

# **International Criminal Justice Series**

Volume 2

## **Series editors**

Gerhard Werle, Berlin, Germany

Lovell Fernandez, Bellville, South Africa

Moritz Vormbaum, Berlin, Germany (Managing Editor)

## **Series Information**

The *International Criminal Justice Series* aims to create a platform for publications in the whole field of international criminal justice. It, therefore, deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

The series concentrates on themes pertinent to developing countries. It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars, in particular from African countries.

## **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

More information about this series at <http://www.springer.com/series/13470>

Sosteness Francis Materu

# The Post-Election Violence in Kenya

Domestic and International Legal Responses



ASSER PRESS



Springer

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

ISBN 978-94-6265-040-4                      ISBN 978-94-6265-041-1 (eBook)  
DOI 10.1007/978-94-6265-041-1

Library of Congress Control Number: 2014954347

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl)  
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2015

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. The use of general descriptive names, registered names, trademarks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Printed on acid-free paper

Springer is part of Springer Science+Business Media ([www.springer.com](http://www.springer.com))

*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



# Acknowledgements

The research leading to this book was supported by the *Deutscher Akademischer Austausch Dienst* (DAAD) with funds from the Federal Foreign Office of Germany. It was conducted under the auspices of the South African German Centre for Transnational Criminal Justice based on cooperation between the University of the Western Cape and Humboldt University of Berlin. I am very grateful to the DAAD and the Federal Foreign Office of Germany for this generous financial support. In addition, I owe a debt of gratitude to the following people whose contributions made this project a success.

My heartfelt gratitude goes to all the members of the South African German Centre for their support. I thank Professor Gerhard Werle of Humboldt University and Director of the Centre, who provided the main intellectual guidance throughout the research process. His trust and encouragement made me work harder and more enthusiastically to complete the project. Professor Lovell Fernandez of the University of the Western Cape and Co-director of the Centre provided intellectual advice on part of my research. He also assisted unreservedly in the final editing of the manuscript. Dr. Moritz Vormbaum, who is the Coordinator of the Centre, extended warm cooperation throughout my affiliation to the Centre. Anja Schepke from the Chair of Professor Werle at Humboldt University provided excellent administrative support that enabled my research to proceed smoothly. She diligently ensured that the research funds were secured and remitted to me both timely and conveniently. During my research stays in Berlin, she ensured that a decent and affordable accommodation was secured for me. Hazel Jeftha and Farieda Hendricks from the University of the Western Cape provided their invaluable administrative support during my research stays in Cape Town.

I am grateful to Professor Florian Jeßberger of Hamburg University and to Dr. Boris Burghardt, Senior Research Fellow at the Chair of Professor Werle at Humboldt University, for their useful insights into my research. Professor Palamagamba John Kabudi, former Dean of the Law Faculty, University of Dar es Salaam, deserves my sincere thanks. He not only encouraged me to seize the research opportunity at the South African German Centre, but also ensured that

my employer, the University of Dar es Salaam, granted me a study leave for that purpose. I am also very grateful to Judge René Blattmann who, on a short notice, agreed to sacrifice his valuable time to write the Foreword.

I would like to thank my dear mother, siblings, relatives and friends for their constant love and support. I also thank my colleagues Dr. Juliet Okoth, Dr. Daniel Leslie, Dr. Charity Wibabara, Windell Nortje, Jean Phillip, Marshet Tessema, Zainabu Mango, Arnold Gessase and Fatuma Silungwe for the moments and time we shared and spent together in Berlin and Cape Town as researchers affiliated to the South African German Centre. I thank Aziz Epik and Janosch Kunner from the Chair of Professor Werle for their cooperation in Berlin.

My very special thanks go to the staff of T.M.C. Asser Press and Springer for the cooperation extended to me throughout the publication process. I particularly thank Philip van Tongeren, Antoinette Wessels and Marjolijn Bastiaans in this regard.

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

# Contents

<b>1 Introduction</b> . . . . .	1
1.1 Preliminary Remarks . . . . .	1
1.2 Setting the Context . . . . .	2
1.3 Objectives . . . . .	8
1.4 Chapters Outline . . . . .	9
References . . . . .	10

## Part I Historical Roots of Ethnic Violence in Kenya

<b>2 Background to the Post-Election Violence</b> . . . . .	15
2.1 Introductory Remarks . . . . .	16
2.2 Historical Role of Negative Ethnicity in Kenyan Politics . . . . .	17
2.2.1 Transition from Colonialism to Independence . . . . .	17
2.2.2 The Regionalism and Centralism Ideologies . . . . .	19
2.3 The Rise of Monopartysm and Consolidation of Dictatorship . . . . .	21
2.3.1 From <i>De Jure</i> Multipartysm to <i>De Facto</i> Monopartysm . . . . .	21
2.3.2 Emergence of Factions Within KANU (1964–1966) . . . . .	22
2.3.3 Suppression of Opposition Parties (1966–1982) . . . . .	23
2.3.4 From Kenyatta to Moi: Tyrannical Rule Consolidates . . . . .	23
2.4 Resumption of Political Pluralism and Proliferation of Political Alliances . . . . .	26
2.4.1 Resumption of Multipartysm . . . . .	26
2.4.2 Politics of Alliances and Party Hopping . . . . .	27
2.5 Criminal Gangs, Election Violence and Impunity . . . . .	34
2.5.1 Use of Criminal Gangs for Political Purposes . . . . .	34
2.5.2 Trends of Election Violence . . . . .	36
2.5.3 Commissions of Enquiry and Culture of Impunity . . . . .	38
2.6 Chapter Summary . . . . .	41
References . . . . .	41

