‘Special tribunal for Kenya’: Ignore Waki’s recommendations to the country’s peril

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The report by the Commission of Inquiry into Post Election Violence (CIPEV) in Kenya, headed by Court of Appeal judge, Philip Waki (hereafter ‘the Waki report’), has made some stunning revelations on the post-election violence that brought the country to the brink of a civil war. The report revealed, among other things, that the violence was pre-mediated, organized and executed with the support of influential politicians and businessmen. Such a revelation cannot be taken lightly. It clearly maps out a case for the prosecution of those who were most responsible for the violence, either through a locally established special tribunal or the International Criminal Court (ICC) in The Hague. This is an opinion piece on the pragmatics of establishing a special tribunal to investigate and prosecute the alleged perpetrators of the post-election skirmishes in Kenya.

“The Waki report”

According to the Waki report, a total of 1,133 people died and 350,000 others were displaced as a result of the post-election violence in Kenya. Gunshots accounted for 962 casualties out of whom 405 died. This represented 35.7% of the total deaths, making gunshot the single most frequent cause of deaths during the violence. No evidence was presented before the Commission to rebut the allegation that deaths or injuries by gunshots were caused by the police. This validates the view that police action accounted for a good part of the pandemonium and dismisses the contention that the violence was a citizen-to-citizen conflict.
Besides the deaths, displacements and injuries, the report also made shocking revelations on the magnitude of the sexual violence that occurred during that period. Sexual violence, according to the report, took the form of gang and individual rapes, as well as horrendous female and male genital mutilation. Women and children’s labia and vaginas were cut using sharp objects and bottles were stuffed into them. Men and boys had their penises cut off and were traumatically circumcised, in some cases using cut glass. Furthermore, entire families, including children, were forced to watch their parents, brothers and sisters being sexually violated. Even when victims told perpetrators that they were HIV positive, perpetrators still chose to rape. Perpetrators often told victims that the sexual violence inflicted upon them was punishment for belonging to a specific ethnic group, or for being affiliated to a particular political party.

The Commission found that perpetrators of sexual violence were not just ordinary citizens, neighbours, and gang members, but also significant numbers of security forces. These included members of the paramilitary General Service Unit (GSU), as well as regular and administration police officers. According to the report, members of the security forces participated in gang rapes; they colluded with each other by having some of their colleagues standing guard outside victims’ houses, while others raped and mutilated inside the dwellings. The report states in part, “many victims let members of the security forces into their houses assuming they would help them. Instead, they found themselves being attacked by those they thought would help them. This entailed a gross betrayal of trust.”

The report further reveals that initially, the violence was spontaneous and was in part a reaction to the perceived rigging of elections. Subsequently the violence resonated a pattern of planning and organisation by politicians, businessmen and others who enlisted criminal gangs to persecute the victims. The report states that some of the pointers to the planning and organization of the violence include the fact that, in some instances, warnings were issued to the victims before the attacks, and that large numbers of attackers were often mobilised from areas outside the location of the violence. Other pointers are, petrol and weapons were used in various places to carry out the attacks and
destruction, which required arrangements as regards acquisition, concealment and transport, and sometimes the attacks specifically targeted only members of given ethnic groups to the exclusion of others.

Ultimately, the report recommends the establishment of a special tribunal that would seek accountability against people bearing the greatest responsibility for crimes committed during the post-election violence. Ordinarily, before establishing such a tribunal, it would be expedient for the government to determine its legal and factual parameters. In this regard, the million-dollar question would be: do the facts stated in the Waki report make out a clear case in support of the prosecution of those who were most responsible for the post-election violence?

“Serious crimes against civilians”

The CIPEV implicated some businessmen and ‘influential people’ who were in positions of authority during the post-election violence. In fact, it even imputes criminal responsibility on, among others, certain administrative authorities, including the police, the security forces and the provincial administration for various omissions and commissions in the height of the violence. It accuses them of gross negligence in failing to respond appropriately and adequately to the violence and its effects, thereby aggravating the suffering of the victims. The security agents and the police are also said to have resorted to an unjustified use of force, unnecessarily causing deaths and injuries. Allegedly, they failed to act with discipline and impartiality and at times resorted “to acts of serious crime against civilians.” At the same time, the planning and organization of the violence was funded by certain influential businessmen. These allegations provide the possibility of the alleged perpetrators being effectively prosecuted for ‘international crimes’ such as crimes against humanity, war crimes and genocide.

