

FACULTY OF LAW, UNIVERSITY OF THE WESTERN CAPE (UWC)

SOUTH AFRICA

INTERNATIONAL CRIMINAL COURT *PROPRIO MOTU* INTERVENTION
WHERE A TRUTH COMMISSION EXISTS: THE KENYAN SITUATION



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Abstract

Kenya's December 2007 Presidential elections sparked a wave of violent clashes over allegations of election rigging. The protests broke out along ethnic lines, causing greater civil unrest. There have been allegations that during these outbreaks of violence crimes against humanity were committed. This violence attracted world-wide concern and was universally condemned. Kenya is loathe to prosecute the perpetrators or those who bear the highest responsibility for the alleged commission of crimes against humanity. It has instead established a national investigatory mechanism, the Kenyan Truth, Justice and Reconciliation Commission (hereafter TJRC). This approach adopted by Kenya has been criticized for the fact that it fosters a culture of impunity. However, the Prosecutor of International Criminal Court (hereafter ICC) has used his *proprio motu* powers to initiate an investigation of alleged commission of crimes that fall within the jurisdiction of the Court.

This research paper has analysed the reasons for the *proprio motu* intervention of the ICC in Kenyan situation. It also examined whether Kenya was unwilling or genuinely unable to prosecute the perpetrators of the post-election violence of 2007. Furthermore, the paper evaluated the provisions of the Kenyan TJRC, the major shortcomings of the Commission and the challenges it is facing in fulfilling its mandate. In conclusion the paper analysed the relationship between TJRC and ICC and re-evaluate any role that the two bodies could play in dispensing justice in Kenya. But before that, the paper laid down the factual background that led to the *proprio motu* intervention of the ICC in Kenya where a truth commission had already been established.

Ten key words

Admissibility

Crimes against Humanity

International Criminal Court

International Criminal Court Prosecutor

Kenya

Perpetrators

Post Election Violence

Proprio motu

Truth, Justice and Reconciliation Commission

Victims



Declaration

I, **Carolene Kituku** declare that the work presented herein is my original work. It has never been presented to the University of Western Cape or any other University for examination purposes to the best of my knowledge. Where other people's works have been used, it has been acknowledged and references provided. It is hereby presented in partial fulfillment of the requirements for the award of the LLM degree in Transnational Criminal Justice and Crime Prevention.

Student: **Carolene Kituku**

Signature:

Date: **October 2010.**



List of abbreviations and acronyms

Art.	: Article
ACHR	: American Charter on Human Rights
AFCHPR	: African Charter of Human and People's Rights
Ed(s).	: Edition or editor
ECHR	: European Charter of Human Rights
<i>et al.</i>	: <i>et alii</i> (and others)
G.A/Res.	: General Assembly Resolution
<i>Ibid.</i>	: <i>Ibidem</i> (same book, same author, and at same page)
ICC	: International Criminal Court
ICCPR	: International Covenant on Civil and Political Rights
ICTJ	: International Centre for Transitional Justice
IMT	: International Military Tribunal
<i>Inter alia</i>	: among other things
KANU	: Kenya Africa National Union
LSK	: Law Society of Kenya
NARC	: National Alliance Rainbow Coalition
No.	: Number
NGO's	: Non Governmental Organisations

ODM	: Orange Democratic Movement
Para.	: Paragraph
Res	: Resolution
SC	: Security Council
Sec.	: Section
TJRC	: Truth, Justice and Reconciliation Commission
Vol.	: Volume
V.	: Versus
US	: United States of America
UN Doc.	: United Nations Document
UN	: United Nations
UNTS	: United Nations Treaty Series



Dedication

To the Glory of God and to all the survivors and victims of the 2007 post-election violence in Kenya.



Acknowledgement

The success of this research paper depends on several factors. The singling out of few names cannot exhaust my moral and intellectual debts. I have benefitted from the input and support of many people. I therefore wish to express my gratitude to them all.

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CHAPTER ONE

GENERAL INTRODUCTION TO THE STUDY

1 Introduction to the study

At the end of December 2007, widespread violence broke out in Kenya over allegations of election rigging following the announcement of the results of presidential elections held on 27 December 2007. The protests erupted along ethnic lines, causing great civil unrest and brutal killings. About 1300 people were killed and thousands were injured. Some areas suffered massive destruction of property, resulting in 300000 people being displaced from their homes. Some 322 women and girls sought hospital treatment for sexual assaults during this period, despite a general reluctance on their part to report these to the police and also because too many victims were displaced¹

Since then debate has been raging in Kenya on what should be done, and what forms of accountability should be imposed on those responsible for the alleged crimes of humanity committed during the post-election violence. The options which were available to Kenya included establishing a special criminal tribunal, setting up a dedicated division of the Kenyan High Court to try specific crimes, referring suspects to the International Criminal Court (ICC) in The Hague, or utilizing the country's ordinary criminal courts, together with the TJRC. Despite calls for an approach that combines both international and domestic justice mechanisms, the government is inclined towards adopting purely local options.

¹ These figures have been extracted from the United Nations High Commission for Human Rights Report (OHCHR) Fact Finding Mission to Kenya, 6 to 28 February 2008, 25.

Owing to the lack of progress, the Prosecutor of the Court (ICC) Louis Ocampo, took the matter to the pre-trial chamber of the ICC, seeking its permission to start investigations in Kenya.² Subsequently, the Pre-Trial Chamber II on 31 March 2010 in its judgment gave the prosecutor permission to lodge an investigation of the Kenyan situation.³

In late October 2008, the Kenyan Parliament unanimously passed into law the bill for creating the Truth, Justice and Reconciliation Commission (TJRC) to investigate and recommend appropriate action regarding abuses committed between the country's independence on 12 December 1963 and on the conclusion of the power-sharing deal of 28 February 2008.⁴ The President, Mwai Kibaki assented to the bill on 28 November 2008.



2. Research questions

Was the Kenyan Government unwilling or unable to prosecute those who bear the highest criminal responsibility for crimes against humanity committed during the post election violence in order for the ICC prosecutor to use his *proprio motu* powers in Kenya? This is one question which this research paper attempts to answer.

The paper also seeks to answer whether the Kenyan situation was admissible before the ICC, knowing that Kenya had established the TJRC as the national process.

Another question which this paper seeks to answer is whether the Kenyan TJRC will contribute to the healing and reconciliation process in Kenya significantly?

²See “Kenya deliver justice for victims of postelection violence”.

³ See the ICC Judgment No ICC-01/09-19 dated 31 March 2010.

⁴ See sec. 5(a) of the TJRC Act No 6 of 2008 Laws of Kenya.

In addition, the paper will attempt to study if the ICC and the Truth Justice and Reconciliation Commission (TJRC) will have any role in dispensing justice in transitional Kenya.

3. Significance of the study

This research paper will be useful in establishing whether in establishing the TJRC in place of a Special Tribunal which would offer retributive justice; the Kenyan government was unwilling or unable to prosecute those who bear the highest criminal responsibility or whether the establishment of the TJRC was the best available option for the victims of the post election violence of 2007. To this end, the study will also study the TJRC with the aim of determining whether it meets internationally acceptable standards of Truth Commissions by drawing from some of the Truth Commissions which have existed in history.⁵

This study also seeks to analyse any role the TJRC and ICC will play in the present transitional period in Kenya. This work will therefore help to contribute to the argument that a truth commission may contribute to the healing and reconciliation process in Kenya significantly, and that the ICC is important in ending the culture of impunity.

Kenyan scenario provides an opportunity in history for the ICC to work simultaneously with a TJRC. This paper therefore studies the role of a truth commission in situations where the ICC has been involved. The study will also be important in establishing the applicability of the principles of complementarity and

⁵ From 1974 to 2010 there have been 40 truth commissions set up across the world. Some of these commissions includes; the El-Salvador Truth Commission, The Sierra Leone Truth and Reconciliation Commission, The South African Truth and Reconciliation Commission, The Clarification Commission in Guatemala, the Chile National Commission on Truth and Reconciliation, The Rwanda Truth and Reconciliation Commission.

the working relationship of both the ICC and the TJRC. The Rome Statute establishing the ICC defines complementarity in the form of admissibility requirements.⁶ Complementarity principle basically means that the state party to the ICC has the primary duty to prosecute international crimes committed within its territory, and the ICC will only act if the state party fails to prosecute the perpetrators of the international crimes committed within its territory.

4. Methodological approach

This research paper will draw on primary sources such as the international law instruments, national statutes, national and international reports and case law emanating from international and domestic jurisdiction. The secondary sources will comprise books, law journal articles, and electronic sources. At a practical level, the study will rely on the recent developments in Kenya. To this end, the study will use print media especially newspapers.



5. Scope

Chapter one introduces the study, its significance, research problem, approach and scope. Chapter two will briefly outline the historical background of the research topic by *inter alia* discussing briefly the violence that erupted following the announcement of the presidential results, the process and signing of the power-sharing coalition government agreement that led to the establishment of the TJRC and briefly discuss the intervention of the ICC in Kenyan situation.

Chapter three gives a general description of the Kenyan truth commission. It will analyse the TJRC with specific reference to its structure, mandate, proceedings, and its investigative methods, which form the backbone of a truth commission.

⁶ See the Preamble and Article 1 and Articles 17 of the ICC Statute.

Chapter four will study Article 15, 17 and 20 of the Rome Statute in order to establish the the reasons that necessitated the ICC prosecutor to use his *proprio motu* powers in Kenyan situation. This will be important in establishing whether the Kenyan government was unwilling or genuinely unable to prosecute those who bear the highest criminal responsibility for the international crimes committed in its territory.

Chapter five will conclude the research paper by determining whether or not the Kenyan TJRC is appropriate for addressing international crimes committed during the post-election violence, and any role the ICC and the TJRC could have in dispensing justice in Kenya.



CHAPTER TWO

FACTUAL BACKGROUND LEADING TO THE INTERVENTION OF INTERNATIONAL CRIMINAL COURT AND ESTABLISHMENT OF THE KENYAN TRUTH COMMISSION

Kenya gained independence from Britain in June 1963 with Mzee Jomo Kenyatta as its first President. Kenyatta, who died in 1978, was succeeded by Daniel Arap Moi as the second president who held office until 2002 when he was succeeded by the incumbent President, Mwai Kibaki.⁷

2.1 Election violence in Kenya: A brief outline of post independent Kenya

Since gaining independence in 1963, Kenya's political history has been marked by violent uprisings and repression. When Kenya African National Union (KANU) won the 1963 elections, the country became a *de facto* one-party state, with President Kenyatta banning attempts to create any opposition party.⁸ When President Moi took office in 1978, he pursued policies of political repression which included excessive use of force, torture, indefinite detention, and other measures against his political opponents.⁹

He was elected unopposed in three consecutive elections held in 1979, 1983 and 1988 all of which were held under the single party constitution.¹⁰ The 1988 election resulted in the advent of the *mlolongo* (queuing) voting system, where voters had to line up behind their favoured candidates instead of voting through secret ballots.¹¹ This was seen as the climax of a very undemocratic regime and it led to widespread agitation for constitutional reform. Only after intense donor pressure did President

⁷ See, "Kenyan political history."

⁸ See Obel (2009:3).

⁹ See, Human Rights Watch, (1993:8). See also *Commission of Inquiry into Post-Election Violence, Report of the Commission of Inquiry into Post-Election Violence* (hereafter Waki Report), (2008: 24).

¹⁰ See, "Kenya Timeline: A timeline overview of big and small events in the history of Kenya".

¹¹ B. Harden (2002).

Moi allow the change of the constitution and multi-party elections in 1992. These first multi-party elections were characterised by threats, harassments and the occurrence of violent clashes between supporters of different parties, leading to a loss of 1500 Kenyan lives and displacing more than 300 000 people.¹² Moi managed to maintain power in the elections and continued to repress political opposition.¹³

The next elections were held in 1997 and were associated with violence as well which started six months before the actual voting took place, causing the death of more than 100 and leading to the displacement of more than 100 000.¹⁴

In 2002, Moi was constitutionally barred from running for presidency again. He appointed Uhuru Kenyatta (Jomo Kenyatta's son) as the KANU's candidate. Mwai Kibaki was running for the Presidency under the opposition coalition the, "National Rainbow Coalition" (NARC), and he won the elections.

These elections were not characterised by any form of violence and were judged free and fair by local and international observers, marking a turning point in Kenya's democratic evolution.¹⁵

2.2 The 2007 elections in Kenya

Kenya has maintained considerable political, economical and social stability despite changes in its political system and crises erupting in neighbouring countries. But at the end of December 2007, widespread violence broke out in Kenya over allegations of election rigging, following the announcement of the results of presidential elections held on 27 December 2007. About 1300 people were killed and thousands were injured. Some areas suffered massive destruction of property and 650 000

¹² Human Rights Watch, (2002:27).

¹³ See, "Kenya timeline: A timeline overview of big and small events in the history of Kenya".

¹⁴ Human Rights Watch (2002:35).

¹⁵ Anderson (2003: 331).

people were displaced from their homes. Some 322 women and girls sought hospital treatment for sexual assaults during this period.¹⁶ There have been allegations that during these outbreaks of violence crimes against humanity were committed. This violence attracted world-wide concern and was universally condemned.