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

<b>3</b>	<b>The Post-Election Violence and Immediate Aftermath</b> . . . . .	47
3.1	Introductory Remarks. . . . .	48
3.2	The Violence. . . . .	49
3.2.1	Immediate Trigger . . . . .	49
3.2.2	Extent, Organization and Nature . . . . .	50
3.2.3	Incitement to Violence . . . . .	54
3.3	Mediation Process . . . . .	56
3.4	Inquiries into the Violence and Road Map for Criminal Accountability . . . . .	57
3.4.1	Commission of Enquiry into the Post-Election Violence. . . . .	57
3.4.2	Other Inquiries . . . . .	58
3.4.3	Findings of the Inquiries: Were Crimes Under International Law Committed?. . . . .	59
3.4.4	Agreement and Recommendations Pertaining to Criminal Accountability . . . . .	63
3.5	The Proposed Special Tribunal for Kenya: An Overview . . . . .	66
3.5.1	Salient Features of the Tribunal . . . . .	67
3.5.2	Evaluation. . . . .	69
3.5.3	Failed Attempts to Establish Special Tribunal . . . . .	72
3.6	Consequences of Failure to Create the Proposed Special Tribunal . . . . .	74
3.7	Where to Prosecute the Big Fish? General Domestic Perceptions . . . . .	75
3.8	Chapter Summary. . . . .	80
	References. . . . .	81
<b>4</b>	<b>Criminal Accountability at Domestic Level</b> . . . . .	85
4.1	Introductory Remarks. . . . .	86
4.2	Legal Position Regarding Enforceability of Core Crimes in Kenya. . . . .	86
4.3	Alternative Legal Frameworks for Domestic Prosecution of Crimes Linked to the Post-Election Violence . . . . .	89
4.3.1	Prosecuting as Domestic “Ordinary” Crimes. . . . .	89
4.3.2	Prosecuting as Crimes Against Humanity as Such. . . . .	115
4.4	Issues Relating to Exercise of State Prosecutorial Function . . . . .	129
4.4.1	Position Under the 1963 Constitution . . . . .	129
4.4.2	Current Position . . . . .	130
4.4.3	Interim Conclusion. . . . .	134
4.5	Chapter Summary. . . . .	135
	References. . . . .	136

**5 Alternatives and Adjuncts to Domestic Prosecutions** . . . . . 141

5.1 Introductory Remarks. . . . . 142

5.2 Transitional Justice in Kenya Through a Truth Commission. . . . . 143

5.2.1 Prelude to Truth Commissions. . . . . 143

5.2.2 Introduction to the Kenyan Truth, Justice and Reconciliation Commission. . . . . 144

5.2.3 Analysis of TJRC’s Mandates Vis-a-Vis Criminal Accountability for the Post-Election Violence. . . . . 150

5.3 Vetting of Judges and Magistrates . . . . . 168

5.4 Chapter Summary. . . . . 170

References. . . . . 171

**Part III International Responses**

**6 The Kenya Situation Before the ICC**. . . . . 177

6.1 Introductory Remarks. . . . . 178

6.2 Issues Relating to Trigger of Jurisdiction. . . . . 179

6.2.1 Proprio Motu Investigation. . . . . 179

6.2.2 The Waki Commission on Trigger Mechanism . . . . . 181

6.2.3 Responses of ICC Prosecutor and Kenyan Government to Trigger Mechanism . . . . . 182

6.3 Issues Relating to Parameters of ICC’s Investigation . . . . . 185

6.3.1 Temporal Scope of Investigation . . . . . 186

6.3.2 Subject-Matter Jurisdiction . . . . . 191

6.3.3 Locating Crimes in Mount Elgon Area in the Investigation . . . . . 192

6.4 Issues Relating to Substantive Criminal Law. . . . . 194

6.4.1 Prosecutorial Discretion Vis-a-Vis Scope of Charges . . . . . 195

6.4.2 Whether Acts Committed During Post-Election Violence Amounted to Crimes Against Humanity . . . . . 200

6.5 Issues Relating to Complementarity . . . . . 216

6.5.1 Meaning of Complementarity . . . . . 216

6.5.2 Evaluation of “Unwillingness” and “Inability” in Relation to Kenya. . . . . 218

6.5.3 Inaction as a Component of Complementarity. . . . . 219

6.6 Other Responses to ICC’s Intervention . . . . . 230

6.6.1 Attempts to Have the Cases Deferred Under Article 16. . . . . 231

6.6.2 Attempts to Resort to Regional Criminal Jurisdictions . . . . . 234

6.6.3 Threats to Withdraw from the ICC Statute. . . . . 237

- 6.7 The Future of the Kenyan Cases at the ICC . . . . . 240
  - 6.7.1 Election of the ICC Suspects to Presidency . . . . . 241
  - 6.7.2 The Integrity Case . . . . . 243
  - 6.7.3 Cooperation from the Kenyan Government . . . . . 247
  - 6.7.4 ICC’s Relationship with the AU in View of the  
Kenyatta and Ruto Cases . . . . . 248
  - 6.7.5 Interim Conclusion . . . . . 253
- 6.8 Impact of the ICC’s Intervention in Kenya . . . . . 254
- 6.9 Chapter Summary . . . . . 255
- References . . . . . 256
  
- 7 Conclusion . . . . . 265**
  
- Index . . . . . 271**

# 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 ( <i>confer</i> )
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 ( <i>et alii</i> )
et seq.	and the following ( <i>et sequens; et sequentes</i> )
G.N	Gazette Notice
i.e.	that is ( <i>id est</i> )
ibid.	in the same place ( <i>ibidem</i> )
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