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# The Post-Election Violence in Kenya

## Domestic and International Legal Responses

Sosteness Francis Materu

Springer

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**Editorial Office**

Prof. Dr. Gerhard Werle
Humboldt-Universität zu, Berlin
Faculty of Law
Unter den Linden 6,
10099 Berlin, Germany
gerhard.werle@rewi.hu-berlin.de
moritz.vormbaum@rewi.hu-berlin.de

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# The Post-Election Violence in Kenya

## Domestic and International Legal Responses

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Sosteness Francis Materu
Faculty of Law
University of Dar es Salaam
Dar es Salaam
Tanzania

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*To my parents, Francis Mlang'a Materu (R.I.P.)*
*and Melania Msise Materu,*
*and*
*my siblings*

# Foreword

Although a familiar fixture for many of us, the nascency of the International Criminal Court (ICC) must be continually brought to our forethoughts. While it may stand alone as the world's only permanent international criminal tribunal, it stands there on the footing provided by all attempts to meet power with law and mete out a justice that ensures victims are entitled to see perpetrators brought to book, regardless of stature and position. That the ICC exists is an achievement of monumental importance; that the early years of the ICC have perhaps raised more questions than answers should equally be expected.

The Court's evolution will include steps forward, sideways, and every which way, as it encounters novel situations as a novel institution. The Court is in this Heraclitean dance with its partners: States Parties that have signaled to the world their rejection of impunity, those that participate from the sidelines, and those that may seek to undermine its operation. Each step yields a new understanding at every move, encountering new challenges and possibilities, undergirded by the promise of constant change. With one of the first contemporaneous studies of Kenya and its own fraught, ever-changing dance with the ICC, Sosteness Francis Materu gives us a lens to examine not only issues of importance to Kenya and Kenyans, but to all those with an eye on the Court and its relationships in the world, the region, and within itself.

As readers and learners, we glean many benefits from the author's own positioning. He is a highly skilled and qualified academic. I learned this first-hand through our interactions at the South African-German Centre for Transnational Criminal Justice, a partnership between the University of Western Cape in Cape Town and the Humboldt University in Berlin, where he was a student. This Centre supports the exploration of emerging transnational criminal issues from both African and International perspectives, an embrace that shines through in the author's own work.

The author displays a systematic approach to teasing apart the many facets of the issues in the Kenyan situation. While he offers a historically grounded socio-political analysis of the post-election violence that engulfed Kenya as 2007 became 2008, his study never loses sight of the procedural and substantive legal

issues within Kenya and the ICC. He draws out the tensions in the evolution of accountability for international crimes, and, while maintaining distinctly national focus, is still able to highlight the overarching challenges of meeting power with law in a world of multi-level jurisdictions. He does all of this in a well-structured manner that is accessible for practitioners, academics, and those interested more broadly in the issues under study.

As he guides us first through the post-colonial genesis of fault lines in the Kenyan society and the dangers of imperial presidencies, we see how recurring episodes of unpunished electoral violence and a culture of impunity bred conditions ripe for exploitation. As Kenyans and the world watch the convulsions run across the country in the wake of the 2007 elections, there was also a belief, however tenuous, that the domestic system may yield the promised outcomes of justice and reconciliation. Materu neither holds false hope nor unwarranted cynicism for the restorative justice mechanisms that were brought in alongside the importance of recognizing the need for retributive justice in the agreements that flowed from the Kenyan National Dialogue and Reconciliation. The author shows us though that even the most promising attempts at creating a roadmap for accountability within Kenya were bedeviled by local politics. Again, we are returned to the persistent challenge of law meeting intransigent power.

Though Materu's analysis concludes there was the technical ability of the domestic Kenyan legal system to confront the crimes, he demonstrates the impossibility of that happening in the post-violence context. As his analysis moves to Kenya's dance with the ICC, which was initiated by the Prosecution's first exercise of the Office's *proprio motu* powers, we see how unwelcoming of a partner Kenya had become. Kenya's various attempts at ousting the Court's exercise of its complementarity jurisdiction are set out and examined, showing how a once willing state can foment discontent with institutions internally and regionally.

