The Judicial Service Commission

Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in The High Court of Kenya

30th October, 2012

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Executive Summary

The vision of the judiciary of Kenya is to be the independent custodian of justice in Kenya." The judiciary intends to achieve this through accomplishing its mission which is "*to deliver justice fairly, impartially and expeditiously, promote equal access to justice, and advance local jurisprudence by upholding the rule of law*."

This report is a product of the initiative of the Judicial Service Commission (JSC) which is established by Article 171 of the Constitution of Kenya. JSC appointed this Committee on 9th May, 2012, with the express mandate look into modalities of establishing an international crimes division in the High Court, to hear and make determination on the pending post-election violence cases and deal with other international and transnational crimes.

Chapter two contains the background which sets out a brief history of political activities that took place in Kenya since independence in 1963, when Kenya was a de facto one party state, to the time Kenya became a de jure one party state in 1982. Later in 1992 through a constitution amendment Kenya was restored into a multi-party democracy. Since then Kenya has held four general elections, and each, with the exception of the 2002 general election were marred by violence and attendant human rights violations. The 2007 general election deserves special mention because the presidential elections were highly disputed and flawed, and it triggered a two month orgy

of violence, now commonly known as post-election violence. This violence culminated in the deaths of 1,133 people and the displacement of 350,000 others. Five years later, many middle and lower level perpetrators of the crimes committed during this period are yet to face the justice system.

Chapter five outlines the policy and legal issues informing the establishment of the proposed division. The main issues that informed the work of the committee were: **the need to uphold access to justice for the victims of the violence committed during 2007-2008, as well as the emergence of crimes that are of an international and transnational nature**. These issues discussed under this section include:-

Legal Framework **-** The Constitution of Kenya, 2010 establishes the High Court of Kenya with unlimited original jurisdiction in civil and criminal matters. Article 161 (2) (a) provides that the Chief Justice is the head of the Judiciary.

The Judicial Service Act, No. 1 of 2011 under section 5 gives the Chief Justice administrative power to exercise general direction and control over the Judiciary.

International Crimes Act, No. 16 of 2008 under Section 8 (2) provides that the crimes proscribed in the Act shall be tried in the High Court of Kenya.

Jurisdiction of the ICD **-**This subsection discusses the various crimes that would fall under the jurisdiction of the ICD. The first category is the crimes

provided under **section 6 of the International Crimes Act** namely genocide, war crimes and crimes against humanity as conduct that infringes international law and which is punishable as such by the imposition of individual criminal liability.

This report captures in depth other international and transnational crimes that would fall under the jurisdiction of the proposed division with a conclusion that the proposed division can have jurisdiction to try other international and transnational crimes like human trafficking, terrorism, piracy and money-laundering and its predicate offences (e.g. drug trafficking, illicit trade in counterfeit goods, small arms and cyber-crime).

Cases pending in other courts -Outlines how the proposed division may affect any cases that may be pending before other courts.

Non-retrospectivity of the law -This section also deals particularly with the core question on how to handle the crimes that were committed during post-election violence in the perspective of the principle of non-retrospectivity of law. This principle holds that laws must not impose criminal liability for acts or omissions that were not criminal offences at the time they were committed. It gives a wide analysis of the development and elements underlying the theory and versions of the principle of legality and its application. At the time of the commission of the post-election violence, these crimes had crystallised under international criminal law. Crimes

committed during post-election violence can be prosecuted as international crimes.

Restorative Justice –This section also deals with an analysis of restorative justice as a component of transitional justice. The report goes on to set out the approaches that the judiciary may apply to spearhead the gains restorative justice. These approaches include truth-telling, amnesty, reparations and reconciliation, which should be undertaken in conjunction with other relevant Government Departments.

***Stakeholder participation* -** The committee took cognizant of the fact that the judiciary does not operate on its own in the administration of justice. The report discusses the ways in which key players such as the State Law Office and the Directorate of Public Prosecutions will contribute towards the establishment and development of the division.

Chapter six contains a comprehensive analysis of the comparative studies from Uganda and Rwanda. From Uganda, the most important lesson learnt was that the creation of the proposed ICD demands wide stakeholder participation. This would ensure that the appropriate enabling legislation is put in place and would also pre-empt unwarranted applications that would challenge the jurisdiction and constitutionality of the ICD.

In Rwanda, the committee visited the International Crimes and Trans-border Crimes Chamber. The committee studied the manner in which the country

applied retributive and restorative justice mechanisms to prosecute the perpetrators of the genocide that occurred in 1994. These were the establishment of the ICTR, the conventional courts in Rwanda and the traditional courts known as Gacaca.

Chapter seven of this report explores intensively the options available to Kenya in dealing with the international crimes committed within its territories. The report has also endeavoured to address various legal impediments arising against the prosecution of various international and national crimes committed in the past. In the end, the report addresses how these crimes can be prosecuted notwithstanding the legal challenges. Two approaches are available: prosecutorial and non-prosecutorial.

The prosecutorial approaches are through the ICC, the regular Kenyan courts and the creation of a Special Tribunal as had been recommended by the CIPEV. The non-prosecutorial approaches include the TJRC and the promotion of other forms of dispute resolution such as reconciliation, mediation and traditional dispute resolution mechanisms as provided under Article 159 of the Constitution.

However, the best option of all these is the creation of a division within the High Court to deal with these crimes. In particular, it is important to deal with middle and lower level perpetrators of crimes committed during the

post-election violence period because Kenya has the primary responsibility to prosecute the perpetrators of crimes committed on her territory.

Creation of the division would ensure that the principles of complementarity and the sovereignty of the state are upheld.

The establishment of the ICD in the High Court is appropriate, necessary and indeed, highly significant in the prosecution of the perpetrators of the international and transnational crimes committed in Kenya. It is also recommended for the purposes of enhancing healing and fostering reconciliation in Kenya. This will restore faith in the Kenyan judiciary and also serve as a deterrence of further commission of international crimes thus end impunity which is deep rooted in Kenya.

In conclusion, this report makes substantial recommendations to the Government and to other actors in the criminal justice system to ensure comprehensive and coordinated prosecution of international and transitional crimes. The main recommendation is that the Chief Justice should establish the International Crimes Division in the High Court to try perpetrators of post-election violence and also deal with other international and transnational crimes. This is because no domestic justice Mechanism has been established to hold perpetrators of such crimes accountable.

Abbreviation

AU	African Union
CIPEV	Commission to Investigate Post-Election Violence (Waki Commission)
CoA	Court of Appeal
DPP	Director of Public Prosecutions
ECK	Electoral Commission of Kenya
FORD	Forum for Restoration of Democracy
GNU	Government of National Unity
HC	High Court of Kenya
IC Act	International Crimes Act No.16 of 2008 (for Kenya)
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICD	International Crimes Division
ICL	International criminal Law
ICJ-Kenya	Kenyan Section of the International Commission of Jurists

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
JSC	Judicial Service Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KPU	Kenya People's Union
LDP	Liberal Democratic Party
LRA	Lord's Resistance Army
MOU	Memorandum of Understanding
NDP	National Development Party
NPPA	National Public Prosecution Authority
NARC	National Rainbow Coalition
ODM	Orange Democratic Movement
PEV	Post- election violence
PNU	Party of National Unity
TCL	Transnational criminal law

TOC	Transnational crimes
UN	United Nations
WPA	Witness Protection Agency
WPU	Witness Protection Unit
WVPU	Witness and Victim Protection Unit

1. Introduction

The Judicial Service Commission (JSC) is established under Article 171 of the Constitution of Kenya, 2010. Its functions are set out under Article 172 of the Constitution and the Judicial Service Act, No.1 of 2011. For the Commission to effectively discharge its mandate it has power to constitute committees and panels under Sec. 14 as read with Sec 19(4) of the Act as and when the need arises.

Pursuant to these provisions the Commission appointed this Committee on 9th May 2012 to put in place mechanisms for the establishment of a Division in the High Court of Kenya to try international Crimes as stipulated in the International Crimes Act No. 16 of 2008.

The Committee was granted power to co-opt such members as would be necessary to assist it in carrying out its mandate.

The following are the members of committee :-

1. Hon. Rev. (Dr.) Samuel Kobia - Chair
2. Hon. Mr. Justice Isaac Lenaola - Member
3. Hon. Ms. Emily Ominde - Member

4. Hon. Mrs. Florence M. Mwangangi - Member
5. Hon. Mr. Justice Mohammed Warsame - Member(co-opted)

The Team was supported in its operations by:

1. John Tamar - Ag. Ass. Registrar JSC
2. Nancy N. Nyamwamu - Legal Researcher

After carrying out extensive comparative studies, research, analysis and deliberations of the relevant laws, various policy documents and precedents the committee is pleased to submit to the Judicial Service Commission this report for consideration and adoption.

FORMAT

The report is set out as follows:

1. Background

   This outlines the basis/reasons for the setting up the division.

2. Terms of Reference (TOR)

3. The methodology

4. Legal basis and policy informing the establishment of the division.

5. Comparative studies from Uganda and Rwanda which have established mechanisms for dealing with past conflicts and the lessons that Kenya can draw from their experiences.

6. The Committee's recommendations.

2. Background

"For there can be no healing without peace; there can be no peace without justice and there can be no justice without respect for human rights and the rule of law"

Kofi Annan

Since Kenya attained independence in 1963, its political history has been marked by sporadic episodes of violent uprisings and repression. At independence Kenya was a multiparty state with the main political parties being the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU). KADU lost the first general elections in Kenya in 1963 to KANU, where it had campaigned on a platform of "majimboism" (federalism). KANU at that time was led by the late President Jomo Kenyatta, the first President of the Republic of Kenya. Later in November 10, 1964, KADU dissolved itself and merged with KANU thereby Kenya became a de facto one-party state during that short period.[1]

In 1966 the Late Oginga Odinga and his followers left the government and formed the Kenya People's Union (KPU), there was a brief revival of multipartyism. KANU responded to the KPU defections by passing a constitutional amendment that forced the rebels to seek re-election.

[1] POLITICAL PARTY ORGANISATION AND MANAGEMENT IN KENYA AN AUDIT INSTITUTE FOR EDUCATION IN DEMOCRACY

The mass by-elections that followed, known since then as the "little general elections," were Kenya's last experience of multiparty politics until 1992. However, "the little general elections" were hardly models of competitive politics. KPU was systematically hindered by the government from campaigning freely. Legal registration of the party was delayed until nomination day, preventing KPU from organising effectively. During the campaign, KPU candidates were denied licenses for meetings, KPU supporters were harassed, and the Voice of Kenya, most voters' only source of news, gave the party a blackout. In spite of this distorted electoral environment, KPU got more total votes than KANU but won only a quarter of the contested seats.[2]

In 1969, shortly before the next general elections, KPU was proscribed and its leaders detained. KANU's monopoly became complete. From then on, the only opposition" was provided by independent-minded members within the party such as Martin Shikuku, Jean-Marie Seroney, and J M Kariuki, and a few prominent dissidents outside the party such as Oginga Odinga. In theory, KANU remained open to criticism from within, but in practice the party's disciplinary provisions were used to stifle internal democracy. With no opposition parties, KANU members who did not toe the line had nowhere to go except the political wilderness.

[2] POLITICAL PARTY ORGANISATION AND MANAGEMENT IN KENYA AN AUDIT by the INSTITUTE FOR EDUCATION IN DEMOCRACY, 1998

Elections due in 1968 were postponed till 1969, and were held on a single-party basis, after the Kenya People's Union, formed in 1966, was banned. Kenya thus became once again a *de facto* one-party state, and President Kenyatta was re-elected unopposed in 1969 and 1974. He died in office in 1978, and was succeeded by the retired President Daniel Toroitich arap Moi, in line with the then Constitution of the Country.[3]

Moi pursued policies of political and economic repression which included excessive use of force, torture, detentions without trial, gross human rights violations, proscription of publications of dissenting views, abuse of taxation laws and application of worst forms of erosion of democracy to stamp out political opposition.

Kenya has had seven general elections of five-year term each since independence. After 1978 Moi was elected unopposed in three consecutive elections held in 1979, 1983 and 1988.

In 1982, after thirteen years of de facto one-partyism, Kenya became a de jure one-party state through the enactment of the Constitution (Amendment) Act Number 7 of 1982, which made KANU the sole legal political party.

From 1986 there emerged widespread agitation for constitutional reforms led by National Council of Churches of Kenya (NCCK) and religious bodies,

[3] Section 35 of the 1979 Constitution of Kenya as amended by Act No. 5 of 1979

university lecturers and students, politicians and other individuals. From 1989 the international community joined in the clamour for political and institutional reforms.

It was only after intense pressure was exerted on Moi that he conceded to an amedment of the Constitution of Kenya by repealing a **section 2A and section 9 (1) (2)** of the Constitution of Kenya, Revised edition 2001, to reinstate multipartism in Kenya and limit the term of service of a President to two terms of five years each. Following that action many political parties were registered, some of them along ethnic lines. A total of eight political parties contested the 1992 elections. The major political parties then were the Democratic Party (DP) led by Mwai Kibaki, Forum for Restoration of Democracy(FORD-Asili) led by Kenneth Matiba, FORD-Kenya (led by Oginga Odinga) and KANU (led by Moi). Needless to say Kenyans paid a huge price as some were killed and maimed while others lost lives and property in the clamour for a new Constitutional order.

On the basis of the amended Constitution, in 1992 multi-party elections were held. These elections were characterised by gross irregularities, abuse of the electoral laws and systems, threats of violence and use of actual violence among supporters of different political parties leading to a loss of about 1500 lives and displacement of more than 300 000 people.

President Moi still retained power admist serious protests and contests mounted by the opposition. A suit was filed challenging the outcome of the elections.

But the Court upheld the results of the elections and Moi not only continued with his policies of political and economic repression but also put in place mechanisms to undermine and dismantle multipartism. The 1988 elections were held under a system of queue voting popularly known as 'mlolongo' elections had been hugely discredited and in 1990 the clamour for a new Constitution gained momentum and the process of Constitution making started.

The next general elections were held in 1997 and were similarly marred by violence and irregularities which had indeed started six months before the actual voting.[4] It resulted in the death and displacement of more than 100 and 100 000 persons, respectively.[5]

In November 2001, President Moi nominated Mr Uhuru Kenyatta, to Parliament and appointed him to the Cabinet, in an effort to rejuvenate the KANU leadership ahead of the 2002 General Election. In March 2002, in the course of his term as a president and to maintain his grip on power in the

[4] Human Rights Watch, "playing with fire: Weapons Proliferation, Political Violence and Human rights in Kenya." New York,(2002)(available at www.hrw.org/legacy(reports/2002/Kenya.)

[5] Ibid.

face of ever growing opposition, Moi entered into a 'merger' with Raila Odinga of the smaller National Development Party (NDP). President Moi remained Chairman of KANU, while the NDP leader, Mr Raila Odinga, became Secretary-General of the party.

The next general elections were held in 2002 and since Moi had served for two (five-year) terms as a president, he was constitutionally barred from running. He nominated Mr. Uhuru Kenyatta as KANU's presidential candidate. This resulted in mass exodus of hitherto diehard KANU members and supporters to form a coalition with the existing opposition political parties. On 14 October 2002, the day of Mr Kenyatta's official nomination, influential politicians carried out their threat to leave the ruling party, and took over the then little known fringe party, the Liberal Democratic Party (LDP).

Talks immediately began between the LDP and other opposition groups on forming a "super alliance". The talks resulted in the creation of the National Rainbow Coalition (NARC) – an alliance on a 50-50 basis between the National Alliance Party (NAP) and the LDP. The main goal of the coalition was to present a formidable candidate to face KANU's nominee. NARC was predicated on what came to be known as a united Kenya which was representative of all tribes and all interest groups. It was a reflection of Kenya's unity, good governance and peaceful coexistence of all Kenyans irrespective of their faith, race, tribe and political affiliation. This is to be seen

in what came to be known as a memorandum of understanding (MOU) which is said to have spelt out power sharing between the various factions in the coalition inorder to take into account the interest of all.

For purposes of elections in 2002, NARC presented Mwai Kibaki as the Presidential candidate against KANU's Uhuru Kenyatta. Mwai Kibaki won the elections.

Notably, these elections were not characterised by any form of serious violence and irregularities that were witnessed in the earlier general elections. They were adjudged to be free and fair both locally and internationally.

Accordingly, the elections were seen as a turning point in Kenya's democratic evolution in relation to the electoral process, or so the people of Kenya and the international community thought.

The coalition set up a Government known as the NARC Government under the leadership of President Mwai Kibaki. However, immediately thereafter sharp differences arose and disatisfaction was expressed by some members ot the coalition parties over the mode of distribution of Cabinet posts and other senior Government positions. The LDP wing headed by Mr. Raila Odinga felt short-changed and betrayed citing gross breach of the pre-election pact under the MOU. The agitation for equity, equality and fairness

by the LDP wing continued both inside and outside parliament considerably disrupting Government operations.

