KatibaNews

Towards a new constitutional dispensation in Kenya

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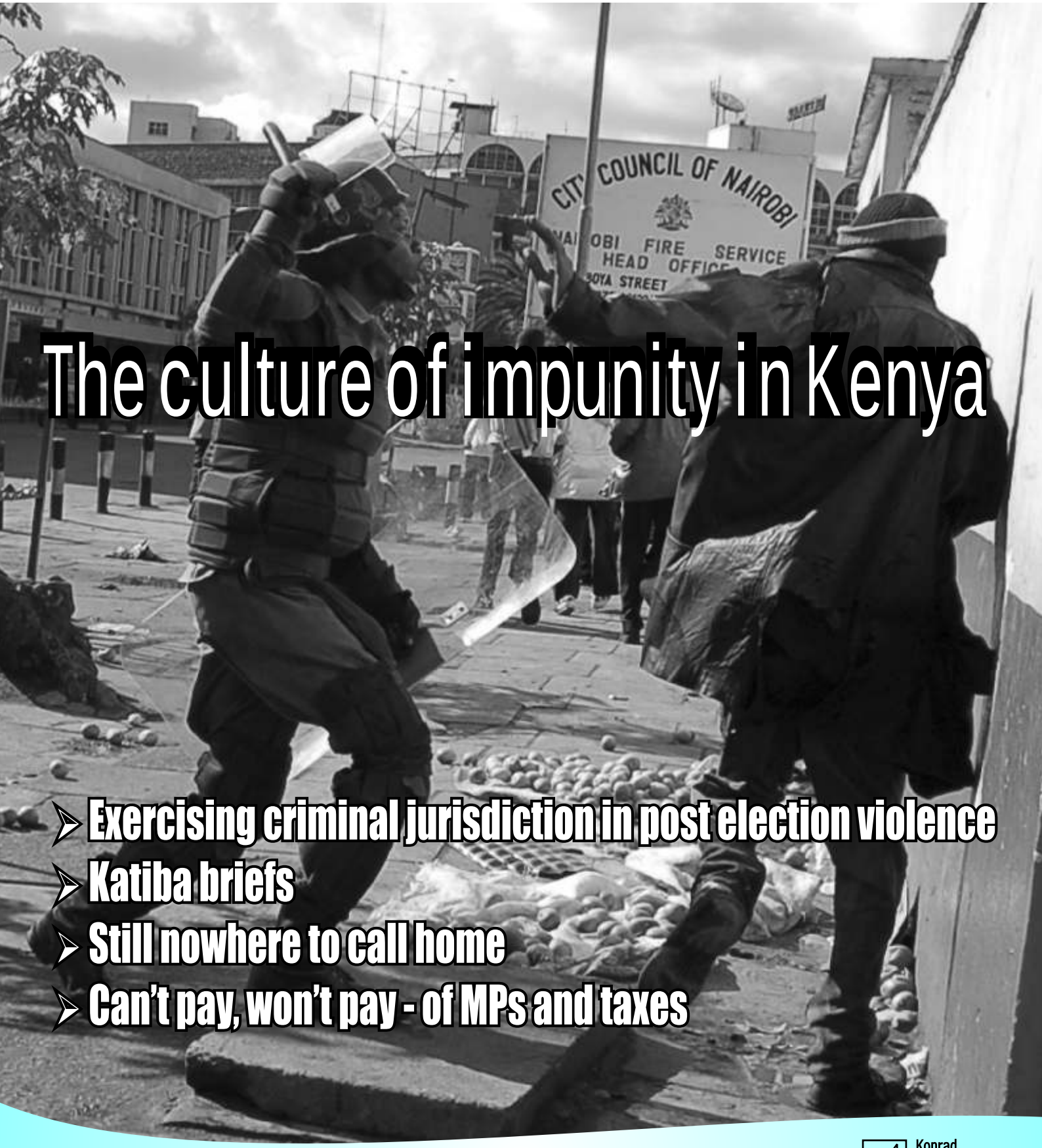

The culture of impunity in Kenya

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ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

The Media Development Association (MDA) is an alumnus of graduates of University of Nairobi's School of Journalism. It was formed in 1994 to provide journalists with a forum for exchanging ideas on how best to safeguard the integrity of their profession and to facilitate the training of media practitioners who play an increasingly crucial role in shaping the destiny of the country.