Ten million Kenyan citizens had gone to the polls on 27 December 2007 in what was generally anticipated to be the most hotly contested and closely run presidential, parliamentary and civic elections in the country's 45 years since emerging from British colonial rule.¹⁷ In the elections, President Kibaki campaigning under the banner of the Party of National Unity, ran for re-election against Raila Odinga, the leader of the main opposition party, the Orange Democratic Movement (ODM).

The Electoral Commission declared Kibaki the winner on the evening of 30 December 2008, placing him ahead of Odinga by about 232 000 votes.¹⁸ Following the Commission's declaration of his victory, President Kibaki was promptly sworn in for his second term late in the evening on the same day, calling for the "verdict of the people" to be respected and for "healing and reconciliation" to begin.¹⁹

Within minutes of the Commission's declaration of Kibaki as victor, inter-tribal rioting and violence broke out across Kenya.²⁰ In his New Year speech President Kibaki emphasised the importance of peace, stability, and tolerance and declared the election as a concluded event warning that law-breakers would be punished.²¹

¹⁶ These figures have been extracted from the United Nations High Commission for Human Rights Report (OHCHR) Fact Finding Mission to Kenya, 6 to 28 February 2008, 25.

¹⁷ See *Report of the Independent Review Commission (IREC)*, (commonly called the Kriegler Report) handed in to the President Kibaki and Prime Minister Odinga on 17 September 2008, 154.

¹⁸ Crummen (2007).

¹⁹ Crummen (2007).

²⁰ Kinuthia (2007).

²¹ Mwangi (2008).

Similarly, in his speech, Odinga stated that he was unwilling to negotiate with President Kibaki as he did not acknowledge Kibaki's legitimacy.²²

On 5 January 2008, Kibaki met the United States of America (USA) Assistant Secretary of State; Jendayi Frazer, where-after he stated that he was willing to form a government of national unity. But Odinga, who also met with Frazer, rejected this proposal and called for the creation of a transitional government under which new elections would be held in three to six months.²³ However, Odinga met with Frazer for a second time and shortly afterwards, Odinga's spokesman said that the ODM would not demand that Kibaki resign or admit defeat if he accepted an international mediator.²⁴

2.3 Negotiations on the signing of peace accord

2.3.1 John Kufuor mediation

The mediation process, facilitated by Ghanaian President and African Union Chairman, John Kufuor, began, on 9 January 2008 with President Kufuor meeting separately with Kibaki and Odinga.²⁵ Government statements on that day emphasised Kibaki's commitment to dialogue and said that he had "already initiated a process of dialogue with other Kenyan leaders". Kibaki also gave a speech in which he said that the election was concluded, that it was impossible to change the outcome, and that any complaints should be handled through the courts.²⁶ Both Odinga and Kibaki agreed to "an immediate cessation of violence as well as any acts which may be detrimental to finding a peaceful solution to the ongoing crisis", but the talks otherwise failed when; President Kibaki refused to sign an agreement

²² Mwangi (2008).

²³ Hull and Moody (2008).

²⁴ Dixon (2008).

²⁵ Kanina and Miriri (2008).

²⁶ Kanina and Miriri (2008).

(which was already signed by ODM representatives) presented to him by Kufuor.²⁷

The agreement would have provided for an interim coalition government and an inquiry into the Electoral Commission. The government blamed Odinga for the failure of the talks, saying that he was not responsive to Kibaki's offer of dialogue.²⁸

On his departure on 10 January 2008, Kufuor stated that both parties had agreed to continue talks together with former United Nations Secretary-General Kofi Annan and "a panel of eminent African personalities".²⁹

2.3.2 Beginning of peace negotiations

On 24 January 2008, negotiations between the incumbent and opposition parties brokered by the African Union's Panel of Eminent African Personalities and former UN Secretary-General, Kofi Annan, were initiated by Annan meeting Kibaki and Odinga, who met for the first time since the crisis began in Annan's presence.³⁰

Annan termed the meeting as very encouraging, as it had represented the first steps towards a peaceful solution of the problem. Annan called on both sides to designate negotiators by 29 January 2008.³¹ Both President Kibaki and Odinga stated after the meeting that they were working for a solution and urged the people to be peaceful.³²

Peace talks began on 29 January 2008, with Annan calling for an end to the violence.³³ Annan anticipated that resolution of short-term issues could occur in four weeks, although he thought deeper talks could continue for a year.³⁴

²⁷ Khan (2008).

²⁸ Khan (2008).

²⁹ Khan (2008).

³⁰ *Associated Press* (CBS News), (2008, 15 January)

³¹ *Reuters* (2008, 28 January).

³² *Reuters* (2008, 28 January).

³³ *CNN* (2008, 29 January).

³⁴ *BBC News* (2008, 1 February).

By 1 February 2008, the two rival leaders had agreed on an agenda for peace talks, which would include the topics of ending the violence, the humanitarian situation, resolving the political crisis, and land and historical injustices. To this end an agreement had been reached on 18 measures that would end the violence, including the demobilization of gangs and ceasing speeches and text messages that incited hatred and violence.³⁵ But the Violence continued.³⁶

By 7 February 2008, the two sides had remained deeply divided in talks, although they had agreed that there would be no recount of votes. Annan had emphasised that he was totally opposed to a re-election in that climate, referring to the persistent violence. Meanwhile, the United Nations Security Council called for peaceful resolution of the dispute through negotiations.³⁷

Progress in the talks was reported on February 8 2008, when Annan announced that both sides had agreed on the need for a political settlement and that he hoped that talks on the resolution of the political crisis could be concluded earlier.³⁸

Despite the reported progress and his earlier adoption of a more conciliatory tone, Odinga returned to a hard-line stance on 9 February 2008 by repeating his earlier demand that President Kibaki should either resign or hold a new election and stressed that he would not compromise on that point.³⁹ However, negotiations continued and on 12 February 2008 Annan stated that both sides in the talks had agreed to set up an independent review committee that would be mandated to investigate all aspects of the 2007 presidential election. He also asked both sides in

³⁵ *BBC News* (2008, 1 February).

³⁶ *BBC News* (2008, 2 February).

³⁷ *Al Jazeera* (2008, 3 February).

³⁸ *BBC News* (2008, 9 February).

³⁹ *BBC News* (2008, 12 February).

the National Assembly to work together in passing legislation that was needed in resolving the crisis.⁴⁰

On 15 February 2008, the two sides agreed to a range of reforms, including the improvement of electoral laws and the upholding of human rights, as well as a review of the constitution. This was even before agreeing on the composition of a power-sharing government. The government wanted Kibaki to retain strong executive powers, while the opposition wanted Odinga to have extensive powers in a new position of Prime Minister. According to Annan, they were about to take "the last difficult and frightening step" which was to conclude a deal, and he said that he intended to remain in Kenya until a new government was in place, by which time he thought the process would be "irreversible". The commission charged with reviewing the election was to be established by 15 March 2008, with a report to follow within three to six months.⁴¹

The U.S. Secretary of State Condoleezza Rice arrived in Kenya to support the talks on 18 February 2008. Rice met with Kibaki, Odinga, and Annan, and she emphasised the importance of reaching a settlement.⁴²

On 25 February 2008 both parties agreed to the creation of the post of prime minister but reached a deadlock when they disagreed about the powers the newly created post would have, over government posts and over a possible election in case the coalition should split. The talks were suspended on 26 February 2008 and Annan announced

⁴⁰ Ron (2008).

⁴¹ *Al Jazeera* (2008, 15 February).

⁴² Khan (2008).

that they had not broken down but that the leaders needed to become directly engaged in the talks.⁴³

Eventually, on 28 February 2008, President Kibaki and Odinga signed the agreement meant to end the crisis at a ceremony in Nairobi.⁴⁴ Annan said that the agreement was to be known as the National Accord and Reconciliation Act.⁴⁵ The two leaders agreed to form a coalition government, with Odinga set to receive the new position of Prime Minister, in which capacity he was to coordinate and supervise government affairs. The agreement also provided for two Deputy Prime Ministers, one for each of the two parties, while the allotment of Cabinet portfolios was to reflect the relative strength of the respective parties in the National Assembly. Thereafter, President Kibaki quickly reconvened the National Assembly on 6 March 2008 so that it could make the necessary constitutional changes in implementing the agreement.⁴⁶

The process also produced agreements to establish several commissions of inquiry, including the Commission of Inquiry on Post-election Violence, the Independent Review Commission on the Elections, a National Ethnic and Race Relations Commission, and the Truth, Justice, and Reconciliation Commission.⁴⁷

2.3.3 Implementation of the peace accord

In pursuance of Agenda Four of the Agreement, two commissions were formed. One of them, the Independent Review Commission on the General Elections (commonly called the Kreglier Commission, named after the former South African Constitutional Court Judge who chaired it), found in its September 2008 report that

⁴³ *BBC News* (2008, 18 February).

⁴⁴ Kenneth (2008).

⁴⁵ Kenneth (2008).

⁴⁶ *BBC News* (2008, 28 February).

⁴⁷ See *the Agreement on the Principles of Partnership of the Coalition Government*, Government Printers, Nairobi.

politicians on all sides incited violence and that neither party had won the elections as both parties were involved in massive rigging. It recommended the disbandment of the Electoral Commission of Kenya and a creation of a new voters' register.⁴⁸

The second commission, the Commission of Inquiry into Post-Election Violence (also called the Waki Commission, named after Kenyan Court of Appeal Judge who chaired it), issued its report shortly after the first commission. The Waki Commission recommended the creation of a special tribunal which would try key suspects for international crimes linked to the violence.⁴⁹ The relevant recommendation was as follows:

*A special tribunal, to be known as the Special Tribunal for Kenya be set up as a court that will sit within the territorial boundaries of the Republic of Kenya and seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 general elections in Kenya. The Special Tribunal shall achieve this through the investigation, prosecution and adjudication of such crimes.*⁵⁰

The Commission also submitted, confidentially, to Kofi Annan the names of individuals who bore the highest criminal responsibility for the alleged crimes against humanity committed during the post-election violence and recommended that if for whatever reasons Kenya was not able to prosecute the said masterminds, the list would be forwarded to the Prosecutor of the International Criminal Court (ICC)

⁴⁸ Kriegler Report, 67.

⁴⁹ Waki Report, 88.

⁵⁰ Waki Report 87.

with a view that the ICC would proceed to investigate and prosecute the said suspects.⁵¹

This commission's report contained a strict timeline for setting up the tribunal and putting it to work, which, if breached, would require the mediator Kofi Annan to pass the sealed envelope with the names of the listed masterminds to the ICC Prosecutor.

2.4 The options available to Kenya in dealing with perpetrators of post-election violence

Since the publication of the Waki Report, debate has been raging in Kenya on what should be done, and what forms of accountability should be imposed on those responsible for the alleged crimes of humanity committed during the post-election violence.

Kenya has therefore been faced with an option of either prosecuting those responsible for international crimes or referring the situation to the ICC as it is a state party to the Rome Statute. However, Kenya did not have any laws that would have enabled it to prosecute international crimes effectively, since it has yet to incorporate the ICC Statute into its legal system.

The Kenyan Penal Code,⁵² which lays down offences under Kenyan law and also provides for the punishment for each offence, does not contain any provisions that define or provide for penalties for international crimes. The only exception is the Geneva Conventions Act⁵³ which incorporates into Kenyan law certain provisions of the Geneva Conventions, specifically the criminalization and punishment of grave

⁵¹ Waki Report 87.

⁵² Chapter 63 Laws of Kenya.

⁵³ Chapter 198 Laws of Kenya.

breaches.⁵⁴ However, this latter Act would not have been relevant in the context of the 2007 post-election violence because the offences in question were not committed in the context of an international armed conflict and, therefore, would not *per se* qualify as grave breaches.⁵⁵

In the light of the foregoing limitations it is very important to enact appropriate laws which would allow for the prosecution of the suspects of the crimes against humanity allegedly committed in Kenya.

2.4.1 The Special Tribunal for Kenya

On 16 December 2008, the grand coalition Government signed an agreement for full implementation of the Waki Report. As regards the establishment of the Special Tribunal, this required two pieces of legislation. First a bill entitled ‘The Special Tribunal for Kenya Bill’ (‘Draft Statute’) was drafted.⁵⁶ The Draft Statute sets out the crimes within the tribunal’s jurisdiction and defines its structure and competencies.⁵⁷ Second, a Constitutional Amendment Bill which would ensure that the Special Tribunal would be in conformity with the Kenyan Constitution was tabled.⁵⁸

While the Waki Report had determined that the crimes committed in the post-election violence could amount to crimes against humanity, the Draft Statute did not limit the tribunal’s jurisdiction to only this category of crimes, but mandated it to prosecute for genocide, gross violations of human rights and other crimes committed

⁵⁴ Section 3 of the Geneva Conventions Act.

⁵⁵ Okuta (2009:1064).

⁵⁶ Okuta (2009:1065).

⁵⁷ See, Draft Statute for the Special Tribunal for Kenya.