The Court's own engagement with the case quickly showed again the novelty of the situation. The Rome Statute's treatment of the contextual elements of crimes against humanity has given rise to divisive interpretations, no more clear than in the Kenyan cases. From the minority, we received the counterpoint to Pre-Trial Chamber II's majority both in authorizing the investigation into the situation in Kenya and subsequently their confirmation of charges against four of the original six who stood accused. As the author sets out, when examining the contested element of what constitutes "a State or organizational policy" from the minority we received an interpretation focused on the nature of the entity, an account that hues closer to our historically informed sense of international crimes. From the majority we get what Materu describes as a forward-looking account of the nature of crimes against humanity, one that focuses on the capacity of a group to commit heinous crimes and that appreciates the dynamic evolution of criminal actors. For a permanent institution, the author implores us to adopt this latter view and sets out cogent reasons for doing so. His legal analysis does not stop there and his treatment of the issues that have arisen in this situation continues to reflect his appreciation for the interplay between local, regional, and international regimes and actors.

At a time when the ICC is being critiqued from multiple angles, Materu's account helps us locate the institution's strengths and weaknesses. His treatment of the dance between the Court and Kenya is informed and balanced; neither escapes criticism. His recognition of the local limits for obtaining justice in Kenya should be a sound reminder to the Court's critics that it has a role to play and should be supported in bringing voice to victims of atrocities regardless of where they find themselves.

Berlin, Summer 2014

Prof. Dr. h.c. mult. René Blattmann
Visiting Professor,
Humboldt-Universität zu Berlin
Former Vice-President and Judge,
International Criminal Court

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Above all, I thank the Almighty God for His constant love and blessings. To Him be all the glory.

# Contents

**Part II Post-Election Violence, Domestic Legal Options and Responses**

# Abbreviations and Acronyms

| | |
|---|---|
| AC | Appeals Chamber |
| AG | Attorney General |
| Art(s) | Article(s) |
| ASP | Assembly of States Parties |
| AU | African Union |
| Cap. | Chapter |
| CCL | Control Council Law (No. 10) |
| Cf. | Compare (*confer*) |
| CORD | Coalition for Reforms and Democracy |
| DPP | Director of Public Prosecutions |
| EAC | East African Community |
| EACJ | East African Court of Justice |
| ECOWAS | Economic Community of West African States |
| ed(s). | Editor(s) |
| edn. | Edition |
| EJIL | European Journal of International Law |
| eKLR | Electronic Kenya Law Reports |
| et al. | and others (*et alii*) |
| et seq. | and the following (*et sequens; et sequentes*) |
| G.N | Gazette Notice |
| i.e. | that is (*id est*) |
| ibid. | in the same place (*ibidem*) |
| ICC | International Criminal Court |
| ICD | International Crimes Division |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for (the Former) Yugoslavia |
| IMT | International Military Tribunal (at Nuremberg) |
| KADU | Kenya African Democratic Union |
| KANU | Kenya African National Union |
| KNDR | Kenya National Dialogue and Reconciliation |
| LDP | Liberal Democratic Party |

| | |
|---|---|
| MP(s) | Member(s) of Parliament |
| NAK | National Alliance (Party) of Kenya |
| NDP | National Development Party |
| NGO | Non-governmental Organization |
| ODM | Orange Democratic Movement |
| OTP | Office of the Prosecutor (of the ICC) |
| p, pp | page(s) |
| para(s) | paragraph(s) |
| PNU | Party of National Unity |
| PTC | Pre-Trial Chamber |
| R.E | Revised Edition (of the laws of Kenya) |
| s, ss. | section(s) |
| SCSL | Special Court for Sierra Leone |
| TC | Trial Chamber |
| TJRC | Truth, Justice and Reconciliation Commission (Kenya) |
| TRC | Truth and Reconciliation Commission |
| UN | United Nations |

# Chapter 1
# Introduction

**Abstract** This chapter introduces the study and gives its general overview. It starts by situating the study within the context of the "duty to prosecute", being the basis for prosecuting crimes under international law allegedly committed in Kenya. The chapter also presents the background to the research problem, the objectives of the study and the outline of the book.