In 2005, a referendum to ratify a draft Constitution was held and this almost tore the Country into two; between those who supported and oppossed the draft.

There were two symbols at the referendum, a banana for **'yes'** and an orange for **'no'**. The banana was associated with the Government of the day while the orange was associated with disgruntled LDP and KANU members. The oranges carried the day and this was seen as victory for those who were anti-Kibaki Government. The outcome in that referendum was the last straw that killed the NARC dream.

A new political party called the Orange Democratic Movement - Kenya (ODM-K) was formed by the Orange **('No')** group in preparation for the next general election and with the sole purpose of wrenching power from President Mwai Kibaki. Similarly, President Kibaki together with his supporters, formed the Party of National Unit(PNU) as a vehicle for his re-election bid. As the next general elections set for 2007 approached, there were three main political front runners in the presidential elections:

i) President Kibaki's PNU,

ii) Raila Odinga's ODM,

iii) Kalonzo Musyoka's ODM (K)

In the run up to, during and after the elections, politicians made inflamatory statements intended to incite one segment of the population against each other. And when Kenyans went to the polls on 27th December, 2007, they were divided along tribal and regional lines. It took about three days for the final results to be released. This gave rise to suspicion among the ODM supporters that the results were being interfered with in favour of the PNU side. As the results were trickling in there were sporadic incidences of violence in some parts of the Country.

On the evening of 30th December 2007, the then Electoral Commission of Kenya(ECK) declared Mwai Kibaki the winner of the presidential elections placing him ahead of Raila Odinga by about 232, 000 votes. This drew great protest from Raila Odinga and his supporters who were claiming that their victory had been stolen. There were calls for mass action to agitate against the results.

Immediately after the results were announced Mwai Kibaki was sworn in as President for a second term and after the swearing ceremony the Country became engulfed in uprecedented violence, resulting to thousands in deaths, displacement of persons and massive destruction of property.

On the eve of the year 2008, President Mwai Kibaki called for the "verdict of the people" to be respected, for "healing and reconciliation" to begin and warned that law-breakers would be punished.[6] On the other hand, Raila Odinga claimed that he was the winner of the presidential elections and state that he would not negotiate for power sharing with Kibaki nor would he acknowlege Kibaki's legitimacy. With these pronouncements, the stage was set for fully fledged violence characterised by gross human rights violations never witnessed before.

The violence continued for about two (2) months resulting in the brutal killing of about 1,200 persons, displacement of about 350,000 people, and rape of women, defilement of children and massive destruction of property.[7]

Although as stated the violence lasted for about two months, most of the carnage and destruction of property occurred in the first 14 days after December, 27th 2007. The magnitude of the violence which came to be know ans the Post Election Violence (PEV) stunned both Kenyans and the international community.

This called for the intervention of the African Union (AU) and other international actors. Notably, of the international actors, were the former UN

[6] Crummen S.M "Incumbent declared winner in Kenya's disputed election" The Washington Post, December 31, 2007(available at www.Washington Post. Com)

[7] CIPEV, Report pp 345 - 346

Secretary General, Kofi Annan, former president of the Republic of Tanzania Benjamin Mkapa and the the former first lady of South Africa, Graca Machel. They put in place a process that came to be known as the National Dialogue and Reconciliation (NDR) which resulted in a negotiatiated power sharing settlement signed on 28th February, 2008 between the PNU and ODM led by President Mwai Kibaki and Raila Odinga respectively. As a result of the settlement a Government of National Unity (GNU) was formed on the basis of a legislation know as the National Accord (NA)[8].

In the GNU power was to be shared with President Mwai Kibaki retaining the presidency, Raila Odinga becoming the Prime Minister and Kalonzo Musyoka being the Vice President.

The NDR settlement had four agendas;

Agenda One of the National Accord:

- restoration of civil and political liberties

- cessation of violence against and between citizens

Agenda Two of the National Accord:

- resolving the post election humanitarian crisis

- reconciliation and national healing

[8] See National Accord and Reconciliation Act.

Agenda Three of the National Accord:

- Resolving the political crisis(power sharing)

Agenda Four of the National Accord:

- overcoming long term issues and providing solutions to mass poverty and unemployment, land reform, regional imbalances, and equity

- addressing national cohesion and reconciliation, transparency and accountability, constitutional reform, institutional reform of Parliament, the Judiciary and the Internal Security Apparatus including the police.

Of importance here is agenda No. 4 under which several commissions of inquiry were to be set up. Some of the Commissions were; the Commission of Inquiry on Post Election Violence (CIPEV) commonly know as the Waki Commission, the Independent Review Commission on Elections commonly known as the (Kriegler Commission, the National Ethnic and Race Relations Commission and the Truth, Justice, and Reconciliation Commission(TJRC).

For purposes of this report our emphasis is on the CIPEV (Waki Commission) which was established to investigate the post-election violence and the factors which influenced the human rights violation. It was to investigate, among others, 'the facts and circumstances surrounding the post-election violence, the conduct of State security agencies in their handling of it, and to

make recommendations concerning these matters and related matters'.[9] After *interalia* collecting and collating evidence, hearing various witnesses, making visits to the areas affected by the violence, the Commission submitted its report to President Mwai Kibaki and Prime Minister Raila Odinga and later to Dr. Kofi Annan.

Part of the Commission's findings were as follows, that:[10]

(i) 1,133 Kenyans had been killed, of whom 1048 were male, 74 female, 11 children; 119 remain unidentified, and of these 405 died from gunshot wounds,

(ii) 3,561 injured,

(iii) Approximately 350,000 persons were internally displaced,

(iv) 117,216 private properties destroyed or looted,

(v) 491 Government-owned properties destroyed or looted,

(vi) women and children were exposed to sexual assault and exploitation,

(vii) Government security agencies were responsible for some of the killings and maiming of people,

[9] CIPEV., Report, p. Vii

[10] CIPEV., Report, pp.345-346

(viii) the chain of criminal justice system is generally weak, epecially at the investigation level, this defficiency as resulted in the detoriation of the rule of law promoting impunity,[11]

(ix) In the view of the Commission, these constituted crimes against humanity.

Arising from these findings, the key recommendation of the CIPEV was that those who bore the greatest responsibilty for the crimes be prosecuted before a Special Tribunal for Kenya (STK) established by an Act of Parliament. In this regard the report stated 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." [12]

The Commission recommended that the Special Tribunal was to be set within a specified time frame and in the event Kenya was unble or unwilling to investigate and prosecute the suspects, the jurisdiction of the International Criminal Court (ICC) under the Rome Statute would be invoked. At this point

[11] CIPEV., Report pp.443-469

[12] CIPEV., Report, pp. 472-475

it is important to note that Kenya is a signatory to and ratified the Rome Statute in 2005 and by the dint of Article 2 (5) and (6) of the Constitution, the statute is deemed to be part of the laws of Kenya under this Constitution.

Parliament did not legislate for the setting up of the Special Tribunal within the specified time. That is why the Prosecutor of the ICC, Moreno Ocampo was authorised by the pre- trial chamber II to commence investigations in relation to crimes against humanity allegedly commited during the occasion of PEV.

As a result six Kenyans were indicted at the ICC. The court confirmed charges against four of the suspects and they are awaiting trial. The charges against the other two were not confirmed and they were discharged.

Going back to the immediate post-election violence period Kenya domesticated the Rome Statute in 2008 through the enactment of the International Crimes Act, No. 16 of 2008 (IC Act) with a commencement date of 1st January, 2009.

The preamble of the Act provides that it is;

"**an Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions".**

Sections 2, 6 and 7 of the Act define the crimes to be tried under the Act while **section 8 (2) provides that a trial of the crimes in Kenya shall be conducted in the High Court.**

On 9th May, 2012 and agenda was deliberated before the JSC on the possibility of operationalizing the IC Act and it was as a consequence of that agenda that this committee was set up as stated in the introductory part above.

The Chief Justice urged the Committee to broaden its thinking around the establishment of an International Crimes Division of the High Court of Kenya. He prevailed on the Committee to, during its conceptualization and design of the architecture of this court, devise mechanisms of vesting on the court expansive mandate to deal with other international crimes and transnational crimes other than having jurisdiction only limited to international crimes as proscribed in Kenya's International Crimes Act, 2008.

The Chief Justice envisages a situation where an International Crimes Division of the High Court shall deal with all international crimes and if possible handle transnational crimes. Kenya is faced with all these challenges and it will be only reasonable to plan on how to administer justice as regards all international crimes and transnational crimes through the proposed international crimes division.

The JSC now finds itself in the position of having to play a gigantic and momentous historic role of putting in place mechanisms to deal with and eliminate the culture of impunity that has for years been deeply ingrained in the socio-political fabric of the Kenyan society. This would be in sync with the reform process heralded by the Kenya Constitution 2010.

It is with this background that the Judicial Service Commission set up a Working Committee of the JSC on the establishment of the International Crimes Division of the High Court to enable it advise the JSC with authority.

3. Terms of Reference

i) To look into modalities of establishing an international crimes division of the High Court, to hear and make determination on the pending post- election violence cases. Further to deal with issues of capacity building for the division.

ii) To look into the possibility of expanding the jurisdiction of the international crimes division to prosecute other international and transnational crimes other than only dealing with the crimes proscribed under the IC Act, 2008.

iii) Conduct literature review.

iv) Consider various policy briefs and research on the subject of international law.

v) Carry out comparative studies from other jurisdictions including but not limited to Uganda and Rwanda.

vi) Prepare a report to be presented to the Judicial Service Commission within a time frame of two months.

4. Methodology

a) Analysis of relevant Kenyan laws, scholarly works, jurisprudence and international instruments,

b) Contribution by members of the committee, which were summarized into the following 18 issues and questions to be addressed in the report;

1) the legal framework guiding the establishment of the ICD,

2) Crimes under International Crimes Act, No 16 of 2008,

3) Jurisdiction of the Proposed ICD,

4) at commencement, how the proposed Division will deal with cases of international character that are pending before other Courts

5) Issues of Retrospectivity in law, especially with crimes which were committed during post-election violence,

6) Where will appeals from the ICD lie?

7) Subject matter jurisdiction of the ICD (will the proposed Division handles both criminal and civil matters?)

8) Legislation which needs to be amended

9) Training needs for members of staff of the ICD

10) Will special rules of procedure and evidence for the Division be formulated to guide its operations?

11) How to deal with the issues of restorative justice,

12) Will the Committee carry out comparative studies,

13) At what stage will the Committee hold consultative stakeholder meeting for the criminal justice system,

14) The proposed ICD structure

15) Number of judges, appointment, terms and conditions,

16) Capacity of staff serving in the registry

17) The seat of the Division

18) Witness protection programs

c) Comparative study visits to Rwanda and Uganda to find out how their International Crimes Divisions function.

5. Policy and Legal issues informing the Establishment of the Proposed International Crimes Division of the High Court.

5.1 Legal Framework

Article 165(1) of the Constitution 2010 which establishes the High Court ***as read with Article 165 (3) (e) of the Constitution which provide that "the High Court shall have- any other jurisdiction, original or appellate, conferred on it by legislation," and Section 8(2) of the International Crimes Act No. 16 of 2008*** which confer on the High Court the jurisdiction to try and punish for the international crimes provided in the Act.

Specifically, Kenya's High Court under Section 8(2) of the International Crimes Act, 2008 has the jurisdiction to conduct trials over persons who are responsible for international crimes committed locally or abroad by a Kenyan, or committed in any place against a Kenyan. That jurisdiction has been in place since 1st January, 2009, when the International Crimes Act, 2008 commenced. The Act ratified the Rome Statute which defines and incorporates the ***crimes of genocide, war crimes and crime against humanity*** *into Kenyan law.*

The procedure for trial and punishment of offences under the International Crimes Act, No 16 of 2008 is provided under Section 8 which provides that;

8. A person who is alleged to have committed an offence under section 6 may be tried and punished in Kenya for that offence if:

(a) the act or omission constituting the offence is alleged to have been committed in Kenya; or

(b) at the time the offence is alleged to have been committed

(i) the person was a Kenyan citizen or was employed by the Government of Kenya in a civilian or military capacity;

(ii) the person was a citizen of a state that was engaged in an armed conflict against Kenya, or was employed in a civilian or military capacity by such a state;

(iii) the victim of the alleged offence was a Kenyan citizen; or

(iv) the victim of the alleged offence was a citizen of a state that was allied with Kenya in an armed conflict; or

(c) the person is, after commission of the offence, present in Kenya

(2) A trial authorised by this section to be conducted in Kenya shall be conducted in the High Court.

The High Court therefore has jurisdiction to try and determine cases provided for under section 6 of the International Crimes Act and since The

High Court contemplated under Section 8 (2) of the IC Act, 2008 already exists as established by Article 165 (1) of the Constitution of Kenya, 2010, The CJ has the power to create a division of the High Court to deal with international crimes. That power is provided for in Section 5 (2) (a) and (b) of the Judicial Service Act, No. 1 of 2011 as read with Article 161(2) (a) of the Constitution.

5.2 Crimes under the International Crimes Act, No 16 of 2008

Under the International crimes Act, 2008, international crimes include genocide, crimes against humanity, or War crimes[13]. These crimes are given the meaning ascribed to them under the Rome Statute and Section 6 of the IC Act creates and defines for following serious international crimes:

- genocide;
- crimes against humanity
- war crimes,
- conspiracy to commit any of the three crimes
- being an accessory to any of the three crimes.

Section 6 (3) provides as follows with regard to sentences upon conviction for the above crimes:

[13] Section 6 of ICC Act, 2008

> "**A person who commits an offence ... shall on conviction be liable –**
>
> **(a) To be punished as for murder, if an intentional killing forms the basis of the offence; or**
>
> **(b) To imprisonment for life or for a lesser term, in any other case."**

By virtue of Section 6 (4) of the Act, the term 'crime against humanity' takes the meaning ascribed to it in article 7 of the Rome Statute and it includes an act defined as a crime against humanity in conventional international law or customary international law. The term 'genocide' has the meaning ascribed to it in article 6 of the Rome statute and a 'war crime' will have the meaning given under paragraph 2 of article 8 of the Rome Statute.

The elements of these crimes are as published by the International Criminal Court and Since the envisaged International Crimes Division shall adopt the rules of procedure and evidence that have been set out by the ICC, to deal with genocide, crimes against humanity and war crimes; it would be appropriate for the ICD to adopt the elements of crimes as they have been described by the ICC.

Act No. 16 of 2008 also provides for offences against the administration of justice.[14] These are offences that may arise during the prosecution of the main offences and they include:

a) Bribery of judges and officials;
b) Obstructing of justice;
c) Obstructing officials;
d) Perjury;
e) Witnesses giving contradictory evidence;
f) Fabricating evidence;
g) Offences relating to affidavits;
h) Intimidation;
i) Retaliation against witnesses.

These are lesser offences explaining why Act No. 16 of 2008 provides that they may be tried in other courts of competent jurisdiction.

5.3 Jurisdiction of the Proposed ICD

The purpose of establishing proposed International Crimes Division in the High Court is to deal with the prosecution of the pending post-election cases and other international and transnational crimes. The need of establishing this division arose as explained elsewhere above, after the Government

[14] Section 9-17 of the ICCA,2008

failed to establish the special tribunal for Kenya, as recommended by the Waki commission.

A proposal to the Committee to consider expansion of the jurisdiction of the proposed International Crimes Division; to allow certain other core international crimes and transnational crimes to be brought into the ambit of the division in addition to the crimes provided by the ICA has been made and the issue is whether this proposal should be taken up, and reasons for doing so if at all.

5.3.1 International and Transnational crimes

International criminal law is currently subdivided into international criminal law *stricto sensu* (core crimes) and crimes of international concern (treaty crimes). Wise in his book explains that in its strictest possible sense, international criminal law applicable in an international court having general jurisdiction to try those who commit acts which international law proscribes and which it provides, should be punished.[15]

Most states, Kenya included, have not been capable of addressing the problem of transitional organized crimes on the domestic level; states have also equally been unable to address the problem through international efforts. That is why Gastrow correctly notes that Kenya ***"is in fact weakening***

[15] Wise, 'Codification: Perspectives and Approaches'.

due to a process of internal decay"[16] caused by ***"powerful transnational criminal networks white-anting state institutions and public confidence in them."***[17] He continues to state, that ***"Termites are at work, hollowing out state institutions from the inside. As a result, development is being hampered, governance undermined, public trust in institutions destroyed, and international confidence in Kenya's future constantly tested."***[18]

The **United Nations Convention against Transnational Organised crime, also called the Palermo Convention**, which entered into force on September 29, 2003,[19] requires states to criminalize certain organized crime activities and provide international cooperation through extradition and mutual legal assistance. However, the Convention lacks international standards in defining organized crime, for the following reasons;

First, the Convention fails to provide a uniform international definition of organized crime, perpetuating inconsistencies between domestic criminal laws, which organized crime groups can exploit. The Palermo Convention defines "o**rganized criminal group"** as *"a structured group of three or more persons, existing for a period of time and acting in concert with the aim of*

[16] P. Gastrow, Termites at work: Transnational Organized Crime and state Erosion in Kenya at p.2

[17] Ibid.