The MDA is dedicated to helping communicators come to terms with the issues that affect their profession and to respond to them as a group.The members believe in their ability to positively influence the conduct and thinking of their colleagues.

The MDA aims at:

- Bringing together journalists to entrench friendship and increase professional cohesion;
- Providing a forum through which journalists can discuss the problems they face in their world and find ways of solving them;
- Organising exhibitions in journalism-related areas such as photography;
- Organising seminars, workshops, lectures and other activities to discuss development issues and their link to journalism;
- Carrying out research on issues relevant to journalism;
- Organizing tours and excursions in and outside Kenya to widen journalists' knowledge of their operating environment;
- Publishing magazines for journalists, and any other publications that are relevant to the promotion of quality journalism;
- Encouraging and assist members to join journalists' associations locally and internationally;
- Creating a forum through which visiting journalists from other countries can interact with their Kenyan counterparts;
- Helping to promote journalism in rural areas particularly through the training of rural-based correspondents;
- Advancing the training of journalists in specialised areas of communication;
- Create a resource centre for use by journalists;
- Reinforcing the values of peace, democracy and freedom in society through the press;
- Upholding the ideals of a free press.

Activities of MDA include:

- Advocacy and lobbying;
- Promoting journalism exchange programmes;
- Hosting dinner talks;
- Lobbying for support of journalism training institutions;
- Initiating the setting up of a Media Centre which will host research and recreation facilities;
- Working for the development of a news network;
- Providing incentives in terms of awards to outstanding journalists and journalism students;
- Inviting renowned journalists and other speakers to Kenya;
- Networking and liking up with other journalists' organisations locally and abroad.

This newsletter is meant to:
1 Give critical analysis of democracy and governance issues in Kenya.

2 Inform and educate readers on the ongoing Constitution Review Process.

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Impunity will be our undoing

Over the years in this country, there are certain events and incidents that have taken place that still sound stranger than fiction. Some powerful people have systematically undertaken grave human rights abuses and walked away simply with the wave of a hand. But why have Kenyans let this culture of absolute abuse of power take root in the country? We take a look at the culture of impunity in Kenya.

By Johnstone Mokua

Police mercilessy beat up a protestor.

Impunity occurs when a perpetrator of a violation is not punished. Impunity has been defined as the exemption or freedom from punishment and connotes lack of effective remedies for victims. Effective remedy requires reparation. Such reparation does not immediately flow from a criminal trial. Impunity has also been defined as the impossibility, *de jure or de facto*, of bring perpetrators of violations to account- whether in criminal, civil, administrative or disciplinary proceedings. The sanctions may include lustration, disciplinary penalties, payment of compensation to the victim and public naming. Impunity is therefore failure to punish violations of established norms, due to circumstances or the law.

Impunity may occur implicitly or latently. Long term peace requires attainment of justice and accountability for violations. A society is able to exact accountability and punish violators if it is governed by the rule of law. Sacrificing accountability at the expense of peace is taking an unduly narrow and short term perspective of peace. There is no true democracy where citizens cannot make challenges to the government on the basis that they may harm its stability. In situations of impunity, rule of law is absent since it requires that no person or institution be above the law. Without rule of law, there is no legal deterrent to prevent violators from infringing the rights of victims. Criminal punishment ends the cycle of impunity and empowers citizens.

The principal causes of impunity are insufficiency of resources, political impediments and lack of willingness to prosecute. Attempting to undertake prosecutions in a system lacking in resources and unable to afford the defendants procedural fairness leads to protracted and unjust decisions and loss of public confidence. The justice system may not be sufficiently resourced in terms of qualified staff and monetary resources to carry out the prosecution of the violators. There may be a negative power relationship between the Executive and the judiciary. Political leaders may demand legal absolution for crimes in exchange for surrender or reconciliation. The differences between national and international legal systems and absence of competent institutions can lead to questions of jurisdiction and procedure.