## Contents



## 1.1 Preliminary Remarks

The Republic of Kenya is located in the eastern part of Africa. By 2009 its population was approximately 40 million people, spread over a land area of 580,000 km$^2$.[1] Like people in other African countries, Kenyans identify themselves, inter alia, by their ethnic groups (tribes), whose total number is 42, and which are distributed unevenly across the country.[2] Before the introduction of the county administration system in 2010, the country was divided into eight geographical-cum-administrative regions called provinces, which were controlled directly by the central government from the capital city, Nairobi.[3] In terms of

[1] See Kenya National Bureau of Statistics 2010, p. 20.

[2] See Jonyo 2003, p. 166.

[3] These are Nairobi, Nyanza, Eastern, Western, Coast, North-Eastern, Rift Valley and Central Provinces.



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economic development, Kenya is a developing country with the largest Growth Domestic Product (GDP) in Eastern and Central Africa (excluding Ethiopia), its capital city being the economic hub of the region.

Kenya was under effective British colonial rule between 1890 and 1963. The British colonialists introduced a settler economy which was accompanied by large-scale commercial farming.[4] By 1950, the white population, mostly settler coffee and tea farmers, was 80,000.[5] Today, the number of white population has dwindled, as most of the British settler farmers left after Kenya became independent. Until the general elections of 2007, which gave rise to the crimes dealt with in this book, Kenya had had three presidents, the third of whom, Mwai Kibaki, was seeking re-election.

## 1.2 Setting the Context

Crimes under international law differ from ordinary domestic crimes. Although some scholars argue that a *precise* definition of the former still remains controversial,[6] it is clear that such a controversy, if any, does not extend to their distinguishing features. Scholars agree on at least three most important features that make a criminal conduct a crime under international law. Firstly, apart from entailing individual criminal responsibility, the criminalization and punishment of such conduct must, as a matter of principle, arise directly under international law. Secondly, the aim of such criminalization must be to protect the interests of not just one or a few states, but of the international community as a whole. Thirdly, the official position of perpetrators of such crimes must not exonerate them from individual criminal responsibility, even if their national jurisdictions would ordinarily avail them such a privilege.[7]

Four "core crimes under international law" are recognized as such, namely genocide, war crimes, crimes against humanity and aggression.[8] This list presents the law as it stands today, but there is a possibility that it might be expanded in the future.[9] The four core crimes are said to be "the most serious crimes of international

[4] Library of Congress 2007, p. 2.

[5] Jonyo 2003, p. 166.

[6] See, e.g., Naqvi 2009, p. 21; Wouters 2005, pp. 17 et seq.

[7] Bassiouni 1986, p. 2; Cassese 2008, pp. 11–13; Damgaard 2008, pp. 56–60; Naqvi 2009, pp. 21–24; Schabas 2007, pp. 82–83; Werle 2009, p. 29.

[8] See Article 5 of the Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998 (hereafter "ICC, Statute"). See also Cassese 2008, pp. 11–13; Damgaard 2008, pp. 56–85; and Werle 2009, p. 29.

[9] See, e.g., ICC Statute, Article 123; Bassiouni 1986, pp. 1–2 (arguing that there are 22 "international crimes" in total). For more details see Triffterer 2008, pp. 40 and 59; and Zimmermann 2008, pp. 98–103.

concern",[10] because their effect not only transcends national boundaries, but also tends to threaten the peace, security and well-being of arguably the world as a whole.[11] In view of this, there is a global consensus that in the event that such crimes occur, the state on whose territory they are committed (state of commission) has a legal duty, arising directly under international law, to investigate, prosecute and punish the perpetrators.[12]

