



A real option for Justice?

The International Crimes Division
of the High Court of Kenya

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Abbreviations

- CIPEV – Commission of Inquiry on Post-Election Violence
- ICC – International Criminal Court
- ICD – International Crimes Division
- JSC – Judicial Service Commission
- KPTJ – Kenyans for Peace with Truth and Justice
- PEV – Post-Election Violence
- WPA – Witness Protection Agency

Summary

One and a half years since the International Crimes Division (ICD) in the High Court of Kenya was first proposed by the Judicial Service Commission (JSC) in its report of October 2012¹, there has been little concrete movement towards actually setting up the Division. This is not in itself a criticism; such processes should take the time necessary to achieve the desired results. However, apart from publishing the report, making several ‘bench-marking’ visits to other countries and holding two low-key workshops, the JSC seems to have made little progress towards actualising an ICD. Despite this inertia, the Division continues to be touted in official circles as a potential answer to providing justice for victims of post-election violence as well as a potential replacement of the ICC ongoing process. On at least two occasions, the Attorney General has gone so far as to erroneously tell international audiences that the ICD has already been launched.² While, ideally, it would make sense to await the production of the final roadmap towards establishing the ICD, it is important to offer a preliminary review of the process so far. This will point out potential strengths, weaknesses, gaps and loopholes, in the hope of ensuring that the eventual outcome of the ICD establishment process is one that will improve the chances of post-election violence victims finally getting justice.

Background

Following Kenya’s disputed presidential elections in 2007, violence broke out around the country. This dark period of the country’s history, now commonly referred to as the post-election violence (PEV), resulted in the death of at least 1,133 Kenyans, the displacement of over 350,000 others, sexual violence, arson, maiming, looting and the destruction of property worth millions of shillings.³ The search for justice for victims of post-election violence began with the establishment of a Commission of Inquiry on Post-election Violence (CIPEV), mandated to investigate the facts and circumstances surrounding the violence and the conduct of state security agencies in handling it and to make recommendations on these matters.

CIPEV recommended the creation of a Special Tribunal for Kenya with Kenyan and international judges to sit in Kenya to try perpetrators of the violence. It set specific timelines during which the tribunal should be created and operationalised, failing which it recommended that Kofi Annan, who chaired Kenya’s mediation process, hand over an envelope containing a secret list of alleged

1. Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya" (JSC Report), 30 October 2012

2. Situation in the Republic of Kenya in the Case of The Prosecutor v. Uhuru Muigai Kenyatta, Government of Kenya’s Submissions on the Status of Cooperation with the International Criminal Court, 8 April, 2013, para 3; Side Event on Complementarity in Kenya organized by the Wayamo Foundation during the 12th Assembly of State Parties held in The Hague in November 2013. During both events, the AG stated that the ICD had already been established despite this not being the case.

3. "Report of the Commission of Inquiry into Post Election Violence" October 2008. The report of CIPEV is commonly referred to as the "Waki Report," after appellate court Judge Philip Waki, who chaired the commission. http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf

perpetrators to the International Criminal Court (ICC) Prosecutor. Despite three separate attempts, the government failed to form the tribunal, causing the ICC to intervene.

On 31 March 2010, the ICC Pre-Trial Chamber II authorised the Prosecutor to open investigations into the Kenya situation.⁴ The Prosecutor subsequently issued summons to appear against six high profile Kenyans and, after confirmation hearings held in late 2011, the cases against four of the suspects, namely Uhuru Kenyatta, William Ruto, Francis Muthaura and Joshua Sang, were confirmed. The charges against Francis Muthaura were dropped by the Prosecutor, citing the admission by a critical witness that he had lied in his statement. The trial of Joshua Sang and William Ruto, the latter now Deputy President of Kenya, opened on 10 September 2013 and is ongoing, while, after several adjournments, that of Uhuru Kenyatta, now President of Kenya, is scheduled to open in October 2014.

Court of last resort

While it is an important feature of the global architecture of the fight against impunity, the International Criminal Court is a court of last resort, which exists to complement national criminal jurisdictions under the principle of complementarity.⁵ It therefore steps in to prosecute international crimes only when a member state is unable or unwilling to investigate and prosecute.⁶ Even then, the ICC's prosecutorial policy mandates it to prosecute only those who allegedly bear the greatest responsibility for the crimes. In Kenya's case, only six individuals appeared before the Court and the number has since been reduced to three. In a situation of such widespread violence, implicating hundreds-and possibly thousands - of mid-level and lower-level perpetrators, domestic prosecutions are necessary to close the resulting gap in accountability. However, in the case of Kenya, there have been only a handful of such prosecutions and even fewer convictions.⁷ The recent admission of the Director of Public Prosecutions that the more than 4,000 cases reviewed by a multi-agency task force set up in June 2012 were not "prosecutable", whether as ordinary crimes or international crimes, seemed all but to extinguish the hope of the post-election violence victims ever getting justice in the courts through state-led prosecutions.⁸

4. *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>

5. *Preamble to the Rome Statute*

6. *Article 17 of the Rome Statute*.