⁵⁸ Draft Statute for the Special Tribunal for Kenya.

in relation to the 2007 general elections.⁵⁹ The tribunal was given exclusive jurisdiction to investigate these crimes and was to have primacy over the local courts for the crimes under its jurisdiction.⁶⁰

The Special Tribunal was to consist of a Trial Chamber and an Appeals Chamber, the Prosecutor, a Registry, the Defence office and the courts of Special Magistrates. The Trial Chamber was to prosecute those bearing the greatest responsibility for the crimes while the Special Magistrates were to deal with the other offenders, as well as with other crimes committed during the post-election violence but which did not amount to international crimes.⁶¹

When the Constitutional Amendment Bill was introduced into Parliament the parliamentarians rejected and voted against it on 12 February 2009. This effectively blocked any amendment to the Constitution and, therefore, the establishment of the Special Tribunal for Kenya.

The Waki Commission had set a deadline of 30 January 2009 for passing the legislation, but on 24 February 2009, Annan granted the government of Kenya three more months to re-introduce the bills.⁶²

On 3 July 2009, the Government sent a delegation to the ICC to discuss the Kenyan situation with the ICC Prosecutor. It was agreed that if there were no modalities put in place within 12 months for the prosecution of those responsible for the 2007 post-

⁵⁹ Sec. 4(1) and 8(1) of the Draft Statute for the Special Tribunal for Kenya, provided that the Tribunal's temporal jurisdiction was to cover the periods between 3 December 2007 and 28 February 2008.

⁶⁰ Sec. 7 (1) and (2), of the Draft Statute for the Special Tribunal for Kenya.

⁶¹ Sec. 8 of Draft Statute for the Special Tribunal for Kenya.

⁶² Okuta(2009:1066).

election violence, the Kenyan Government would refer the matter to the ICC in accordance with Article 14 of the ICC Statute.⁶³

With pressure mounting, the Government had to move fast and provide guidance on the way forward. Cabinet papers called for support of the local tribunal on the ground that it would impart public confidence and enhance the competence of the local institutions. Further, unlike the ICC, if the matter were referred to this court, which would deal with only those bearing the greatest responsibility for the crimes, the Special Tribunal would deal with everyone, including those who had committed less grave crimes, through the courts of the Special Magistrates. It was also acknowledged that prosecution at the ICC would damage Kenya's credibility internationally and undermine its international influence. Despite these arguments, no support or acceptance of the Draft Statute and the Constitutional Amendment Bill was forthcoming from the Cabinet or other parliamentarians.⁶⁴

On 31 July 2009, after a series of Cabinet meetings the Government announced that the suspects would be dealt with through the local courts and the Truth Justice and Reconciliation Commission (hereinafter TJRC). The idea to establish a Special Tribunal was therefore put to oblivion. In fact in late October 2008, the Kenyan Parliament unanimously passed into law the bill for creating the TJRC with the mandate of investigating and recommending appropriate action regarding abuses committed between the country's independence on 12 December 1963 and on the

⁶³ The agreed minutes between the ICC Prosecutor and the Kenyan Government.

conclusion of the power-sharing deal of 28 February 2008.⁶⁵ President Kibaki assented the bill on 28 November 2008.⁶⁶

Efforts for creating the Special Tribunal were reintroduced on 7 November 2009, when another bill was reintroduced to parliament by a private member. The Bill failed to win the support of the majority of MPs. This Bill had proposed that those who caused the chaos be punished locally while those who organised and financed the violence be tried at the ICC.

Probably owing to the unwillingness of the State to prosecute the perpetrators, and frustrated by the lack of progress, Kofi Annan submitted the names of the masterminds (who had been named by the Waki report) of the violence to the Prosecutor of the ICC.⁶⁷



⁶⁵ Sec. 5(a) of the TJRC Act No 6 of 2008, Laws of Kenya.

⁶⁹ Korir (2008).

⁶⁷ See, "Kenya: deliver justice for victims of post-election violence."

CHAPTER THREE

THE KENYAN TRUTH JUSTICE AND RECONCILIATION COMMISSION

3.0 Introduction

Thomas Buergenthal has defined Truth commissions as fact-finding bodies set up for the specific purpose of investigating serious violations of human rights and humanitarian law committed in a country during a specific period of time, usually during an armed conflict or a particularly repressive regime.⁶⁸ Similarly, Priscilla Hayner defines truth commissions as bodies set up to investigate a past history of violations of human rights in a particular country, which can include violations by the military or other government forces or by armed opposition forces.⁶⁹ Therefore truth commissions are bodies charged with the task of finding out the nature of human rights violations during a certain period, causes and extent of such abuses and the antecedent factors.

Following the signing of the power sharing agreement which created coalition government in Kenya several commissions of inquiry, including the TJRC were established.⁷⁰

This chapter studies the TJRC with special focus on its composition, mandate and provisions related to amnesty and reparations. This will be important in drawing conclusions as to whether the TJRC has meet the internationally required standards of a Truth Commission. This chapter will also compare the Kenyan TJRC with other truth commissions which have been formed in the world.

⁶⁸ Buergenthal (2006:103).

⁶⁹ Hayner (1994:597).

⁷⁰ See, Kenya National Dialogue and Reconciliation Accord of 2008.

3.1 Background of the Kenyan TJRC

The idea of a truth commission was first recommended in August 2003, by the Task Force appointed in 17 April 2003 on the Establishment of a TJRC. It was chaired by Prof Makau Mutua a distinguished Kenyan jurist and a Human Rights activists. In its report the Task Force indicated that 90% of Kenyans wanted a TJRC established.⁷¹

The mandate of the Task Force was to find out if a truth commission was necessary for Kenya and if so, to make recommendations on the type of truth commission that ought to be established. The Task Force recommended the immediate establishment of a TJRC before June 2004, with specific powers, functions and mandate.⁷² However, these recommendations were never implemented by the Government.⁷³ It has been argued that the Government was not taking the creation of TJRC seriously.⁷⁴ But it seems that there was no political will.

The violence that followed the 2007 elections again brought to the fore the need to address the deep-seated political, social and economic issues facing Kenya. As a result, the Kenya National Dialogue and Reconciliation Peace Accord mediated by Kofi Annan and a Panel of Eminent Personalities, agreed on a number of reforms. Key among these were that a TJRC be created through an Act of Parliament.⁷⁵

Pursuant to this agreement, in October 2008, the Kenyan Parliament unanimously passed into law the bill for the creation of the TJRC. President Kibaki signed the bill on 28 November 2008.⁷⁶

⁷¹ See, *Report of Task Force's on establishment of Truth Commission.*

⁷² *Report of Task Force's on establishment of Truth Commission.*

⁷³ See, "the memorandum on the proposed amendments to the TJRC Bill 2008."

⁷⁴ See, "the TJRC proposed."

⁷⁵ Hayner (1994:598).

⁷⁶ Mungai (2008).

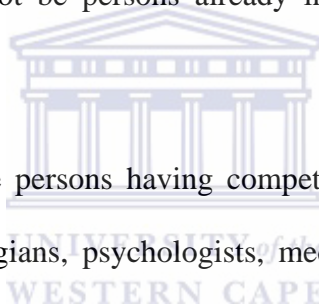
3.2 Kenyan TJRC: Its specific Features

3.2.1 Establishment of the Commission

The TJRC was established by an Act of Parliament as Act No 6 of 2008 which came into force on 9 March 2009. The Commission headquarters are in Nairobi but it can hold its sittings at any other place in Kenya.⁷⁷

3.2.2 Composition of the Commission

As a rule, Commissioners appointed to a truth commission are required to be highly credible persons and are often seen as representing the seriousness of the efforts of investigating the past which was characterised by human rights abuses.⁷⁸ Thus the commissioners should not be persons already in a position with a high political profile.⁷⁹



Commissioners could be persons having competence as lawyers, social scientists, religious leaders, theologians, psychologists, medical practitioners, historians e.t.c. This is important because the professional background of Commissioners of truth commissions can reflect the primary focus of a Commission's work. For instance a Commission made up of lawyers will likely convey an implication of justice and a commission made up of religious leaders will possibly convey the attempt to reach healing and forgiveness.⁸⁰

The TJRC Commissioners were selected by a Selection Panel⁸¹ which had advertised the positions of the Commissioners in local dailies. The qualified candidates were

⁷⁷ Sec. 4(1) of the TJRC Act.

⁷⁸ Hayner (2002: 216).

⁷⁹ Dumbuya (2003:20).

⁸⁰ Fullard and Rousseau (2008:216).

⁸¹ The Selection Panel was inclusive and made up of persons nominated by the Kenya Episcopal Conference, the National Council of Churches of Kenya, the Evangelical Alliance of Kenya, the Hindu Council of Kenya, the Seventh Day Adventist Church, the Supreme Council of Kenya

interviewed and thereafter short listed the names of 15 potential Commissioners for Parliamentary approval that were later approved by Parliament in June 2009.⁸² Subsequently the President was supposed to appoint nine commissioners for from that list. He eventually appointed them in July 2009.⁸³

The nine Commissioners are from different professional backgrounds and nationalities. Six members are Kenyan citizens and three are foreigners (from Ethiopia, the United States of America and Zambia) nominated by the Panel of African Eminent Personalities.

Ambassador Bethuel Kiplagat the Commission's Chairman is a career diplomat. He is a renowned peace negotiator who has expertise in conflict management, which made him serve as the special envoy to the Somalia peace talks. In addition, he was the Executive Director of the African Peace Forum and a permanent secretary in the Kenyan Ministry of Foreign Affairs.⁸⁴

The Vice Chairperson of the commission Betty Murungi is a co-founder and executive director of the Urgent Action Fund for Women's Human Rights, which supports innovative and rapid initiatives on women's leadership in peace building and access to justice in Africa. She is an expert in international human rights and transitional justice and has worked for the International Criminal Court, the Truth and Reconciliation Commission of Sierra Leone, the Kenya Human Rights Commission and the East African Centre for Constitutional Development in Uganda.

Muslims, the Law Society of Kenya, the Federation of Kenya Women Lawyers, the Central Organization of Trade Unions, the Kenya National Union of Teachers, the Association of Professional Societies of East Africa, the Kenya National Commission on Human Rights, the Kenya Private Sector Alliance, the Federation of Kenya Employers, and the Kenya Medical Association. See section 9 of the TJRC Act.

⁸² See, "Why Ambassador Bethuel Kiplagat should quit for Kenya to attain truth, justice and reconciliation."

⁸³ Kenya Gazette Notice No 8737, Vol 70 of 14 August 2009 and Vol 77 of 31 August 2009.

⁸⁴ See, "Seeking truth, justice and reconciliation in Kenya."

She received the national honour of the Moran of the Order of the Burning Spear in December 2003 for her work in human rights.⁸⁵

Commissioner Margaret Shava, a lawyer, is the chairperson of Women in Law and Development in Africa and a peace builder with International Alert, an independent organisation working in over 20 countries and territories around the world.⁸⁶ Other Commissioners are: Ahmed Sheikh Farah who is a retired military Officer, Tecla Namachanja a Human Rights Activists and Tom Ojienda who is a former Chair of the Law Society of Kenya and the former East Africa Law Society president. Ojienda has consulted for the Njonjo and the Ndung'u Land Commissions, which aim to establish more equitable land distribution and rights in Kenya and served on a national task force on HIV and Aids.⁸⁷

Foreign Commissioners are; Prof Ron Slye from Seattle University School of Law who served as a legal consultant to the South African Truth and Reconciliation Commission from 1996 to 2000. The other two foreign appointees are Judge Gertrude Chawatama from Zambia and Berhanu Dinka from Ethiopia.⁸⁸ Chawatama is a High Court judge and served on a special commission of inquiry into torture claims made by apparent coup plotters in 1997. Dinka served as U.N. Special Representative for Burundi and is formerly the Secretary-General's Special Representative and Regional Humanitarian Adviser for the Great Lakes Region. He was also a former United Nations envoy for Ethiopia, but was recalled by Lieut.⁸⁹

Over the years truth commissions have been appointed either by the executive arm of the government as happened in Panama, or the executive arm, together with the

⁸⁵ See "Seeking truth, justice and reconciliation in Kenya."

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

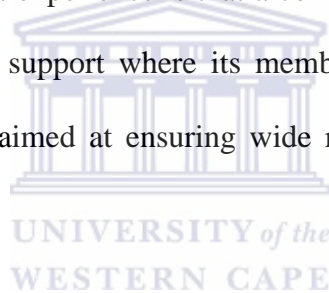
⁸⁹ Ibid.

legislative arm, as was the case in South Africa, or by the legislative arm alone, as was the case in Germany and Chile, or by the monarchy, as happened in Morocco.⁹⁰

A Commission appointed in any of these ways becomes a national commission.

Commissioners may also be appointed by, or in coordination with or by a mix of international and national authorities as was the case in Sierra Leone. Sometimes the Commission selection is preceded by a formal and independent nomination and selection process, as was the case in Timor-Leste. At times Commissioners are selected in accordance with explicit criteria and procedures set out in the Truth Commission mandate as was the case in Ghana.⁹¹

The key lesson from past experience is that a commission will tend to enjoy greater public and international support where its members are selected through a broad process of consultation aimed at ensuring wide representation of ethnic, religious groups and gender.⁹²



Kenya has both national and international Commissioners. Having foreign members is an advantage as the foreign commissioners would bring in foreign expertise. Furthermore, the national commissioners have an understanding of history, social and political background of the country. This is commendable as it would enhance the legitimacy and credibility of the commission. Even though this might seem to be the case, the TJRC has recently faced a confidence crisis as the credibility of the

⁹⁰ Freeman (2006:27).