The duty to prosecute, which is imposed on the state of commission, exists alongside the right to prosecute availed to third states through universal jurisdiction. Pursuant to such a right, a third state may, in principle, prosecute a core crime even if it does not have any direct link with the perpetrator, the crime or the victims.[13] The right to prosecute exists solely on the basis of the *jus cogens* (customary) nature of the core crimes,[14] which makes them prosecutable by any state, irrespective of whether or not there is a treaty obligation to do so.[15]

Both the duty and the right to prosecute underscore one main point: impunity for the core crimes is not an option.[16] In addition, the right to prosecute is intended mainly to play a curative role, namely to fill a foreseeable impunity gap; it seeks to ensure that if the state of commission ignores or fails to discharge its duty to prosecute, then any third state which is committed to international criminal justice is able to do so.

However, if history is anything to go by, it proves amply that there is no guarantee that the state of commission will always discharge its duty to prosecute. A lacuna may arise in any of the following three scenarios. First, the state of commission may simply *ignore* its duty to prosecute (inaction). Second, it may *wish or even attempt* to prosecute, but fails to do so due to its inability to conduct effective investigations and/or prosecutions (inability). Third, it may *purport* to investigate or prosecute, but prove to be unwilling to carry out genuine investigations or prosecutions, sometimes with the intention to shield the perpetrators (shielding). Similarly, both history and practice show that in these three scenarios, even universal jurisdiction may not always be a reliable tool to fill the resulting lacuna. The reason being that in most

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[10] ICC Statute, Preamble para 4 and Article 1.

[11] ICC Statute, Article 5 and Preamble, para 3; Werle 2009, p. 31.

[12] See Human Rights Watch 2009, pp. 10–17; International Committee of the Red Cross 2005; Jeßberger 2007, pp. 213–22; Scharf 1996, pp. 1 et seq.; Tomuschat 2002, pp. 315 et seq.; Werle 2009, pp. 69–70. On how the duty to prosecute is extended to third states by the principle of *aut dedere aut judicare* (prosecute or extradite), see generally Bassiouni and Wise 1995.

[13] Werle 2009, p. 64. See also generally Macedo 2004.

[14] Article 53 of the Vienna Convention on the Law of Treaties of 1969 defines a *jus cogens* as a "peremptory norm of general international law … from which no derogation is permitted".

[15] Bassiouni 1996, p. 63 (noting, inter alia, that the *jus cogens* status of international crimes constitutes obligations *erga omnes* (owed to all mankind) which are non-derogable). See also Obura 2011, pp. 13–14.

[16] Cf. May 2005 (giving a theoretical and philosophical justification on why third states and international tribunals must exercise jurisdiction over *jus cogens* crimes when the state of commission fails or is unwilling to do so).

cases, third states do refrain from exercising their right to prosecute on account of, inter alia, diplomatic, political or practical considerations.[17]

If states fail or are unwilling to investigate and prosecute, there is a fallback: criminal accountability for at least those who bear the greatest responsibility for the core crimes can be sought before international courts and tribunals vested with jurisdiction. Currently, the most prominent institution vested with such jurisdiction is the permanent International Criminal Court (hereafter "the ICC" or "the Court"),[18] a treaty-based court for which a Statute (hereafter "ICC Statute") was adopted in 1998 and put to effect on 1 July 2002. The Court became fully operational in 2003.[19]

The ICC Statute reaffirms the duty of national jurisdictions to prosecute and punish the core crimes under international law, and reiterates that no impunity shall be tolerated in this regard.[20] As the Court officially commenced its activities, Luis Moreno-Ocampo, its first Chief Prosecutor, underscored the pivotal role of states in the fight against impunity with regard to these crimes through genuine utilization of their national courts. Ocampo stated that the ICC's efficiency would not be measured by the number of cases it prosecutes, but rather by the number of cases it *avoids* due to the proper functioning of domestic legal systems.[21] In line with this statement, the jurisdiction of the ICC is designed to be complementary (secondary) to that of national courts.[22] This arrangement rightly makes the