7. See *Kenyans for Peace with Truth and Justice (KPTJ) and Kenya Human Rights Commission (KHRC)*, "Securing Justice: Establishing a domestic mechanism for the 2007/8 post-election violence in Kenya", p. 8; Human Rights Watch, 2013 "Turning Pebbles": *Evading Accountability for Post-Election Violence in Kenya* <http://www.iccnw.org/documents/SecuringJusticeKPTJandKHRC.pdf> http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf, 2013

8. "Most PEV cases cannot be prosecuted – Tobiko", *The Star Newspaper*, 6 February 2014. <http://www.the-star.co.ke/news/article-153986/most-pev-cases-cannot-be-prosecuted-tobiko>

The International Crimes Division of the High Court of Kenya

On 9 May 2012 the Judicial Service Commission (JSC) set up a working committee mandated to study and make recommendations on the viability of establishing an International Crimes Division (ICD) in the High Court of Kenya. After visiting several countries to study various approaches to domestic prosecution of international crimes, the committee produced its first report in October 2012.⁹

The report rightly observes that the Rome Statute obligates member states to punish international crimes and that the ICC cannot deal with all post-election violence cases. It also notes the continuing demand for justice following the failure to establish a special tribunal as recommended by the CIPEV and goes on to recommend the establishment of the ICD.

The legal framework

The legal framework proposed for the formation of the ICD includes the Constitution, which establishes the High Court of Kenya with unlimited original jurisdiction on civil and criminal matters; the International Crimes Act, No. 16 of 2008 which, under Section 8 (2), provides that the crimes proscribed in the Act shall be tried in the High Court of Kenya; and the Judicial Service Act, Section 5 of which gives the Chief Justice administrative power to exercise general direction and control over the Judiciary and under which, presumably, the Chief Justice would create the ICD through a Gazette Notice. The JSC report also provides that the ICD shall apply special rules of procedure, practice and evidence in its operations and conduct of trials.

Jurisdiction

Although the initial discussion of the JSC was on the possibility of operationalising the International Criminal Act, 2008 in order to address pending post-election violence cases, the report proposes that the ICD should now have jurisdiction to prosecute not only crimes under Section 6 of the International Crimes Act - that is, genocide, war crimes and crimes against humanity - but also transnational crimes including drug trafficking, human trafficking, money laundering, cybercrime, terrorism and piracy, and any other international crimes as may be proscribed under any international instrument that Kenya is a party to.

9. Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya" (JSC Report), 30 October 2012.

Proposed structure

The report proposes that the ICD should be modelled on the standards of the ICC at The Hague, with the same rules, practices and procedures being adopted.¹⁰ Seven judges would be appointed to sit in the ICD in panels of three, with one extra judge in case one of the judges cannot sit. Once the judges for this Division have been identified, they would undergo rigorous training in international criminal law and related subjects, through long-term and short-term courses. The seat of the proposed Division will be in Nairobi but it can also operate by circuit and may sit and conduct proceedings in any other place in Kenya as the Chief Justice may direct.

Prosecution

The JSC report recommends that there should be established a well-equipped independent prosecution unit within the office of the Director of Public Prosecutions to deal exclusively with international crimes. At the same time, it also says that Parliament should enact legislation to provide for the appointment of a Special Prosecutor who shall be responsible for the prosecution of cases that fall within the jurisdiction of the ICD under Article 157(12) of the Constitution of Kenya. These two recommendations are confusing as they are contradictory. If an independent prosecution unit were to be established within the DPP's office, then it would not be necessary or feasible to appoint a special prosecutor under Article 157(12). The DPP, who has publicly stated that he regards post-election violence cases as unprosecutable, has made clear his reservations to what would amount to taking away some of his powers and vesting them in an independent prosecutor. On the other hand, the appointment of a Special Prosecutor under Article 157(12) would require new legislation by Parliament and it is highly doubtful that the necessary political will would be forthcoming.¹¹

Challenges, Gaps And Weaknesses

Jurisdiction

As already stated, the proposed ICD is to have jurisdiction to prosecute two categories of crime, namely core international crimes such as genocide, war crimes and crimes against humanity, and transnational and organised crimes, which are domestic crimes with potential cross-border elements, such as terrorism, piracy, drug trafficking, cybercrime etc. While the JSC report acknowledges the hitherto limited prosecutions of mid-level and low-level perpetrators of post-election violence as a key driver behind the formation of the proposed ICD, it does not give a sound policy justification for lumping together both categories of crime. This is intriguing given the

10. It is not clear how the ICD can adopt the rules, practices and procedures of the ICC since the latter's rules are an amalgam of both common law and civil law traditions while Kenya is a purely common law country.

