

Contents

1 Introduction	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

2 Background to the Post-Election Violence	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

3	The Post-Election Violence and Immediate Aftermath	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
4	Criminal Accountability at Domestic Level	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**



<http://www.springer.com/978-94-6265-040-4>

The Post-Election Violence in Kenya
Domestic and International Legal Responses
Materu, S.F.

2015, XVIII, 275 p., Hardcover

ISBN: 978-94-6265-040-4

A product of T.M.C. Asser Press