

International Criminal Justice at Domestic Level in Kenya: Reality on the Ground

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Abstract

The primary duty to prosecute international crimes is vested in states. This duty is effectively discharged where a domestic criminal justice system is empowered to prosecute such crimes. In this regard enactment of good laws that reflect international crimes as contained in international instruments is imperative. It is noted that, over the years Kenya had a rather sketchy legislative framework for the prosecution of international crimes. War crimes were the only international crimes that were prohibited through implementing legislation related to the Geneva Conventions. The Genocide Convention had not been implemented and crimes against humanity which have mainly developed under the body of customary international law without independent convention were also not prohibited in any domestic law. As such, crimes against humanity and the crime of genocide had no domestic law until the implementation of the Rome Statute of the International Criminal Court in 2008. This article analyses legislative framework for the prosecution of international crimes in Kenya before and after the enactment of Rome Statute. This analysis of prosecution of international crimes before domestic courts in Kenya brings to the fore the ordinary crime approach in prosecuting international crimes.

1. Introduction

In line with article 5 (1) of the Rome Statute of the International Criminal Court (ICC), core international crimes are limited to such conducts which are so serious and grave that they bring about concern to the international community in general.¹ Based on the two elements, the article has limited international crimes to only four that is; crime of genocide,² war crimes,³ crimes against humanity⁴ and the crime of aggression.⁵ This limit is also consonant with the International Law Commission (ILC) position which has restricted its definition of international crimes in the Draft Code to those offences which have the ability to disturb or interfere with international peace and security.⁶ As such other transnational crimes like the crimes of piracy⁷ and terrorism have been left out from

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¹ Rome Statute of the International Criminal Court United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 2187 U.N.T.S. 90, entered into force July 1, 2002. Herein after referred to as the Rome Statute of the ICC.

² *Ibid.*, article 5(a).

³ *Ibid.*, article 5(b).

⁴ *Ibid.*, article 5(c).

⁵ *Ibid.*, article 5(d).

⁶ The Work of the International Law Commission 7th edition, volume I, 2007, p. 96.

⁷ High Seas Convention of 1958; United Nations Convention on the Law of the Sea. Sundberg J.W.F., "The Crime of Piracy," in Bassiouni M.C., *International Criminal Law: Sources, Subjects and Contents*, Vol I, 3rd ed, Koninklijke Brill NV, Laiden, The Netherlands, 2008, p. 813. Although the crime of piracy is one of the oldest crimes recognized under international law, the attitude by main actors in international law made it difficult for it to be categorized as a crime of international concern that requires a special mechanism to have it addressed. There exists a difference of views between the British who wanted international law and its mechanism to address it and the Scandinavians who wanted the normal criminal procedure to address

the purview of “core international crimes” at international level.⁸ This is different when the term international crimes is defined under regional instruments like the Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights (Protocol Amendment).⁹

Kenya is one of the African countries which had a rather negative experience of international crimes being perpetrated in its territory. These crimes have been committed even during colonial period as accounted for in the books by Elkins¹⁰ and Anderson.¹¹ After independence, elections in Kenya had features of internal unrests. It is reported that, at least 3,000 people were killed in clashes during the 1992 and 1997 elections.¹² The situation worsened in the 2007 elections.¹³ The notorious *Mungiki*¹⁴ and other militia groups like the Sabaot Land Defence Force (SLDF)¹⁵ found a platform to perpetrate violence as organized and fuelled by politicians and businessmen.¹⁶ The violence is reported to have started as a spontaneous reaction to the election results and later came to be more organized, targeting rivals who fought back to counter the attacks.¹⁷ The police’s excessive use of force also did not aid the situation. These attacks resulted in the commission of a number of crimes against humanity calling for accountability before domestic courts. For domestic courts to prosecute international crimes it presupposes the existence of a good legislative framework.

Legislative framework to prohibit the commission of international crimes in Kenya is traced from a number of international conventions to which Kenya is a party.¹⁸ Some of

brought a drift. Therefore piracy has remained a crime under international law mainly dealt with the criminal law of states.

⁸ Werle G., *Principles of International Criminal Law*, op. cit. The scope of the term international crimes is different when elaborated under regional instruments like the Protocol on Amendment to the Protocol to the Statute of the African Court of Justice and Human Rights (Protocol Amendment) which has an expansive definition as shown in chapter four of the thesis.

⁹ Adopted by the Twenty-Third Ordinary Session of the Assembly, Held in Malabo, Equatorial Guinea 27th June 2014 Article 3 (1). Ibid Article 28a (4)-(13).

¹⁰ Elkins, C., **Britain’s Gulag: The Brutal End of Empire in Kenya**, London, Jonathan Cape, 2005.

¹¹ Anderson, D., **Histories of the Hanged: Britain’s Dirty War in Kenya and the End of Empire**, London, Weidenfeld and Nicolson, 2005.

¹² Cheeseman, N., “The Kenyan Elections of 2007: An Introduction,” **Journal of Eastern African Studies**, 2 (2008) 2, p. 170.

¹³ It was expected that the President would move constitutional reforms including creating the post of the prime minister and further ensure the 50/50 allocation of ministerial and key civil service positions among the allied political parties.

¹⁴ This militia openly stated its support for Uhuru Kenyatta in the 2002 elections.

¹⁵ Human Rights Watch, “Turning Pebbles” Evading Accountability for Post-Election Violence in Kenya, 2011, p. 12. This militia is reported to have committed attacks prior and after the elections.

¹⁶ Kriegl and Waki Reports on 2007 Elections, p. 54.

Available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf [Accessed 25 May 2016].

¹⁷ *Ibid.*, p. 8-10.

¹⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 entered into force Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950; the Convention on the Prevention and

the conventions have been domesticated as shall be shown in the subsequent parts of this article. Kenya, a common law country, was traditionally a dualist country and therefore needed to domesticate international conventions for them to have effect before domestic courts. However, this has been changed since the new constitution was passed. The 2010 Constitution has transformed Kenya into a monist state making international laws directly applicable without a need of domesticating them.¹⁹ This position has changed the traditional understanding that in most cases only civil law countries would automatically belong to the monist school.²⁰

Prior to 2008, available law that directly dealt with international crimes was the Geneva Conventions Act.²¹ This law catered for only a selection of one category of international crimes, i.e., war crimes.²² Other international crimes particularly the crime of genocide and crimes against humanity did not feature in any existing laws. The International Crimes Act of 2008 has changed this by including all the 3 core international crimes. Therefore, in Kenya, existing penal laws are applicable and have been used to prosecute international crimes particularly crimes against humanity perpetrated before 2008.²³ The approach adopted therefore is to prosecute international crimes as ordinary crimes. The analysis hereafter begins with the existing penal laws and thereafter those laws that have prohibited international crimes. The second part of the article gives an account on domestic prosecution of international crimes in Kenya using the ordinary crime approach.