11. See below on anti-accountability environment.

fact that the criminal justice system has had no problems prosecuting transnational crimes with some success, even in the absence of a specialised division of the High Court. Further, many of the transnational crimes named are currently prosecutable in the first instance in the magistrates' courts with possible appeals lying in the High Court, the Court of Appeal and, in appropriate instances, the Supreme Court. Removing these crimes from the ambit of magistrates' courts and giving the jurisdiction to prosecute them to a division of the High Court would require a change in legislation and cannot simply be done by the Chief Justice through a gazette notice, as the JSC report seems to envisage.

Giving the proposed ICD the mandate to prosecute both categories of crimes also runs the risk of the court being kept busy with prosecutions of drug traffickers and terror suspects, while never seriously addressing the more politically sensitive cases of post-election violence. This would give the illusion of movement in the search of justice for post-election violence crimes while in reality the situation would remain unchanged.

Absence of political will

The limited number of domestic prosecutions of post-election violence crimes is attributable either to a lack of proper investigations or to a lacklustre approach to their prosecution by the Office of the Director of Public Prosecutions, which appears content to tell the public that the cases are unprosecutable, without stating how the Director of Public Prosecutions has used his considerable powers under the Constitution to improve their fortunes in court. This lack of political will, which has stood in the way of justice for victims of post-election violence for the last six years, cannot be fixed merely by setting up an international crimes division. This is because, under Kenya's legal system, judges do not investigate or prosecute cases; they adjudicate over them as neutral arbiters. This means that, without meaningful reforms in the investigative and prosecutorial arms of the criminal justice system, the proposed ICD could end up being a white elephant, with no cases to prosecute.

Hostile, anti-accountability environment

Of equal concern is the fact that the debate on the proposed ICD has been taking place in an official environment that is decidedly opposed to accountability. Since the election in March 2013 of Uhuru Kenyatta and William Ruto as President and Deputy President respectively, and despite surveys consistently showing public support for accountability, the government of Kenya has gone to great lengths to stop the cases facing the two at the ICC. The fallout from the legal, political and diplomatic offensive conducted to this end has negatively affected the prospects of obtaining justice for victims of post-election violence at home. The most notable example of this is the

motion that was passed in the National Assembly and the Senate in September 2013 to withdraw Kenya from the Rome Statute and to repeal the International Crimes Act.¹² Although the motion has not yet been acted upon by the Executive and Kenya remains a member of the ICC for now, it is unclear how the ICD would function in the absence of the International Crimes Act, which the JSC report designates as a key pillar of the ICD's legal framework.

Inadequate witness protection

The JSC report acknowledges the importance of an effective witness protection agency to the successful prosecution of international and transnational crimes. It recommends that “the government should fully fund and make operational the existing Witness Protection Agency” (WPA).¹³ In so doing, the JSC recognises the inadequacy of the WPA in its current state. This is a serious shortcoming that has the potential to sabotage any efforts aimed at domestic accountability for serious crimes. The WPA is seriously underfunded: in financial year 2013/2014, it received only Ksh 196 million (2.2 million US dollars) of the Ksh 500 million (six million US dollars) that it requested.

According to experts, witness protection in Kenya seems to lack the political support necessary to make it effective because it is viewed in the light of the ICC and the efforts to hold high profile politicians accountable.¹⁴ The WPA also has an image problem that makes it difficult for potential witnesses to entrust it with their safety, especially when they are called upon to testify against powerful political interests. While it is formally independent, the fact that the WPA began its life as a department in the Office of the Attorney General and that its board includes senior government officials, among them the Attorney General, the Inspector General of Police and the Head of the National Intelligence Service, may make potential witnesses doubt its independence from the executive arm of the government.