⁹¹ Freeman (2006:28), see also Buergenthal (1994:109) also Cassel (1993:18) and Tomuschat, (2001:236) where he has argued that the composition of a commission may vary greatly in terms of nationalities, profession and gender. For instance the commissioners may all be nationals as the case of South Africa, Uganda, Chile and Argentina or all foreigners like was in El Salvador or a mixture of both nationals and foreigners as was the case in Guatemala and Sierra Leone.

⁹² Tomuschat (2001:238).

chairman of the commission has been questioned by the citizenry and the international community.⁹³

3.2.3 Confidence crisis facing TJRC

Unfortunately, just as it was beginning its work in January 2010, the TJRC experienced a public confidence crisis. The first sessions of the Truth Commission were disrupted on two occasions by Civil, NGO's and Human Rights activists.⁹⁴ Victims have also vowed not to appear before the Truth Commission as it is presently constituted.⁹⁵ This crisis has affected Kenyans' belief in transitional justice.

3.2.3.1 Credibility of the Commission's Chairman

Allegations of bias and misconduct have been made against the Chairperson. The allegations about his role in the former Moi government have generated a widely-held perception that he is in a conflict of interest situation and that he is unable to bring an impartial mind to bear on his important duties as TJRC Chairperson. A statutory Commission of Inquiry as well as a Parliamentary Committee of Inquiry into the murder of Dr. Robert Ouko, a foreign affairs minister, made disturbing findings against Kiplagat on matters that fall squarely within the TJRC's mandate. The Report of the Commission of Inquiry into Illegal and Irregular Allocation of Public Land (released in 2004) makes references to instances of the illegal acquisition of public land on the part of Kiplagat. The Report of the Parliamentary Committee of Inquiry into the Wagalla Massacre includes a report from an

⁹³ Ongeyo (2010).

⁹⁴ Turay (2010).

⁹⁵ Ongeyo (2010).

investigation team which concluded that Mr. Kiplagat was untruthful in his submissions.⁹⁶

While Mr. Kiplagat has disputed the references to him in these reports, they nonetheless have a direct and serious impact on public perceptions in relation to his fitness to hold the high office in the Commission. Furthermore, the final make up of a truth Commission affects the appearance and reality of its independence and also that of the person serving as Commission's president because he often becomes the public face of the Commission.⁹⁷

Protest against the TJRC Chairman erupted even before the Commissioners were sworn in. The Chairman was even constrained to go on television before being sworn in to defend the accusations against him.⁹⁸ The situation is deteriorating to the extent that even television talks now show that no sensible Kenyan is likely to believe in truth, justice or reconciliation delivered by processes such as the Truth Commission headed by a retired public officer, whose career apex coincides with the height of gross human rights violations, and who spent this part of his career publicly denying that such violations were occurring.⁹⁹

The Kenyan Human Rights Commission, a body charged with spearheading human rights in the country, threatened to call for mass action if Kiplagat would not have resigned within seven days for allegedly being answerable to historical injustices.¹⁰⁰

In addition the International Centre for Transitional Justice (ICTJ) asked Kiplagat to resign over what it called, "his endangering the TJRC's ability to deliver truth,

⁹⁶ Minya and Kalekye (2010).

⁹⁷ Tomuschat (2001:226).

⁹⁸ Ongeyo (2010).

⁹⁹ Ongeyo (2010).

¹⁰⁰ Ongeyo (2010).

justice and accountability for past injustices and gross human rights violations."¹⁰¹ Moreover the Law Society of Kenya (the Kenyan bar association) also asked Mr. Kiplagat to resign saying that the resignation was about his moral integrity and dignity.¹⁰² Furthermore the former chairpersons and commissioners of truth commissions from around the world, also called upon Mr. Kiplagat, to step down from his positions as Chairperson and Commissioner of the TJRC saying that they were deeply troubled by the serious allegations of bias and misconduct made against the Chairperson Kiplagat.¹⁰³ Thereafter the International Centre for Transitional Justice also called upon the chairperson to resign.¹⁰⁴ Earlier on the civil society had filed a case in court seeking for orders of prohibition to issue prohibiting Bethwel Kiplagat from running the affairs of TJRC and from participating in activities of TJRC and for orders of certiorari to quash the oath of office of Chairman and commissioner Kiplagat in August 2009.¹⁰⁵ The case is still pending in court.

Subsequently, the Justice and Constitutional Affairs Minister under whose portfolio the TJRC falls asked Parliament to disband the TJRC. The Minister expressed concerns that a year since its inception, the TJRC had not covered any ground and had thus failed in executing its mandate.¹⁰⁶ Shortly thereafter, the vice-chairperson of

¹⁰¹ Mutua and Orenge (2010).

¹⁰² Ngirahu (2010).

¹⁰³ The former chairpersons and commissioners included Archbishop Desmond Tutu, former chairperson of the South African Truth and Reconciliation Commission; Bishop Joseph Christian Humper, former chairperson of the Truth and Reconciliation Commission for Sierra Leone; and Salomon Lerner Febres, former chairperson of the Peruvian Truth and Reconciliation Commission, available at www.blog.marsgroupkenya.org (accessed 4 June 2010).

¹⁰⁴ Press release of 24 February 2010.

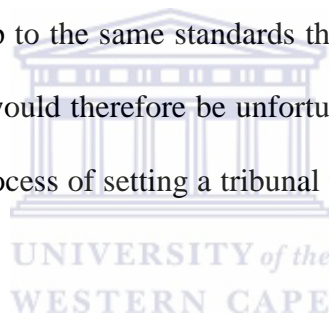
¹⁰⁵ Republic of Kenya v TJRC & Others, Ex-parte Augustine Njeru Kathangu and Others; Miscellaneous Application No. 470 of 2009.

¹⁰⁶ Omanga (2010).

the commission resigned, stating that her stay was becoming untenable.¹⁰⁷ As at the time of writing this paper, the TJRC has not started its work.

The TJRC Act sets out the procedures for the removal of the chairman or commissioner in section 17, which involves the formation of a tribunal to investigate the commissioner.¹⁰⁸

Kiplagat has however, stipulated that he will quit only after following the legal process.¹⁰⁹ This therefore amounts to bad faith on part of Kiplagat because he has brought the TJRC to a standstill and its time is running. While it is impossible for the TJRC to please everyone, the language of reconciliation demands that the TJRC's office-holders be held up to the same standards that the people it is created to serve deem appropriate.¹¹⁰ It would therefore be unfortunate for Kiplagat to allow himself to be subjected to the process of setting a tribunal to remove him from office instead of resigning amicably.



3.2.4 Mandate of the TJRC

The mandate of a commission defines its purpose, powers, and limitation. This is included in the commissions' terms of reference which define a commission's

¹⁰⁷ Kariuki (2010).

¹⁰⁸ Section 17 of the TJRC ACT states that the chairperson or any other commissioner may be removed from office by the President; for misbehavior or misconduct, if convicted of an offence and imprisoned, if is unable to discharge the functions of his office because of physical or mental infirmity or if the chairperson or commissioner is absent from three consecutive meetings of the Commission without good cause.

Sub section 2 provides that, where the question of the removal from office arises the Chief Justice shall, by notice in the Gazette, appoint a Tribunal which shall consist of a chairperson and two other members selected by the Chief Justice from among persons who hold or have held office as judges of the High Court to inquire into the matter and report on the facts to the Chief Justice and recommend whether the chairperson or the commissioner ought to be removed from office and the Chief Justice shall communicate the recommendations of the Tribunal to the President.

¹⁰⁹ Leftie and Namunane (2010).

¹¹⁰ Bosire (2010).

investigatory powers; the time scope of the commission's investigation and its life. The mandate also states when and to whom the final report must be submitted.¹¹¹

Truth commissions are obliged to fulfil their terms of reference. The mandate of some truth commissions have been explicit about what kind of abuses they were to investigate and document, but there have been others which provide only general guidance about the kind of abuses to be investigated.¹¹² It therefore follows that the terms of reference of a commission can either limit or strengthen its investigative reach. For instance a number of the commissions have been mandated to look only into disappearances such as those in Argentina, Uruguay and Sri Lanka. Notably, such specific terms of reference make a commission exclude a significant portion of the truth. For instance, the Uruguayan Commission¹¹³ failed in achieving its objectives of auditing the past since the majority of the human rights violations that had taken place during the military regime, such as illegal detention and torture, which constituted a bulk of violations, were ignored. Similarly, Chilean Commission investigated disappearances, executions and torture leading to death,¹¹⁴ but its mandate prevented it from investigating incidents of torture that did not result in death. This has been criticized by international human rights observers.¹¹⁵

The commissions which have had a more flexible mandate have been able to achieve their terms of reference. The El Salvadoran Commission had its mandate fairly open; indicating that the commission should report on serious acts of violence, whose impact on society the public ought to know the truth.¹¹⁶ The commission was thus

¹¹¹ Buergenthal (2006:106).

¹¹² Hayner (2006:217).

¹¹³ *Report of the Uruguayan Investigative Commission on the situation of Disappeared people and its causes*. 1985.

¹¹⁴ Chile, Executive Branch Supreme Decree No 355.

¹¹⁵ Hayner (2006:115).

¹¹⁶ *From Madness to Hope: Report of the Commission on the Truth for El Salvador*, 18.

not limited and it summarized the overall patterns of violence and reported fully on the abuses that took place over the twelve years of civil war.¹¹⁷ This was a great achievement for the El Salvadoran Truth Commission.¹¹⁸

Even with a flexible mandate, a commission may fail to document certain widely experienced abuses, especially those suffered by women, such as sexual abuse.¹¹⁹ In South Africa for example, a very small number of cases of sexual abuse were brought to the commission, compared to the widespread practices of rape that were known to have taken place.¹²⁰ However this underreporting is due to a number of factors. In many cultures, rape carries a huge social stigma, embarrassment and shame for the victim, and women are understandably uncomfortable giving testimony in public hearings and even in private hearings if the details would be published in a public report.¹²¹ Nevertheless, some commissions have written effectively on this subject. The Guatemalan report included a chapter that described testimonies of witnesses, incidents of gang rape and other wide-spread practices of extreme sexual violence against women.¹²² The El Salvadoran Commission chose not to mention in its report cases of rape, though the commission concluded that rape had taken place.¹²³ The Sierra Leonean Commission paid special attention to the subject of sexual abuse. It devoted a considerable attention to issues concerning women in the conflict. Many women gave statements to the commission and testified

¹¹⁷ Tomuschat(2001:239).

¹¹⁸ Buergenthal(2006:106).

¹¹⁹ Hayner(2006:12).

¹²⁰ Padarath(1998:64), where she writes that “while the sexual nature of prison torture is the focus of much attention, the sexual brutalization of women believed to be the supporters of opposing political parties has received very little emphasis or even acknowledgement”.

¹²¹ The South African Commission describes this phenomenon in its report. See vol 4, chap.10, sec.36-43, 293-94.

¹²² See *Guatemalan: Memoria del Silencio*, vol. 3, chap.2, par.49.

¹²³ The *Report of Commission on the Truth for El Salvador* lists many incidents of rape in its appendix, which documents all victims who provided testimony and the violations that they suffered. These rape victims clearly were considered to fall within the commission’s mandate. The Commission never explained this discrepancy in its policy.

during its hearings. Their statements were taken in closed sessions in the presence of women members and staff of the commission. But in the end the commission made no findings or recommendations on this point,¹²⁴ except to urge the Sierra Leone government to ratify the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.¹²⁵

Pursuant to section 5 of the TJRC Act,¹²⁶ the Kenyan commission is charged to:- establish a record of abuses, nature and causes of human rights violations and economic rights inflicted on persons by the state, public institutions and holders of public office, between 12 December 1963 and 28 February 2008. It is also supposed to investigate violations of international human rights law and determine those responsible. In addition, it is empowered to investigate economic crimes and inquire into illegal and irregular acquisition of land. Further, it should inquire into the causes of political violence before and after elections and make recommendations on how to prevent future occurrences of such violence. It should also recommend prosecutions of the perpetrators of gross human rights as well as determine ways and means of redressing those violations. Moreover, it ought to facilitate the granting of conditional amnesty to persons who make full disclosure of all the relevant acts associated with gross human rights violations and economic crimes. Finally, it should compile a comprehensive report of its findings with recommendations on how to prevent future human rights violations.¹²⁷

¹²⁴ Schabas (2006: 24).

¹²⁵ Article 5 (b) of the African Charter on Human and People's Rights on the Rights of Women in Africa requires the prohibition "through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and Para-medicalization of female genital mutilation and all other practices in order to eradicate them.

¹²⁶ Act No 6 of 2008.

¹²⁷ See section 5 of the TJRC Act.

The Kenyan TJRC seems to be the first with such broad mandate. Remarkably, it is the first commission charged with the mandate of investigating economic crimes such as grand corruption and the exploitation of natural or public resources for private enrichment. It is also the first to inquire into irregular and illegal acquisition of public land with a purpose of making recommendations of repossessing such land. The commission has also been well mandated to investigate broadly on human rights violations and violations of international human rights law and abuses such as massacres, sexual violations, murder, extra-judicial killings, torture, political assassinations and disappearances and to include their causes, nature, antecedents, and perspective of victims and motives of persons responsible.