2. Approaches in prosecution of international crimes before domestic courts

There are two approaches in prosecuting international crimes before domestic courts. International crimes before domestic courts can be prosecuted based on the hard mirror theory or soft mirror theory. Hard Mirror Theory is based on the foundation that all domestic prosecutions of international crimes must be analogous to their prosecution as piloted before international courts.²⁴ This position requires the provisions criminalizing international crimes at national level to be the same as those under international law. There is no room for using any existing laws that fall short of what international instruments have prescribed in terms of the definition of the core international crimes.²⁵

Punishment of crime of Genocide, 78 U.N.T.S. 277 (1951); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, U.N. Doc. A/39/51 (1984), entered into force on June 26, 1987; Rome Statute of the International Criminal Court United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court U.N. Doc. A/Conf.183/9.

¹⁹The Constitution of Kenya article 2(5) and 2 (6).

²⁰Mapunda B.T., "Treaty Making and Incorporation in Tanzania", **Eastern Africa Law Review**, Vol 28-39, 2003, at pp. 156 – 170.

²¹Chapter 198 of 1972 [R.E 2012].

²² There are other war crimes that have not been catered for under the Act a selection was made thereof.

²³ This is with reference to the 2007 post-election violence cases such as *Republic v. Joseph Lokuret Nabanyi*, Criminal Case No. 40 of 2008, [2013] eKLR; *Republic v. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa* Kitale HRCC No.19 of 2008; *Republic v. Ben Pkiech Loyatum Eldoret* HRCC No. 5 of 2008.

²⁴ Heller K.J., "A Sentence-Based Theory of Complementarity," **Harvard International Law Journal**, Volume 53, Number 1, 2012, p. 85 at 88.

²⁵ Xavier P., "The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh"?, 88 **International Review of the Red Cross** 2006, p. 375 at 390.

The theory is based on the presumption that every state has incorporated or transformed international instrument to become part of domestic law.²⁶ Countries that adhere to the monist approach (especially in case of self-executing treaties), this may not be an issue because a treaty becomes part of domestic law without the need for passing an Act of parliament.²⁷ For dualist countries, the lack of special status to international treaties poses difficulty to the theory. Treaties are required to be incorporated or being made part of domestic law before they can be invoked before a domestic court. In case a country has not passed the necessary legislation incorporating a treaty, such treaty cannot be used before domestic court.²⁸ States will therefore be unable to adhere to the strict requirement of the theory.²⁹

On the other hand, the soft mirror theory is more relaxed compared to the hard mirror theory. It recognizes the domestic prosecution of international crimes under what is referred to as the “ordinary crime approach.”³⁰ The ordinary crime approach is the tactic of prosecuting international crimes in domestic courts using the existing penal laws which have not incorporated international crimes.³¹ Here, the prosecution of such crimes does not make reference to international crimes. The conduct being prosecuted under the ordinary crime approach is analogous to the one prohibited under international instruments.³² The main difference is on the caption of the crime in question, and the elements that need to be proven to establish guilt or innocence of the accused. Example, instead of mass murder being prosecuted as crime against humanity, under the ordinary crime approach, prosecution of such conducts would be brought under the charges of multiple counts of murder.³³

International tribunals have supported this approach.³⁴ It has to be noted that the sentences handed down upon conviction on the ordinary crime approach may be

²⁶ Heller K.J., “A Sentence-Based Theory of Complementarity,” *op. cit.*, p. 89.

²⁷ Aust A., **Modern Treaty Law and Practice**, Cambridge, United Kingdom, Cambridge University Press, 2013, p. 163; Mapunda B.T., “Treaty Making and Incorporation in Tanzania”, **Eastern Africa Law Review**, Vol 28-39, 2003, at 156 – 170.

²⁸ *Ibid.*

²⁹ Materu F.S., **The Post-Election Violence in Kenya: Domestic and International Legal Responses**, The Hague, Netherlands, T.M.C Asser Press, 2014, p. 91. The use of ordinary criminal law to prosecute international crimes is argued to be an indication of inability and unwillingness of states to prosecute international crimes thereby triggering the admissibility of cases before the ICC.

³⁰ Heller K.J., “A Sentence-Based Theory of Complementarity,” *op. cit.*, at 97 and 98.

³¹ Materu S.F., *op. cit.*, p. 91.

³² Stahn C., ‘Sentencing Horror or Sentencing Heuristic?’ A Reply to Heller Sentence Based Theory of Complementarity,’ in Schabas W., McDermott Y. and Hayes N., (eds) **The Ashgate Research Companion to International Criminal Law: Critical Perspectives**, Routledge, New York, USA, 2016, p. 358. The aim of having complementarity regime under the ICC is not for the ICC to change national justice systems to reflect that of the ICC. The principle recognizes that the ICC and national criminal justice systems have a shared obligation to which the latter has the primary position to discharge.

³³ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, 10 February 2006, p. 37. The ICC has stated that the conduct must be substantially the same as the one to be prosecuted before the ICC.

³⁴ The ICTY has affirmed that there is neither treaty obligation nor norms of customary international law that prohibit the prosecution of war crimes as ordinary crimes. See Materu F.S., *op. cit.*, p. 93.

equivalent or higher than the one contained in an international instrument.³⁵ What is clearly lacking when using the soft mirror theory is the labelling of the crime as one belonging to a special group of core international crimes. To this effect, the moral guilt that is normally attached to international crimes is absent. Hence, for as much as the theory allows the prosecution of international crimes as ordinary crimes, it is still desired that states adopt legislative framework to enable them prosecute international crimes as such.³⁶

Kenya has employed the soft mirror approach as shall be shown in the following parts of this article. There has been no prosecution of international crimes before Kenyan domestic courts based on the hard mirror theory due to retrospectively applicability of the Act that implemented international crimes in Kenya. By the time international crimes were perpetrated in Kenya, the implementing law had not come into force. The only way that was proposed to prosecute international crimes as international crimes was by the establishment of a Special Tribunal.³⁷ This was however rejected.