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[17] Cf. Bassiouni 2001, pp. 81 et seq.; Macedo 2004, p. 44, Kissinger; 2001, pp. 86–96; and Werle 2009, pp. 67–68. A clear example of how sceptical the policies of states are with regard to the exercise of universal jurisdiction is to be found in State's argument in the judgment of the High Court of South Africa: *Southern African Litigation Centre and Another v. The South African National Director of Public Prosecutions and Three Others,* 8 May 2012, pp. 25–27. Also see the subsequent judgment of the South African Supreme Court of Appeal: *National Commissioner of the South African Police and another v. Southern Africa Litigation Centre and others* (485/2012) [2013] ZASCA 168 (27 November 2013). For critical analysis of these judgments see Kemp 2014; Werle and Bornkamm 2013, pp. 659 et seq.

[18] ICC Statute, Article 5(1). However, with regard to the crime of aggression, the ICC will only be able to exercise jurisdiction after 2017 upon meeting the specific conditions stipulated under Article 5(2) of the ICC Statute read together with Article 15 *bis* adopted in the first amendment to the Statute in 2010. For more details see Ambos 2010, pp. 463 et seq.; Clark 2009, pp. 1103–1115 and Manson 2010, pp. 417–443.

[19] For more information see "ICC at a glance" http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at.%20a%20glance/Pages/icc%20at.%20a%20glance.aspx. Accessed September 2014 See also Werle 2009, pp. 20–25.

[20] The Statute provides that in order to "put an end to impunity for perpetrators of these crimes and thus contribute to the prevention of such crimes…effective prosecution must be ensured by taking measures at national level". And therefore, "it is a duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". See ICC Statute, Preamble, paras 4, 5 and 6.

[21] See Statement given at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC (June, 16 2003), p. 2 http://www.iccnow.org/documents/MorenoOcampo16June03.pdf. Accessed August 2014.

[22] See infra Sect. 6.5.

ICC "the ultimate executor of compliance to the duty to prosecute" and arguably "the main guarantor" of the same.[23]

In summary, therefore, a principle of international customary law exists which requires that commission of any of the core crimes under international law must not go unpunished. Similarly, the avenues or forums in which criminal accountability for such crimes can be sought are clearly known and well established: In the first place, the state of commission is duty-bound to institute genuine prosecutions in its domestic courts, failing which last resort can be had to the ICC or to prosecution on the basis of universal jurisdiction.

One would expect that apart from their retributive purpose, the foregoing initiatives would have also the effect of deterring the commission of crimes under international law. However, gross human rights violations resulting in the commission of these crimes remain a serious problem currently, especially in Africa. In the recent past, following the establishment of the ICC, several African countries, including the Democratic Republic of the Congo, Central African Republic, Sudan, Ivory Coast, South Sudan, Nigeria, Mali, Libya and Egypt, have been affected by such violations in varying degrees.

Although most gross human rights violations in Africa have, in the past, been associated with civil wars, recent experience and trends show that terrorism and election-related violence are playing an increasing role. In addition, in some of the incidents where such violations occurred, particularly those related to election violence, both national and regional actors, including the African Union, have focused more on political solutions, including, for example, urging the formation of so-called "governments of national unity".[24] In such cases, legal responses were not given priority, even where it was apparent that crimes under international law were or could have been committed. However, when similar gross human rights violations occurred in Kenya, an agreement was reached that both political and legal responses would be pursued. This created the immediate impression that perhaps a positive step in the right direction was being made.

The background is that from 30 December 2007 to 28 February 2008 Kenya was plunged into a widespread violence following a highly contested and controversial presidential election.[25] In the course of this violence (hereafter "post-election violence"), atrocities such as murders, rapes, inflictions of grievous bodily injury, forceful evictions, malicious destruction of property, arson, pillaging, etc., were committed.[26]

A mediation process was carried out amidst the heightening violence (see infra Sect. 3.3). As a result, five important agreements were signed between the contesting political parties. The first agreement, which was signed on 28 February 2008,

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[23] Valinas 2010, p. 269. Cf. Laplante 2010, p. 636.