This is commendable because for a truth commission to be effective, in providing the truth it is important that the most prevalent types of human rights violations be opened up for investigations. Furthermore, states have a duty to prosecute grave crimes against the life, physical integrity and freedom of human beings if such crimes have been committed in their respective territories.¹²⁸ Moreover States have an obligation to find and make public the truth about human rights abuse. International human rights law obliges states to investigate and punish gross violators of human rights in most circumstances. This means that the citizen has a right to know the results of such investigations.¹²⁹ This was reaffirmed by The Inter-American Court of Human Rights in the 1988 case of *Velasquez Rodriguez*.¹³⁰

¹²⁸ See Rome Statute, preamble (4) and (6).

¹²⁹ Article 19 of the Universal Declaration of Human Rights which stipulates that there is indeed “a right to know the truth” which is contained within the right to seek, receive and impart information’. Article 9 of the African Charter on Human and Peoples’ Rights, provides for the right to receive information.

¹³⁰ The Inter-American Court of Human Rights in the *Velasquez Rodriguez* Case, Judgment of 29 July 1988; [Inter-Am.Ct.HR.(Ser.C) No.4(1988)].

3.2.5 Time frame

3.2.5.1 Duration of the Commission

As a general rule, Truth commission should carry on for a minimum period of nine months and no longer than two and half years. It should have a deadline for completion.¹³¹ The commission's mandate should also investigate human rights committed over a reasonable period to avoid overloading the commission.

Section 20(1) of the TJRC Act provides that the commission shall be inaugurated within 21 days of the appointment of its members and shall operate for two years. Subject to subsection 2 of that section, the commission shall have a preparatory period of three months to undertake all tasks to ensure that it is able to work effectively from the commencement of its operations.

The appropriate preparatory period of the commission depends on the political culture and circumstances of the country under consideration. The South African commission spent 18 months designing its work. This preparatory time was crucial to developing the commissions' complex empowering legislation.¹³² The Kenyan TJRC took four months for its preparatory work and started working in January 2010.

The TJRC has two years for collecting and organizing documentation, receiving and processing testimony from thousands of victims, completing investigations, and finishing a final report. This is a tight time frame and it may be difficult given the wide mandate and period the commission is to cover. The investigations cover a total period of 45 years, stretching all the way back from 12 December 1963 to 28 February 2008.

¹³¹ Hayner (2002:218).

¹³² Hayner (1994:597).

A study of some of the commissions that have existed to date helps create doubts on the possibility of the Kenya TJRC completing its work within the stipulated time of two years, given the period it has to cover. For example, the Guatemalan Commission which was to cover a period of 34 years, took two years and the South African Commission covered the same period of time took five years. The German Truth Commission which covered 40 years, took three years.¹³³

On the one hand, one must acknowledge an element of legitimacy in the strict limitation of time allotted to a truth commission. A time frame extending more than three years would eventually create boredom and make the citizenry lose interest and support in the commissions' work. This has happened with the Ugandan commission which was set up in 1986 and took nine years and also with the South African Commission which was in place for 5 years.¹³⁴

3.2.5.2 Period covered by the TJRC investigations

Investigating a period of 45 years would be difficult for the commission, as some of the witnesses, victims and survivors of gross violations of human rights could be dead or evidence may be destroyed or memories could have faded.

Further it amounts to overburdening the TJRC and preventing it from discharging the mandate in a thorough manner. This was the dilemma facing the Commission in Guatemala which was supposed to investigate all the human rights violations committed during a period of 34 years. In the end, it reflected at length on the dilemma created by its terms of reference and identified itself with similar difficulties experienced by other truth commissions in particular the Chilean and the El Salvadoran commissions. Accordingly, it determined that it had to give

¹³³ Hayner (2002: 223).

¹³⁴ Ibid.

priority to attacks on life and personal integrity, in particular extrajudicial executions, forced disappearances and sexual violations.¹³⁵

Some of the cases to be investigated by the TJRC such as murder, grand corruption, and election violence, irregular and illegal acquisition of public land have been the subject of investigation in the past. The recommendations of these commissions of inquiry have never been implemented or made public.¹³⁶

It is in this context that, we would argue that the TJRC would have been properly mandated to enquire into the victims and survivors of the past injustices with an aim of offering compensation, instead of investigating that which is known to the citizenry. This would serve to acknowledge what many already know about the past and it would be important for national healing and reconciliation.

3.2.6 Funding for the TJRC

Full funding for a commission should be committed and must be available at the start of its work. This is particularly important if the commission is fully or largely funded by the state.¹³⁷

The Kenyan TJRC is being funded by the government and it is experiencing financial problems. The TJRC is yet to receive the US\$ 26, 666, 666 it requested from the Justice Ministry in 2009. According to a brief released by the TJRC Communications Consultant, the request for the two-year operational budget was

¹³⁵ See, *Guatemalan Commission for Historical Clarification Report*.

¹³⁶ See, Gichaba, (2008:9) Where he states that; The Kiliku Commission of inquiry into the land clashes of 1991/2 through 1997, more than 10 years later, Mr. Kiliku's findings still on government shelves. The Elijah Mwangale Commission of inquiry investigated the murder of J.M Kariuki, and more than three commissions of inquiry have investigated the assassination of Dr. Robert Ouko. On the other hand, in non-murder cases, the best example would be the Goldenberg Commission of inquiry and the Commission of Inquiry into the Illegal and Irregular allocation of Land, commonly known as Ndungu Commission.

¹³⁷ Hayner (2002:134).

submitted in December 2009 but there was no official response from the ministry. Commissioner Slye once stated in a press conference that TJRC had not received official communication as to what amount it is supposed to be getting and added that the commission was limited and was trying to seek funding from donors.¹³⁸

It has been common for truth commissions in the past to run short of funds and to struggle under a tight budget. For instance, the South African commission which had US\$18 million a year complained of insufficient funds. The Guatemalan and El Salvadoran Commissions also had inadequate funds. The Haitian commission ran into serious problems as well. Only Chilean commission had sufficient resources for the task and the government was willing to provide funding for it to complete its work successful.¹³⁹



3.2.7 Assignment of individual responsibility

The mandate of a Commission can expressly empower it to name persons responsible for gross violations of human rights. Naming the perpetrators has been one of the most controversial issues facing truth commission. Some commissions such as, the Guatemalan and Chilean Commissions were not authorised to name individuals, while others, such as, the Rwandan, El-Salvadoran and the Chadian Commissions named the perpetrators.¹⁴⁰

The mandate of the TJRC has empowered it to name those responsible for the commission of the violations and abuses with an aim of prosecution.¹⁴¹ This is laudable as it grants the named individuals an opportunity to acknowledge their deeds and ask for forgiveness. Acknowledgement implies that the perpetrators have

¹³⁸ Amran (2010).

¹³⁹ Hayner (2002:216).

¹⁴⁰ Hayner (2002:216).

¹⁴¹ Sec. 5 of the TJRC Act.

admitted their misdeeds and have recognized that they were wrong.¹⁴² Citizens also have the right to know the truth. Those who are meant to forgive must know what and whom they are forgiving. Truth has precedence over punishment. Punishment can be negotiated. The truth cannot. “There can be no reconciliation without the truth”.¹⁴³ This was the approach adopted by the South Africa Commission. The truth promotes forgiveness which enables reconciliation thus healing of the nation.

3.2.8 Proceedings before the TJRC

Proceedings of a truth commission may be confidential or public. The Guatemalan and the El Salvadoran Commissions held their hearings privately whereas the South African and Sierra Leonean Commissions held public proceedings. It has been argued that public proceedings safeguard impartiality.¹⁴⁴ The Kenyan TJRC Act provides that the proceedings of the commission shall be public but the Commission may direct the proceedings to be held privately in any of the following instances, where;

- (a) the security of perpetrators, victims or witnesses is threatened;
- (b) it would be in the interests of justice or
- (c) there is a likelihood that harm may ensue to any person as a result of proceedings being open to the public; and
- (d) a victim, perpetrator or witness may apply to the Commission for proceedings to be held in *camera*.

Where the Commission has directed that the proceedings shall be private the information relating to those proceedings is also private. The Act has provisions ensuring

¹⁴² Neier (1990:31).

¹⁴³ Werle (1996:72).

¹⁴⁴ Hayner (2002:229).

that the dignity of the victims is up-held, for example, the victims' privacy and safety and that of their families shall be protected. Victims shall also communicate in a language of their choice.¹⁴⁵

Despite these provisions, the measures included in the Act are insufficient to take into account the needs and rights of victims. The experiences of other truth commissions such as the Sierra Leonean and the South African Truth Commissions show that victims and witnesses, especially women, fear participating in the process that would put them at risk of reprisal, and need the truth commission to provide them with comprehensive and effective protection.¹⁴⁶ The TJRC has a vaguely worded power to ensure that "appropriate measures" are taken for the victims' safety¹⁴⁷ and *in camera* hearings. The Act does not include any provisions establishing comprehensive, long-term and effective protection measures for victims and witnesses.

Kenya adopted a Witness Protection Act in 2006. The Act seeks to put in place measures for the protection of witnesses.¹⁴⁸ But, it is not clear whether the provisions of the Witness Protection Act will regulate the protection of victims and witnesses giving statements to the Commission.

3.2.9 Collection of evidence

The commission has powers to gather, by any means it deems appropriate, any information it considers relevant to its cause. To this end it has powers to search,

¹⁴⁵ See generally section 25 of the TJRC Act.

¹⁴⁶ Dumbuya (2003:37).

¹⁴⁷ Sec. 25(5).

¹⁴⁸ See the preamble to Kenyan Act No.6 of 2006.

enter any place without prior notice and take any property or documents which may be of assistance to the commission.¹⁴⁹

The Commission can interview any individual at its discretion. It can also compel a person to attend its session or hearing. Further, it can request information from the relevant authorities of a foreign country and gather information from victims, witnesses, government officials and others in foreign countries. In addition, it can issue summonses as it deems necessary in fulfilment of its mandate and request and receive police assistance as needed in the enforcement of its powers.

These subpoena powers are similar to those vested with a court and are very vital for fulfilling its mandate. They are useful in a number of situations. For example a person with relevant information is summoned and compelled to disclose. To date, the following commissions have had subpoena powers: Uganda, Chad, South Africa, Sierra Leone and Timor-Leste.¹⁵⁰

Remarkably, the Kenyan TJRC is the only one so far in the history of truth commissions which has powers to request for information from foreign authorities and gather information from victims, witnesses and government officials in other countries.

3.2.10 Amnesty provisions

Black's Law Dictionary defines amnesty as, "a sovereign act of oblivion for past acts, granted by a government to all persons ...guilty of a crime ...and often

¹⁴⁹ Sec. 7 of Kenyan TJRC Act.

¹⁵⁰ Freeman (2006:189).

conditioned upon their return to obedience and duty within a prescribed period".¹⁵¹
States grant amnesty to achieve peace and reconciliation.¹⁵²

Section 34 of the TJRC Act deals with amnesty. Under this section a person may make an application for amnesty in relation for a matter to be investigated under the Act and the commission may recommend granting of conditional amnesty. However no amnesty may be granted for genocide, crimes against humanity, gross violation of human rights or an act, omission or offence constituting a gross violation of human rights including extrajudicial execution, enforced disappearances, sexual assaults, rape and torture.

Section 35 provides that a person who wishes to apply for amnesty will make an application in writing. The Commission may recommend amnesty if it is satisfied that the application complies with the requirements of the Act and that the applicant has made a full disclosure of all relevant facts.¹⁵³ And where the commission has refused amnesty, it should as soon as is practicable notify the applicant.¹⁵⁴ If amnesty is granted to any person in respect of any act, the Commission may order that person to compensate the victim of that act.¹⁵⁵

The prohibition of both conditional and unconditional amnesties for crimes such as genocide, crimes against humanity, war crimes and other gross human rights violations is commendable. The conditional amnesty process of the South African

¹⁵¹ Black's Law Dictionary (2007:82-83). See also the case of *Azania Peoples' Org. V. President of the Republic of South Africa*, 1996(4) salr 671, 690,692(CC) (AZAPO case) and *Prosecutor v Kallon, Kamara*, Appeals Chamber Decision of 13 March 2004 on the Lome Accord Amnesty.

¹⁵² *AZAPO case* and *Dumbuya* (2006:45).

¹⁵³ Sec. 38 of the Act.

¹⁵⁴ Sec. 40 of the TJRC Act.

¹⁵⁵ Sec. 41 of the TJRC Act.

Commission is now considered to be unacceptable under international law.¹⁵⁶ The Sierra Leonean blanket amnesty was also considered to be ineffective as it violated international law.¹⁵⁷

3.2.11 Provisions relating to reparations

Normally truth commissions help in designing a reparation program for victims of human rights violations. International law establishes an obligation on the part of the state to provide redress for human right abuses.¹⁵⁸ This may take many forms that go beyond the payments of cash to the injured. Reparation is a general term encompassing different types of redress including restitution, compensation, rehabilitation, satisfaction and guarantee of non repetition.¹⁵⁹

The TJRC Act provides at section 41 that if amnesty is recommended to any person in respect of any act, the Commission may recommend reparation and rehabilitation of the victim of that act.¹⁶⁰ Section 42 provides that “Any person who is of the opinion that he has suffered harm as a result of a gross violation of human rights may apply to the Commission for reparation in the prescribed form”. Subsection 2 of that section provides that where the Commission is of the opinion that the applicant is a victim, it shall make recommendations in an endeavour to restore the human and civil dignity of that victim.