2.1 Prosecuting international Crimes in Kenya: The ordinary crime approach

The cases reviewed in the following paragraphs reveal the prosecution of international crimes related to the 2007 post-election violence as ordinary crimes. There is therefore no mention of any international crime i.e. crimes against humanity in the decisions of the courts because such prosecutions were never based on charges of crimes against humanity. The main law that has been used is the Penal Code of Kenya. The International Crimes Act has not been used in any of the analyzed cases. It is noteworthy that, there have been acquittals for many cases brought for trial relating to the 2007 post-election violence although some of the perpetrators have been convicted.³⁸ *R v. Peter Kipkemboi Ruto*³⁹ is one case where the accused has been convicted for murder in relation to the 2007 post-election violence killing and was sentenced to death by Kenya's Court of Appeal in Nakuru.⁴⁰ Other cases include *Republic v John Kimita Mwaniki*⁴¹ where the accused was charged and convicted of murder contrary to section 202 as read with section 203 of the Kenyan Penal Code. From the facts of the case, it is apparent that the

³⁵ *Ibid*, p. 93.

³⁶ Heller K.J., "A Sentence-Based Theory of Complementarity," op. cit, p. 98. "incorporating the Rome Statute into domestic law is necessary to avoid "impunity gaps": situations in which effective prosecution is impossible, because a state's national criminal law fails to include an ordinary equivalent to an international crime, contains an inadequate range of modes of participation, or makes available overly broad defences. Others offer a more conceptual argument, claiming that the greater expressive value of a conviction for an international crime justifies, encourages states not to prosecute ordinary crimes even if the practical consequences of the two prosecutions would be the same."

³⁷ See information available at

<http://www.hrw.org/news/2009/03/25/establishing-special-tribunal-kenya-and-role-international-criminal-court> [Accessed 28 May 2015].

³⁸ A Progress Report To The Hon. Attorney-General by the Team on Update of Post-Election Violence Related Cases in Western, Nyanza, Central, Rift-Valley, Eastern, Coast And Nairobi Provinces March, 2011, Nairobi, ICC-01/09-79-Anx1 16-09-2011 2/84 EO PT.

³⁹ [2010] eKLR.

⁴⁰ Information available at <http://africajournalismtheworld.com/2015/02/20/kenya-peter-kipkemboi-ruto-sentenced-to-death-for-pev-killing/> [Accessed 9 July 2015].

⁴¹ Criminal Case No. 116 of 2007, [2011] eKLR.

accused did not perpetrate the crime alone. However, the other perpetrators were not brought before the court under a joint charge.⁴² And from the records thus far, nothing reveals that they have been prosecuted on separate charges.

Other murder cases where the accused were convicted include; *Republic v. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa*,⁴³ *Republic v. Ben Pkiech Loyatum*,⁴⁴ *Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa v. Republic*⁴⁵ and *Republic v James Omondi & 3 others*.⁴⁶ On the other hand, in the case of *Republic v. Andrew Mueche Omwenga* the charge of murder was reduced to manslaughter and upon conviction the accused was sentenced to 10 years imprisonment.⁴⁷

In the case of *Republic v. Edward Kirui*⁴⁸ the judges ordered a retrial where the accused was initially acquitted for crimes charged.⁴⁹ This is a case where a police officer was charged for murder of two persons. The case shows the desire to ensure all those who perpetrated the crimes irrespective of their official capacity are held accountable. It must be noted that, all of these cases have been prosecuted as ordinary crimes, no one has been prosecuted for international crimes before any Kenyan domestic court. The prosecutions so far have been few compared to the number of cases which ought to be prosecuted.

3. Legal framework

3.1 The Penal Code Chapter 63 [R.E 2012]

The Penal Code is Kenyan principal legislation addressing different forms of criminal conducts.⁵⁰ It is the oldest penal law that came into force in 1930. The law can and has been used to prosecute international crimes under the ordinary crime approach. In this regard, ordinary penal law is used to prosecute international crimes. This practice does not however result in the prosecution of international crimes but rather the prosecution of ordinary crimes. For example, the 2007 post election violence cases were prosecuted under this law.⁵¹ The law lists different types of crimes whose *actus reus* is akin to some of the *actus reus* under different headings of core international crimes but they lack the required *mens rea* and contextual element to qualify them as international crimes. These include crimes such as murder,⁵² assault,⁵³ different forms of sexual offences,⁵⁴ offences

⁴² *Ibid.* p. 18. The court affirmed “Robert, Geoffrey, Supe, Mathayo, Elijah and Peter (of Mengiso)” made good their escape.

⁴³ Kitale 811/30/2008 Kitale HRCC NO. 19 OF 2008.

⁴⁴ Eldoret HRCC No. 5 of 2008.

⁴⁵ Criminal Appeal No. 105 of 2013. The Court of Appeal at Eldoret confirmed the decision of the High Court upholding the conviction of the two accused. Accuse 1 all four counts while accused 2 three counts.

⁴⁶ Criminal Case No. 57 of 2008, [2015] eKLR. James Omondi alias Castro, Wycliffe Walimbwa Simiyu alias Zimbo and Paul Otieno alias Baba were convicted. The fourth accused was acquitted.

⁴⁷ Nakuru HRCC No. 11 of 2008.

⁴⁸ Criminal Appeal No. 198 of 2010, [2014] eKLR.

⁴⁹ HC.CR.C. No. 9 OF 2009.

⁵⁰ Chapter 198 of 1972 [R.E 2012].

⁵¹ *Republic v. Joseph Lokuret Nabanyi*, Criminal Case No. 40 of 2008, [2013] eKLR; *Republic v. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa* Kitale 811/30/2008 Kitale HRCC NO. 19 OF 2008; *Republic v. Ben Pkiech Loyatum* Eldoret HRCC No. 5 of 2008.