[24] See generally Chigora and Guzura 2011; Mapuva 2013.

[25] BBC News, 31 December 2007.

[26] See Internews 2010 https://internews.org/sites/default/files/resources/2010-05_Kenya_ICC_5-Page_Briefing.pdf. Accessed September 2014.

concerned power sharing between the main contestants in the presidential election. This agreement de-escalated the violence immediately.[27] The second agreement pertained to the establishment of a commission of inquiry into the post-election violence which was mandated, inter alia, to identify and recommend "measures with regard to bringing to justice those persons responsible for crimes committed during the violence".[28] The third agreement pertained to the formation of a truth commission to look into, among other things, the human rights violations that occurred during and beyond the violence.[29] The fourth agreement pertained to "long-term issues and solutions", the most important issue being the creation of agencies for constitutional reforms and mechanisms for implementation of such reforms.[30] The fifth agreement related to the creation of an Independent Review Committee (IREC) to, among other things, do a review of the electoral legal framework and give recommendations for appropriate electoral reforms.[31]

The findings of the commission of inquiry formed pursuant to the second above-mentioned agreement suggested that gross atrocities constituting crimes against humanity had been committed. The commission gave, among others, two important recommendations on addressing criminal accountability in respect of those crimes. First, it identified the alleged main perpetrators and recommended that they be prosecuted by a local special tribunal that had to be created. Second, it recommended that should Kenya fail to prosecute the perpetrators domestically, then the intervention of the ICC would be invoked.

As the recommendation above had speculated, Kenya did not institute proceedings against the alleged main perpetrators within the set time frame. As a result, the commission of inquiry in conjunction with the mediators requested the ICC to intervene as it had been agreed.[32] Thus, on 6 November 2009, the ICC became officially seized with the matter,[33] and subsequently, indicted six Kenyans for crimes against humanity. The then ICC Prosecutor Luis Moreno-Ocampo noted that the ICC's intervention in Kenya was particularly important in order to "prevent the commission of [similar] crimes during the next elections."[34]

The Kenyan government was discontented with the intervention of the ICC and tried to halt the ensuing judicial process in at least four different ways. First, it made two unsuccessful attempts at requesting the United Nations Security Council

[27] See Kenya National Dialogue and Reconciliation 2008a.

[28] See Kenya National Dialogue and Reconciliation 2008b.

[29] See Kenya National Dialogue and Reconciliation 2008c.

[30] See Kenya National Dialogue and Reconciliation 2008d.

[31] See Kenya National Dialogue and Reconciliation 2008e.

[32] See ICC Press Release ICC-OTP-20090709-PR436, 9 July 2009.

[33] See Decision Assigning the Situation in Kenya to Pre-Trial Chamber II, ICC-01/09-1, 6 November 2009.

[34] ICC Press Release ICC-OTP-20090716-PR439, 16 July 2009.

to suspend the proceedings before the Court.[35] Second, it threatened to withdraw from the ICC Statute.[36] Third, it raised a legal challenge against the jurisdiction of the ICC over the alleged crimes, citing complementarity as a basis. This, too, failed. Fourth, it showed a keen interest in and actively pressed for the initiative to extend criminal jurisdiction to two regional courts in Africa, hoping that such a development would make the ICC "transfer" the cases back to Africa. This, too, did not work out.

Meanwhile, at the time of the post-election violence, Kenya had already ratified the ICC Statute, but was yet to domesticate it. Besides, the Kenyan government has not denied that crimes against humanity were or might have been committed on its territory during the violence. However, 6 years after the violence, Kenya has not instituted domestic proceedings against the alleged main perpetrators whose number is clearly more than the six suspects indicted by the ICC. Although the Kenyan Parliament blocked all attempts to create a local tribunal that would have prosecuted these perpetrators, it swiftly passed a law which established a truth commission with "non-retribution" as its main objective, and which contained some amnesty provisions.