Under international law, crimes against humanity are committed as part of a widespread or systematic attack against any civilian population, on national, political, ethnic, racial or religious grounds. These crimes could be in the form of murder, extermination, imprisonment, torture, rape, forced pregnancy and any other form of sexual violence.
Other forms include persecution on political, racial, ethnic or religious grounds and other inhumane acts. However, these offences will amount to crimes against humanity only if they are part of a widespread or systematic practice. Isolated offences of this nature may only constitute grave infringements of human rights, but may fall short of being crimes against humanity.

Crimes against humanity are regarded as the worst forms of offences against any civilian population. According to the *Rome Statute Explanatory Memorandum*, they are “particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings. They are not isolated or sporadic events, but are part, either of a government policy (although the perpetrators need not identify themselves with this policy), or of a wide practice of atrocities tolerated or condoned by a government or a *de facto* authority.”

Related to crimes against humanity are genocide and war crimes. Genocide refers to acts committed with intent to destroy, in whole or in part, an ethnic, racial, religious, or national group. According to the 1948 *United Nations Convention on the Prevention and Punishment of the Crime of Genocide* (‘the Genocide Convention’), the crime comprises of acts such as, “killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.” War crimes are violations of established ‘laws of war’, which are mainly entrenched in the *Geneva Conventions*. The ‘laws of war’ are rules that govern the conduct of combatants during an armed conflict.

Other international criminal law doctrines may also be invoked when prosecuting the alleged perpetrators of the post-election violence. For instance, ‘the doctrine of command responsibility’ could be invoked to prosecute those who were in authority, for acts committed by their subordinates. According to this doctrine, a superior is criminally responsible if he or she knew (or had reason to know) that the subordinate was about to commit a crime (or had done so), and the superior failed to take the necessary and
reasonable measures to prevent the crime or punish the perpetrator. It is clear therefore that the government of Kenya has sufficient grounds to prosecute the alleged perpetrators of the post-elections violence. In fact, if explored properly, international criminal law could bring to book more people than those in Waki’s ‘secret list’.

However, the major impediment is, as yet, the country does not have any legislation enabling the prosecution of international crimes. It therefore relies solely on its Penal Code, which is limited to domestic criminal offences that are ‘petty’, compared to international crimes. This therefore leaves the country with one of two options: either to form a special tribunal to prosecute the alleged perpetrators, or defer jurisdiction to the International Criminal Court in The Hague. Should it prefer the first option, then a comprehensive piece of legislation would have to be enacted by parliament towards that end. Such legislation will have to stipulate the nature and substantive contents of the crimes to be prosecuted by the proposed tribunal.

“A Special tribunal for Kenya?”

The idea of instituting a tribunal to prosecute those with the greatest responsibility for crimes against humanity, genocide or war crimes is not novel. Rather, one of the most interesting novelities in the contemporary international criminal law discourse is the proliferation of ad hoc tribunals with such jurisdiction, especially in the post-1990 period. Since the early 1990s, a number of tribunals have been created to prosecute people for various crimes under international law. These include the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Court (ICC), Special Court for Sierra Leone (SCSL), Crimes Panels of the District Court of Dili (of East Timor) and “Regulation 64” Panels in the Courts of Kosovo. Two of these tribunals— the ICTR and SCSL— are situated in Africa.

The main differences between all the above tribunals relates to the circumstances under which they were established (factual basis) and their jurisdiction (legal basis). Whereas the ICC, ICTR and ICTY fully operate under the United Nations (UN) umbrella, the
other tribunals are ‘internationalised or hybrid’ criminal bodies, meaning they were set up jointly by their respective governments and the UN. The SCSL, for example, was established through an agreement between the government of Sierra Leone and the United Nations, “to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.” The Special Court, established in 2002, has adopted a statute that prosecutes both international and national crimes.