⁵² Penal Code, Chapter XIX.

against liberty⁵⁵ and offences against property.⁵⁶The provisions under this law do not reflect any category of international crimes as provided for under different international instruments including the Rome Statute. What is criminalized is analogous conduct with different material and mental element.⁵⁷ Hence, whenever the Penal Code is used to bring charges to prosecute those who have perpetrated international crimes, the practice is understood in terms of prosecuting international crimes as ordinary crimes.⁵⁸

Individual criminal liability akin to that under international instruments befalls on direct perpetrators or those who aided, abated, counseled, procured or even attempted the commission of prohibited conduct.⁵⁹ There is no corporate liability for commission of crimes listed under the Penal Code. Punishment under the Kenyan Penal code ranges from death penalty to conditional or unconditional imprisonment for a certain term, imprisonment for life, compensation and fines.⁶⁰For example, a person who is convicted of murder or manslaughter is liable to suffer death or imprisonment for life.⁶¹ This severity of punishment is enough to acknowledge that the prosecution of international crimes as ordinary crimes under the Penal Code does impose a punishment that is equivalent or even higher than that provided for under the body of international criminal justice particularly the Rome Statute of the ICC.⁶² Therefore, the Penal Code offers a tool that can be used to bring charges for international crimes under the ordinary crime approach ascribed to by the soft mirror theory. However, it is still desirable that, international crimes are prosecuted as international crimes before domestic courts. This will ensure that the severity of international crimes is reflected in the prosecutions. The moral guilt associated with such gross human rights violations is achieved when international crimes are prosecuted as such.

3.2 Geneva Conventions Act Chapter 198 of 1968 [R.E 2012]

The Act is the implementing legislation for the body of international humanitarian law and the four Geneva Conventions to which Kenya is a party. The law is an old body of domestic legislation providing for the criminalization of war crimes. The Geneva Conventions Act is a very short piece of legislation with eight sections. However, the Act contains schedules which form the bulk of the provisions of the four Geneva Conventions. Most of the Geneva implementing laws adopted this approach, namely of a

⁵³*Ibid.*, Chapter XXIV.

⁵⁴*Ibid.*, Chapter XV and the Sexual Offences Act of 2006.

⁵⁵*Ibid.*, Chapter XXV.

⁵⁶ *Ibid.*, Division V.

⁵⁷ The *actus reus* of murder, for example, remains the same. However, the qualification to make it one of the core international crimes is what is not provided for under the definition.

⁵⁸Materu F.S., *op.cit*, pp. 91 and 92.

⁵⁹ Kenya Penal Code, Chapter 63 part V. The law also provides for liability of corporations and other legal entities which fall out of the scope of the ICC Statute.

⁶⁰*Ibid.*, Chapter V.

⁶¹*Ibid.*, section 204 and 205. Attempted murder is punishable by imprisonment for life while manslaughter is punishable by imprisonment for 14 years.

⁶² The punishment under the Rome Statute does not go beyond imprisonment for life.

few provisions and schedules of the conventions. Uganda⁶³ and Tanzania⁶⁴ have adopted this approach.

The Act provides for universal jurisdiction for grave breaches as contained under the Geneva Conventions.⁶⁵ There is no reproduction of the content of the conventions detailing grave breaches, a mention of the sections in a manner as to provide for cross reference has been adopted. It is, however, important to point out that, no provision of the Act has ever been invoked to assume universal jurisdiction for war crimes committed in other countries. While European countries were active prosecuting international crimes committed in Africa under universal jurisdiction,⁶⁶ countries like Kenya, which ought to prosecute war crimes, have never assumed jurisdiction. This passiveness is partly⁶⁷ attributed to the limited legislative framework that had existed over the years on international crimes.

The Kenyan legislation made along the lines of the Geneva Conventions Act also contains sections which provide for notice of trial,⁶⁸ legal representation,⁶⁹ appeal,⁷⁰ reduction of sentence and custody.⁷¹

3.3 The International Crimes Act Number 16 of 2008

Kenya signed the Rome Statute on 11th August 1999 and ratified the same on 15th March 2005. It took Kenya three years to implement the Statute. The International Crimes Act enacted in 2008 is a legislation implementing the Rome Statute of the ICC. The law became operational on 1st January 2009. It is important to point out that, it was necessary for Kenya to enact an implementing legislation because it was adhering to the dualist school on the applicability of international law at domestic level.⁷² The Act has two objectives, namely, to provide legislative framework for the punishment of international crimes as contained in the Rome Statute and to enable Kenya to cooperate with the ICC.⁷³

The International Crimes Act is a comprehensive legislation reflecting the provisions of the Rome Statute of the ICC. Majority of the provisions under the law are geared towards enabling the government of Kenya to fully cooperate with the ICC. Parts III- VII of the

⁶³ The Geneva Conventions Act, Cap.363 16 October 1964.

⁶⁴ Geneva Conventions Act (Colonial Territories) Order in Council, 1959. The applicability of this law is subject to the reception clause under the Tanganyika Order in Council of 1920.

⁶⁵ Geneva Conventions Act, Section 3. The section makes reference to the relevant articles of the Geneva Convention providing for grave breaches which form part of the law in terms of schedules.

⁶⁶ Reydams, L., "Belgium's First Application of Universal Jurisdiction: The Butare Four Case," **Journal of International Criminal Justice**, 2003, p. 428 – 436. The author has given a background to the cases, summary of the trial and assessed the merits and shortcomings of the cases.

⁶⁷ The exercise of universal jurisdiction must be provided for under relevant provisions of domestic laws for the offences to which the courts seek to prosecute. The country has to also have the ability to prosecute and enforce sentences upon conviction.

⁶⁸ *Ibid.*, Section 4.

⁶⁹ *Ibid.*, section 5.

⁷⁰ *Ibid.*, section 6.

⁷¹ *Ibid.*, section 7.

⁷² The Constitution of Kenya, 2010 article 2(5) and 2(6) provide that the general rules of international law and any treaty ratified by Kenya shall form part of the law of Kenya.

⁷³ International Crimes Act 2008.