The African Union Constitutive Act proscribes impunity. Impunity has political, moral, juridical aspects. It prevents peaceful coexistence among communities and is an obstacle to development of democracy. Reconciliation can be defined as an agreement renouncing, either unilaterally or reciprocally, all crimes. The agreement is made between the parties to the dispute to the exclusion of the judiciary. Reconciliation is inseparable with the exigencies of justice, fairness and reason and must not be achieved in defiance of the rule of law. In many political situations, taking the road to reconciliation means obliterating the past. In the post Apartheid South Africa, the Truth and Reconciliation Commission helped ease political tensions. The incoming government of the African National Congress was of the view that prosecution of perpetrators would further complicate the fragile political situation prevailing at the time.

Amnesty is intended to defuse tensions and its objective is to bring the main parties to a negotiating table to explore solutions to a political crisis. Impunity attributable to non observance of the rule of law prevents national reconciliation. Seeking truth on violations, demanding justice and meting out appropriate punishments does not preclude national

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reconciliation. There is need for truth, justice and then forgiveness. This eliminates the necessity of vengeance or private justice. Reconciliation should not be caused to deliver injustice to the victims and cannot be achieved by forgetting the acts committed but by punishing such violations. States cannot be committed to human rights unless they put an end to conditions that destroy values and perpetuate impunity. Impunity stifles and criminalises public life.

A victim of police brutality.

The battle against impunity requires thorough and impartial investigation into violations and identification of perpetrators. Immunity may occur by legal means where states adopt measures of amnesty, clemency, pardon, mercy or other measures taken to prevent the prosecution of perpetrators. States may also refuse to undertake investigations. The courts may refuse or inordinately delay to punish perpetrators due to political motives or intimidation. Impunity may lead to trivialisation of serious human rights violations and serious breaches of international humanitarian law.

The advance of criminal impunity has allowed involvement of significant part of the population in war as impunity breeds violence and war. Criminal violence is nurtured by impunity for the prior crimes committed. Impunity has taken root in many African states and has affected vital sectors of the society. The political elite and their cronies continue to loot public resources at the expense of the larger population. Corruption has thrived due to impunity and the knowledge by the corrupt that they will not be prosecuted for their acts. Work, merit and competence are sacrificed at alter of impunity which encourages cronyism. The fear of loosing political power compels corrupt leaders to meddle in the democratic processes.

International tribunals have an important role to play due to the failure and incapacity of state justice systems to effectively combat impunity. Africa cannot resist globalisation of justice. African states should integrate the concept of universal jurisdiction into their national legislation. African countries have not secured independent and impartial judiciaries given the mode of appointment of judicial officers and the failure by states to provide the necessary infrastructural and resource support. Impartiality, independence and competence must be the first attributes of a judge. The independence of the judiciary is the *sine qua non* for proper, independent and impartial administration of justice necessary to combat impunity and observe the rule of law in any state.

Justice has been defined as the conduct of a criminal trial according to international law standards resulting in punishment. This concept that is limited to criminal sanction is not victim centred. Restorative justice focuses on remedying the harm to the victim and reintegrating the perpetrator, rather than emphasizing penal punishment. The process includes victim participation and compensation. Establishing a comprehensive and correct record of atrocities is essential to ensuring full accountability and justice.

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Examples of Impunity

Korean 'Comfort' women

During World War II, Japanese soldiers are alleged to have captured Korean women who were detained as sexual slaves. At the end of the war, a tribunal was formed to investigate the atrocities of the war. However, sexual enslavement was not fully investigated. The victims of the violations have been seeking justice since then but no concrete steps have been taken. The main cause of the impunity has been the unwillingness of the Japanese government to punish the perpetrators. The international community failed to swiftly respond to crimes that occurred during the World War II. War crimes against women were not granted adequate recognition. Japan has established an Asia Women's Fund into which private entities donate money. Japan continues to deny responsibility for the atrocities committed against the women.

