.

⁹⁶ The three factors are impartiality and independence of the proceedings, unjustifiable delay and the intention to shield the suspects from justice.

taking action on the Kenya situation, the ICC would be taking steps to develop the emerging concepts of International Criminal Law under the Rome Statute. It would also do well to ensure that Kenya prosecutes the remaining suspects. This may be through constantly negotiating with the Kenyan government as it has already been doing and using the carrot and stick approach (it still has the privilege of wielding the complementarity hammer and Kenya is a country that cares about its foreign image). The ICC action should not end with prosecuting the few persons most responsible for the crimes. It ought to make sure that the remaining perpetrators are also prosecuted by Kenya's domestic courts.