Act cater for different things on cooperation including but not limited to arrest and surrender, evidence gathering and enforcement of penalties.⁷⁴ Further, the law has provided under part IX provisions regulating the possibility of the ICC to sit and hold proceedings in Kenya.⁷⁵ Part X deals with request of assistance to the ICC.⁷⁶ This enforces the principle of complementarity and the role the ICC can play in assisting domestic courts. On the strength of this part the Attorney-General (AG) or the Minister⁷⁷ is empowered to seek assistance on the investigation or trial proceedings of international crimes in Kenyan courts.⁷⁸ The assistance so requested is on anything the ICC may lawfully provide including:

- (a) the transmission of statements, documents, or other types of evidence obtained in the course of an investigation or a trial conducted by the ICC; and (b) the questioning of any person detained by order of the ICC.⁷⁹

It is interesting to note that, immediately after the interpretation section, the law provides for a section stipulating that, the law is binding on the Government.⁸⁰ This provision is inspired by the fact that, what the law does, is putting in place provisions which the Government of Kenya has agreed on the international plane. Moreover, it predominantly provides for obligations which the Government has to discharge with respect to cooperation with the ICC.

The following sub part is an analysis of selected provisions of the International Crimes Act 2008.

3.3.1 Selected Provisions of the International Crimes Act 2008

3.3.1.1 Definition and Jurisdiction over International Crimes

The definition of international crimes is similar to what is provided for under the Rome Statute. The law has adopted specific provisions for each offence linking them to the definition under the Rome Statute.⁸¹ When reading the International Crimes Act provisions providing for crimes against humanity, the law has made recognition that, the Rome Statute may not have adequately captured conducts amounting to crimes against humanity. The provision thus allows the understanding of crimes against humanity to follow what other conventions and customary international law provide. This position could be attributed to the lack of independent convention catering for crimes against humanity.⁸²

⁷⁴The International Crimes Act, 2008.

⁷⁵*Ibid.*, section 161-167.

⁷⁶*Ibid.*

⁷⁷*Ibid.*, section 2(1)(b). The Minister under the Act “means the Minister for the time being responsible for matters relating to national security.”

⁷⁸*Ibid.*, section 168.

⁷⁹*Ibid.*, section 170 (a) and (b).

⁸⁰*Ibid.*, section 3.

⁸¹*Ibid.*, section 6(4).

⁸² The ILC is currently developing a specific convention for crimes against humanity under special rapporteur Prof. Sean Murphy.

The Act has provided for limited universal jurisdiction. The provisions on jurisdiction require a nexus between the offence and the Republic of Kenya. As such the law has provided for territorial jurisdiction,⁸³ nationality jurisdiction,⁸⁴ passive personality jurisdiction⁸⁵ and jurisdiction based on the citizenship of the victim of a country involved and allied with Kenya in an armed conflict.⁸⁶ The connection with Kenya is not required for cases where a person has committed international crimes elsewhere with no connection with Kenya but appears to be within Kenyan territory.⁸⁷ This shall enable Kenya to effectively discharge the duty placed upon it by international instruments to ensure the perpetrators of international crimes are prosecuted. This is subject to availability of other infrastructure needed for effective prosecution.

3.3.1.2 Punishment

Punishment for international crimes, i.e., war crimes, genocide and crimes against humanity prescribed under the law depends on whether the offence is one of intentional killing or not. Thus, if a person is convicted of an offence that contains *mensrea* such a person will be sentenced to death.⁸⁸ On the other hand conviction on any other offence will attract a punishment of imprisonment for life or lesser term.⁸⁹ Imposing of death penalty is a modification from what the Rome Statute provides. Under the Rome Statute, the highest punishment is imprisonment for life.⁹⁰

Kenya has maintained the provisions of the Penal Code with regard to intentional killing. Therefore, death penalty is a possible penalty when a person is convicted for any international crime amounting to intentional killing. This position could affect the ability of Kenya to be authorized by the ICC⁹¹ to carry prosecution of international crimes that were not prosecuted by the Court. This scenario is analogous to that of Rwanda. Rwanda could not receive transfer of cases from the International Criminal Tribunal for Rwanda (ICTR) until it abolished death penalty.⁹²

While the above sentences are applicable to proceedings conducted before domestic courts, the Act has provisions that enable Kenya to act as a state of enforcement of

⁸³*Ibid.*, section 8(a).

⁸⁴*Ibid.*, section 8(b) (i). This provision extends to cover persons who are not citizens of Kenya but are employed by GOK on civilian or military capacity. On the other hand, jurisdiction can also be assumed where the perpetrator is a citizen or was employed by the country that was involved in armed conflict with Kenya. This is enumerated under section 8(b)(ii).

⁸⁵*Ibid.*, section 8(b)(iii).

⁸⁶*Ibid.*, section 8(b)(iv).

⁸⁷*Ibid.*, section 8(c).

⁸⁸*Ibid.*, section 6(3)(a); Kenya Penal Code, section 204 sets out the punishment for murder.

⁸⁹*Ibid.*, section 6(3)(b).

⁹⁰ Rome Statute of the ICC, article 77.

⁹¹ *The Prosecutor v. Germain Katanga* Decision Pursuant to article 108(1) of the Rome Statute.

⁹² Organic Law No. 66/2008 of 21 November 2008 modifying and complementing Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, 1 December 2008.

sentences issued by the ICC.⁹³ The serving of sentences in Kenya may be a subject of further conditions as the minister may deem fit.⁹⁴

3.3.1.3 Immunity of State Officials

Immunity of state officials is a very alive issue when dealing with individual accountability for the commission of core international crimes. When reference is made to state officials' immunity it attaches to two concepts i.e. functional immunity (*ratione materiae*)⁹⁵ and personal immunity (*ratione personae*)⁹⁶ which have been born out of the rule of state immunity. It is a well settled position that state officials enjoy immunity from courts of foreign state for violations of international law.⁹⁷ When reference is made to state officials who enjoy immunity *ratione personae* under international law, it includes heads of states, heads of governments and other members of government like ministers of foreign affairs.⁹⁸ This form of immunity is absolute while functional immunity is lifted in event a state official has perpetrated international crimes.

The immunity of state officials has been waived by the Rome Statute. The provisions of the Act have maintained the same position in relation to surrender of persons to the ICC. Section 27 provides that:

The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.⁹⁹

Following this provision, state officials' immunity will only be maintained pursuant to section 62 which provides for instances where the request to surrender is in conflict with obligations to another state.¹⁰⁰ The section is analogous to article 98 of the Rome Statute. Immunity of state officials is still maintained for all proceedings before Kenyan courts when reference is made to the law. Therefore, those officials (not Kenyan) who enjoy immunity under customary international law cannot be prosecuted in Kenya when universal jurisdiction is exercised.

⁹³ The International Crimes Act, 2008, section 134.

⁹⁴ *Ibid.*, section 134 and 135.