However, the Act does not expressly state what form of reparation should be recommended. Therefore the Commission can emulate the Chilean Commission

¹⁵⁶ “Concerns about the Truth, Justice and Reconciliation Commission Bill.”

¹⁵⁷ *Prosecutor v Kallon, Kamara*, Appeals Chamber Decision of 13 March 2004 on the Lome Accord Amnesty.

¹⁵⁸ *United Nations Commission on Human Rights: Study concerning the Right to Restitution, Compensation and Rehabilitation for victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report*, UN Doc. E/CN.4/EC.4/Sub.2,1993, 8 July, 1993.

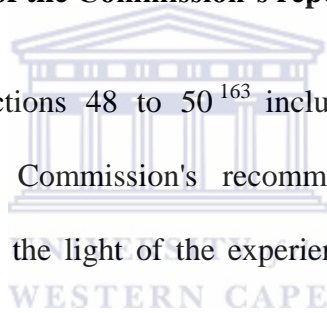
¹⁵⁹ Hayner (2002: 12).

¹⁶⁰ Sec. 41 of the TJRC Act.

which recommended financial benefits to the victims, such as scholarships to the children of victims and survivors, medical insurance and monthly stipends to cover the cost of living and school supplies.¹⁶¹ The South African Commission recommended detailed reparations program including financial, symbolic and community-based reparations.¹⁶² In the circumstances, it would make sense to recommend community-based reparations such as building of schools, health centres or projects aimed at elevating poverty. It would be beneficial to victims if they could be supplied with water and electricity because many Kenyans lack these important utilities especially in rural areas.

3.2.12 Implementation of the Commission's report

The TJRC ACT at sections 48 to 50¹⁶³ includes provisions to guarantee the implementation of the Commission's recommendations. Such provisions are particularly important in the light of the experience of previous judicial and non-



¹⁶¹ Details of the Chilean reparations program, and the total costs, are reported in *Corporation Nacional de Reparacion Reconciliation*, 1996, 595-602.

¹⁶² Hayner (2002:217).

¹⁶³ Section 48 of the TJRC Act provides that, the Commission shall submit a report of its work to the President at the end of its operations. The report shall summarize the findings of the Commission and make recommendations concerning reforms which could be legal, political, or administrative. The report shall also recommend prosecution and reparations for the victims. In addition the report shall make recommendations on the mechanism and framework for the implementation of its recommendations.

After submitting the report to the President, the Commission shall publish the report in the Gazette and in such other publications as it may consider appropriate, and shall make copies of the report, or summaries thereof, widely available to the public in at least three local newspapers with wide circulation.,

Thereafter, the Minister shall table the report in Parliament within twenty one days after its publication and shall, operationalise the implementation mechanism in accordance with the recommendations of the Commission. There shall also be an implementation committee which shall publish the reports of the Government in the appropriate form and submit its own quarterly reports to the public evaluating the efforts of the Government in implementing the recommendations of the Commission.

The implementation of the report of the Commission shall commence within six months upon its publication and the Minister shall report to the National Assembly within three months of receipt of the report of the Commission, and twice a year thereafter, the progress of the implementation of the Commission's recommendations. The section also provides that all the recommendations shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation.

judicial commissions of inquiry in Kenya, whose recommendations have not been implemented. Therefore, efforts to address this broader problem of ensuring the implementation of the Commission's recommendations are welcomed.

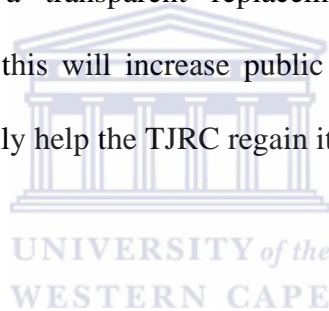
3.3. Conclusion

Even though the TJRC has not started its work, it has effective provisions to enable it carry out its mandate. It has the wide mandate which includes the following:- investigating economic crimes:- illegal and irregular allocation of land; human rights abuses; powers to make recommendations for institutional reforms; and an express power to name individuals responsible for human rights abuses with an aim of having them prosecuted. It has wide subpoena powers. Moreover, it is the first truth commission to have powers of providing a clear framework of ensuring the implementation of its report. Further, it has no powers to grant conditional or unconditional amnesties in relation to international crimes of genocide, crimes against humanity, or war crimes. All these are commendable provisions.

But the big question is whether the TJRC will play any role in post conflict Kenya especially in bringing the perpetrators of post-election violence of 2007 to justice? Will the TJRC bring an end to the culture of impunity in Kenya, especially in regard to prosecution of people responsible for human rights violations? Indisputable is the fact that the TJRC will be fundamental in creating a proper record of the past while stating the truth which has been elusive in Kenya for a long time. This in itself will be a form of reparation to the victims and survivors of human rights violations who have been desiring to know the official truth for a long time. It is also indisputable that the TJRC has no prosecutorial powers, but can only recommend prosecutions. In this regard therefore, this paper submits that, Kenya has not been keen to bring the

perpetrators of the alleged crimes against humanity committed during the post-election violence to book.

Finally this paper argues that; the TJRC is a crucial body needed in Kenya for dealing with the historical injustices. However, since not all commissions with credibility challenges have recovered in the past, there is need to take seriously the credibility challenges levelled against the TJRC if it is to achieve any of its objectives. Kenya can draw lessons from TRC procedures in Liberia, the Democratic Republic of Congo and Serbia which influenced the manner in which the TRCs were perceived. This paper submits that it is important to address the current credibility challenges by having a transparent replacement of the chairperson of the commission. In the end this will increase public and international support for the TJRC. This will eventually help the TJRC regain its moral authority as it executes its mandate.



CHAPTER FOUR

PROPRIO MOTU INTERVENTION OF THE ICC IN THE KENYAN SITUATION

4.0 Introduction

Over the last two years Kenya has faced a huge task of establishing an appropriate justice model for dealing with perpetrators of crimes against humanity committed in the country during the post-election violence in 2007. This has been particularly difficult for Kenya due to the culture of impunity and low public confidence in the judiciary.¹⁶⁴ Initially the government tried and failed to establish the Special Tribunal for Kenya which would have tried those responsible for the violence as was recommended by the Waki Commission.¹⁶⁵ Following this failure the ICC Prosecutor sought the permission of the Pre-Trial Chamber to initiate *proprio motu* investigations in Kenya.¹⁶⁶

The situation in Kenya is of great interest to international criminal justice and jurisprudence for various reasons. Firstly, this is the first time the ICC Prosecutor is invoking the powers conferred upon him under Article 15 to open *proprio motu* investigations into a situation occurring in a state party to the Rome Statute. Currently the other situations under ICC investigations and prosecution are “self-referrals”, and the situation in Darfur, Sudan (a non-States Party) which was referred by the United Nations Security Council. The determination of the Kenyan situation will set a precedent.¹⁶⁷

¹⁶⁴ “The ICC and post-election violence in Kenya.”

¹⁶⁵ Nicholas (2009).

¹⁶⁶ Prosecutor's Request, ICC-01/09-3, available at www.icc-cpi.int (accessed on 6 June 2010).

¹⁶⁷ Nicholas (2009).

Secondly, the Pre-Trial Chamber had the opportunity to clarify a number of contentious issues of international criminal law such as the principle of complementarity, the gravity threshold and the meaning of “interests of justice”.¹⁶⁸

Thirdly, this the first time the ICC will be intervening in a situation where a truth commission is also in existence. It will be interesting to see how these two bodies will function together. The question one would ask is this: can a non-prosecutorial mechanism conduct genuine investigations with the intent to bring the persons concerned to justice in order to keep the ICC at bay?¹⁶⁹

This chapter attempts to discuss Articles 15, 17, 20(3) and 53 of the Rome Statute with an aim of establishing whether the Kenyan situation was admissible before the ICC and the basis upon which a *proprio motu* intervention was authorised by the ICC. It will also seek to assess any role the ICC could have in Kenya.

4.1.1 International Criminal Court

The Rome Statute of the ICC (hereafter the “Statute”) establishing the ICC came into force on 1 July 2002.¹⁷⁰ The official seat of the Court is The Hague but its proceedings may take place anywhere.¹⁷¹ The Court began its work on 11 March 2003.¹⁷²

The Statute has been described as a “major step forward for substantive international criminal law.”¹⁷³ Unlike the statutes of earlier international courts, such as the Nuremberg Tribunal and the International Criminal Tribunals for the former

¹⁶⁸ Nicholas (2009).

¹⁶⁹ Bosire (2009).

¹⁷⁰ Heller (2008).

¹⁷¹ Article 3 of the Rome Statute.

¹⁷² Werle (2009:22).

¹⁷³ Werle (2009:22).

Yugoslavia and Rwanda, the Statute provides detailed definitions of the core international crimes, the possible modes of participation in those crimes, and the permissible grounds for excluding criminal responsibility. The Statute thus represents the international community's most ambitious attempt to create a special and general part of international criminal law.

The court is designed to complement existing national judicial systems. It can thus only exercise its jurisdiction when national courts are unwilling or unable to investigate or prosecute crimes committed in their territory.¹⁷⁴ The preamble of the ICC affirms that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.¹⁷⁵

To date the Court has opened investigations into 5 situations: Northern Uganda; the Democratic Republic of the Congo; the Central African Republic; Darfur (Sudan); and -Kenya. The Court has indicted 14 people; seven of whom remain fugitives, two have died (or are believed to have died), four are in custody, and one is appearing voluntarily before the court.¹⁷⁶

4.1.2 Jurisdiction of the ICC

The ICC is a permanent tribunal for the prosecution of individuals for genocide, crimes against humanity and war crimes.¹⁷⁷ The court will have jurisdiction over the crime of aggression in the future.¹⁷⁸

¹⁷⁴ Article 11 and 20 of the Rome Statute.

¹⁷⁵ See the Preamble of the Rome Statute paragraph 6.

¹⁷⁶ See, "ICC situation and cases."

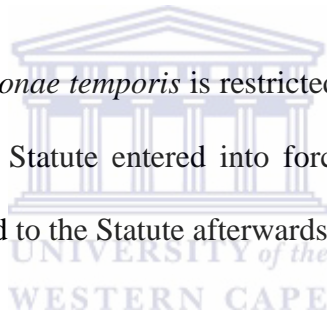
¹⁷⁷ According to Article 5(1), 6, 7 and 8, this is known as jurisdiction *rationae materiae*.

¹⁷⁸ The Review Conference of the Rome Statute held at Kampala on 11 June 2010 amended the Rome Statute as to include a definition of the crime of aggression and the conditions under which the court would exercise jurisdiction with respect to the crime. The actual exercise of jurisdiction is subject to a

The jurisdiction of the ICC is restricted to crimes committed within the territory or by a national of either a states party or a state which has accepted the Court's jurisdiction. The Court therefore adopts the territoriality and active personality jurisdiction.¹⁷⁹

Nonetheless, the Court may exercise its jurisdiction regardless of the jurisdiction in which perpetrators find themselves when the UN Security Council refers a situation to it under Chapter VII of the UN Charter. Here, the UN acts to maintain peace since it can take authoritative action with regard to any UN member state. The UN Security Council exercised this power by referring to the Court the situation in Sudan, a non-member state of ICC, on 31 March 2005.¹⁸⁰

The ICC jurisdiction *rationae temporis* is restricted to crimes committed from 1 July 2002 the date when the Statute entered into force.¹⁸¹ Special provision applies to states parties that acceded to the Statute afterwards.¹⁸²



4.1.3 Kenya and the Rome Statute

Kenya ratified the Statute on 15 March 2005 and domesticated it in December 2008 by enacting the International Crimes Act of 2008. The Act, however, entered into force on 1 January 2009 and therefore does not apply to the post-election violence crimes, as this would be in conflict with non-retrospectivity principle enshrined in the Constitution at the domestic level.¹⁸³

decision to be taken after 1 January 2017 by the majority of state parties. See Review Conference of the Rome Statute.

¹⁷⁹ Werle(2009:84).

¹⁸⁰ U.N Resolution 1593, UN Doc.S/RES/1593(2005).

¹⁸¹ Article 11 of the Rome Statute.

¹⁸² Article 11(2)Rome Statute.

²³ Section 77 of the Constitution of the Republic of Kenya.

4.2 *Proprio motu* intervention of ICC in Kenya

On 6 November 2009 the President of the ICC assigned the situation in Kenya to the Pre-Trial Chamber II. Consequently, the Prosecutor of the ICC, Moreno Ocampo, filed a request for authorisation of an investigation pursuant to Article 15 of the ICC into the situation in Kenya in relation to the post election violence of 2007. In its judgment of 31 March 2010, The Pre-Trial Chamber II (hereafter the Chamber) gave the Prosecutor permission to lodge an investigation into the Kenyan situation.¹⁸⁴ The Chamber considered Article 15 and 53 of the Statute which regulate the procedures for initiating an investigation upon the Prosecutor's own initiative subject to authorisation by the chamber.