Retroactive prosecution of international crimes

The JSC report recognises a potential obstacle to prosecuting post-election violence crimes as international crimes under the International Crimes Act. This is because the Act came into force in January 2009, prior to which core international crimes of genocide, war crimes and crimes against humanity did not exist as such in the laws of Kenya. It is a general principle of both international law and the Kenyan Constitution that a person cannot be punished for an act that did not constitute

12. Kenya parliament votes to withdraw from ICC, Al Jazeera Africa, <http://www.aljazeera.com/news/africa/2013/09/201395151027359326.html>

13. JSC Report, page 149

14. Wanja Gathu, Institute of War and Peace Reporting, “Big Questions About Witness Protection in Kenya.” 27 May 2014 - <http://iwpr.net/report-news/big-questions-about-witness-protection-kenya>

an offence at the time it was committed. This is known as the principle of non-retroactivity of the law. This refers to the requirement that the law should not extend its scope to matters that occurred before the law was enacted. This legal principle is best encapsulated in the Latin maxim as *“nullum crimen, nulla poena sine lege scripta,”* meaning nothing is a crime and no punishment may be imposed except by a written law or *“nullum crimen, nulla poena sine lege praevia,”* which translates as ‘nothing is a crime except as provided by law and no punishment may be imposed except as previously provided by law’; that is to say, the law must pre-exist the crime.

Kenya ratified the Rome Statute in 2005 and domesticated it through the International Crimes Act in 2008, after the post-election violence. The Act became operational on 1 January 2009. The Act provides for prosecution of crimes against humanity domestically in Kenya but cannot be applied to crimes that were perpetrated between 2007-2008 before the Act was passed into law.

In its report, the JSC has argued that there should be no reason under international law that the International Crimes Act, or any other subsequent Act, cannot be used to prosecute crimes that predate its enactment. This is because the principle of non-retroactivity would not be violated where the conduct to be prosecuted was already a crime under international law.

Unsound legal interpretation?

The report suggests that since the Constitution of Kenya 2010 acknowledges that all conventions ratified by the State are part of Kenyan law, then the Rome Statute was a part of Kenyan law from 2005, when Kenya ratified it. As such, the report argues, perpetrators of international crimes in 2007-2008 were therefore committing pre-existing crimes and can be prosecuted under the Rome Statute as read with the Penal Code and should not be limited by the International Crimes Act. However, not only is this an expedient interpretation of the law, it is not legally sound. This is because treaties are specific as to time, content and jurisdiction. They come into force only upon ratification and, where a State's legal system is dualist, a further step of domestication is required.

A dualist state, as opposed to a monist one, is a state whose laws require that all treaties, in addition to being signed and ratified by the state, must be adopted through national legislation before their provisions can become part of the domestic law. At the time of ratification of the Rome Statute, Kenya was a dualist state and therefore domestication was necessary. Kenya domesticated the Rome Statute in 2008 after the post-election violence and therefore the treaty only has effect after this domestication. It would be important to clearly establish why this case should be an exception, which the JSC report does not do convincingly.

Secondly, an observation of analogous situations indicates that retroactivity cannot be provided for in a carte blanche provision that allows a look into all past atrocities of a nation. Whilst following

the JSC's recommendation would mean the possible prosecution of all alleged international crimes committed after 2005, best practice in Timor l'Este, Rwanda and the Democratic Republic of Congo shows that a retroactive clause in legislation should be limited to a specific time to deal with a specific atrocity and not be open to all past historical injustices. There has to be a limited scope in which the retroactivity provision operates, in order to prevent states from assuming unlimited power and potentially abusing this provision. Therefore, while it is important and necessary to prosecute serious post-election crimes as international crimes, more thought needs to be given to how to get around the retroactivity obstacle than the JSC has included in its report. This will avoid the danger of the prosecutions being challenged for unconstitutionality once they get underway.

Lack of stakeholder input

The process of debating the possible establishment of the ICD has been faulted for lacking adequate consultation with key stakeholders, especially relevant civil society actors and victim groups. Long before the JSC recommended the formation of the ICD, civil society had been grappling with the challenge of closing the gap in prosecutions and had held various consultations and produced a number of reports on the issue.¹⁵ However, when the JSC process got under way, there was no attempt to bring civil society on board at the outset. What passed for consultation was a breakfast meeting at which the JSC shared its proposals with little room for feedback. Subsequent communications between the JSC and civil society on the issue have been intermittent and procedural, without a platform for proper engagement in which the JSC might respond to civil society's concerns and incorporate its input into the process.

Positive complementarity

The purpose of establishing a domestic mechanism to prosecute crimes against humanity through an ICD or other mechanism is to complement existing prosecution at the International Criminal Court (ICC) and not to replace the ICC process, as some local proponents of the ICD have suggested. The prosecutions at the ICD also have to be a legitimate effort to pursue justice for victims of post-election violence in accordance with international standards and not designed to shield perpetrators of crimes against humanity from justice.