⁹⁵ Van ALebeek R., **The Immunity of States and their Officials in International Law and International Human Rights Law**, Oxford University Press, New York, United States, 2010, 2-3. Functional immunity protects state officials from the jurisdiction of foreign courts for certain conducts performed by them on their official capacity in the discharge of state duties. These conducts cannot be taken to have been done on their personal capacity.

⁹⁶ *Ibid.* This provides immunity to state official during their term in office and covers all conducts.

⁹⁷ *Arrest Warrants Case (Democratic Republic of Congo v. Belgium)* Judgement ICJ Reports 2002, p. 3. The Court concluded that there was no existence of customary international law rule that stripped away the immunity of state officials before foreign national courts. The principles laid down in the Nuremberg, Tokyo, ICTY, ICTR and ICC did not establish a new rule of customary international law.

⁹⁸ Van ALebeek R., **The Immunity of States and their Officials in International Law and International Human Rights Law**, 187 and 188.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

The Constitution of Kenya article 143 (4) has limited immunity of president from criminal prosecution before Kenyan courts to the extent that the same has been waived by an international treaty.¹⁰¹ Therefore, the President of Kenya can be prosecuted before domestic courts in Kenya for charges on any of the core international crimes because such immunity has been waived under the Rome Statute.¹⁰² The president of Kenya does not enjoy immunity from prosecution before domestic courts in relation to core international crimes. This is a departure from the position that is available in other East African countries such as Tanzania¹⁰³ and Uganda.¹⁰⁴

The Rome Statute implementing legislation has provided Kenya with the missing link in the availability of substantive laws on international crimes. The law has provided for the three core international crimes and their punishment. Domestic courts in Kenya are therefore now able to utilize this law to prosecute the perpetrators of international crimes before the High court.¹⁰⁵

4. Accountability for international crimes and the Proposed International and Organized Crimes Division

Accountability for crimes that would qualify to be international crimes has been very limited since colonial period. Those loyal to colonial powers and the colonialist who perpetrated different forms of crimes against humanity¹⁰⁶ were not prosecuted.¹⁰⁷ Impunity was normal and could not be questioned. Other political related crimes perpetrated during the 1992 election were also not addressed. However, international crimes perpetrated during the 2007 post-election violence caught the attention of many and the call for accountability has been voiced by those who desire to see justice being done.

As of March 2015, the Director of Public Prosecutions of Kenya tendered a report which revealed that there were “6,000 reported cases and 4,575 files opened” in relation to crimes committed during the 2007 post-election violence.¹⁰⁸ The report is yet to be made public. However, the number of cases reveals the overwhelming nature of the magnitude of cases that need redress. International crimes committed in absence of armed conflict no matter how small the scale may be when compared to international crimes perpetrated during armed conflicts, they usually shock the prosecution, investigation and judiciary.

¹⁰¹The Constitution of Kenya, 2010, article 143 (4).

¹⁰²Rome Statute article 27.

¹⁰³Constitution of the United Republic of Tanzania, article 46.

¹⁰⁴ The Constitution of Uganda, article 98 (5).

¹⁰⁵ The International Crimes Act, article 8 (2).

¹⁰⁶ Elkins C., *op. cit.*, pp. 5-49. The assaults against Mau Mau supporters as mounted by the Governor and Colonial office has far reaching consequences leading to the detaining of around 1.5 million civilians who were subjected to different forms of inhuman treatments.

¹⁰⁷ *Ibid.*

¹⁰⁸ Information available at

<http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326> [Accessed 9 June 2015].

Normally, the justice system is challenged on how best to tackle the many cases which were never anticipated, where victims depend on them to see justice being rendered.

The court system in Kenya comprises of Supreme Court,¹⁰⁹ the Court of Appeal,¹¹⁰ High Court,¹¹¹ and subordinate courts which include Magistrates' Courts, Kadhis Courts, Court Martial, and any other Courts or local Tribunals established by an Act of Parliament.¹¹² The judiciary in general has undergone major changes following the adoption of the new Constitution which called for the renewal of the judiciary in 2010.¹¹³ The process of bringing about changes in the judiciary started with the passing of laws particularly the Judicial Service Act¹¹⁴ and Vetting of Judges and Magistrates Act.¹¹⁵ The process of vetting under the named law aims at ensuring that the judiciary is working properly and its independence is guaranteed through tackling the problem of rampant corruption and ineffectiveness among magistrates and judges. Other changes are notable in areas such as recruitment of more judicial officers and staff, building and refurbishment of more courts and adoption of modern management practices with support from government and development partners.¹¹⁶ These changes aimed at addressing pressing issues such as inadequate prosecutors and judicial officers resulting in backlog of cases.¹¹⁷ Despite these short comings, Kenyan courts have never been in a state that they are incapable of functioning.

However, to bring about efficacy in the investigation and ultimate prosecution of international crimes before Kenya's domestic courts, there have been efforts to establish the International and Organized Crimes Division (IOCD) within the Kenyan High Court.¹¹⁸ These efforts are made pursuant to section 8 (2) of the International Crimes Act.¹¹⁹ The Division will have jurisdiction far and beyond the ICC crimes.

In order to effectively prosecute international crimes before the proposed IOCD, the Judicial Service Commission's report made an innovative proposal. It proposed for a Special Prosecutor pursuant to article 157(12) of the Constitution and an independent prosecution unit under the office of the DPP exclusively responsible for the prosecution

¹⁰⁹Constitution of Kenya, article 163.

¹¹⁰ *Ibid.*, article 164.

¹¹¹ *Ibid.*, article 165 and 162. The High Court has several Divisions including the Industrial Court, Environmental and Land Division, Civil Division, Family Division, Commercial Division, Criminal Division, Judicial Review Division and Constitution and Human Rights Division.

¹¹² *Ibid.*, article 162 (2)(b).

¹¹³Information available at <http://www.judiciary.go.ke/portal/page/about-the-judiciary> [Accessed 3 February 2014].

¹¹⁴Constitution of Kenya.

¹¹⁵No. 1 of 2011 R.E 2012.

¹¹⁶Chapter 8B 2011 R.E 2012.

¹¹⁷ Performance Management Directorate, "Judiciary Case Audit and Institutional Capacity Survey," The Judiciary, Republic of Kenya, 2014, p. 3.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, the Judicial Service Commission (JSC) engaged a committee to seek information on the viability of establishing the International Crimes Division in 2012.