Article 15(1) provides that the Prosecutor may initiate investigations *proprio motu* on crimes that fall within the jurisdiction of the Court. Pursuant to Article 15(3), the Prosecutor must request authorisation of that investigation from the Chamber. Once such a request has been made, the Chamber shall, in accordance with Article 15(4), authorise the commencement of the investigation upon being satisfied that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court.

Most important is Rule 48 of the Rules of Procedure and Evidence. It provides that in determining whether there is a reasonable basis to proceed with an investigation under Article 15(3), the Prosecutor is required to consider the matters set out in Article 53(1), namely:

(a) Whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

¹⁸⁴ See the *Decision pursuant to Article 15 of Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya* on 31 March 2010, ICC-01/09-19 (hereinafter Judgement).

- (b) Whether the case would be admissible under Article 17; and
- (c) Whether, taking into account the interests of victims and the gravity of the crime, it would be in the interests of justice to proceed with an investigation.

4.2.1 Reasonable basis to believe that a crime within the Jurisdiction of the court has been committed

In its authorisation judgement the Chamber observed that the words “reasonable basis to proceed” referred to in article 15(3) and in the *chapeau* of article 53(1) are reiterated in article 53(1)(a) of the Statute. It therefore concluded that the "reasonable basis to believe" test set out in article 53(1)(a) of the Statute is subsumed by the "reasonable basis to proceed" standard referred to in the opening clause of article 53(1) of the Statute, since the former is only one element of the latter.

Therefore, if upon review of the three elements embodied in article 53(1)(a) to (c) of the Statute and on the basis of the information provided, the Chamber reaches an affirmative finding as to their fulfilment, the "reasonable basis to proceed" standard will consequentially be met.

In addition, the Chamber considered the meaning of the “reasonable basis to believe” and argued that it is one which requires the lowest evidentiary standard provided for in the Statute as it is confined to a preliminary examination of the information available to the Prosecutor, which may not be comprehensive. Accordingly, in evaluating the information provided by the Prosecutor the Chamber must be satisfied

that there exists a sensible or reasonable justification that a crime falling within the jurisdiction of the Court has been committed.¹⁸⁵

In establishing whether a crime within the jurisdiction of the Court had been committed the Chamber stated that the crime had to satisfy the set conditions which were:

- (i) The crime had to fall within the category of crimes referred to in article 5 and defined in articles 6, 7 and 8 of the statute;
- (ii) It must fulfil the temporal requirements specified under article 11 of the statute; and
- (iii) It meets one of the two alternative requirements in article 12 of the statute.¹⁸⁶

In authorising the investigation in its decision of 31 March 2010, the Chamber agreed with the Prosecutor that there was reasonable basis to believe that crimes against humanity of murder, rape, deportation or forcible transfer of population and other inhumane acts were committed in Kenya and therefore the Courts material jurisdiction had been established. Furthermore, these crimes fell under the temporal jurisdiction of the Court since they occurred after the entry into force of the Statute in the Republic of Kenya. Finally, since the alleged crimes were committed on Kenyan territory, they fell within the Court's territorial jurisdiction.¹⁸⁷

¹⁸⁵ Judgement, para. 27 and 35.

¹⁸⁶ Judgement, para. 39 also *Pre-Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, para. 36; *Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-14-tENG, para. 12.

¹⁸⁷ Judgement paragraph 70 also Prosecutors request, paragraphs 47, 48 and 49.

4.2.1.1 Contextual elements of the crimes against humanity

As the alleged crimes were committed in Kenya two years after it ratified the Statute, the next issue that had to be determined by the Chamber was whether the alleged crimes amounted to crimes against humanity.

The commission of the crimes against humanity require the commission of one of the individual acts described in article 7(1), which describes the contextual elements of crimes against humanity as follows,

“...Crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

Article 7(2) (a) of the Statute further indicates that the:

“attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.

The Prosecutor's request had alleged that the post-election violence of 2007-2008 occurred in the context of a widespread and systematic attack against the Kenyan civilian population, and that it comprised hundreds of incidents with varying degrees of organization.¹⁸⁸ Eventually, the Chamber considered that the available information indicated that murder, rape and other forms of sexual violence, forcible transfer of the population and other inhumane acts occurred on Kenyan territory within the time frame covered by the Prosecutor's Request.¹⁸⁹

¹⁸⁸ Prosecutors request para. 77 and 14.

¹⁸⁹ Judgement, para. 102.

4.2.2 Admissibility Test for a case under article 17

Before exercising his *proprio motu* powers the Prosecutor must satisfy the Chamber that the case is admissible before the Court under article 17 of the Statute. In other words, the Court must be satisfied that the material elements of admissibility have been met. The question of admissibility mainly concerns the scenarios or conditions on the basis of which the Court shall refrain from exercising its recognized jurisdiction over a given situation or case. This is known as complementarity principle.¹⁹⁰ The Pre-Trial Chamber I, in the *Lubanga case*,¹⁹¹ stated that the principle of complementarity is the “first part of the admissibility test”.

4.2.2.1 Grounds for inadmissibility

As a starting point, article 17 of the Statute presumes the admissibility of each case before the Court. Hence, a case becomes inadmissible when a ground for inadmissibility is proven. Article 17(1) regulates four different situations on inadmissibility. The first three relate to investigations and prosecutions by a state which has jurisdiction over a case, which can be distinguished on the basis of the measures a state has taken and how far the case has progressed on the national level. The primary consideration in this regard is whether the case is being investigated or prosecuted; whether the case has been investigated and whether the state decided not to prosecute the persons concerned or the persons concerned have been prosecuted.¹⁹² The last inadmissibility situation is that “the case is not of sufficient gravity to justify further action by the court”.¹⁹³

¹⁹⁰ The close relationship between the complementary principle and the admissibility test is explicitly recognised in article 17(1) with reference to paragraph 10 of the preamble and article 1 of the Statute.

¹⁹¹ *Prosecutor v Lubanga*, Pre-Trial Chamber decision of 29 January 2007.

¹⁹² Article 17(1) (a), (b) and (c).

¹⁹³ Article 17(1) (d).

(a) Current investigations or prosecutions; Article 17(1)(a)

Once initial investigative steps have been taken, the case should be left to the national prosecution systems. The grounds for inadmissibility in this regard require two elements. First “investigations or prosecution”, and second “by a state which has jurisdiction over it”. A prosecution is to be understood as the opening and undertaking of a judicial criminal process by a state. Investigations by other bodies such as NGOs, do not qualify. Moreover the acting state must have jurisdiction over the case.¹⁹⁴

This therefore means that the Kenyan TJRC investigations cannot be deemed to be investigations for the purposes of Article 17(1)(a).

(b) Case having been investigated and the State has decided not to prosecute: Article 17(1)(b).

To fulfil the requirements of this ground, the case must have been investigated and a decision not to prosecute must have been taken. The use of the term “state” encompasses all state organs that can investigate ICC crimes and all such organs are in a position to take a decision not to prosecute. However, the investigating state and the one that took the decision not to prosecute must be one and the same. The investigations must also be completed and the decision not to prosecute must be final. This is to prevent the Court from running the risk of making a premature decision.¹⁹⁵

The notion “not to prosecute” also raises other questions such as the question of legitimacy. For example, it applies where a state adopts an amnesty law that bars

¹⁹⁴ Kleffner and Kor (2004:117).

¹⁹⁵ Kleffner (2008:116).

initiation of an investigation and extends to cases already investigated, and it also includes the situation where prosecutorial authorities exercise their prosecutorial authority and decide not to prosecute.

(c) *Ne bis in idem*; Articles 17 (1)(c) and 20(3)

Article 17(1)(c) deals with cases which have already been decided and which thus have the effect of *res judicata*, whereas article 20(3) regulates the conditions under which a retrial by the ICC is permissible when a person has already been tried by another court. Article 20(1) provides that the Court is barred from trying a person with respect to conduct which has formed the basis of crimes for which the person has been acquitted or convicted by any another court. Also a prior trial by ICC bars a subsequent trial by another court.

The above notwithstanding, the provisions of article 20(3) allow the Court to try a person again, if the proceedings in the other court were for the purposes of shielding the person concerned from criminal responsibility or were not conducted independently or impartially in accordance with the norms of due process recognized by international law, or were conducted in a manner which, in the circumstances, was inconsistent with the intent to bring the person concerned to justice.

(d) Insufficient gravity, Article 17(1)(d)

A final ground for declaring a case inadmissible is where it is considered to be "not of sufficient gravity to justify further action by the Court". The crimes must be sufficiently grave to justify further action by the Court. The early practice of the Court suggests that crimes are sufficiently grave only when the conduct in question is systematic or undertaken on a large scale, the perpetrator in question falls within

the category of most senior leaders in the state entity, and the person concerned falls within the category of those most responsible.¹⁹⁶

In its authorisation judgement the Court clarified this issue of gravity and stated that it requires both qualitative and quantitative approaches. This means that it is not the number of victims that matters but rather the existence of some aggravating or qualitative factors attached to the commission of the crime which makes it grave. The Court went on to state that, when considering the gravity of the crime, it ought to consider the scale of the alleged crimes (including an assessment of the geographical and temporal intensity), the nature of the unlawful behaviour or of the crimes allegedly committed, the means employed for the execution of the crimes, and the impact of the crimes and harm caused to victims and their families.¹⁹⁷

4.2.3 Was the Kenyan situation admissible before the ICC?

The Kenyan situation raised many difficult questions on admissibility. First, could it be said that a State is “willing” to prosecute when leaders of its government publicly support the trial of suspected perpetrators, but the government then fails to establish the necessary tribunal? Secondly, how long is the Court expected to wait for domestic investigations and prosecutions to commence? Finally, in the absence of any prosecutions, does the existence of the Truth Justice and Reconciliation Commission make the Kenyan cases inadmissible under Article 17(1)(a)?

A case becomes admissible before the Court if, first under article 17(1)(a) “the state is unwilling or unable genuinely to carry out the investigations or prosecution.” In the second situation, a case is admissible when the decision not to prosecute resulted

¹⁹⁶ Pre-Trial Chamber 1, Decision of 10 February 2006 and the incorporation of documents into the case against Mr. Thomas Lubanga Dyilo [42-63].

¹⁹⁷ Judgement, paragraph 67.

from the unwillingness or inability of the state genuinely to prosecute, and in the third situation, where a person concerned has already been tried, the case is admissible on condition that the proceedings in the court “were for the purpose of shielding the person concerned from criminal responsibility for crimes within the Courts’ jurisdiction, or where the proceedings were otherwise not conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”¹⁹⁸ The fourth situation in which admissibility follows would be where the case is of such great gravity as to justify further action by the Court.¹⁹⁹

4.2.3.1 Unwillingness or inability to investigate or prosecute as a ground of admissibility

Paragraphs 1(a) and (b) of Article 17 have the same exceptions: a case under investigations or prosecution is inadmissible “unless the state is unwilling or unable genuinely to carry out an investigation or prosecution”. Therefore, a case which has been investigated or prosecuted by a state which has jurisdiction over it becomes admissible before the Court if the state is unwilling or unable genuinely to carry out the investigation or prosecution. Similarly, a case will be admissible before the Court if it has been investigated and the state concerned decided not to prosecute if the decision resulted from unwillingness or inability of the state to genuinely prosecute.

Both concepts; “unwilling and unable” are often confused and treated simply as one and the same although they are regulated separately as alternatives for the

¹⁹⁸ Article 17(1) (c) in conjunction with Article 20 (3).

¹⁹⁹ Article 17(1) (d).

admissibility test.²⁰⁰ Paragraphs 2 and 3 of Article 17 contain exhaustive legal definitions of both terms. According to Article 17(2), after having regard to the principles of due process recognized by international law, a state would be unwilling to prosecute when one or more of the following situations exist:

(a) *‘The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court;*

(b) *There has been unjustified delay in the proceedings which in the circumstances is inconsistent with intent to bring the persons concerned to justice; and*

(c) *The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which in the circumstances is inconsistent to bring the person concerned to justice.’*

The reference to due process and the two forms of unwillingness spelled out in paragraphs (a) and (b) are similar to terms in Article 20(3)(a) and (b). Thus the following analysis applies to the latter provisions to the extent that they are identical.

(a) Shielding from criminal responsibility

As regards the phrase “for purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court”, what needs to be said is this: first the use of the words “for purpose of shielding” implies that the proceedings must specifically be directed at shielding from criminal responsibility. Secondly, the need to determine the purpose of proceedings, which in turn requires an inquiry into the state of mind of a state which raises the difficulty of determining

²⁰⁰ ICC Press Release “Communications received by the Office of the Prosecutor of the ICC” of 16 July 2003.

the mindset of an abstract entity such as a state. In the present context this may involve an appraisal of the intentions of those individuals acting as state organs such as investigators, prosecutors and judges as well as an evaluation of collective organ such as the legislative and the executive. In exceptional cases, purposes of shielding may be established due to express statements or manifested actions such as blanket amnesty following initial investigatory steps of the relevant national authorities.²⁰¹

The Court can also consider the sentence imposed in the trial. If the sentence does not reflect the gravity of the crime in question, it can be determined that the sentence was imposed for the purpose of shielding a person from criminal responsibility.²⁰²

Nevertheless, when national courts of the same jurisdiction treat comparable cases very differently without any good reason, such differences may be indicative of an intention to shield from criminal responsibility.²⁰³

Obviously the ICC must satisfy itself that the purpose of shielding from criminal responsibility manifests in investigations or prosecutions which can effectively be prevented by subsequent proceedings before the ICC.