In addition, ICD proceedings should be designed to plug the gap in the prosecution of mid to lower level perpetrators, and not merely to initiate token prosecution of lower-level perpetrators so as to disguise the lack of prosecution of elite perpetrators. This means that the ICD must also pursue higher-level suspects. Only then can the ICD be viewed to be legitimate. Legitimacy would also be

15. e.g. Kenyans for Peace with Truth and Justice, "The Post-Election Violence in Kenya: Seeking Justice for Victims." http://www.africog.org/reports/KPTJ%20SPECIAL%20REPORT_Seeking%20Justice%20for%20PEV%20Victims.pdf

conferred on the ICD if it had judges and prosecutors drawn from among local and international legal practitioners, judges and scholars. This would give it access to international best practice and expertise, as well as address any suspicion of potential bias that tends to accompany domestic institutions that seek to pursue justice in a politically polarised environment such as that in Kenya.

Recommendations

- The JSC sub-committee on the establishment of the ICD should embark on proper consultations with key actors including relevant civil society organisations, victim groups and academics, to develop proper consensus on how to establish an adequate complementarity mechanism for Kenya.
- The JSC report's proposal to retroactively prosecute post-election crimes as international crimes needs to be better thought out and supported, if the International Crimes Act is to remain the legal basis to prosecute crimes from 2007/8. Part of the JSC's arguments must emphasise the grave nature of international crimes and that the obligation to prosecute is incumbent on all states under international law. An acknowledgement by the International Law Commission and the International Court of Justice that crimes against humanity are violations of *jus cogens* (that is, certain fundamental, overriding principles of international law, from which no derogation is ever permitted) means that the responsibility to prosecute these violations cannot be limited by national statute even as concerns retroactivity.
- Despite the difficulty in obtaining the necessary political will, the legislative framework establishing the ICD should be a parliamentary statute as opposed to an administrative decision by the Chief Justice, as appears to be currently envisaged. This will insulate the process of investigation and prosecution from subsequent political interference whilst providing a legal basis both for funding as well as administrative functions such as issuance of summons. A statute would also provide a legal framework for engagement with experts in international criminal justice, allowing for the possible secondment of international actors, such as prosecutors and possibly judicial officers. The statute would also regulate the qualifications of persons to be appointed as prosecutors.
- There is a need to harmonise all relevant legislation, particularly the Evidence Act, to respond to evidentiary standards for crimes committed in an environment of conflict or generalised violence; the Criminal Procedure Code, in light of the unique requirements of prosecuting international crimes and the Penal Code to provide a basis for sentencing alongside the International Crimes Act, should it be amended to apply retroactively.

- With regard to the jurisdiction of the ICD, whereas the inclusion of transnational and organised crimes widens the ambit of the ICD by giving it a role beyond international crimes, the High Court of Kenya as presently constituted, as well as the Penal Code, Criminal Procedure Code, international conventions ratified by Kenya which form part of Kenyan law through Article 2 (5) and 2 (6) of the Constitution of Kenya and relevant statutes, are able to address these violations and have already done so in the past fairly successfully.¹⁶ It is therefore necessary for the JSC to clearly justify the proposed mixed jurisdiction of the ICD. A better alternative, given the urgency of addressing post-election violence, would be to sequence the work of the ICD so that it deals with post-election violence cases on a priority basis, after which its jurisdiction may be expanded to include transnational crimes.

Conclusion

The recommendation to establish an International Crimes Division of the High Court of Kenya is welcome in principle, as part of the enduring search for justice for victims of post-election violence. However the Judicial Service Commission report recommending the establishment of the ICD raises as many questions as it attempts to answer. Much more thought needs to be put into addressing concerns regarding the proposed legal framework, the mixed jurisdiction of the ICD, the investigation and prosecution of the crimes, witness protection and the harmonisation of existing legislation necessary to ensure that the resulting mechanism becomes a real option for delivering justice for victims of post-election violence. Key actors and stakeholders in the search for justice, especially victim groups and relevant civil society organisations that have worked on and thought about these issues consistently, and for a sustained period of time, should be genuinely engaged and their input sought for every stage of the process. These measures are necessary to ensure that once established, the proposed International Crimes Division becomes a viable option for justice for victims of post-election violence and not just an expensive white elephant.

16. See *Ambani Osogo, Prosecuting Piracy in the Horn of Africa, the Case of Kenya, in Prosecuting International Criminal Law in Africa*, Pretoria University Law Press, 2011. http://www.pulp.up.ac.za/pdf/2011_04/2011_04.pdf p.233

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