¹²⁰Number 16 of 2008.

of international crimes.¹²⁰ The Unit has been established.¹²¹ The mandate of the unit is limited to core international crimes i.e. genocide, war crimes and crimes against humanity.¹²² The independent unit is headed by the Special Prosecutor assisted by other prosecutors employed under the Unit. This will enable the utilization of skilled personnel in the field.

In preparing for the launching of the IOCD, training has been conducted on Judiciary personnel, Prosecutions under the DPP office and Office of Criminal Investigation.¹²³ It is however important to note that, since the proposal was tendered in 2012, no IOCD has been established to date. It is only in January 2015 that the Judiciary has affirmed the commitment to establish it coming July 2015.¹²⁴ However, up to September 2016, it is yet to be established. This reveals the lack of political will to ensure that the perpetrators of international crimes are held accountable.

The IOCD is a necessary step in ending impunity to international crimes in Kenya. The AG of Kenya stated that the delay in the establishment of the Division has crippled Kenya's ability to prosecute international crimes on behalf of the ICC in Kenya (absence of appropriate institution).¹²⁵ Contrary to what the AG has stated, Kenya is not expected to prosecute international crimes on behalf of the ICC; it is fulfilling its primary obligation of ending impunity to international crimes.¹²⁶

5. Challenges in the Prosecution of International Crimes in Kenya under the ordinary crime approach

The prosecution of international crimes before domestic courts, even under the ordinary crime approach, comes with its challenges. Reflecting on the few cases related to international crimes perpetrated during the 2007 post-election violence that have been prosecuted as ordinary crimes, Kenya has faced and still faces a number of challenges as the victims yearn for justice. The absence of legislative framework at the time international crimes were committed inhibited the application of hard mirror theory on the prosecution of international crimes.¹²⁷ As stated in the previous part, the absence of a specialized division of the high court specifically dealing with the prosecution of international crimes is inhibiting effective measures to bring accountability. Therefore, on

¹²⁰ Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya," 30 October 2012

¹²¹ Information available at <http://www.odpp.go.ke/index.php/international-crimes-division.html> [Accessed 16 July 2016].

¹²² *Ibid.*

¹²³ Interview transcript. The Director of Public Prosecutions and the Director of Criminal Investigations have been at the fore to ensure that those working under them receive training on investigation and prosecution of international crimes. The two offices work together to bring about the effective prosecution of international crimes.

¹²⁴ Information available at <http://www.wayamo.com/?q=projects/international-and-organised-crimes-division-icd-kenyan-high-court> [Accessed 15 June 2015].

¹²⁵ Kenya Citizen TV, 12, May 2015.

¹²⁶ Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya" (JSC Report), 30 October 2012.

¹²⁷ This theory requires international crimes to be prosecuted as international crimes.

top of these main crippling factors, there are notable challenges in the prosecution of international crimes in Kenya.

5.1 Lack of Political Will to Prosecute International Crimes

Following the failure to implement recommendations to establish a special Tribunal for the prosecution of post-election violence, the Kenyan government has displayed reluctance to bring about accountability by retributive justice. This could be attributed to the fact that those who hold high office, i.e., the president and vice president are also alleged to have perpetrated crimes during the post-election violence. The refusal by parliament to pass Constitution Amendment to set up a tribunal for prosecuting international crimes in Kenya shows the lack of political will. Even after the recommendations by the JSC to establish an IOCD, the trend is almost the same. Three years down the line, the Division has not been established. In the words of the AG “If it was up to me, two years ago, it would have been ready.”¹²⁸ There is therefore no priority to ensure that the IOCD is established.

Further, the 2015 March report of the DPP which was supported by the President indicates that PEV cases cannot be prosecuted, hence the government ought to look for “restorative approaches”. This is yet another sign of unwillingness to invoke retributive justice.¹²⁹ Judging Kenya on the threshold of Western justice may not be ideal. The country can decide the best mechanism of addressing international crimes as it deems appropriate to bring about accountability. A similar position was taken by Rwanda which established the *Gacaca* courts to hear and determine international crimes.¹³⁰

5.2 Poor Investigation of Criminal Cases

Investigation of crimes in Kenya is entrusted to the Criminal Investigation Department (CID). Reports from the DPP have consistently indicated difficulty in conducting investigation of crimes perpetrated during the 2007 post-election violence. As of 2013 a new team was set to carry out the investigation of approximately 4,000 cases out of which only 1,500 cases were considered to be eligible for trial before the IOCD.¹³¹ Even with the new team, difficulties still persisted. The March 2015 report from the DPP has indicated that difficulties still existed in the investigation of such cases.¹³² Cases like *Republic v. Joseph Lokuret Nabanyi*¹³³ and *Republic v. Stephen Kiprotich Leting & 3*

¹²⁸ Kenya Citizen TV, 12, May 2015. The IOCD was supposed to be up and running by June 2014.

¹²⁹ Sh10 billion fund has been promised to achieve the proposed restorative justice. Information available at <http://www.capitalfm.co.ke/news/2015/03/uhuru-apologises-for-past-atrocities-much-to-kiplagats-delight-2/> [Accessed 16 June 2015].

¹³⁰ “Kagame calls for equality in international justice”, **The New Times** (Kigali), 24 September 2012. “This home-grown solution through our Gacaca court process, has served us better than any other system could.... We have been able to strengthen the rule of law in our country, particularly through universal access to quality justice, so that citizens are not hindered by financial constraints or long distances to judicial centers.”

¹³¹ Information available at <https://thehaguetrials.co.ke/article/new-team-investigate-kenyas-pending-pev-cases> [Accessed 17 June 2015].

¹³² Information available at <http://m.news24.com/kenya/MyNews24/Full-State-of-the-Nation-address-by-president-Uhuru-Kenyatta-20150326> [Accessed 9 June 2015].

¹³³ Criminal Case No. 40 of 2008, [2013] eKLR.