[18] Ibid

[19] *See* United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 40 I.L.M. 335 art.16, and 18. [hereinafter Organized Crime Convention].

committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."[20] "**Serious crimes**," in turn, are defined as *"conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."*[21] Because domestic laws, and not international standards, determine this aspect of the definition, some states may change the penalties in their domestic criminal statutes to remove crimes from the scope of the Convention. This would erode the international community's ability to cooperate to combat and prevent transnational crime, particularly in the areas of extradition and mutual legal assistance that are focal points of the Convention.

Second, the Palermo Convention does not provide for any international authority or for any other measures to enforce its provisions. Instead, the Convention expects each party to adopt domestic measures to implement provisions of the Convention. Because the Convention lacks any measures to guarantee that parties fully implement its provisions or penalize violations, parties may disregard their obligations without implications from other parties or from any international body.

[20] Ibid art. 2 (a).

[21] Ibid art.2(b).

Thirdly, The Convention lacks an enforcement mechanism thus undermining its efficacy in the international realm.

As to definition, there is no agreed definition of transnational crimes. Section 3 (2) of Palermo Convention gives characteristics of transnational crimes, namely;

i) **It is committed in more than one state;**

ii) **It is committed in one state by a substantial part of its preparation, planning. Direction or control takes place in another state;**

iii) **It is committed in one state but involves an organised group that engages in criminal activities in more than one state; or**

iv) **It is committed in one state but has substantial effects on another state.**

Three protocols supplement the Convention, and they further define the scope of transnational crimes. These are the:

(1) **Protocol to prevent, suppress and punish trafficking in persons, especially women and children;**

(2) **Protocol against the smuggling of migrants by land, sea and air;**

(3) **Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.**

Boister has defined transnational as crimes that have actual or potential effect across national borders and crimes which are intra-State but which offend fundamental values of the international community.[22]

The word "transnational" describes crimes that are not only international (that is, crimes that cross borders between countries), but crimes that by their nature involve border crossings as an essential part of the criminal activity.

Transnational crimes also include crimes that take place in one country, but their consequences significantly affect another country. Examples of transnational crimes include: human trafficking and smuggling, smuggling/trafficking of goods (such as arms trafficking and drug trafficking and illegal animal and plant products and other goods prohibited on environmental grounds (e.g. banned ozone depleting substances), money laundering, sex slavery, terrorism offences, torture, apartheid and crimes carried out by organized crime organizations.

The jurisdiction of international crimes covers the interest of international society as whole. **The Princeton Principles on universal Jurisdiction**[23] clearly demonstrate that Universal jurisdiction in criminal law is based solely on the

[22] Boister, Neil (2003). "Transnational Criminal Law?". *European Journal of International Law* **14**: 953, 967–77.

[23] *Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, Princeton, New Jersey, 2001.

nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or the any other connection to state exercising such a jurisdiction.

Jurisdiction over extra-territorial transnational crimes is more limited, because it is ordinarily only established when a direct injury is threatened or caused to the state taking responsibility. Such jurisdiction is usually dependent on the terms of a particular suppression convention and that is one of the main reasons why transnational crimes are excluded from the jurisdiction of the ICC; absolute universality does not apply to transnational crimes.

5.3.2 Elements of international crimes

According to Bassiouni, "crimes have an international element if they are inconsistent with a fundamental norm of international law and thus violate a *jus cogens* norm. They will do so if they are

(a) sufficiently serious to constitute a threat to the international community, and/or

(b) so egregious that they shock the conscience of humanity. "[24]

[24] See Neil Boister Transnational criminal law at pg.964

In other words, protecting international interests like International peace and security or the most important basic common values of mankind like life and human dignity is the principal purpose of international criminal law.

International criminality may involve many small actions that threaten individual human rights and interests, but its collective public nature marks out an extraordinary gravity that gives the individual acts the singular potential to threaten international values or interests. International criminality is also characterized by state involvement, which makes it impossible to expect justice to be carried out by the state itself and requires the exceptional measure of international law superseding national law. In essence then, ICL has a unique international element in the sense that it proscribes conduct that threatens international order or international values.

From the analysis above, we may draw a conclusion that very outrageous or state-implicated harmful conduct which threatens general human interests has to be suppressed by humanity acting as a whole. Going down the scale, harmful conduct that crosses borders or threatens cross-border morality may only require affected states to act together (co-operation of the affected states). Finally, harmful conduct that only affects interests within states can be dealt with adequately by states acting alone.

The distinction in the type of international society protected by International criminal law and transnational criminal law (TCL) is attested by a distinction in the density of institutionalization of these legal systems.

Abi-Saab's law of legal physics is that *'each level of normative density requires a corresponding level of institutional density in order to enable the norms to be applied in a satisfactory manner.'*[25] The establishment of individual penal responsibility under International criminal law has required a greater density of institutionalization than that required to suppress transnational crimes. In order to suppress state-implicated conduct in war crimes and related crimes, states have had to cooperate to hold individuals responsible for these actions. Friedman notes that individual criminal responsibility *'presages the inclusion of individuals as passive subjects of international law'.*[26] The establishment of the ICC, the application of absolute universal jurisdiction and the classification of crimes as international crimes are all institutional manifestations of the application of individual criminal responsibility under international law to certain offences.

Transnational crimes are not confined to the boundaries of any one state. Transnational criminal activities have existed in different forms since the ancient times, but in the modern times patterns of organised crime and

[25] Abi-Saab, 'Whither the International Community?', 9 *EJIL* (1998) 248, at 256.

[26] W. Friedman, *the Changing Structure of International Law* (1964), at 168 and 247.

money laundering have become more complex than they have been at one point in history. This is due to developments technology and the emerging world order which have undermined the conventional parameters of state sovereignty and the inviolability of national boundaries.[27] It is in this context that transnational crime has established itself as one of the most serious and violent manifestations of the modern criminal world. Worldwide transnational crimes have been considered as a major threat to human security.

The following are crimes classified as transnational crimes;

a) Money Laundering and Transnational Organised Crimes

Money laundering is the process of disguising the unlawful source of criminally derived proceeds to make them appear legal. This can be done either by disguising the sources of the money, changing the original form or moving the money to a place where it is less likely to attract attention.

Money laundering is predominantly carried out through the financial sector and it involves three stage or processes. First is the placement of the money obtained from an illegal activity in the financial market through the banks. Second, layering the illegal money by separating the money from the original criminal activity by creating complex layers of financial transactions designed

[27]Sarkar and Tiwari, "Combating Organised Crime: A case study of Mumbai City", *Fautlines*, vol 2, available at, www.satp.org (accessed last on 10 October 2012).

to disguise the audit trail and thirdly, integrating the illegal money to the financial market as money acquired legally by using legitimate transaction in order to disguise the illicit proceeds.

Article 3(1) (b) and (c) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 also known as (the Vienna Convention) defines money laundering as the transfer of property while knowing that such property was derived from an offence dealing with narcotic drugs and psychotropic substances.

This definition excludes the proceeds of other criminal activities such as tax evasion, fraud, embezzlement, misappropriation or theft of public funds, illicit trade in arms and kidnapping.

Although a significant portion of laundered funds come directly or indirectly from the trade in illicit drugs, considerable funds and property are derived from numerous other illicit activities. Myers has observed that significant contributions to the pool of laundered money derive from organised crime, tax evasion and fraud in its many varieties[28] (e.g. trade fraud, bank and financial fraud, medical, insurance and other frauds), the illegal arms trade and public sector corruption.

[28] J.M. Myers 'International strategies to Contro Monet Laundering' (1998) available at www. Iccir.law.ubca.publications/Report/Myer.

Other international instruments have however expanded the above definition of money laundering to include other predicate offences. For instance, the Palermo Convention requires all the state parties to apply the Vienna Convention's definition of money laundering to other widest range of predicate offences.

Further, The Financial Action Task Force on Money Laundering (the FATF),which is recognised as the international setter of standards for anti-money laundering efforts, defines money laundering as the processing of criminal proceeds to disguise their illegal origin in order to legitimise the ill-gotten gains of the crime. Additionally, in its Forty Recommendations for fighting against money laundering, the FATF incorporates the Vienna Conventions technical and legal definition of money laundering and recommends expanding the predicate offences of that definition to include all serious offences.

In view of the foregoing, money laundering simply means processing criminal proceeds acquired from commission of serious crime in order to disguise the original source. It therefore follows that money launderers have three objectives: to disguise the ownership and source of money, to maintain control over the money and to change the form of the money. As a result, money laundering does not include one but a number of offences, such as bypassing compulsory reporting requirements or registration stipulations and

contravening legislation that prohibits certain types of transaction with the proceeds of crime.

On the other hand, transnational organised crime is a complex concept that is difficult to grasp and lends itself to many definitions. The International Secretariat of INTERPOL was the first to define organised crime, at the International Colloquium on Organised Crime as "any association or group of persons engaging in a continuing illegal activity whose aim is to make profits without regard for national frontiers". The Palermo Convention has not defined organised crime explicitly but has defined organized criminal group to mean a structured group of three or more persons, existing for a period of time which is acting with the aim of committing one or more serious crimes or offences established under the convention so as to obtain directly or indirectly a financial or other material benefit.

Anti-money laundering legislation in Kenya has developed on a piecemeal basis. Before 1994 there was no legislation against money laundering. During that year the Narcotic Drugs and Psychotropic Substances Act was enacted, which made it an offence to launder the proceeds of drugs. It thus covered only the proceeds of drug trafficking, excluding money earned from other criminal activities. The Anti Corruption and Economic Crimes Act was only enacted in 2003, extending anti-money laundering legislation to the proceeds of corruption and economic crime. The new anti-money laundering

legislation, The Proceeds of Crime and Anti-Money Laundering Act of 2010, came into force in June 2010.

Its preamble provides that it is an act of "Parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes".

It needs to be stated that these statutes merely create offences in relation to the laundering of proceeds of the criminal activities that they set out to control, that is corruption, economic crimes and drug trafficking. The statutes neither intend nor attempt to set up institutions to detect and punish money laundering, which may occur notwithstanding their provisions.

Cyber-laundering

The term cyber-laundering was introduced nearly a decade ago in order to describe money laundering that used newer kinds of payment systems. It is used to refer to electronic wire transfers utilizing the internet. Money launderers and those committing organised crimes can use the internet in various ways; they can seamlessly transfer money to internet banks; they can use illegal internet casinos as a mechanism to generate funds or they can even transfer money electronically to a private server which can be browsed by individuals using File Transfer Protocol. In order to understand the

complications of cyber laundering one must understand the concepts of electronic money, stored value cards and encryption technology (masking the account holder's identity by mathematically encoding the transaction with a special formula called a 'key'. The receiving party must have the 'key' to successfully decrypt a coded transaction).

While current international money laundering laws are designed to create an audit trail by allowing enforcement agencies to track suspicious transactions when they are first deposited in banks, electronic money's instantaneous and anonymous nature allows transactions to bypass the existing safeguards. The cyber launderer can evade current anti-laundering tactics by depositing e-money in an internet bank, without any reporting requirements, because e-money accounts usually operate independent of financial institutions. In addition e-money affords the account holder complete anonymity to conduct internet transactions with virtually no means for identifying the purchasers, because any computer connected to the internet can access e-money accounts.

The Convention on Cyber Crime adopted by the European Council in November 2001 is the deliberate commitment to dealing with cybercrime. The Convention pursues three aspects. First it devises a common definition of criminal offences, which enables harmonization of national laws to define

cyber appropriate investigation methods, and to redesign ways of co-operating internationally against cybercrime.

The Convention groups nine cyber offences into four categories. They include illegal computer access, the misuse of computer devices and computer related forgery all of which are committed when money is laundered in the cyber space.

Second, it was recognized that applying ordinary investigations techniques to cybercrimes was futile. The lack of clear rules on collection and presentation of reliable electronic evidence to the courts presents major hurdles to the authorities. The Convention thus provides basic rules for certain procedural methods e.g. in compelling a person to produce certain data stored in a computer.

Third, as cybercrimes do not acknowledge geographical borders, it is important to enhance the ability of the authorities to conduct investigations on behalf of other states and to provide for international collaboration if required. Thus the convention is keen on establishing application of traditional forms of international cooperation and also implementation of new procedural methods especially those on the acquisition of data and also on data preservation touching on cybercrime.

While defining organised crime, several attributes of such crimes needs to be considered. For instance, John Dellow, Assistant Commissioner, Metropolitan Police, London, ascribes three basic features to organised crime.

Firstly, organised crime involves any group of individuals that is structured, sophisticated and widely spread across nations. Secondly, this group seeks to operate outside control of the people and their government and thirdly, this group is a continuing criminal conspiracy for profit and power and it uses fear and corruption in order to get protection from law.

The transnational crimes therefore includes organised crime of terrorism and piracy and also includes money laundering and all its predicate offences such as human trafficking, drug trafficking, smuggling of people and goods, tax evasion and fraud.

b) Human Trafficking

The Protocol to Prevent, Suppress and Punish Trafficking in persons, especially women and Children (also referred to as the **Trafficking Protocol**) is an international legal agreement annexed and supplements the Palermo Convention. The purpose of the Trafficking Protocol is to facilitate convergence in national cooperation in investigating and prosecuting trafficking in persons. An additional objective of the Protocol is to protect

and assist the victims of trafficking in persons with full respect for their human rights. The Trafficking Protocol defines human trafficking as:

[...] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

From the above definition, it therefore means that the elements of crimes against humanity may be appropriately interpreted to cover the organized crime acts of human trafficking, murder, and related violence. Accordingly human trafficking satisfies all the elements of crimes against humanity as

contained under the Rome Statute, where trafficking constitutes and includes the crimes against humanity of sexual slavery and enforced prostitution under Article 7(1) (g) and enslavement under Articles 7(1) (c) of the Rome statute. Enslavement is defined in Article 7(2) (c) as including trafficking in persons.[29]

The ICC elements of Crimes against humanity also define enslavement and sexual slavery to include trafficking in women.[30] Sexual slavery and enforced prostitution are considered subsets of enslavement.[31]

According to the ICC Elements of Crimes, enslavement exists when "[the] perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."[32] This definition agrees with the definition of "enslavement" that the International Criminal Tribunal for Yugoslavia (ICTY)

[29] Rome Statute of the International Criminal Court, art. 7(2)(c) ("'Enslavement' means the exercise of any or all of the
powers attaching to the right of ownership over a person and includes the exercise of such power in the Course of trafficking in persons, in particular women and children."). [hereinafter ICC Statute]

[30] ICC Elements of Crimes, *supra* note 17, arts. 7(1)(c) n.11 & 7(1)(g) n.18.

[31] *See* Machteld Boot, *Crimes Against Humanity: Analysis and Interpretation of Elements: Paragraph 1: List of Crimes*: *The Different Subparagraphs: "Sexual Slavery," in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINA L COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 123 (Otto Triffterer ed.,
1999 , at 142.) [hereinafter COMMENTARY ON THE ROME STATUTE].

[32] ICC Elements of Crimes, art. 7(1) (c).

Appeals Chamber in **Prosecutor v. Kunarac**.[33] Where the chamber set forth a non-exhaustive list of factors or indicia of enslavement to include *"control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."*[34]

c) Terrorism

Terrorism is an international crime provided in various international instruments. Recently Kenya enacted its first laws ever specifically targeting acts of terrorism through the Prevention of Terrorism Act, 2012, a law expected to make it easier to disrupt the networks of financiers and sympathisers terrorists use to carry out their crimes. Persons who engage in terrorism or help terrorists now risk life in jail or up to 30 years imprisonment without the option of a fine.

Under the new law, those convicted for assisting in the commission of terrorist's acts or found in possession of property intended for the commission of terrorist acts can be jailed for up to 20 years.

[33] *See* Prosecutor v. Kunarac, Case No. IT-96-23-A & IT-96-23/1-A, Judgment, pp. 117–18 (June 12, 2002).

[34] *Id.* P. 119.

The Act also provides stiff penalties for membership to terrorist groups, and recruiting, training and directing of terrorist groups and persons. The Act further amends two extradition laws, making it legal to send terror suspects abroad for trial.