The ICTR, which is also based in Africa, was established by the UN Security Council “to prosecute serious violations of international humanitarian law, to sustain law and order and thereby to contribute to the restoration and maintenance of peace and national reconciliation in Rwanda.” The tribunal is mandated to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January and 31 December 1994. It is funded and supervised entirely by the UN.

Perhaps Kenya ought to emulate Sierra Leone’s approach when setting up the proposed ‘Special tribunal for Kenya’. This would therefore mean that the government should approach an international body such as the UN or the African Union (AU) to assist in instituting the tribunal. Getting the assistance of these bodies will guarantee the integrity and independence of the tribunal, as well as help to shoulder the economic burden that comes with institutions of this nature. Secondly, the government, after securing an agreement with either the UN or AU, must embark on putting in place a water-tight legislative framework to entrench the tribunal’s legitimacy. Such a framework may include aspects like the mandate and competence of the tribunal; its composition and appointment of judges, prosecutor, registrar and other personnel; its premises, funding and management; and its rules of procedure and evidence.

The issue of enforcement of sentences will also have to be addressed comprehensively. Where and how those found guilty will serve their sentences should be spelt out clearly in the legislation. Like all other international criminal bodies, in order to succeed in carrying out its mandate, the tribunal will have to rely on international cooperation and
assistance by states and international organizations. This is especially with regard to effecting arrests and execution of judicial sentences. To enhance such cooperation, the tribunal will have to employ both international and national staff (whether judges, prosecutor or support staff) and apply a ‘hybrid’ of international and national substantive and procedural laws.

Rather than opt to defer jurisdiction to the ICC, it would do the government more good to prosecute the alleged perpetrators of the post-elections violence locally. It is no longer a question of whether such a tribunal should be formed, but of how and when it should be formed. There is ample evidence, at least on the basis of the Waki report, that horrendous crimes against humanity were committed during the post-elections period. Failing to prosecute the alleged perpetrators would mean that the government is ready to condone impunity. Already, there are a number of ‘youths’ behind bars over their purported roles in the violence. This therefore means that a precedent has already been set; prosecution is the route to follow.

The failure to prosecute the so-called ‘big fish’ or ‘sacred cows’ will raise pertinent questions on the commitment of the Grand Coalition government to curbing impunity, and its role in harbouring suspected violators of international law. Indeed, Kenyans and the world are waiting with bated breathe to see whether or not the Grand Coalition is merely ‘old wine in a new wineskin’.

As events gradually unfold in Kenya’s changing political landscape, a myriad of concerns have already been raised on the pragmatics of prosecuting the post-elections violence suspects. Some contend that such prosecutions would open ‘old wounds’. Others perceive ‘political witch-hunt and mischief’ as the motives behind the call for prosecution. There is another contention premised on the financial implications of establishing the proposed special tribunal. Soon, ‘legal experts’ will assert that there is no sufficient legal basis to justify the tribunal’s inception. All these may be excuses but not tangible reasons that would impede the prosecution of what international law would term, ‘hostis humanis generis’ (enemies to the entire mankind).
While impunity has its own ways of fighting back, we should recall the many lives that were lost, displaced and injured during the post-elections mayhem. Not only so, it is almost the norm for Kenyans to fight in every election year. Hence, in the country’s dictionary, ‘elections time’ is synonymous to ‘war time’. History has been known to repeat itself. Most likely, and more so if Waki’s recommendations are ignored, the country will be engulfed in another ‘battle-royale’ come 2012. This trend will only be curbed if the perpetrators of violence are brought to book. At all costs, impunity should not be condoned. Rwanda and Sierra Leone have already set the pace for Kenya and the rest of Africa to follow. By all means, the two countries are determined to make impunity a thing of the past. The sad indictment for Kenya is: ‘Ignore Waki’s recommendations to your own peril’.

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