*Others*¹³⁴ were dismissed due to the lack of sufficient evidence. In the case of *Stephen Kiprotich* the Court stated:

One would have expected the police to place before court evidence of the Accused having been part of the gang that pre-arranged to commit this offence. That, however, was not the case. The evidence on record does not show, leave alone suggest, the involvement of the Accused in any pre-arranged plan to execute any or any unlawful act... I know that it is an undoubtedly difficult thing to prove even the intention of an individual and therefore more difficult to prove the common intention of a group of people. But however difficult the task is, like any other element of crime, the prosecution must lead evidence of facts, circumstances and conduct of accused persons from which their common intention can be gathered. In this case there is absolutely no evidence of the raiders and/or any of the accused having met to arrange the execution of any or any unlawful purpose. There is absolutely no evidence to show that the Accused and/or others had a pre-arranged plan to attack Kimuli, Rehema and/or Kiambaa farms and kill their residents... In this case, without placing any evidence on record, the prosecution wants me to find that the Accused had a common intent with the murderers of the deceased and were part of that joint enterprise. That cannot be... I have to point out the shoddy police investigations in this case so that blame is placed where it belongs... The judiciary is being accused of acquitting criminals and unleashing them to society... I do not want to dismiss those complaints off hand. But what I know is that courts acquit accused persons if there is no evidence against them. In our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. Because of that our law requires that for a conviction to result the prosecution must prove beyond reasonable doubt the case against an accused person.¹³⁵

The trend of poorly investigated cases was sharply contrasted with the experience the court had on a high level case of *Republic v. James Omondi & 3 others*. The court stated:

More often than not courts have made pronouncements decrying the shoddy manner in which criminal cases are investigated. In the present case, the police acted with utmost professionalism... The case was investigated by senior and experienced investigators. The combination of this effort is evident in the quality of evidence that was produced before this court. It is the hope of this court that the investigations conducted in this case should serve a template on how investigations should be conducted with a view to resolving cases involving serious crimes. Maybe the high profile of the victim of this crime may have prompted the police to marshal their best resources in resolving the case. That should not be the case. Each serious crime should be accorded the professionalism that was shown in this case.¹³⁶

The *Stephen Kiprotich* decision has shown the court's concern on the lack of professionalism in the investigation of crimes in Kenya. Even though that was a general remark, the case specifically dealt with crimes perpetrated during the post-election violence which as reports have revealed, constitute one or more category of crimes against humanity.

¹³⁴Nakuru High Court Criminal Case No. 34 of 2008.

¹³⁵ *Ibid.*

¹³⁶ Criminal Case No. 57 of 2008 [2015]eKLR, p. 10.

In 2011 the AG stated that “time had lapsed since the crimes were committed that is why it has been difficult to gather evidence”.¹³⁷ Questions that arise out of this are the following: what can be drawn from the Hissene Habre trial that convicted him decades after the crimes were committed? How did the Extraordinary African Chambers manage to gather evidence for crimes committed 3 decades prior to its formation? The submissions are just a reflection of lack of commitment to ensure thorough investigation is conducted and prosecutions commenced. This brings back the issue of lack of political will in the search for justice. Victims have continued pressing the government to bring about the investigation and prosecution of those claimed to have perpetrated international crimes during the conflict as stated by the prosecutor of the ICC Fatou Bensouda.¹³⁸

The investigation of international crimes is not similar to the investigation of ordinary crimes. When investigators are faced with over 4,000 complaints to investigate and if the investigators are not well trained and equipped, such investigations may never bear fruits.¹³⁹ This being the case, special training and expertise are required.¹⁴⁰

5.3 Reluctance of witnesses to testify

The Report by the DPP has indicated that, most witnesses are not willing to testify on post-election violence cases due to fear of reprisal. The Witness Protection Authority (WPA) has been established and is currently carrying out its functions within Kenya.¹⁴¹ The Authority is all out to ensure that witnesses who come under its protection are effectively protected.

In order to qualify for witness protection, a person must lodge an application for such protection. Such application may also be lodged by a related person, an intermediary, a legal representative, a parent or legal guardian, public prosecutor or law enforcement agency. There is therefore no way a witness can be protected without prior application and assessment by the Agency. Since the office of the DPP has indicated witnesses are reluctant to testify, it needs to disseminate information about the protection measures that can be accorded to the witnesses in case of any threat they may face. If such information is availed to them, it may ease such reluctance. Further, protection measures ought to be requested and granted to witnesses at the investigation phase of international crimes.

Thus far, the Witness Protection Authority holds routine awareness forums especially targeting the stakeholders like the police, the Directorate of Criminal Investigations, Ethics and Anti-Corruption Commission, Office of the Director of Public Prosecutions and the Judiciary. The Agency also conducts awareness campaigns through mass media

¹³⁷ Kenya National Assembly Official Record (Hansard) 23 November 2011.

¹³⁸ Mkawale S., “PEV victims want leaders investigated,” 22 January 2015, available at <http://standardgroup.co.ke/entertainment/pulse/article/2000148727/pev-victims-want-leaders-investigated> [Accessed 17 June 2015].

¹³⁹ Human Rights Watch noted that most investigators were not trained enough to conduct the investigation of PEV cases.

¹⁴⁰ Training is already underway and the established international crimes division under the Office of Director of Public Prosecution is a step to ensure specialization.

¹⁴¹ Witness Protection Act, Chapter 79, 2006; Witness Protection (Amendment) Act, 2010; The Witness Protection Regulations, 2011; Witness Protection Rules Legal Notice No. 224, 2015 and Witness Protection (Amendment) Act, 2016 (Act No. 45 of 2016).

especially radio and television in order to reach the general public, to make them aware of the existence of the agency and the services that the agency offers. It must be noted that, the problem of witnesses' fear of reprisal and their protection is not one that is unique to Kenya. Other countries like Uganda and Rwanda, even international courts face a similar challenge.

Conclusion

The legal framework for the prosecution of international crimes in Kenya has greatly improved. Prior to 2008, the country had a very limited legal framework with the Geneva Conventions Act as the only instrument addressing core international crimes. After domesticating the Rome Statute through enactment of the International Crimes Act, Kenya has a very comprehensive law on all core international crimes. Despite the presence of this legislation, it has not been possible to prosecute perpetrators of crimes against humanity committed during the 2007 post-election violence under the heading of crimes against humanity. This has mainly been attributed to the principle of non retrospective application of law. As such, crimes against humanity have been prosecuted as ordinary crimes as shown in section four (4) of the article. While the practice of prosecuting international crimes as ordinary crimes addresses the issue of impunity for international crimes, there is still the lack of evidential weight that is normally attached to core international crimes.