Kenya has ratified the International Convention on Suppression of Terrorist Bombings and the OAU Convention on the Prevention and Combating of Terrorism, 1999. As such, the crime of terrorism can be dealt with under the proposed International Crimes Division.

d) Piracy

Since the nineteenth century, piracy in the high seas has been regarded as a universal crime in customary international law. As such all states have the jurisdiction to arrest and prosecute piracy suspects. The nature of pirate activity has always been indiscriminate since it targets ships regardless of where they belong or where they are bound hence the common expression that a pirate is *hostis humani generis* (an enemy of all mankind).

The legal definition of piracy in international law is found in the United Nations Convention on International Law (UNCLOS). Article 10 defines piracy to include illegal acts of violence or detention or depredation committed by

crew of a private ship for private ends (on the high seas against another ship or persons or property aboard such a ship).

The jurisdiction of a state over acts of piracy is based on the universality principle of the crime of piracy and the authority of the UN Security Council Resolutions where all states have jurisdiction to deal with the suspects of piracy regardless of whether they are apprehended on the high seas or territorial waters. Kenya has entered into a number of agreements with a number of states where captured suspected pirates are brought to Kenya to stand trial before the Kenyan courts. Section 69 of the Penal Code relates to the offence of piracy, though this section raises questions of interpretation since it is wider than the definition available under UNCLOS as it extends piracy activities to territorial waters only and is silent on piracy activities in the high seas.

Kenya has ratified the UNCLOS, and in reality therefore it means that it has jurisdiction both under the Convention and customary international law to try the offence of piracy.

For ages, piracy has been recognized as a universal crime, indeed it is the oldest known international crime and has been recognized by the UN as such and it is a threat to international peace and security generally being a universal crime of concern to the international community, it would be well placed to be handled within the jurisdiction of the proposed ICD.

Other Crimes considered

e) Computer Crimes

The current classes of crimes that can be classed under computer crimes are found in the Kenya Information and Communications Act. They include:

- S. 83U - Unauthorized access to computer data;

- S. 83V- Access to a computer system with intent to commit an offence

- S. 83W – Unauthorized Access to an interception of computer service

- S. 83X- Unauthorised modification of computer material

- S. 83Y- Damaging or denying access to a computer system

- S. 83Z – Unauthorized disclosure of password for wrongful gain, an unlawful purpose or knowing the disclosure will cause prejudice to another;

- S. 84A – Unlawful possession of devices or data for committing any of these offences person;

- S. 84B- Electronic Fraud - Fraudulently causing another to lose property by interfering with data or the operation of a computer system with intent to procure an advantage for himself or other;

- S. 84C – Tampering with computer source code where such code is required to be preserved by law.

- S. 84D – Publishing obscene information in electronic form.

- S. 84E – Publishing an electronic signature certificate for a fraudulent purpose.

- S. 84F – Unauthorized access to protected systems.

- S. 84G – Unauthorized alteration of mobile phone equipment identity or interfering with its operation.

- S. 84H. - Possession or supply of equipment for committing the above offences.

These classes of crimes do not necessarily have an international element, nor do they often do as they were created in the context of incidents that originate in Kenya. The sentences attached to them are also not as severe as some of the other crimes allocated to the proposed ICD. They should not therefore be included in the mandate of the ICD and can be tried at magistrate's courts.

f) Crimes under the Prevention of Organised Crimes Act No.6 of 2010

Crimes under the Prevention of Organized Crimes Act do not possess any international element, and cannot therefore be classified as international crimes; they only deal with organized criminal activity in Kenya.[35]

Section 3 of the Prevention of Organised Crimes defines **organised criminal activity** as follows;

3. A person engages in organised criminal activity where the person -

(a) is a member or professes to be a member of an organised criminal group;

(b) knowingly advises, causes, encourages or recruits another person to become a member of an organised criminal group;

(c) acts in concert with other persons in the commission of a serious offence for the purpose of obtaining material or financial benefit or for any other purpose;

(d) being a member of an organised criminal group, knowingly directs or instructs any person to commit a serious crime;

[35]Section 3 of Prevention of Organized Crimes Act No.6 of 2010

(e) threatens to commit or facilitate the commission of any act of violence with the assistance of an organised criminal group;

(f) threatens any person with retaliation in any manner in response to any act or alleged act of violence in connection with organised criminal activity;

(g) being a member of an organised criminal group with intent to extort or gain anything from any person, kidnaps or attempts to kidnap any person, threatens any person with injury or detriment of any kind;

(h) provides, receives or invites another to provide or receive instructions or training, for the purposes of or in connection with organized criminal activity;

(i) possesses an article for a purpose connected with the commission, preparation or instigation of serious crime involving an organised criminal group;

(j) possesses, collects, makes or transmits a document or records likely to be useful to a person committing or preparing to commit serious crime involving an organised criminal group;

(k) provides, receives, or invites another to provide property and intends that the property should be used for the purposes of an organised criminal group;

(1) uses, causes or permits any other person to use property belonging to an organised criminal group for the purposes of the activities of an organised criminal group;

(m) knowingly enters into an arrangement whereby the retention or control by or on behalf of another person of criminal group funds is facilitated;

(n) being a member of an organized criminal group endangers the life of any person or causes serious damage to the property of any person;

(o) organises, attends or addresses a meeting for the purpose of encouraging support of an organised criminal group or furthering its activities.

This means that crimes proscribed under the Prevention of Organised Crimes Act, are crimes affecting the interests of the state of Kenya alone and can be dealt with adequately by other courts and consequently should be excluded from the jurisdiction of the proposed ICD.

From the discussion above the jurisdiction of the proposed International Crimes Division can be expanded to try both core international and transnational crimes, namely:-

(a) genocide

(b) War crimes

(c) Crimes against humanity

(d) Human trafficking

(e) terrorism

(f) Money laundering

(g) Piracy

(h) cyber laundering

5.4 International Crimes Cases Pending in Other Courts

Under Section 8 (2) of International Crimes Act, No. 16 of 2008, only the High Court has jurisdiction to try international crimes and shall have supremacy over other courts in that regard.

Where criminal proceedings relating to an international are pending before other courts, one of the following options should be taken:

a) the ICD may formally request the court to defer its jurisdiction or

b) the court in which the matter is being heard may refer the case to the ICD

Where such request or referral is made, the proceedings in the other courts shall be terminated and the ICD will then take over the same and assume exclusive jurisdiction.

5.5. Retrospective Principal of legality

Black's Law Dictionary 9th ed., 2009 defines retrospectivity in law as "extending in the scope or effect to matters that have occurred in the past." So a retrospective law is one that is to take effect, with regard to time, before it was passed.

The right to protection from retrospective criminal law has generally been accepted without argument. Literature on the justification for the principle is scarce but it has become well accepted that individuals have such a right.

The principle has been enunciated in various declarations of human rights from 1789 until the present. Nevertheless, there are several examples in Australian and British laws where the principle has been ignored or (at the very least) circumvented.

Inpite of the rule of non-retrospectivity being one of the core components of the principle of legality; it has on a number of occasions presented a challenge to the domestic prosecution of international crimes.

The legality principle is very clear that laws must not impose criminal liability for acts that were not criminal offences at the time they were committed. This principle is packaged in two major but diverging versions. The first is to be found in the *Latin maxim* "*nullum crimen, nulla poena sine lege*," which translates as nothing is a crime except as provided by law and no punishment may be imposed except as provided by law (hereinafter *sine lege*); and the second is expressed in the maxim: "*nullum crimen, nulla poena sine lege scripta*," meaning nothing is a crime and no punishment may be imposed except by a written law (hereinafter *sine lege scripta*).

The distinction between the *sine lege* and *sine lege scripta* versions of the principle of legality is that while the *sine lege* version simply requires that the

crime and penalty be recognised by some law, which could extend to all possible sources of law such as treaty law, common law and customary international law, the *sine lege scripta* version bears a strict requirement of prior recognition of any crime or penalty in a written statute.

The history of the principle of non-retrospectivity

The principle that people should be free from retrospective law has been traced by Glanville Williams, to have been formulated first under Article 8 of the French Declaration of the Rights of Man of 1789, which reappeared in the French Constitution of 1791, and remains in the French Code Penal. It became part of the Bavarian Code in 1813, when Feuerbach formulated the *Latin maxim "nullum crimen sine lege, nulla poena sine lege*." It headed the German Penal Code of 1871 and was guaranteed by the Weimar Constitution. It is also clear that the principle had wide acceptance in Europe by the end of the nineteenth century.

From the *nullum crimen maxim*, jurists have deduced the principle of prohibition of retrospective penal laws. As early as 1651, Hobbes wrote:

"No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law."

This principle was stated in 1789 in Article 1, section 9(3) of the American Constitution which prohibited *ex post facto laws*. It has also been provided

for in various international instruments, for instance Article 7 of the European Convention on Human Rights provides that no one shall be held guilty of a penal offence made so retrospectively. Article 7 also includes the important proviso that no law;

"... shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

Further, Article 15 of the International Covenant on Civil and Political Rights (ICCPR) states, inter alia that;

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

Article 15 includes a proviso identical to that contained in Article 7 of the European Convention on Human Rights, except that the phrase "civilized nations" is replaced by "the community of nations".

There has been little discussion of the basis for the principle of protection from retroactive criminal law. Proponents of the principle's validity tend to accept it as axiomatic. In the leading Australian case on retroactive legislation, **Yrttiaho v. Public Curator** (Queensland), the High Court discussed, at some length, the existence of a presumption against the retrospective operation of a statute. However, at no stage did the Court

justify this presumption. The High Court drew a distinction between statutes that divest vested rights and statutes that are merely procedural.

In the absence of clear words to the contrary, examples of the former type are to be construed as prospective, but merely procedural statutes are construed as being retrospective. This interpretation would seem to imply that the presumption against retrospectivity exists (in cases where the statute divests vested rights) to ensure that "justice is done".

Some supporters of the principle claim that prohibiting retrospective law-making contributes to the stability and certainty of the justice system. In the words of Friedrich Carl von Savigny:

"... an immovable [sic] confidence in the authority of the existing laws is extremely important and desirable. I do not mean confidence in their permanent endurance ... But I mean the confidence that their authority and efficacy will be unassailable as long as they subsist."

Another argument for retrospectivity is touched upon by Williams. Williams[36] claims that one corollary of the nullum crimen maxim is the principle that penal laws should be accessible and intelligible. This principle is closely linked to the principle that ignorance of the law is no excuse, because that principle relies upon the accessibility of the law for its justification.

[36] G.W.A Schabas,(2003) The Abolition of Death Penalty in the International Law, 3rd ed. Cambridge University Press.

Retroactive laws are inaccessible in the sense that they are not knowable at the time when the erstwhile legal acts or omissions occur. Clearly, application of the *maxim "ignorantia juris non excusat"* to such a situation is unfair as that ignorance is beyond the control of the person in question.

Retrospectivity means that even a person well-informed about the law will be ignorant of the illegality of her or his acts because those acts are not deemed illegal until the retroactive law is made. So, it can be seen that retroactive laws are at odds with the principle that ignorance of the law is no excuse.

Supporters of the principle of non-retrospectivity point to the scope for abuse of individual liberties that exists where retroactive law is allowed. In the words of one commentator:

"... Although the advantage of a [retrospective] system of judicial discretion the protection of society against injuries unforeseen by the law-giver is recognized ... the protection of the individual against tyranny is deemed a higher necessity."[37]

[37] M.A. Drumbl,(2007) Atrocity, Punishment and International Law, Cambridge University Principle.

The formulation of the principle of non-retroactivity in Article 15 of the ICCP R has been justified as protecting the rights of the individual. According to one scholar:[38]

"... the main principle of Article 15(1) ... is that criminal law should be applied as it stood when the offence was committed, *nulla poena sine lege*. The purpose of the main principle is to proscribe, and thus protect individuals against, ex post facto criminal laws operating to their detriment.

The exception reasonably departs from this safeguard when its purpose is absent; on the contrary, it not only allows, but prescribes the retroactive operation of the new law when it is to the individual's benefit.

It is argued that there has not been any explanation advanced as to why the individual must be so protected except on the principle that it is based on concern for foresee ability and justice. Thus most proponents of the principle couch their arguments in terms of "fairness" and "justice". Typical is the opinion of Sheldon Glueck in 1944 for example, that; *"To depart from the rule of **nulla poena sine lege** would mean to let international law sink to the depth of Nazi jurisprudence, amongst whose minor "discoveries" is the abandonment of a rule which the rest of the civilized world quite rightly continues to hold in esteem."*

[38] A. Eser 'Individual Criminal Responsibility' In Antobio cases. Paola Gaeta, John Jones(eds) The Rome statute if the ICC: A commentary, Oxford University Press(2007) 767-822

So, indirectly, the principle of non-retroactivity is given legitimacy by reference to ex post facto law-making in Nazi Germany (discussed below).

If apologists for the principle of protection from retroactive criminal laws are few, then apologists for retroactivity are fewer still. Savigny makes the point that:

"A new law is always enacted in the persuasion that it is better than the former one. Its efficacy, therefore, must be extended as far as possible, in order to communicate the expected improvement in the widest sphere."

But he immediately rejects any suggestion that the expected improvement of a law should extend as far as acts which pre-date that law; as he also argues that *"... the natural limits of this authority of a new law are indicated by the principle of non-retroactivity ..."*[39]

Williams points out that the principle of non-retroactivity is associated with the retributive theory of punishment, as opposed to the deterrent theory. If punishment is justified as a deterrent to future wrongdoing, then new laws can only apply prospectively. Unless the previous wrongdoer expected to be punished, the punishment would be useless as a deterrent. Furthermore, announcement of the change in the law should be sufficient deterrent to

[39] R.Savigny,(2004) Conceptualizing In Social and Legal Studies Journal, 27-36. Access to Justice and Victims "Rights in International Sentencing,"

future wrongdoers; punishing previous wrongdoers would have no deterrent effect upon those future wrongdoers.

However, if punishment is viewed as society's retribution for moral wrongdoing, then retroactivity can be justified. As Williams puts it: *"Morality can have no special exemption for those who "commit the oldest sins in the newest kind of ways".*[40]

Williams then argues that this approach tends to suggest a wide role for retroactivity, a role which draws criticism that the adoption of retroactivity as a general principle is altogether inadmissible because it is unjust.

But, accepting that retrospectivity has a role in the retributive punishment of wrongdoers does not mean that retrospectivity need be a general principle. Proponents of retrospectivity only argue for the making of retroactive laws in exceptional circumstances especially in situations where the wrongdoer's acts or omissions were morally wrong, though legal at the time that they were committed, that is, where the wrongdoer has transgressed the "natural law".

This argument is not much favoured amongst jurists because it smacks of arbitrary, and unpredictable, law-making. Yet, the case studies discussed below indicate that law-makers, judges and legislators have been prepared to take a retributive approach to punishment by ensuring that their decisions

[40] W.A Schabas (supra note 36)

or legislation have retrospective effect. In so doing, they have accepted that there is a role for the retrospective operation of criminal law in order to punish wrongdoers whose crimes, even if legal at the time, were always immoral.

Four examples of retrospective law-making are discussed below: the Nuremberg trials of the late 1940s and the decision of the House of Lords in Shaw v. Director of Public Prosecutions in 1961; ICTY and ICTR jurisprudence. In each case, the actions of the defendants were considered so morally repugnant that the principle of non-retroactivity was relaxed so as to allow them to be punished.

These examples differ in the extent to which the retrospective aspect of each has been accepted: the Nazis tried at Nuremberg are generally said to have been adjudged fairly; the decision in Shaw's case has been criticized widely; and the "bottom of the harbour" tax legislation has attracted both critics and champions.

The fundamental question raised by these three examples is this: is the right to protection from retroactive criminal law an absolute human right, or should its application be qualified by reference to the circumstances in each case? Despite the criticism that these examples provoked, none of them could easily be characterised as a miscarriage of justice. But, in each

instance, the defendants were punished for committing acts which were not criminal at the time that they committed those acts: they were found guilty retrospectively. Clearly, then, the right to protection from retroactive criminal law is not an absolute human right if looked in that context.

Nuremberg Trials

Thirteen separate trials of war criminals were held in Nuremberg between 1945 and 1947. These trials were presided over by judges from all four major victorious allied powers: America, Britain, France and the Soviet Union. A total of 177 Germans and Austrians were indicted. All but 35 were found guilty: 25 were executed, 20 were sentenced to life imprisonment and 97 were sentenced to shorter prison terms.

These trials represented a large-scale prosecution of Nazis, many of whom pleaded the defence of superior orders. In previous war trials, after previous wars, this defence was generally held to be available to subordinate soldiers. Before World War II, prosecutions for war crimes were limited to heads of State, and to high-ranking military commanders. The defence of superior orders was at the time an accepted general principle of law recognized by the community of nations. In convicting lower-ranking soldiers, the Nuremberg trials were, in a sense, applying international law retrospectively. Before the trials, lower-ranking soldiers could claim that in following orders from their superiors they were not breaking any law.