Africa

In Africa political leaders have for long seemed immune from prosecutions for violations that occurred during their tenure. Fredrick Chiluba, the former President of Zambia is facing charges of corruption during his tenure while Charles Taylor, the former President of Liberia has been charged before the Special Tribunal for Sierra Leone on eleven counts of war crimes, including crimes against humanity for supporting the rebel

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group that relied heavily on child soldiers and was known for mass rapes and severing the limbs of civilians. The former President of Chad, Hissene Habre is set to be charged in a special tribunal in Senegal for atrocities committed during his reign.

Already, a Belgian court has issued a warrant of arrest against him in exercise of universal jurisdiction. There is international pressure for the trial of Colonel Mengistu Haile Mariam, formerly the President of Ethiopia who is currently in exile in Zimbabwe to be tried. There trials underscore the emergence of rule of law culture in many African countries. The Truth and Reconciliation Commission set up in South Africa had the power to grant amnesty which was defined as immunity from criminal and civil liability for certain acts, omissions and offences. It was observed at the time that such a blanket amnesty was in violation of international human rights principles, especially the right of victims to access an effective remedy.

The culture of impunity has contributed to increased corruption in public offices, especially in the period prior to 2002. Public officers who were known to be corrupt were exempted from punishment for political reasons. The initial efforts to set up the anti-corruption commission were nipped in the bud by the High Court which declared the commission was unconstitutional. A former Minister who was charged with corruption was also exonerated by the court which stated that the Attorney General had delayed for nine years in arraigning the Minister in court.

Culture of impunity in Kenya

In 1997, the Government set up a commission of inquiry to investigate ethnic clashes. The commission was chaired by Justice Akilano Akiwumi and it handed in its report in 1998 after conducting hearing for about one year. The report indicted politicians and top civil servants for complicity in the clashes. The Government did not release the report until 2002 when a court ordered the release of the report. The failure to implement or even investigate the contents of the report and prosecute complicit officers and politicians marked the height of the culture of impunity in relation to politically driven but ethically organised violence in Kenya. A similar report by a Parliamentary Selected Committee chaired by Hon Kennedy Kiliku in 1992 was similarly ignored by the Government. It can be argued that failure to prosecute the perpetrators of the 1991 and 1997 ethnic clashes lead to the post election violence in 2007. The perpetrators had noticed that the Government was not keen to investigate and prosecute cases of ethnic violence.

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Impunity, failure of the State and rule of Law

In August, 2004, Kofi Annan, the then Secretary General of the United Nations defined rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with the international human rights norms and standards.

The equality before the law forms the central pillar in rule of law. This means that the law should apply to all without exception. Weak judicial institutions in Africa have contributed to the unwillingness to hold perpetrators of human rights atrocities accountable. The judiciary, police and prosecution suffer from lack of capacity, poor policies and inefficiency, thereby compromising the quality of service. The weakness of these governance institutions have contributed to the culture of impunity. Rule of law requires effective separation of powers between the Executive, judiciary and legislature and effective and independent judiciary and effective laws and policies on human rights founded on solid and modern constitutional frameworks. Courts invoke rule of law to question arbitrary actions of the Government.

Rule of law protects the citizenry from the government. Access to justice is one of the most fundamental rights of a citizen in a democracy. The judiciary and related institutions must hold public officials and leaders accountable to prevent a culture of impunity. The African Commission on Human and Peoples Rights has urged states to ensure that perpetrators of crimes under international human rights law do not benefit from impunity and further called on states to ratify and implement the Rome Statute on International Criminal Court.

The UN has stated that amnesties for gross human rights violations remain unacceptable and cannot be recognised unless they exempt crimes of genocide, crimes against humanity and war crimes. Impunity breeds conflict and promotes corruption. In societies which embrace impunity, the ruling elite discriminate and marginalise the majority of the citizens. Ending the culture of impunity will be achieved through the strengthening of the rule of law. Impunity and failure to observe the rule of law can precipitate the collapse of the state. KN

The writer is a freelance journalist with an international media agency based in Nairobi.

Exercising criminal jurisdiction on post election related offences

Justice Philip Waki did what we told him to do. He spent many days talking to people in a bid to unearth what went wrong after the December 2007 elections. But the hardest part has just begun. Now that we know the truth, what are we going to do with it? Our correspondent analyses the options available for justice to the victims of the violence, and analyses the proposed legal framework for a special tribunal.