Two main arguments have been advanced in the aftermath of the violence regarding Kenya's failure to institute domestic proceedings against the main perpetrators. The first argument is that the Kenyan government lacked (and still lacks) a political will to investigate and prosecute the perpetrators. The second argument is that even if it was to be assumed that Kenya had wanted to prosecute the prosecutors, it would not have succeeded, because it lacked a sufficient legal framework. One view that emerged domestically soon after the end of the violence was that the Kenyan substantive criminal law as it stood at the time of commission of the crimes was inadequate for the prosecution of core crimes under international law. According to this view, even though a law was enacted a year after the violence to domesticate the ICC Statute, it would not have been legally possible to use that law retrospectively to prosecute the perpetrators. It was further argued that even if, for argument's sake, one could assume that the existing Kenyan laws were sufficient, the Kenyan judicial institutions would still have been "unfit" to enforce such laws, the reason being that these institutions were not independent and credible enough to be entrusted with such a huge task. From these arguments, the predominant conclusion drawn was that the ICC or a tribunal which is completely independent of the Kenyan judicial system would be the best forum to address criminal accountability for the post-election violence.[37]

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[35] See infra Sects. 6.6.1 and 6.7.4.

[36] See Daily Nation, 22 December 2010. A Motion to withdraw from the Statute was presented to the Parliament by Isaac Ruto (MP) on Thursday December 16, 2010. See Parliament of Kenya 2010, pp. 30 et seq.; For further discussion see infra Sect. 6.6.3.

[37] See Asaala 2010, pp. 377–406; Asaala 2012, pp. 119–143; Gathii 2010; Mohochi 2011; Musila 2009, pp. 445 et seq.; Nmaju 2009, pp. 78 et seq.; Okuta 2009, pp. 1063 et seq.; Sing'Oei 2010, pp. 5 et seq.

Even though there were consistent calls made on Kenya to institute domestic proceedings, several influential people who were named by official reports as being the masterminds or sponsors of the violence continued serving in the Kenyan Parliament and others in the government as ministers or senior civil servants. This includes almost all the individuals who were officially indicted by the ICC. Thus, these individuals continued to have both direct and indirect influence in respect of key government actions, decisions and policies, including those pertaining to the search for criminal accountability for the crimes that they themselves were accused to have masterminded. The climax of all this, which brought in a completely new dimension, was reached in March 2013, when two among those Kenyans indicted by the ICC were elected Kenya's President and Deputy President.

Moreover, since the ICC started exercising its jurisdiction over the Kenyan cases, several issues of interest, some of which entailing contentious legal issues, have emerged. The most contentious legal issue which deserves a mention at this stage emerged at the very inception of the ICC process, and for the first time in the jurisprudence of the ICC. It concerned the interpretation of the definitional elements of crimes against humanity under Article 7(2)(*a*) of the ICC Statute, namely the phrase "State or organizational policy". A serious disagreement arose over whether this definitional threshold was met with regard to the criminal acts that occurred in Kenya so as to justify the ICC's intervention. In the end, both the judges of the ICC's Pre-Trial Chamber and scholars were left fundamentally divided (see infra Sect. 6.4.2.3). The ensuing debate[38] is far from settled, and this book adds more thoughts to it.

Apart from the legal issues that have arisen out of the ICC's proceedings, much more happened outside the courtroom. Most importantly, the fact that the ICC continued to exercise jurisdiction in respect of the persons who are now the Kenyan President and Deputy President fuelled a pre-existing "hostility" of the African Union (AU) towards the ICC, thereby compounding the perception held by the AU that the ICC is "targeting" African leaders.