At the trials they were told that their actions were crimes against humanity: that their actions were criminal even though they were not in breach of international law as settled at the time that their acts were committed.

According to Williams, a number of eminent jurists have severely criticized the Nuremberg trials for providing for punishment of all crimes against humanity (whether or not in violation of the domestic law of the country where the acts were committed), and for declaring the waging of a war of aggression to be a crime. Both of these steps were said to go beyond existing international law. Despite these protestations, most jurists rationalized the behaviour of the Nuremberg court by claiming that the actions of the Nazis were so immoral as to be an exception to the principle of non-retroactivity. Williams claims: that,

"No injustice was done at Nuremberg, because all the defendants there found guilty were clearly guilty of war crimes in the traditional sense."

At this point, it is illustrative to quote from the law with which the Nazis altered the German Criminal Code in 1935, it provided that;

"Whoever commits an act which ... deserves punishment according to the principles of criminal law and to the sound feelings of the people, will be punished."

This amendment brought condemnation from jurists around the world. Julius Stone referred, some thirty years later, to "[t]he frightfulness ... of fascist resorts to punishment of ex post facto 'crimes' ..." [41]

The tribunal indicated that a sovereign state could enact a retrospective law if it is just to do so because the principle is never a limitation of sovereignty. It stated that:

*"The maxim '**nullum crimen sine lege'** is not a limitation of sovereignty but it is a general principle of justice. To assert that it is unjust to punish those who are in defiance of treaties and assurances and have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. "*

It is at least arguable that finding Nazis guilty of war crimes "in the traditional sense" is as much the application of an ex post facto law as the punishing of people who deserve punishment according to the "sound feelings of the people". Few would argue that the Nazis found guilty at Nuremberg were treated unfairly or unjustly, and jurists have been loath to admit that they were tried under a retroactive law. Yet it is clear that the principle of non-retroactivity was largely ignored.

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ICTY Trials

The belief in freedom and the rule of law have kept the idea of Nuremberg alive - and finally succeeded almost fifty years later, when the UN Security Council again applied the idea of international criminal prosecution in 1993 in view of the human rights violations in the former Yugoslavia, when the Statute of the permanent International Criminal Court was passed in 1998, and when the Court was established in The Hague in 2003.

Shaw -v- Director of Public Prosecutions[42]

In 1961, the House of Lords handed down a decision which caused great consternation amongst lawyers and commentators: **Shaw – v- Director of Public Prosecutions**. Shaw had published a booklet called the "Ladies' Directory," which advertised the names and addresses of prostitutes. The booklet,it was said;

"... left no doubt that the advertisers could be got in touch with at the telephone numbers given and were offering their services for sexual intercourse and, in some cases, for the practice of sexual perversions."

[42] Shaw v DPP (1961) 2 AllER 567.

Shaw was successfully prosecuted under a number of provisions of the Sexual Offenses Act, 1956 and the Obscene Publications Act, 1959. He was also convicted on a charge of "conspiracy to corrupt public morals" on the basis that, when he published the booklet, Shaw was conspiring with the prostitutes *"... to debauch and corrupt the morals of youth and other subjects of the Queen".*

Shaw complained to the House of Lords, inter alia, that the crime of conspiracy to corrupt public morals was hitherto unknown or innominate. All five Law Lords upheld the conviction. Only Lord Reid maintained that the crime with which Shaw was charged was an existing common law misdemeanour. The other four law lords went further. They held that courts have a residual power to superintend offenses which are prejudicial to the public welfare.

The majority built their argument upon the notion, put forward by Lord Mansfield almost two hundred years earlier, that the courts are "guardians of public morals" and that they ought to restrain and punish.

Commentators were quick to criticize this decision, seeing that it had serious consequences: One commentator stated thus;

"A principle of considerable importance but disquieting possibilities was established by the House of Lords in Shaw v. Director of Public Prosecutions ... It is difficult not to regard the decision ... as a serious blow to the principle of

***nullum crimen sine lege**, one of the oldest and most enduring of all the ideas of Western civilization. "*

In the earlier case of **R. Vs - Manley**, Manley made false allegations of robbery to the police. Before the Court of Criminal Appeal she was found guilty of "unlawfully affecting a public mischief". This decision was widely attacked as being an example of ex post facto punishment, as no such crime existed before it. Courts had avoided following that case until **Shaw – Vs - DPP** provided an implied affirmation (and, in the judgment of Viscount Simonds, an express affirmation) of the decision.

Both Manley and Shaw were found guilty of having committed crimes that were not recognized as such when they committed the acts in question. These two cases have been much criticized, yet they remain as examples of how the principle of non-retroactivity has not been universally applied in British courts. In the words of Stone:

"The vigour of [the] juristic and professional controversy [after Shaw's case and Manley's case] is a salutary reminder that ex post facto punishment is still a problem even in the legal order which was the progenitor of "the rule of law".[43]

[43] O.Stone, International Sentencing and the undefined Purposes' of International Criminal Justice; available at SSrn:http://srrn.com.

The Uganda Situation

The Uganda prosecutors were faced with a number of challenges when deciding on the appropriate law they would apply, to commence charges against the LRA rebels over the war crimes and crimes against humanity they had committed in Northern Uganda. The LRA rebel, Thomas Kwoyelo was the first rebel to be prosecuted in Uganda's International Crimes Division of the High Court in July 2011. Even though Uganda had enacted the International Crimes Act of 2010 domesticating the Rome statute, the Act did not make matters easier because it did not provide for retrospect effect in the prosecution of crimes which predates the Act. Similarly the Constitution of Uganda prohibits prosecution of conduct which when it was committed was not recognised as a "criminal offence."

Kwoyelo's charges were based under the Ugandan penal code and the Geneva conventions Act, which was enacted in 1964, domesticating and criminalising grave breaches of the four Geneva conventions. The prosecutors opted for this legal path because the Geneva Convention Act was in force before the crimes of international character and especially war crimes were committed in northern Uganda by the RLA. The case is pending on appeal on grounds unrelated to the issue discussed above.

Rwanda situation

Rwanda managed to establish the Gacaca courts with jurisdiction to try perpetrators of egregious crimes of genocide and crimes against humanity committed in Rwanda from 1st October 1990 to December 1994(the planning period was justified and covered in the law) through the enactment of the Organic Law despite the principle of non-retroactivity. This was made possible because the principle of legality under the Constitution of Rwanda recognises international law as the basis for criminal prosecution. The Organic Law of June this year which abolished the Gacaca Courts transferred pending cases to the International and Trans boundary Division of the High Court which has jurisdiction to try cases transferred from ICTR and try other perpetrators who are yet to be found or transferred from other countries.

5.5.1 How to deal with the issues of Retrospectivity in Kenya

One of the major reasons why attempts were made to amend the Constitution of Kenya in 2008, to provide for the trial of persons responsible for 2007 Post Election Violence (PEV) offenses, and before the establishment of a special tribunal was that Kenyan law at that time, did not provide for offenses of genocide, war crimes and crimes against humanity.

The Constitution of Kenya then (now repealed), followed strict requirement of the concept *sine lege scripta* or the national version of the principal and, and as a state Kenya had not domesticated the Rome statute. It was thus impossible to try and convict perpetrators of international crimes as Section 77 (4) of the repealed Constitution of Kenya provided that,

"**No person shall be guilty of a criminal offence be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for such a criminal offence that is severer in degree or prescription than the maximum penalty that might have been imposed for that offence at the time it was committed."**

Kenya's International Crimes Act, No. 16 of 2008, was enacted in 2008 to fill this lacuna and provide for the prosecution of international crimes which were committed during the PEV occasion but even under the repealed Constitution, it was not possible to charge someone with an offence under international law as it fell short of the threshold required under section 77(4). It has been argued that the prosecution of international crimes committed during post-election violence period in Kenya's domestic courts, is tied to its International Criminal Court Act, 2008, enacted to domesticate the Rome Statute.

However, the Act, in which so much hope was placed for the prosecution of past atrocities, in fact did not offer any solutions. The Act defines and criminalizes the core international crimes of genocide, crimes against humanity and war crimes but it has no retrospective effect. The non-retrospectivity of the Act was justified on the basis that the principle of legality was embedded in section 77(8) of the repealed Constitution of Kenya, which was the superior law in Kenya at the time, when post-election violence atrocities were committed. When Kenya's International Criminal Court Act was finally enacted it had prospective rather than retrospective application, because it was to commence its operations on 1st January, 2009.

Kenya's Constitution 2010 abandoned the strict national version of the principle of legality which applied to all crimes under its repealed Constitution and adopted the international version, allowing prosecution of acts that were considered criminal under "international law."

The Constitution 2010 allows for prosecution of conduct that at the time it was committed was criminalised under international law even though the act or omission did not constitute an offence under the National law.

This means that under Article 50(2) (n) (ii) if crimes which were committed during the post-election crisis were not crimes recognised under Kenyan law then they can be prosecuted as international crimes, because Kenya ratified

the Rome statute in 2005 which outlawed genocide, crimes against humanity, war crimes. Article 50(2) (n) of the Constitution now provides that every accused person has a right to a fair trial, which includes the right,

"not to be convicted for an act or omission that at the time it was committed or omitted was not- (i) an offence in Kenya; or (ii) a crime under international law." Thus notwithstanding the lack of a specific law in Kenya defining an offence, the court in Kenya can take cognizance of crimes of international law.

Kenyan law also includes in its Constitution under Article 2 (5) and (6) the general rules of International law and any treaty or convention ratified by Kenya shall form part of Kenyan laws.

This Article gives more reinforcement to prosecution of international crimes and covers most of the crimes that occurred during the post-election violence, in particular crimes against humanity.

5.5.2 Way forward for Kenya

As discussed above, the right to protection from retrospective criminal law is well recognized throughout the international community. Yet there are many examples where retroactive criminal laws have been made. The examples of retroactive criminal law-making discussed above differ greatly in the extent to which each has been greeted with approval or disapproval.

In human rights conventions, the right to protection from retrospective criminal law is typically qualified by the proviso that the protection does not apply to acts or omissions which are criminal according to the general principles of law recognized by the community of nations. Yet that proviso is not applicable to any of the above chosen examples; not even to the trial of the Nazis, the Genocide perpetrators or the war-crime perpetrators in Uganda. So, it can be seen that, despite the statement that the principle of non-retroactivity is a fundamental human right (in various human rights instruments), retroactive law has been made, and continues to be made, in societies which ostensibly accept that principle as being a right.

However, it has drawn criticism, but is nonetheless accepted, often tacitly. It can therefore be argued that the application of this principle is limited and that its limitation is unpredictable and applied on a case to case basis.

With regard to crimes against humanity and war crimes the Nuremberg Tribunal could not be criticized for their punishment because acts falling within these categories were existing crimes under international customary law although the heading "crimes against humanity" was used for the first time. The Nuremberg Judgment has remained relevant today as it was sixty years ago. It represented the first modern international criminal trial for serious crimes notwithstanding some criticisms given. These crimes later became internationalized and were embraced by the United Nations Organization which affirmed the Nuremberg principles through a General

Assembly Resolution that gave them international recognition. This, therefore, laid the foundation for the current body of international criminal law. The categories of crimes enforced in the judgment have led to criminalization of the worst forms of violations of international criminal law which has become part of the international legal system. Crimes against humanity (nomenclature first used in the Nuremberg Charter), war crimes and crimes against peace (mainly the crime of aggression) have been adopted wholly, partly or with some modification by the ICTY , ICTR and the ICC Statutes .

Accordingly, at the time when crimes against humanity were committed during the post-election atrocities of 2007/2008, the concept of crimes against humanity had crystallised at the international level and gained the status of *jus cogens*. It was and is recognised and forms part of the international customary law, even though not recognised as specific offences in Kenyan penal code. The reality is that the absence of National legislation at the time when crimes against humanity were committed in Kenya cannot change the character of the crime against humanity as *jus cogens*. We need to recognise the binding nature of customary international law, the unique nature of an international crime, and its status as jus *cogens* thus separating it from national crimes. The resultant effect would allow for the punishment of those international crimes in any event. Furthermore, the justification would also be based on the 'Convention on the non-applicability of Statutory

limitations to war crimes and crimes against humanity which requires states to remove all Constitutional and statutory limitations to the prosecution of these crimes irrespective of where and when they were committed.[44]

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 may not apply to the post-election violence crimes, as this would be in conflict with the non-retrospectivity principle enshrined in the Constitution at the domestic level.

This notwithstanding, under international criminal law, a state has the primary responsibility for investigating, prosecuting, and punishing mass atrocities that take place within its territory. Paragraph 4 of the preamble to the Rome 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". Thus the Statute spells out the object of the Court as being effective prosecution and it also underlines that, measures for prosecution at national level must be

[44] UNGA Resolution 2391(XXIII) of 25 November 1968, acceded to by Kenya on 1st May 1972; see Articles 1,4 of the convention on the no applicability of statutory limitations to war crimes and crimes against humanity http://www1.umn.edu/humanrts/4cnaslw.htm (accessed 17 July, 2012).

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 as a matter of the obligation under the Statute.

Crimes committed during post- election violence period can thus be prosecuted under the Rome Statute within the ICD because Kenya had ratified the Rome Statute at the time the crimes were committed and is bound by the provisions of the Rome Statute, which was the enabling law criminalising crime against humanity at that time. The elements of crimes against humanity such as murder, sexual offences of rape, sexual slavery are crimes under the Penal Code Cap 63 Laws of Kenya and it follows that an indicted person can be charged both under the Rome Statute as read together with the particular offence contravening a particular section of the Penal Code, Cap 63 of the Laws of Kenya.

5.6 Appeals from the ICD

Appeals from the ICD will ordinarily lie to the Court of Appeal, which under Article 164 (3) (a) of the Constitution has absolute jurisdiction to hear appeals from the High Court. A party who is aggrieved with the Court of Appeal decision can lodge a further appeal to the Supreme Court which has

appellate jurisdiction by virtue of Article 163 (2)(b) and (4) to hear appeals from the Court of Appeal.

5.7 Reparations and Compensations

The High Court established under Article 165 of the Constitution has unlimited original jurisdiction in criminal and civil matters. However, the ICD will only have criminal jurisdiction in trying international and trans-national crimes. It may however in determining criminal culpability award only reparations and compensations to victims in deserving cases to avoid a situation where a victim would have to make such a claim in separate civil proceedings. The Constitution and the Penal Code, Cap 63 of the Laws of Kenya give the Court the power to award remedies, including compensation, in both civil and criminal matters.

Article 23 of the Constitution gives the High Court the authority to uphold and enforce the Bill of Rights. The Article provides as follows;

23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications

for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review

Section 24 of the Penal Code provides the punishment that a court can inflict as follows;

a) death;

b) imprisonment;

c) community service under the Community Service Orders Act, 1998;

d) detention under the Detention Camps Act;

e) a fine;

f) forfeiture;

g) payment of compensation;

h) finding security to keep the peace and be of good behaviour;

i) any other punishment provided by the Code or by any other Act

Similarly Article 75 of the Rome statute allows the court to award reparations during criminal proceedings. The Article provides that;

75(1) The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

5.8 Training Needs for Members of Staff of the ICD

Training is a prerequisite component for all the staff who will be working in this division. They will be trained in order of priority; the judges, prosecutors, investigators, defense counsel, legal researchers and other registry staff

Training needs will encompass:

- International Law generally,
- International Criminal Law specifically elements of international crimes prosecuted before the ICD.
- Rules of procedure and evidence under the Rome statute and Kenyan criminal law.
- Undertaking legal research on international crimes.
- Issues of reparations and compensation for victims
- There are also training needs in the areas of witness protection, court management, and archiving and court room procedures.

Training can be done through initial visits to other jurisdictions where there have been similar experiences and where serious crimes have or are being tried in an international context e.g. The ICC at The Hague, Uganda, Bosnia, Rwanda, Sierra Leone etc.

Training can also be by way of workshops and seminars for staff. But particularly training for judges, who will serve in this division, will require both long and short term training programs to enable them to be fully equipped with skills to undertake their duties.

5.9 Rules of procedure required to operationalize this division

Special rules of procedure and evidence should be formulated to provide the procedure on the prosecution of crimes in this division. This is so because, this division will be dealing with criminal matters with significant international character and needs to be modelled in accordance with international standards of the International Criminal Court and tribunals.