In this regard therefore, it is submitted that by establishing the TJRC which is a non-prosecutorial body, the government of Kenya had the intention of shielding the perpetrators of post-election violence from criminal responsibility. Why else, would the government establish the TJRC unanimously and fail to pass the required legislation to establish the Special Tribunal for Kenya?

²⁰¹ Kleffner (2008: 136).

²⁰² Olosolo (2006:52).

²⁰³ Kleffner (2008:137).

(b) Unjustified delay inconsistent with intent to bring the person concerned to justice

In order for cases to be admissible before the Court, they must meet a threefold test: there must not only be a delay in the proceedings, but such a delay has to be unjustified and such unjustified delay ought to be inconsistent with an intent to bring the person concerned to justice.²⁰⁴ Therefore Article 17 2(b) seems to suggest that no unjustified delays may occur, regardless of whether the proceedings are of an investigative, prosecutorial, trial, appellate, or any other nature, and that all stages of the proceedings have to be conducted expeditiously.

This provision can be traced to the jurisprudence established by human rights conventions on the right to be tried without undue delay²⁰⁵ and to a hearing within a reasonable time²⁰⁶ as well as to a hearing by an impartial and independent tribunal.²⁰⁷ In practice when interpreting these human rights norms, one has to consider whether the delay is justified. This entails considering such matters as the legal and factual complexity of the case. But economic and administrative restraints cannot justify a delay.

But Article 17 2(b) concerns itself with unjustified delays which are inconsistent with an intent to bring the person concerned to justice, which the prosecutor must establish for the case to be admissible before the Court.

Thus the Kenyan situation became admissible before the Court since the delay in proceedings against the perpetrators of the post-election violence was left in limbo

²⁰⁴ Kleffner (2008:140).

²⁰⁵ Article 14 3 (c) ICCPR.

²⁰⁶ Article 6 (1) ECHR, 8(I) IACHR, 7 (1) (d) AFCHPR.

²⁰⁷ Article 8 (1) AFCHPR.

for approximately two years without any indication as to whether they would be tried.

(c) Lack of independence or impartiality

A case becomes admissible under Article 17 2 (c) and 20 3(b) when proceedings were not conducted independently or impartially and were conducted in a manner inconsistent with an intent to bring the persons concerned to justice. Proceedings are impartial when they are not biased and are independent when the trial judges are not subject to improper influence from executive, legislature as well as other parties.²⁰⁸

4.2.3.2 Inability

Inability is defined in Article 17(3) as a situation in which “*due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings*”.

Here a state would be willing to prosecute but cannot do so because of the total or substantial collapse or unavailability of a national judicial system. The state is simply unable genuinely to carry out the proceedings. A judicial system is unavailable when it is non-existent. A state is unable genuinely to prosecute when its justice system has substantially collapsed. This is the case when its deficiencies are irreparable and, as a whole, it does not function as a system anymore. Thus it can be referred as a failed state. If the collapse is temporal the requirements for this exception are not fulfilled and the case is inadmissible before the Court.

²⁰⁸ Kleffner (2008:123).

4.3 Conclusion

In conclusion, under international criminal law, the state has the primary responsibility for investigating, prosecuting, and punishing mass atrocities that take place within its territory.²⁰⁹ Paragraph 4 of the ICC Statute affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.²¹⁰ Thus the Statute spells out the object of the Court as being effective prosecution, whereas it underlines that measures for prosecution at national level must be enhanced since not all crimes can be prosecuted before the Court. Consequently the Kenyan Government has a duty to prosecute crimes against humanity committed in its territory.

There have been no initial investigative steps that were taken in Kenya, such as establishing an investigative unit, securing the site where the crimes against humanity were allegedly committed and collecting evidence; nor has any prosecution with an aim of bringing the perpetrators to justice been undertaken. Again, the Kenyan justice system could not be regarded as having substantially collapsed because of the lack of the machinery to carry out investigations and prosecutions. The fact of the matter is that; its judiciary, police force and all the three arms of government were working. This does not fit into the category of not being able to genuinely investigate. Kenya is therefore a clear example of a state that is unwilling to investigate or prosecute.

²⁰⁹ Preamble to the Rome Statute, paragraph 6.

²¹⁰ Preamble to the Rome Statute, paragraph 4.

Lastly, Paragraph 5 of the preamble states that the object of “effective prosecution” is to end impunity and thus to contribute to prevention of crimes.²¹¹ This goal would be undermined in if cases that are admissible to the Court are left unprosecuted by the court when the respective state remains inactive. At the end, this would be a way of fostering impunity. The Kenyan TJRC was established to carry out investigations on historical injustices in Kenya (which has been discussed in chapter two of this paper) with an aim of recommending prosecutions for the persons found responsible.

It is submitted that this is just another way of fostering impunity as it would delay prosecutions of crimes against humanity. It also shows that Kenya was unwilling to prosecute. Now that the government has failed or delayed unduly in establishing the Special Tribunal for Kenya. The Court’s intervention was proper since its involvement is expected only where a states party to the Rome Statute is unwilling or unable to prosecute and punish international crimes.

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²¹¹ Preamble to the Rome Statute Paragraph 5.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

This paper has so far analysed the factual background leading to the intervention of the ICC and the establishment of the TJRC in Kenya. It has also studied the specific features of the TJRC and the grounds that made the Kenyan situation admissible to the ICC. In conclusion therefore, the paper will tackle two elements, namely; the intervention of the ICC where a TJRC exists and the relationship between TJRC and the ICC. To this end, we shall study the TJRC in relation to admissibility test for the ICC and secondly any role that both bodies can have in the transitional Kenyan society.

5.1 Intervention of ICC where TJRC exists

International criminal law has traditionally been concerned with governing relations between states. However, this perception changed with the advent of the International Military Tribunal sitting at Nuremberg, when individuals became subject of international criminal law when the tribunal stated that individuals could be held responsible for crimes against international law and could be punished accordingly since crimes against international law are committed by men and not by abstract bodies.²¹² This observation was important as it provided a platform for the development of international criminal law as it ensures that individuals are held responsible for serious violations and the desire of the state to bring such individuals to justice.

²¹² Principle 1 of the Nuremberg Principles recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, Report of the International Law Commission covering the work of its second session (5 June-29 July 1950), UN Doc. A/316, in *Yearbook of International Law Commission* 1950 II, 374.

However, many states, including Kenya are not willing to participate in this process which subjects them to greater accountability. Article 17 of the Rome Statute makes states accountable at a local level by acknowledging that states bear the primary responsibility for investigating and prosecuting international crimes committed within their territory. This means that a state must incorporate laws to establish criminal liability at a national level for crimes ordinarily within the jurisdiction of the ICC. This is what has been referred to as the principle of complementarity. If a state does not investigate and prosecute, it may invite the attention of the ICC as it may indicate unwillingness or inability to prosecute. The state should be able to genuinely carry out investigations or prosecution. A state is therefore able to forego the complementary jurisdiction of the ICC if it can actually fulfil its obligations to punish the perpetrators of international crimes.

Regarding the intervention of the ICC where a truth commission exists, this paper argues that: the ICC should not interfere with a states' process of dealing with the past as long as it does not cause a violation of human rights. Thus, the Kenyan case became admissible before the ICC since the government choose to institute the TJRC whose ability to perform its mandate as it is currently composed is questionable. Besides, the TJRC is a non-prosecutorial body. And, Kenya being a state party to the ICC has a duty to punish those responsible for international crimes. The Waki Commission which investigated the post-election violence reported that crimes against humanity were committed in Kenya. It called upon the government to establish a proper criminal body such as the Special Tribunal for Kenya to try those who bore the highest criminal responsibility or refer the situation to the ICC. That notwithstanding, the government choose to establish the TJRC at the option of a criminal process.

This paper does not however question the establishment of the TJRC since Truth commissions have become bodies which are highly respectable as they are a useful platforms established at national level to deal with the past. What the paper questions is the act of its establishment over and against the criminal process in Kenya. This shows that the Kenyan government acted in bad faith as a state party to the Rome Statute and without recourse to her duty to investigate and prosecute those responsible for crimes against humanity allegedly committed in her territory.

Moreover, it is a well recognized international law principle that states have a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out serious investigations of violations of human rights committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victims adequate compensation.²¹³ When Kenya adopted the option of a truth commission as the first step of dealing with human rights violations, it clearly indicated unwillingness to investigate and prosecute those responsible; thus making the situation admissible before the court under Art 17(3).

This paper cannot underestimate the work of the TJRC; but it simply asserts that, the TJRC cannot replace criminal prosecutions. Nonetheless, TJRC complement criminal justice by contributing to a clarification of the historical background, and it is necessary and indispensable for a state in dealing with past violations of human rights. The ICC should carry out its operations in a way which minimizes interference with the work of truth commission.

²¹³ *Velasquez Rodriguez Case*, Inter American Court Judgment of 29th July 1988, HRL 9 212.

Now that the ICC investigations are ongoing in Kenya, and that there is a TJRC in existence, this paper recommends that the two bodies should not exclude each other but rather function complementarily.

5.2 Does the TRJC and the ICC have any role in Kenya?

For Kenya to foster reconciliation and healing, it is essential that the truth of the past be officially established. As Prof. Werle observes, there can be no reconciliation without truth.²¹⁴ Furthermore, it is the right of the citizen to know the truth. Normally, the citizenry know what abuses happened and who did what, thus the TJRC will serve as a way of acknowledging the evasive truth officially. At the end, the TJRC would serve as an avenue of healing and reconciliation which is needed in the fractured Kenya society.

But, that notwithstanding, there is also need to figure out, what would be done with the perpetrators of the crimes against humanity, since Kenya has a duty to prosecute those who bear the highest criminal responsibility.

The intervention of the ICC in Kenyan situation must be viewed against the backdrop of the failure of the Kenyan government to establish the Special tribunal for Kenya. It therefore became evident that a solution was necessary to punish the perpetrators as the preamble of the ICC puts it “the most serious crimes of concern to the international community as a whole must not go unpunished...” The solution was therefore the *proprio motu* intervention by the ICC Prosecutor. The ICC thus will have the role of punishing those who are most responsible, a role which the government avoided.

²¹⁴ Werle (1996:72).

The subject matter jurisdiction of the TJRC overlaps with that of ICC. The ICC is limited to crimes against humanity committed in Kenya from June 2005 to 31 March 2010, when authorisation was granted, whereas the TJRC can investigate all human rights violations between 12 December 1963 and 28 February 2008. This therefore puts the human rights violations committed during the post-election violence within the TJRC mandate. Notably, the TJRC has the mandate to recommend prosecution of the perpetrators of human rights violations, this paper therefore argues that the TJRC is better placed to recommend prosecution at national level of those who would not be prosecuted by the ICC as the ICC prosecutes only those who bear the highest criminal responsibility.

Since prosecution of all perpetrators by the ICC is impossible, this paper submits that it would be credible to establish a local mechanism which would try the backlog of those not tried by the ICC and the ones recommended by the TJRC. This would serve to illustrate the complementary nature of the two bodies. And it would be precedent-setting as this is the first time these two bodies are existing concurrently.

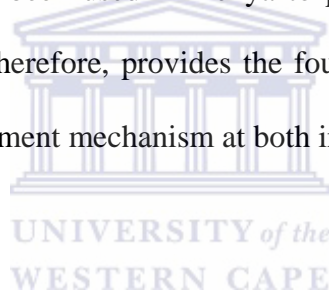
At the international level, reconciliation and prosecution are in most situations pursued separately, as was the case in Rwanda and Sierra Leone. It has, however, been argued that being far and remote from the local people, especially the victims and survivors, these prosecutions are unlikely to produce lasting peace to deter the commission of future crimes.²¹⁵ Because of this criticism, the ICC has almost been physically involved in Kenya. For instance, the Prosecutor has been to Kenya twice within one year and another visit has been scheduled before the end of the year 2010. Secondly, the Registrar of the Court has also been in Kenya as a way of following up on investigations. Lastly, the ICC is also setting up a local registry in Kenya. All

²¹⁵ Monshipouri and Welch (2001:389).

these activities are ways of showing concern of the Court for Kenyan situation, and this has been very important as the people of Kenya feel part of the process.

While, post-conflict TJRC investigations and criminal trials for international crimes have similar aims, they approach these goals differently. On the one hand, TJRC aims at reconciling a deeply divided society; on the other hand, the primary objective of the ICC is to put an end to crimes by prosecuting those responsible. To this end, both bodies serve a deterrent function.

In the light of the foregoing, this paper argues that the two bodies have the role of ending the culture of impunity in Kenya, which the Prosecutor seems to be keen on achieving. Impunity has been used in Kenya to protect the perpetrators of human rights violations. This, therefore, provides the foundation for the ICC to become a truly meaningful enforcement mechanism at both international and national level.



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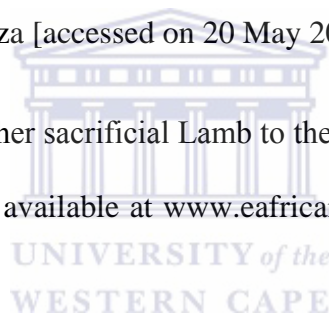
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