## 1.3 Objectives

In view of the foregoing background, there is a need to take stock of what transpired during the post-election violence in Kenya and how the question of criminal accountability for the alleged crimes against humanity has been dealt with so far, both at the national and international level. In addition, there is a need to clarify a number of issues, ranging from socio-political and historical issues related to the violence; controversies, allegations, perceptions and demands which have arisen so far in connection with the ICC's intervention in Kenya. More importantly, there is a need to clarify and analyse the main legal issues and options arising at both

[38] See, e.g., Halling 2010, pp. 827 et seq.; Hansen 2011, pp. 1 et seq.; Kress 2010, pp. 855 et seq.; Werle and Burghardt 2012, pp. 1 et seq.

the domestic and international level in relation to accountability for the post-election violence. The main aim of this book is to carry out this task. It will do so by seeking to answer the following specific questions:

- To what extent is Kenya's political and historical background linked to the 2007–2008 post-election violence, and how has this background affected or how is it likely to affect the efforts to ensure criminal accountability for the alleged crimes against humanity?
- Pursuant to the agreed road map for domestic criminal accountability for the crimes linked to the violence, and in view of the currently available domestic legal framework, to what extent has Kenya discharged and can still discharge its duty to prosecute those who bear greatest responsibility for the crimes?
- To what extent are the non-prosecutorial mechanisms adopted in response to the post-election violence consistent with Kenya's duty to punish the alleged crimes against humanity? And given their design, could these mechanisms ultimately affect the search for criminal accountability for those responsible for the crimes?
- To what extent was the ICC's intervention justified, and what are the main legal issues of jurisprudential significance that have so far emanated from the Kenyan cases before the ICC?

## 1.4 Chapters Outline

To achieve the objectives above, the book is organised into seven chapters.

Apart from Chapter 1, which introduces the book and gives its general overview, Chapter 2 presents a concise political, sociological and historical background of the Kenyan politics prior to 2007. This chapter is meant to give the reader the impression of how the post-election violence links to Kenya's recent history. It also prepares the ground for understanding that such historical background has had a spill-over effect with regard to how Kenya has so far acted at the national level with regard to criminal accountability for the alleged crimes against humanity.

Chapter 3 is devoted for the post-election violence, describing its immediate trigger, patterns, magnitude and associated crimes. It also discusses the mediation process, focusing mostly on the political settlement, the agreed road map towards criminal accountability, the failed attempt to implement the road map and the consequences of such failure. Lastly, the chapter presents the general perception of Kenyans about the appropriate place or forum to prosecute the perpetrators.

Chapter 4 discusses the legal options for ensuring criminal accountability at the domestic level. It analyses Kenya's substantive criminal law as it stood at the time of commission of the alleged crimes against humanity and subsequent to their commission, with a view to establishing whether this legal framework could be used as an effective tool to prosecute the alleged crimes against humanity, taking into consideration the principle of legality, which prohibits imposition of

retrospective punishment. In addition, the chapter examines to what extent Kenya has actually prosecuted the crimes under the available domestic legal framework; and whether by doing so Kenya can be said to have fulfilled its duty to prosecute those who bear major responsibility for the crimes.

Chapter 5 explores the alternatives and adjuncts to domestic prosecutions, with particular emphasis on the Kenyan truth commission. It outlines the background of the commission, its creation, composition and mandates, but the main focus is on the relationship between the commission and criminal accountability for the post-election violence. The chapter studies the relationship between the commission and the domestic judicial institutions, specific focus being on how such a relationship could impair or foster domestic criminal accountability for the alleged crimes.

Chapter 6 concerns the prosecution of the alleged crimes against humanity at the ICC level. It analyses the Kenya situation before the ICC, and covers selected legal issues of procedural and substantive nature arising from the pre-trial phase of the proceedings. These include, but are not limited to, the trigger mechanism, complementarity, and more importantly, the Pre-Trial Chamber's interpretation of the definitional elements of crimes against humanity under the ICC Statute. Other issues covered include the impact of the ICC's intervention on Kenya's 2013 general elections; the implications of the outcome of the 2013 presidential election on the ICC legal process; and the African Union's position with regard to the ICC's prosecution of Kenya's serving head of state and his deputy.

Lastly, Chapter 7 concludes with a summary of the book.

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