5.10 How to approach issues of Restorative Justice

Restorative justice is a worldwide criminal justice reform movement that focuses on the harm crime causes. Restorative justice is a victim-centered response to crime that provides opportunities for those most directly affected by crime - the victim, the offender, their families, and representatives of the community - to be directly involved in responding to the harm caused by the crime. Restorative justice is based upon values which emphasize the importance of providing opportunities for more active involvement in the process of; offering support and assistance to victims;

holding offenders directly accountable to the people and communities they have violated; restoring the emotional and material losses of victims (to the degree possible); providing a range of opportunities for dialogue and problem solving among interested crime victims, offenders, families, and other support persons.[45]

Restorative programs are aimed at restoring dignity of the victims as well as offering a forum where individuals/victims can share their experiences about what happened. This process has a transforming effect on the lives of the victims. Compared to retributive justice, restorative justice focuses on the victims and on reintegration of offenders rather than the retributive justice which focus on punishing offenders.

Kenya is going through a transitional period from decades of widespread repression and human rights violations towards a new dawn of a democratic and humane State heralded by the promulgation of a democratic and just constitution in August 2010.

The practice all over the world now is that States and nations in transition ought to deal with their past of egregious human rights violations, conflict and violence by carrying out certain measures that give justice to the victims of those atrocities, transform the institutions under which such violations were carried out, guarantee non-repetition and set out a future of respecting

[45] http://www.restorativejustice.org

human rights and the integrity of public institutions and processes. These processes of dealing with the past in States that are in transition are generally what have come to constitute Transitional Justice processes.

In dealing with the past and building a better future of justice and peace, Kenya seems to have chosen prosecutorial and non-prosecutorial approaches in order to achieve the collective desire of the people. The notion that there cannot be peace without justice emerges forcefully in many communities. But justice can be based on *retribution* (punishment and corrective action for wrongdoings) or on *restoration* (emphasizing the construction of relationships between the individual and communities).[46]

In pursuant of retributive justice (prosecutorial strategy), Kenya has chosen to deal with the cases related to the 2007/8 Post election violence cases in two ways: first by engaging the International Criminal Court (ICC) to deal with the suspects of the post-election violence who bear the highest responsibility for crimes against humanity that were perpetrated against citizens and; secondly through the current efforts to try middle and lower perpetrators of crimes against humanity as relates to the post-election violence period.

The judiciary is in the process of establishing the International Crimes Division (ICD) of the High Court of Kenya, which is likely to try middle and

[46]Sanam Naraghi Anderlini, Camille Pampell Conaway and Lisa Kays; Transitional Justice and Reparation.

lower level perpetrators of crimes against humanity relating to the post-election violence.

In respect to restorative justice, the country set in motion certain processes and measures as relates to the PEV though but also ranging back to 1963 when Kenya got her independence from Britain. These measures inter alia include the establishment of the Truth Justice and Reconciliation Commission (TJRC) whose report will hopefully foster healing and reconciliation among communities and citizens in Kenya.

Restorative justice therefore focuses mostly on the non-legal and non-penal processes and measures that a country puts in place to ensure that justice is done away from the prosecutorial milieu of courts and prosecutors. Nonetheless it ensures that justice is done in a manner that perpetrators get to accept that they wronged the victims and the victims get satisfied that justice has been done and that non recurrence has been assured.

There are six main approaches that will energize the Kenyan process of achieving restorative justice as outlined below;

(1) Truth telling and restorative justice

(2) amnesty as differentiated from pardon

(3) reparations and restorative justice

(4) memorialization and restorative justice

(5) Institutional policy, legal and institutional reforms

(6) reconciliation

(1)Truth telling and restorative justice

For a country to successfully deal with its past and lay a firm foundation for a future of integrity, democracy, respect for human rights and stability, that country must uncover its dark past and make it public and incontrovertible. The Judiciary must help the truth telling process to be as productive and credible as possible. However, Kenya's truth telling process through the Truth Justice and Reconciliation Commission (TJRC) has been riddled with controversies and scandal to the extent that its product- the TJRC report- which is expected within the year 2012 risks lacking the confidence of the public.

Regardless of this, the truth telling process shall offer a public record of individuals and communities to know or at least to tell who violated their rights, who killed their loved ones, who tortured them, who massacred their family and community members. When such facts are documented by a

government commission, communities and individuals will feel recognized that wrongs were done against them individually or as communities.

The collective guilt of the nation will be galvanized and the government, depending on the recommendations of the report will be compelled to take certain symbolic and substantive measures to redress those historical and not so historical injustices. Acknowledgement of the truth is seen as an important element to a successful transition. It serves to foster healing and reconciliation in the society.

The culpability of government agents and agencies will be exposed and the report may direct what needs to be done to transform such institutions that presided over the commission of such egregious crimes and violations against individuals and/or communities.

(2)Amnesty in restorative justice as differentiated from pardon

Related or sometimes unrelated to truth telling processes, amnesty is a powerful strategy in facilitating the construction of relationship between individuals and the entire community. Amnesty is not pardon. It refers to those 'legal measures which have the impact of prospectively baring criminal prosecution and, in some cases, civil actions against certain individuals or

categories of individuals in respect of prior criminal conduct; or retroactively nullifying legal liability previously established.[47]

It is the duty of every state to prosecute crimes committed within its territory. Recently, states that have been in transition have enacted amnesty law to foster healing and reconciliation. Thus a national amnesty cannot be condemned as being unlawful so long as it does not jeopardize human rights of the victims and the perpetrators.

Kenya can and should explore the place of amnesty to enhance truth telling, help communities reconcile where for example ethnic clashes in the previous years has jaded relationships deeply, in communities where cattle rustling has been going on for years to gather weapons like guns in order to forestall futures deaths arising from the use of such weapons or as relates to the PEV period to enhance the collection of important information that will support further prosecution of high level and middle level perpetrators of crimes against humanity.

It has to be noted that under International law, amnesty is not acceptable and does not apply to matters that have to do with the core international crimes of genocide, crimes against humanity and war crimes and other violations of human rights including torture and enforced disappearances[48].

[47] See Office of the UN High Commissioner for Human Rights (2009). Amnesties: Rule of Law Tool for Post Conflict States. New York & Geneva: UN.

[48] Ibid 8, 11,

Amnesty law is only legitimate if it is absolutely necessary to foster reconciliation; by acknowledging the past. Blanket amnesty has been heavily criticized.

(3)Reparations and restorative Justice

Reparations have been discussed in great detail in the United Nations instrument referred to as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law[49]. There are five basic categories of reparations which include

a) Restitution which refers to measures which 'restore the victim to the original situation before the gross violation occurred.' For example restoration of identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. In the Kenya case, the victims of the ethnic clashes of 1992, 1997/8 and the PEV may be restituted by returning their land.

b) Compensation is for any damages that can be economically assessed such as lost opportunities, loss of earnings etc.

[49]United Nations General Assembly Resolution 60/147 of 16 December 2005, annex, paras. 19-23

c) Rehabilitation includes medical and psychological care as well as the provision of legal and social services such as education for university students who were expelled and or jailed for many years in the 1980s and 1990s on political grounds.

d) Satisfaction includes the search for the disappeared, the decent reburial of the remains of the dead loved ones, public apologies, truth seeking as part of reparations (the Wagalla Massacre victims' families have demanded this) commemoration, human rights education and training.

e) Guarantee of non-repetition is a broad demand and category which includes other measures outlined hereunder such as institutional reforms, the civilian control of the military and security forces, protection of human rights workers and the enforcement of international human rights standards, the operations of the media, public service and the law enforcement of the country. This remedy is appropriate after the state has acknowledged the past as the truth and thus offers the victims assurance that the same will never happen again.

Already in Kenya, public interest litigation by victims of various violations such as those of the Nyayo torture Chambers have already lodged

successfully and compensation given by the government. IDPs can litigate as a basis of reparations among other categories of citizens.

Reparations however are always most sustainable when they are a recommendation of a government recognized body such as the Justice Truth and Reconciliation Commission.

Nevertheless, reparations can also be faced with many challenges including the lack of sufficient information, budget constraints where compensation and restitution may drain the whole budget of a government and sometimes where such claims are challenged for lack of participation by others.

(4)Memorialization and restorative justice

In some cases, communities or individuals may demand that all they need is for the government to initiate a process where their loved ones are memorialized. This is sometimes seen as symbolic reparations. All Kenya, communities and clans will be more than happy if certain memorialization measures are undertaken to recognize what certain individuals or communities suffered or have contributed to the historical progress of Kenya as a nation.

Memorization is done through setting aside of commemorative days, naming of streets and public institutions, construction of monuments, national parks etc. as the Dedan Kimathi memorial in Kimathi Street in Nairobi; the setting

aside of commemorative days such as Mashujaa day; the naming of streets; the naming of public institutions such as Masinde Muliro university etc;

More can and should be done to bring out shared memories of pain/suffering as well as to celebrity and recognize those who have contributed to communities by the government initiating such a process. This can contribute greatly towards a feeling of justice for these individuals and communities.

(5)Institutional policy, legal and institutional reforms

The passage of the new constitution which has ushered in massive momentum for institutional, policy and legal reforms in Kenya must be seen within the context of restorative justice. The Judiciary has continued to play its decisive role in ensuring that the values of the new constitution are lived by all Kenyans and that a culture of the rule of law is lived by all Kenyans. The Judiciary must continue to play its judicial role when interpreting the constitution in a way that various government policies and laws that are not in line with the constitution shall seen to be out of line and as such put pressure on the legislature and the executive to make laws and policies that

abide by the spirit and the letter of the constitution especially in the values outlined in Article 10.

(6)Reconciliation

The Judiciary has continued to play a key role in promoting reconciliation among Kenyans. Through such court judgments as was in the case of the Boundaries petitions July 2012, the court has continuously shared vision of interdependence and fair society while acknowledging and dealing with the past and endorsing and promoting positive relationships among Kenyans.

Reconciliation is a process and its results must be worked for. A human rights approach to this pursuit which will promote restorative justice is the continuous promotion of equality and non-discrimination in the administration of justice.

II. PROSECUTIONS AND RESTORATIVE JUSTICE

As we outlined earlier, reparations and generally other restorative justice measures are dependent on the success of retributive/ prosecutorial justice processes and measures. This is because the context within which Kenya is dealing with the past is one where individuals who willfully violated and offended the law and the constitution in committing crimes against

humanity, which amounts to gross human rights violations and must be dealt with.

Unlike in countries like South Africa where the Apartheid systems largely enacted the discriminative and xenophobic system into law, in Kenya individuals acted against the law in committing torture, massacres, ethnic cleansing, murder, arson, sexual violence etc. It is therefore important in considering and pursuing the restorative justice agenda. It is therefore significant that the prosecutions be successful in and by themselves be they at the International level, national level or at informal and traditional levels;

Kenya may consider such traditional and informal mechanisms such as the Gacaca system in Rwanda if the policy of the government is to promote truth telling at the grassroots level, offer amnesty to low level offenders and hope that through such amnesty grants information and evidence to sustain the highest level and middle level prosecutions is gathered and consolidated. However, there would be a problem because there is no a universally accepted traditional dispute resolution mechanism among the 42 communities/tribes of Kenya. Therefore, without this kind of understanding, informal and traditional prosecutorial and truth telling mechanisms will not work in Kenya. Nonetheless, the constitution under Article 159(2) (c) empowers courts to use alternative forms of dispute resolution including but not limited to reconciliation and traditional dispute resolution mechanisms.

III. GENDER AND RESTORATIVE JUSTICE

It is important for the judiciary in advising the government and informing its policies to note that the pursuit of restorative and retributive justice always has a gender perspective to it. In transitional justice studies, it is important to;

a) Ensure that the processes are gender sensitive. For example the Waki Commission noted that women and men, boys and girls suffered the PEV differently thus addressed gender based violations in its own chapter of the final report. However, such an approach was lacking in other commissions, for example the Akiwumi and Kiliku reports on ethnic clashes.

b) Ensure that the staffing is gender sensitive in all processes whether it is in reparations, memorialization, Truth Commissions, prosecutorial mechanisms which includes court prosecutors, judges, investigators etc.

c) Ensure that the measures approved take into account issues of policy in gender aspects. For example, it is significant to note that the overwhelming majority of the people in IDP camps are

women and children, the men having moved into urban centers soon after the PEV.

Restorative justice in Kenya is dependent on the success of retributive justice mechanisms and process. The success of prosecutions at the ICC and at a national level through a credible tribunal/court will herald the success of restorative justice initiatives outlined above for one main reason: that most of the gross human rights violations and the crimes against humanity in Kenya since independence have not been part of a state policy as such but as a product of impunity where individuals in power use the instruments of force and power to torture, dispossess, massacre, assassinate and commit economic crimes against the law.

The judiciary should therefore support processes of reconciliation and justice in Kenya by enhancing the delivery of justice through the formal institutions and by ensuring adherence to the tenets of the constitution and the respect for the rule of law. This way, communities and citizens will be encouraged and motivated to engage in long lasting non legal and informal processes of enhancing and promoting restorative justice through various approaches including truth telling, memorialization, reparations, reconciliation, institutional reforms, policy and legal reform and any such other.

This is because they will now have faith that impunity has no place in Kenya and that if they approach the courts, the courts will interpret the constitution in a way that justice and the rule of law will prevail.

5.11 Comparative Studies by the Committee

The committee should make visits to other jurisdictions to gain and learn from their experiences. Such countries include; Rwanda, Bosnia, Uganda, the Netherlands, South Africa, etc.

Members can also complement this by undertaking research through the internet and considering reference materials relevant to the mandate of the committee.

5.12 Stakeholder Participation in Creating the ICD

Emphasis should be placed on wide stakeholder consultations with:

- Judges
- The Director of Public Prosecutions
- The Attorney General
- The Police

- The International Criminal Court. (The Liaison Officer of the ICC in Kenya should be identified by the AG and be invited to participate in the process as a stakeholder.)
- the Department of Prisons (for purposes of discussing treatment of convicts)
- Academia
- The civil society organizations e.g. the ICJ- Kenya chapter
- Law Society of Kenya (LSK).

6. Key Findings of the Committee from Other Jurisdictions

As regards Country analysis

6.1 Uganda

The committee carried out comparative study of the International Crimes Court of Uganda and The International Crimes Chambers of Rwanda between 16th and 22nd September, 2012. The objective of the study was to learn from the experiences of the two countries that had set up specialized courts to deal with international and transnational crimes.

While in Uganda the Committee held discussions with Hon. Justice Benjamin J. Odoki, Chief Justice of the Republic of Uganda, Judges of the International Crimes Division of the High Court of Uganda and the Senior Principal State Attorney in charge of prosecution at the International Crimes Division in the office of the DPP. From the discussions held with the above personalities the findings were as below:-

The proposal to establish the International Crimes Division in the High Court of Uganda came during the peace talks to end the conflict between the Lord's Resistance Army (LRA) and the Ugandan Army in Northern Uganda.

These peace talks were held in Juba, Southern Sudan, from 2006 to 2008 between the representatives of the LRA and the Ugandan Government. Through these negotiations an agreement was reached as part of the Peace Talks, which provided that a special division of Uganda's High Court be formed to prosecute those who planned or carried out war crimes or other widespread or systematic attacks on civilians. It should be noted that, the LRA refused to sign the agreement at the end of the talks.

Nonetheless Uganda's International Crimes Division, (ICD), a division of Uganda's High Court, was set up in 2009 by the Ugandan Government as part of its efforts to implement the 2008 Juba peace Agreements between the Ugandan government and the LRA. Initially it was known as the War Crimes Division before Ugandan's International Criminal Court Act Which domesticated The Rome Statute was ratified in in June, 2010.

Legal Framework

The statutory basis for the ICD is through a legal notice issued by the Uganda's Chief Justice in May 2011, which formally established the ICD and defined its operations.[50]

According to Direction 6(1), the Division has jurisdiction to try, among others, any offence relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime as defined in Uganda's Penal Code Act, the 1964 Geneva Conventions Act, the 2010 International Criminal Court Act (ICCA) and any other relevant laws.

The Chief Justice of Uganda established a Court User's Committee which is an advisory body and section 9 of the Legal Notice No. 10 or 2011 provides that the Committee shall be composed of;

- The Head of ICD who shall be the Chairperson.
- Judges of the division.
- The Attorney General or his representative.
- The DPP.
- The Director of CID department of Uganda or his representative.

[50] Practice Direction of the ICD(Legal Notice No. 10 of 2011, gazette 31st May,2011) Uganda

- The President of the Ugandan Law Society.
- The Commissioner General of Prisons or his or her representative.
- The Registrar.
- Not more than seven members of the public appointed by the Principal Judge in consultation with the Head of the Division, except that three of whom shall be women.

On the 11th July, 2011, the Division began hearing its first case brought by the state against Thomas Kwoyelo, a former LRA commander who was charged with having committed several crimes contrary to the 1964 Geneva Conventions Act of Uganda. In August 2011, the Constitutional Court of Uganda agreed to hear matters that were referred to it by the ICD considering the case of **Uganda V Thomas Kwoyelo**.[51] These included whether Acts of the DPP and the Amnesty Commission in failing to grant amnesty to the applicant while granting the same to others is discriminative and inconsistent with the constitution of Uganda. The Constitutional Court held that the DPP acted in contravention of the constitution when he failed to authorize grant of amnesty to Thomas Kwoyelo. The matter is pending before the Supreme Court of Uganda whose decision shall be final.

[51] Constitutional Reference No. 36 of 2011

The ICD's jurisdiction is not limited to particular individuals or categories of individuals such as the LRA members or members of the Ugandan army.

The court in this division may sit as a bench of at least three judges and one of the ICD judges serves as the Head of Division. The Registrar of the Division handles daily administration issues.

ICD's prosecution jurisdiction is handled by a unit of Uganda's Directorate of Public Prosecution's (DPP). About five to six prosecutors are appointed to the unit.

Investigations of crimes that may be tried before the ICD are carried out by the Criminal Investigation Department (CID) of the Ugandan police force.

In spite of the proposal to set up the ICD in Uganda being generally laudable, there are some other problems that emerged from the rushed effort to try a first case at the ICD as quickly as possible. The case before the ICD showed that witness protection laws in Uganda are inadequate; the judges are only able to order ad-hoc measures to protect witnesses if there are clear signs for danger. The Justice Law and Order Sector (JLOS) of the Ugandan Government are working on laws to alleviate this problem.

Lessons to draw from Uganda

First, creation of an international crimes division, demands wide stakeholder consultation and engagement to set up a solid division; and more especially

to ensure that appropriate laws are in place and that the court is qualified to deal with international crimes.

This will alleviate the unwarranted applications challenging the jurisdiction of the proposed division and its constitutionality.

Second, creation of an international crimes division should not be rushed before a fully and operational Witness Protection Agency is in place to deal with safety of witnesses.

6.2 Rwanda

The Committee visited Rwanda's International and Trans boarder Crimes Chamber on 20th -21st September, 2012 to learn from their experiences. During the two day visit the Committee met with Hon. Justice Prof. Sam Rugege, the Chief Justice of the Republic of Rwanda, Judges of the International Crimes Chamber of Rwanda, the National Public Prosecution Authority (NPPA), the Witnesses and Victims Protection Unit and the Director of Training for the Gacaca Courts. The Committee concluded its visit at the Kigali Genocide Memorial.

The Committee noted that between 1959 and 1994, Rwanda was wracked by violence, culminating in the genocide of 1994 where more than 800,000 people were killed in 100 days.

At end of the genocide over 3,000,000 people had fled the country, Over 130,000 people were put in prison on suspicion of genocide and one of the most challenging problems encountered by the Government of National Unity, after its inauguration on 19 July 1994, was the pursuit of justice for genocide crimes.

The Government of Rwanda applied both retributive and restorative justice mechanisms to prosecute perpetrators of the egregious crime of genocide. The mechanism included the establishment of the:-

a. International Criminal Tribunal for Rwanda(ICTR),

b. Conventional Courts and

c. Gacaca Court**'s (traditional Courts)**

6.2.1 ICTR

The ICTR was set up after the most serious acts of genocide had already taken place, to prosecute the high profile cases involving the planners and organizers who masterminded the genocide. Talks for the initiation of a cease-fire started in 1994[52] . This took place within a broader framework, namely the search for a political settlement and national reconciliation.

[52] . After the adoption of Security Council Resolution 918 in 1994.

It was realized that these were long-term objectives which had to be pursued within the framework of the Arusha Peace Agreement, concluded in August 1993. The talks and the subsequent measures all took place within the context of a certain degree of international involvement.

The Rwandan process is based on a direct concern for international humanitarian considerations and bringing the perpetrators of acts of genocide to justice. The implications of such an approach for national reconciliation have not been properly addressed. The two pillars of the broader process are justice and the reconstruction of the Rwandan society. They are directly interrelated. The latter national reconstruction and reconciliation is mentioned, but does not directly form part of the mandate of the ICTR.

The Security Council of the UN requested the establishment of a Commission of Experts to investigate specific violations of international humanitarian law[53] . The Commission found serious breaches of international humanitarian law on both sides of the conflict. Acts of genocide were then found to have been committed specifically against the Tutsi group and it was then decided an international criminal tribunal for the purpose of dealing with these violations, be set up.

[53] .Security Council Resolution 935 (1994).

The ICTR was set up by the Security Council, acting under Chapter VII of the UN Charter [54] which allows for UN action with respect to threats to international peace, breaches of the peace and acts of aggression. Action under Chapter VII thus provides an important indication of the international standing and the seriousness of the Rwandan problem.

The decision to establish the Tribunal was made in response to a request by the government of Rwanda. Its purpose was to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and in the territory of neighboring States. It focuses on acts committed between 1 January 1994 and 31 December 1994. The Tribunal has the power to prosecute persons who have committed genocide as defined in the Statute of the Tribunal. Article 2 defines genocide as killing members of national, ethnic, racial or religious groups, causing serious bodily or mental harm to those members, bringing about the physical destruction of the group, preventing births and forcibly transferring children. In addition to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity therein are also punishable. Crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II are also included and defined in considerable detail.

[54] Security Council Resolution 955 (1994).

The Tribunal has jurisdiction over natural persons and individual criminal responsibility cannot be disclaimed by reliance on superior orders. Its jurisdiction extends over the territory of Rwanda as well as to the territory of neighbouring States in respect of these violations[55] . Other States are required to cooperate with and assist the Tribunal. Although concurrent jurisdiction[56] with respect to other forum is recognized, the Tribunal had primacy over the national courts of all States[57] . The principle of *non bis in idem* is included in the Statute.[58]

The remainder of the Statute deals with powers, procedures, rights of the accused, protection of victims and witnesses, judgments, penalties, appellate proceedings, review proceedings, enforcement of sentences, pardon or commutation of sentences, and the privileges and immunities of the Tribunal itself. Its expenses were to be borne by the United Nations in accordance with Article 17 of the UN Charter.

[55] Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda (hereafter "the Statute").

[56] Article 8(1) of the Statute.

[57] Article 8(2) of the Statute.

[58] Article 9 of the Statute provides that the non bis in idem rule applies strictly in the case of a person already tried before an international tribunal. There are some exceptions to the rule with regard to a person previously tried before a national court — e.g. Where a person was not tried diligently or where a national trial was not impartial or independent.

Imprisonment is to be served in Rwanda or any of the States on the list of States which have indicated their willingness to accept convicted persons[59] . Convicted persons may be eligible for pardon or commutation of sentence according to the laws of the State in which a convicted person is imprisoned. This may, however, only happen in consultation with the judges of the ICTR.

6.2.2 Conventional/Classic Courts

The regional magistrate's courts were mandated to prosecute the crimes which were committed during the genocide period including the offences of torture, killing, rape, property related cases, looting, destruction of property among others. Due to the large number of suspects who were awaiting trial, special chambers were created to fast track the cases. But the specialized chambers were stunned and did not offer a permanent solution to the prosecution of the genocide perpetrators. Indeed, conventional courts were not able to try all the genocide suspects.[60] These specialised courts began the trial of genocide cases in December 1996 and five years later, an assessment of progress showed that only 6,000 cases had been tried and closed.

[59] Article 26 of the Statute.

[60] Murungu C. & Biegon J (Eds) Prosecuting International Crimes in Africa

At this pace, it meant that it would take over 100 years to conduct the trials of the suspects who were already in prison.[61] It is for this reason that it was decided during the consultations at Village Urugwiro that it was necessary to conceive an alternative mechanism that would provide justice for the people during their natural lifetime. It was concluded that the Rwandan Gacaca process should be applied and complemented by the necessary laws in order for its proceedings to be conducted as court trials. The Rwandan Government decided to establish traditional courts known as *Gacaca* to speed up genocide-related cases.

6.2.3 Gacaca Courts

Gacaca (pronounced 'ga-CHA-cha') is a type of grass in the Rwandan language of *Kinyarwanda* and it is on this grass where elders, the *Inyangamugayo* or "people of integrity," would lead villagers through a process to resolve village conflicts. The grass therefore lent its name to this dispute resolution process. While traditional *gacaca* dealt primarily with relatively minor misdeeds in the community, it was modified to address the serious nature of the genocide-related cases that had been choking up the Rwandan prisons and courts.

[61] The number of genocide suspects to be tried did not include only those who were already in prison; many genocide suspects were still at large in Rwanda and in exile.

Gacaca jurisdictions brought together modified elements of customary practices for resolving conflicts and aspects of a conventional state-run punitive justice system. Prosecutions in the *Gacaca* courts have been inspired by customary dispute settlement in Rwanda.[62] Judges of the *Gacaca* courts are known as *inyangamugayo* and are elected at the community level by their peers. Their eligibility is based only on their moral integrity and most have no legal background. Unlike conventional courts, no prosecution is represented in *Gacaca* proceedings as such - the parties are the accused, victims, judges and the community (witnesses and observers).

There was no law punishing genocide in 1994and on August 30th 1996 an Organic Law n° 08/96**,** establishing organisation and prosecution of offences constituting the crime of genocide or other crimes against humanity was passed; The first law to establish *Gacaca* courts is known as Organic Law 40/2000 of 26 January 2001 (Establishing the Organization, Competence and Functioning of Gacaca Courts Charged with Prosecuting, Establishing the Organization, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes Against Humanity, Committed between October 1, 1990 and December 31, 1994). The organic law has been amended several times.[63]

[62] Ibid

[63] Ibid

The Gacaca Courts Classified the genocide suspects into three categories based on the gravity of the charges brought against them. The categories were as follows:-

Category 1 – People in national leadership level, the planners or organizers of genocide or crimes against humanity

Category 2 – Those who executed the plan (those who were killing).

Category 3 – Those who destroyed and looted property. However, where the offender and the victim came to a settlement by themselves, and settled the matter before the authorities or before the witnesses prior to commencement of this law, the offender is not prosecuted.

It is worth mentioning that the ICTR and Gacaca courts try individuals irrespective of their constitutional mandate with regard to the prosecution of genocide; meaning that a person's official capacity is not a bar to prosecution for the crime genocide. Both the ICTR and Gacaca courts do not confer the death sentence; the heaviest penalty is life imprisonment. When abolishing the death penalty in 2007, Rwanda replaced it with life imprisonment with solitary confinement as its severest sentence. It is worth mentioning that the abolition of the death penalty was one of the conditions set by the ICTR for the transfer of cases to Rwanda, including cases of genocide.

Gacaca is more than just a judicial instrument; it has restorative justice at its origin and seeks, as its ultimate aim, to reconcile Rwanda's divided

communities. To reach this aim, Gacaca has several other objectives including discovering the truth of what happened in 1994, ending impunity which has plagued Rwanda since independence and allowing the Rwandan population to participate in the search for justice at a local level.

Gacaca courts were closed on the 18th June, 2012. They recorded tremendous success having collected detailed information all over Rwanda and tried nearly two million cases. However not all genocide perpetrators were identified and punished for their crimes. This is why the prosecution of genocide crimes will continue in ordinary courts as provided by the organic law dissolving the Gacaca courts.

6.2.4 International and Cross border Crimes Chamber (ICBC)

This is a new division in Rwanda High Court, which started its first trials earlier this year. The division was set up by the Chief Justice who has administrative power to create different divisions in the High Court with the approval of the Judicial Council. The need to establish an international and trans boarder crimes division in Rwanda arose to address the continuity of prosecuting perpetrators of genocide, because the Gacaca courts had closed its operation June this year and ICTR's mandate is coming to an end.

The division is currently prosecuting cases which were transferred from the ICTR for example the case of **Public prosecutor – Vs - Dr. Magesera**. ICTR has

transferred to the division a residual power to take over the functions of the ICTR as an ad hoc mechanism including prosecuting those who have not been found and may need to be tried in the future.

The objective of this division is prosecution of the suspects who are out of the country and those who have not been arrested. The Organic law provides for the transfer of suspects from other countries and from the ICTR in Arusha. The division applies the rules of procedure and evidence as provided by the ICTR in conducting trials for the cases transferred from the ICTR. The division conducts its proceedings in Kinyarwanda.

The division has six judges and four registrars. The judges who are serving in the division were transferred from other High Court divisions by the Chief Justice and other judges were appointed to replace them in their previous duties. Preparation to operationalize the division was commenced in 2008. This was done by first building capacity though training and once the judges and the registrars were nominated to serve in the division, they underwent rigorous short and long term training on international criminal law and other related subjects, sponsored by the ICTR and other partners. Training needs were also conducted through workshops and seminars.

All the judges for this division visited the International Criminal Court in The Hague and the ICTR in Arusha, to learn prosecution of international crimes.

Article 90 of the Organic Law provides that the jurisdiction of the division is to try both international and transitional crimes. The Chamber has jurisdiction over the following crimes, terrorism and hostage taking, human trafficking especially young children, slavery and other crimes of similar nature, inhuman or degrading treatment of persons, torture, genocide, crimes against humanity, war crimes and genocide denial or inciting, mobilizing, aiding and abetting whether directly or indirectly.

Appeals from the International crimes division lie to the Supreme Court

The ICTR has monitors who have access to the trial proceedings, to observe how the division handles the cases and especially the cases which were transferred from the ICTR.

The division has a modern and up to date court room, which meets the international standards. The court is fitted with special and modern electronic systems including cameras, screens etc. Where witnesses are not willing to give evidence in open court, they are allowed to do so from any country where they reside through video conferencing.

Prosecution of cases at the division is done by the National Public Prosecution Authority (NPPA), which appoints prosecutors who serve in this Division.

Witness protection

In Rwanda, witness and victim protection during the criminal justice process is a key obligation of the state and this requires an effective response to the risk that witnesses assume when they cooperate with criminal justice processes;

Law N° 15/2004 relating to evidence and its production under Article 128 provides that "In the follow up and prosecution of crimes and felonies, the court will put place measures to protect:

1° people with information leading to the prosecution and

2° witnesses."

Rwanda has two modern and functional programs for witness and victim support and security; the Witness and Victim Protection and Assistance Unit (WVSU) within the National Public Prosecution Authority (NPPA) and the Witness Protection Unit (WPU) within the Rwandan Supreme Court. Both WVSU and WPU are available to provide victim and witness services in any referred case.

The unit was created at the end of 2006, after considering the increased number of crimes committed against the witnesses and victims and the

effect it had on reported criminal cases. This was proposed by NPPA and approved by the Cabinet in 2006.

The Purpose of the unit is to provide protection to witnesses thereby encouraging crucial witnesses who would otherwise desist from testifying for fear of retaliation towards their life, to come forward and testify and to maximize investigation and information gathering with the view to reduce crimes committed against a witness or a victim.

Lessons learnt from Rwanda

The Gacaca courts, offer an insight into transitional justice driven by the community. Such initiatives may prove to be effective alternatives to traditional post-conflict justice mechanisms. The Gacaca courts, which ran from 2001 until June 2012, represent a different approach to transitional justice. The ICTR places its emphasis on retributive punishment, focusing on perpetrators and the punishment necessary to bring them to justice. In contrast, the 11,000 Gacaca courts, located all over the country, highlight the importance of community-level reconciliation and openness in the struggle for national rehabilitation.

Kenyans can draw a wealth of experience from Rwanda in steering peace building processes by first restoring trust in state institutions, engaging

Kenyans in the reconstruction of sustainable reconciliation, and in overcoming ethnic divisions.

The most important lesson to be drawn from Rwanda's reconciliation process is that the path from justice to reconciliation is not necessarily smooth and direct. In reality, this path is guided by two important factors: the relationship between victims and aggressors as well as the form of power that justice flows from and the notion that reconciliation can only occur if preceded by punitive justice is superfluous.

Rwanda has a modern court that meets international standards in all its operations. For Kenya to set up the ICD it needs to build a modern court, complete with modern facilities. Trials to be conducted in the ICD must meet the required international standards to avoid a situation where the ICC can invoke its jurisdiction to investigate and prosecute afresh where it feels that the justice system has been used to shield the perpetrators of international crimes.

7 Options for the establishment of the International Crimes Division in Kenya

7.1 Options available to try International Crimes and Post-Election Violence Cases

7.2.1 Judicial/Prosecutorial Approaches.

1. The International Criminal Court

The International Criminal Court at The Hague was established by the Rome Statute. The International Criminal Court is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community. The crimes that fall under the purview of the Court are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

The International Criminal Court was established by the Rome Statute of the International Criminal Court. The Statute came into force on 1st of July 2002. Article 1 of the Rome Statute provides for the establishment of the International Criminal Court as a permanent institution that 'has jurisdiction over persons for the most serious crimes of international concern ... and shall be complementary to national criminal jurisdictions.'

This means that the primary responsibility of trying offences that meet the threshold of international crimes falls within the mandate of national courts. The ICC is therefore the court of last resort.

International co-operation is of paramount importance if the objectives of the International Criminal Court are to be achieved. The ICC does not have a police force or a mechanism for preserving the property of accused persons. State parties are relied upon to ensure that persons of interest to the ICC are brought forward and that property of accused persons is preserved (through seizure or freezing of assets) so that it is available for use in reparations or compensation of victims.

Kenya ratified and became a state party to the Rome Statute in March 2005. The ICC therefore has jurisdiction for crimes committed in Kenya since 1st of June 2005. Kenya is therefore under an obligation as a state party to co-operate with the ICC in the performance of its work either through:

a) Application of the existing ordinary criminal law of the country.

This method takes the view that the Penal Code already in force provides adequate punishment for the acts in question and it is therefore superfluous to characterise the acts as distinct offences.

The disadvantage with this approach is that often the offences introduced under domestic law do not fully cover the relevant act prohibited under international law. Another disadvantage is that the elements of the crimes do not always correspond to the requirements of the relevant treaties nor are the penalties always appropriate to the underlying context.

b) General criminalisation in domestic law by adopting legislation that refers specifically to the relevant provisions of international law, treaties in general, the range of applicable penalties may be specified.

The advantage of this approach is that it is simple and economical. It provides for the punishment of all applicable crimes by simple reference to the relevant instruments and where applicable to customary international law.

Another benefit is that there is no need for new national legislation where the treaties are amended or new obligations arise for a state party that becomes party to a new treaty.

One disadvantage is that general criminalisation may prove insufficient in view of the principles of legality particularly if this method does not permit any differentiation of the penalty in accordance with the severity of the act,

unless this is left to be decided by the judge on application of strict criteria and laid down law.

It also requires national judges to specify and interpret the applicable international law in light of international obligations leaving the judges with considerable room for manoeuvre though this flexibility may be an advantage in certain circumstances.

c) Specific criminalisation of the offences concerned

Where offences are independently defined in national criminal codes, this may lead to the regression of a particular breach of a treaty, even if the treaty has not been ratified by the State.

Specific criminalisation most closely respects the principles of legality in that it provides the most clarity and it is predictable. Moreover, it simplifies and clarifies the work of law enforcement personnel by relieving them of the burden of research, comparison and interpretation of the principles of international law.

It also upholds the principle of cooperation and the complementarity principle.

Opening of Investigations at the ICC

There are three main ways in which investigations may be opened at the International Criminal court;

a) A State Party may refer a situation to the Office of the Prosecutor;
b) The Security Council may refer a situation to the Prosecutor, who will analyse the information presented and make a determination on whether or not there is a basis to begin an investigation; and
c) The Prosecutor may begin an investigation on his own initiative. The investigations in Kenya were initiated by the Prosecutor on his own motion.

However it must be noted that the ICC only deals with persons who bear the greatest responsibility for serious crimes. Currently only four Kenyans will stand trial at The Hague for crimes committed during the post-election violence period.

2. Special tribunal

The establishment of a special Tribunal was another option recommended by Justice Waki commission, with a mandate limited to try post-election violence cases. This requires the adoption of a bill establishing the Tribunal and specifying its mandate.

So far, there have been three failed attempts by Parliament to establish a special tribunal. This is the reason why the Prosecutor of the International Criminal Court elected to commence an investigation into the Kenyan situation.

3. Regular courts

This would mean that the current situation prevailing would continue. Accused persons would be tried in the courts as they presently are depending on the charges which have been preferred against them under the Penal Code and other legislation. The few international crimes recognized under Kenyan law will continue to be tried in the criminal division of the High Court and local Magistrate's Courts.

7.2.2 Non-Judicial/Non- prosecutorial approaches

1) The Truth Justice and Reconciliation Commission (TJRC) which is expected to investigate gross violations and abuses of human rights committed in Kenya between 12th December 1963 and 28th February 2008, and to make appropriate recommendations for interventions. This exercise will cover a wide range of issues including post-election violence. The commission has not released

its final report which is expected to provide recommendations on how to deal with the pending post- election violence cases.

2) Promotion of other forms of dispute resolution including reconciliation, mediation and traditional dispute resolution mechanisms, provided under Article 159(2)(c) of the Constitution of Kenya which can help mediate with a view to reconcile communities, bringing together victims, survivors, perpetrators and the entire community like the Gacaca of Rwanda.

7.3 Justification for the Creation of the Proposed ICD

It remains the rule that "states have a primary responsibility to exercise jurisdiction over perpetrators who commit international crimes." This obligation is stipulated in the UN Principles to combat impunity as "states shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."[64]

[64] See "updated set of principles for the prosecution and promotion of human rights (UN Principles to Combat Impunity) 2005, Principle 19

The same position is reiterated in the preamble to the Rome Statute "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."

The matter of how to deal with the issue of criminal accountability arising from the events of the 2007/8 post-election violence has remained highly charged in the country especially as it relates to what has come to be referred to as the **middle and lower level** perpetrators of crimes within the description of the PEV period. Despite intense domestic and international pressure, over four years later, a Special Tribunal has not been created or any other clear mechanisms for such domestic prosecutions and trials.

ICC is a Court of last resort and is likely to prosecute only a handful of those responsible for PEV in Kenya. A local mechanism is needed to deal with the remaining cases of crimes against humanity, to prosecute and punish hundreds of other perpetrators of serious crimes against humanity who continue to evade accountability. The fact that ICC is not able to deal with a large number of cases limits its direct role in the fight against impunity and confirms the important need to create domestic mechanisms which would make it possible to prosecute the most serious crimes.

It is this failure by the Government of Kenya to establish the special tribunal that has posed the current challenge on how to facilitate justice for the victims of crimes against humanity. It is worth to note at this point, that the TJRC will not carry out prosecution against the perpetrators; they can only make recommendations to the Government and judicial authorities on the suitable mechanisms to apply to fight against impunity for the perpetrators for the most serious crimes of international law.

One of the most important aspects of a state's sovereignty is its right to create and enforce criminal laws. The territorial principle, whereby jurisdiction is determined by reference to the site of the crime, forms the bedrock of most domestic criminal justice systems. It is the state that determines whether a particular act committed within its territory is or is not a crime. That state normally has the greatest interest in seeing that the perpetrator is tried, as it is the state itself, inhabitants of the state, or property located within that state which has been victimized by the crime. From a more practical perspective, the territorial state generally has the greatest and most immediate access to evidence of the offence, the crime scene, and any witnesses to the offence. Usually, there are investigation and prosecution organizations in place. It is also likely that the state would have custody of the alleged perpetrator.

Under international law including the Rome Statute of the International Criminal Court (ICC) to which Kenya is a party since 2005, Kenya has an

obligation to try international crimes committed on its territory or abroad by its nationals. According to the preamble to the Rome Statute, "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes".

According to the ICC Statute, the court is complimentary to national criminal jurisdictions. This means that the ICC only intervenes when the relevant state is either unable or unwilling to carry out investigations and prosecutions. ICC investigations and prosecutions focus on those persons who bear the greatest responsibility for the most serious crimes of International Crimes. This principle of complementarity places a heavy burden on individual states to help achieve the Rome Statute's overarching goal of ending impunity for grave atrocities and affords justice to the victims by prosecuting the perpetrators of these crimes.

Consistent prosecution of offences also informs other people within the state that they will be punished for similar actions. This provides the victim with a measure of satisfaction, thus reducing the victim's desire to seek revenge. Also Prosecution ensures that state laws and value systems underlying them, are respected, and demonstrates the state's and (by extension) the people's abhorrence for the offence.

These reasons demonstrates why the ICD should be created to try international and transnational crimes, to eliminate the culture of impunity

in the Kenyan socio-political sphere, contribute to deterrence through the promotion of accountability at the national level and enable national authorities to invest in creation of functional criminal justice systems which can put an end to repeated cycles of mass atrocities.

This is so, because assigning individual responsibility is an important component to prosecution of international crimes, for the simple reason, that crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

A local trial has an important symbolic impact; it can set standards, create precedent and establish a real respect for the rule of law. It is important to note that the wounds left by the PEV are too deep to be healed by mere patriotic messages without a proper reconciliation and prosecution of the perpetrators of crimes against humanity. Fair and credible prosecutions must be instituted against the perpetrators who commit international crimes to end the culture of impunity which has been deeply rooted in Kenya, to eliminate any situation where the victims, survivors and their communities may want revenge because they feel that perpetrators may never be punished.

The proposed division is seen as the specialised Court dealing with criminal matters with significant international character. These matters may require particular attention and reference to international criminal law because Section 4 and 7 IC Act, provides for cross references to the Rome Statute in regard to the general principles of criminal law to be applied to cases under it.

This makes the division a desirable location to deal with all cases having crimes with significant international attributes. The objective test is to ensure that the Court neither usurps the mandate of the High Court's Criminal Division nor overloads itself with matters that are only incidentally international.

The Committee having addressed itself to numerous issues that would need to be resolved in the options above, settled for the creation of a Permanent International Crimes d Division (ICD) of the High court as the best option to try crimes against humanity committed during the PEV period and other international and transnational crimes like the ICD of Uganda and Rwanda. The Division will have a firm legal, policy and operational foundation.

The High Court contemplated under section **8(2) of the ICC Act No. 16 of 2008** already exists as established under Article 165(1) of the Constitution of Kenya, 2010.

The Chief Justice in exercise of his administrative authority under Article 161(2) (a) as read with Article 165(b), Section 5 of the Judicial Service Act, No.1 of 2011 and Article 165(3) (e), may organise the High Court so as to create a division to deal with International crimes.

7.4 The proposed ICD STRUCTURE

The Committee proposes that the ICD should be modelled on the standards of the ICC at The Hague with the same rules, practice and procedures being adopted, in respect to prosecution of the crimes proscribed by the Act, namely genocide, crimes against humanity and war crimes.

The Committee proposes for the appointment of seven judges to sit in the ICD in panels of three (3) judges with one extra judge in case one of the judges cannot sit.

In identifying judges for the Division, the Chief Justice should send out an internal request to all judges who have interest to apply and there after the judges will be subjected to an interview by the JSC on their suitability before appointment to the Division.

Once the judges for this division have been identified, they should undergo rigorous training on internal criminal law and related subjects, through long term and short term courses.

The seat of the Court will be in Nairobi but it can also operate by circuits and may sit and conduct proceedings in any other place in Kenya as the Chief Justice may direct.

The proposed ICD should meet international standards in its trials, because the ICC retains a revisionary power to try the perpetrators afresh, where in its own motion a conclusion is made that the trials carried out at the domestic level are a sham and intended to shield the perpetrators.

That before the court commences its trials, all measures should be put in place to ensure that the court room has modern ICT facilities e.g. cameras, videos etc. because of the nature of crimes proposed to be tried at the ICD, some witnesses may prefer to give evidence through video conferencing services without attending open courts.

8. Recommendations on the Establishment of the ICD

RECOMMENDATIONS

Having considered the various policy issues informing the establishment of the ICD and the various options available, the committee recommends that;

A. On the establishment of the International Crimes Division within the High Court

1. The CJ to establish the International Crimes Division as a division of the High Court, to prosecute the pending post-election violence cases, international and transnational crimes.

2. The proposed International Crimes Division shall have jurisdiction to try:-

    i. core International crimes

    ii. transnational crimes and

    iii. Any other international crime as may be prescribed under any international instrument that Kenya is a party.

3. The ICD shall apply special rules of procedure, practice and evidence in its operations and conduct of the trials.

4. The proposed International Crimes Division of the High Court should be conferred with powers to interpret any constitutional issues that may arise in the course of proceedings before it (Article 165 of the Constitution). This would protect the Court from challenges that are experienced in other divisions of the High Court.

5. Appeals from the ICD shall lie to the Court of Appeal, with a final appeal to the Supreme Court.

6. The Chief Justice should appoint and gazette a bench of judges among the Court of Appeal judges who will hear and make determinations of Appeals from the ICD to ensure that all judges dealing with international crimes have relevant experience and training on the subject.

7. The identified judges in the Division and Court of Appeal who will handle international crimes, as well as the staff of the ICD be trained on all aspects of International Criminal Law.

8. The Judiciary to acquire a separate facility where the ICD will be housed on its own due to the nature of sensitive cases it is likely to handle. This facility will house the departments the ICD will work with such as the prosecution and witness protection departments.

9. Within thirty (30) days from the date the Committee represents its Report to the JSC, a consultative stakeholder meeting should immediately be held between the Committee and the Attorney General(AG), Director of Public Prosecutions (DPP), National Council for the Administration of Justice (NCAJ),representatives from the office of the Witness Protection Agency (WIPA), the Commission for the Implementation of The Constitution (CIC) and the Constitutional Implementation Oversight Committee (CIOC), ICC representatives, Law Society of Kenya(LSK), Law Reform Commission, Federation of Women Lawyers (FIDA), ICJ-Kenya and other stakeholders as the Commission shall recommend.

10. JSC to commission a study visit to the International Criminal Court at The Hague. Considering the nature, of the exercise and the fact that the ICD will be modeled on the standards of the ICC, it is imperative that the Committee carries out a comparative study at The Hague, to enrich the report on the rules of procedure and evidence and the international standards required to establish a modern ICD.

B. On the Office of the Director of Public Prosecutions

1. There should be established a well facilitated **independent prosecution unit** within the office of the Director of Public Prosecutions to deal exclusively with international crimes.

2. That parliament enact legislation to provide for the appointment of a special prosecutor who shall be responsible for prosecution of cases that fall within the jurisdiction of the ICD under **Article 157(12) of the Constitution of Kenya.**

3. The staff of the proposed independent prosecution unit should be trained on all aspects of international criminal law.

C. On the Witness Protection Agency

1. The Government should fully fund and make operational the existing Witness Protection Agency (WPA)

2. To set up reparations programmes and a special fund to help victims.

3. The WPA should set up an office within the ICD.

4. The Witness Protection Agency should put in place sufficient safeguards to guarantee the safety and well-being of witnesses and victims of crimes.

5. The Agency should collaborate with the staff of the ICD, the DPP and the Police Service to ensure that witness protection programmes are well co-ordinated.

D. On the Government

1. To provide political support and good will in the creation of the proposed ICD. It is imperative that the Government makes both financial and institutional commitment for the Division to achieve its desired goals.

2. To give an undertaking through a memorandum of understanding to the International Community and the ICC that any person charged, prosecuted and convicted for committing an international crime shall not be sentenced to death.

3. To provide adequate financial support, and clear commitment in order to facilitate vigorous investigations across the country.

4. To build prison facilities that will comply with international standards.

E. On Amendments to the Existing Legislation

1. The Kenya Information and Communications Act

There is need to amend the Act provide for cybercrimes (cyber laundering) as they relate to other crimes e.g. terrorism, money laundering or drug trafficking.

2. The Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009)

This Act should be reviewed to address the crime of money laundering when it is committed alongside other international crimes.

3. Government Proceedings Act, Cap 40 of the laws of Kenya

Amend section 21 of the Government proceedings Act to allow for enforcement of judgments against the Government.

4. The Judicial Service Act No. 1 of 2011

Amendments of Section 5 of the Judicial Service Act, 2011 to specifically anchor the powers of the Chief Justice to create divisions or such other units of the Court for proper administration of justice and also to give him power to assign any judge/ judicial officer or staff any

other responsibility as may be necessary. This amendment is premised on the fact that the Chief Justice as the Head of the Judiciary has powers to administer the Judiciary and establish divisions using that administrative power.

F. On Reconciliation And Restorative Justice

1. The judiciary to explore the promotion of alternative dispute resolution mechanisms such as reconciliation, mediation and traditional dispute resolution mechanisms under **Article 159(1) (c)** of the Constitution of Kenya as a basis for lasting and sustainable peace, national cohesion and prosperity.

2. That the Truth Justice and Reconciliation commission (TJRC), as a vehicle of transitional justice release its recommendations as soon as possible to provide a way forward on prosecutions.

Submitted for your perusal and Approval.

Dated at Nairobi this …….. Day of …… 2012

Member			**Signature**
1. Hon. Rev. (Dr.) Samuel Kobia	-	Chair	_____
2. Hon. Mr. Justice Isaac Lenaola	-	Member	_____
3. Hon. Ms. Emily Ominde	-	Member	_____
4. Hon. Mrs. Florence M. Mwangangi	-	Member	_____
5. Hon. Mr. Justice Mohammed Warsame	-	Member(co-opted)	_____

9. Appendices

Annex I: Members of the JSC Committee.

Annex II: Schedule of Meetings of the JSC Committee.

Annex III: Legal Notice Establishing the Ugandan International Crimes Division.

Annex IV: Proposed Gazette Notice to be issued by The Hon. CJ of the Republic of Kenya to operationalize the ICD