By Macharia Nderitu

Chief Justice Evans Gicheru addressing a meeting during a Kenya Law Reports conference.

The most significant recommendation by Commission of Inquiry on Post Election Violence is the formation of a Special Tribunal for Kenya. The formation of the tribunal led to initial rejection of the Report of the Commission chaired by Justice Philip Waki. However, consensus has been built grudgingly on the need to implement the report.

The tribunal is mandated to seek accountability against persons bearing the greatest responsibility for crimes against humanity. The tribunal will investigate prosecute and adjudicate on the crimes. The tribunal shall apply Kenya law and the International Crimes Bill, once enacted. This will raises questions of retrospectively in application of criminal laws. The constitution and international human rights standards protect accused persons from retrospective application of criminal law. However, the atrocities committed during the violence are crimes against humanity which are recognised crimes under the international customary law. Tribunal will be staffed with Kenyan and international staff.

The representatives of the parties to the Accord shall sign an agreement establishing the Tribunal within 60 days. The statute for the Special Tribunal shall be enacted into law and come into force within a further 45 days. The date of commencement of the Tribunal shall be determined by the President, in consultation with the Prime Minister, Chief Justice, and the Attorney General, within 30 days after Presidential Assent to the Bill setting up the Tribunal. The agreement has not been signed to date through the Cabinet has formed a Subcommittee chaired by the President to work on modalities of implementing the report.

The report recommends that if the agreement is not signed or the Statute for the Tribunal fails to be enacted, the list containing names of and relevant information on persons suspected to bear greatest responsibility for crimes shall be forwarded to the Prosecutor of the International Criminal Court, who shall analyse the information with a view to investigating and prosecuting such persons.

The Bill creating the Tribunal shall be anchored in the Constitution. This means that at least 145 MPs must support the Bill. The special tribunal shall consist of four organs: the Chambers, including an appeals chamber, the Prosecutor, the Registry and defence. The Chambers shall consist of six judges, with the Trial and Appeal Chambers having three judges each. The Presiding judges shall be Kenyan while the rest shall be non Kenyans drawn from the Commonwealth.

The President shall appoint the Chair of the Trial Chamber in consultation with the Prime Minister and acting on advice of the Chief Justice from persons qualified to be appointed judges of the High Court. The Panel will nominate the rest of the judges who will be appointed by the President. The Prosecutor shall be appointed by the President in consultation with the Prime Minister from a list provided by the Panel. The jurisdiction of the tribunal shall be adjudicating cases against persons bearing the greatest responsibilities for serious crimes relating to 2007 post election violence. There will be a right of appeal from the Trial to Appeals Chamber.

The Tribunal shall have sufficient authority and independence to conduct investigations and shall have authority to recruit and control its own staff. The

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head of investigations and three other members of the investigating team shall be non Kenyans. The investigators shall work under the general direction of the prosecutor. The tribunal shall take custody of all investigative material, witness statements and testimony collected by CIPEV. The International Crimes Bill should be fast tracked in Parliament to facilitate investigation and prosecution of crimes against humanity.

Overview of the Rome Statute of International Criminal Court

The ICC was established in 2002 under the Rome Statute on the International Criminal Court as a permanent tribunal to prosecute individuals for genocide, crimes against humanity and war crimes and the crime of aggression. The court cannot exercise jurisdiction over the crime of aggression as a standard definition has not been agreed upon between state parties. The court came into existence on 1st July, 2002 and it is based at the Hague Netherlands. The court has jurisdiction over crimes committed after 1st July, 2002. There are 105 member states of the court and a further 41 states have signed but not ratified the Rome Statute.

Following the Nuremberg and Tokyo tribunals after the World War II, the UN General Assembly recognised the need for a permanent tribunal at the international level to deal with atrocities similar to those experienced during the war. The International Law Commission developed two statutes which were shelved due to the international politics at the time. The international community established *ad hoc* tribunals to try crimes committed in Former Yugoslavia and Rwanda thereby highlighting the need for a permanent tribunal. In 1998, the UN General Assembly convened a conference in Rome with the object of finalising the treaty to establish the court whereby the Rome Statute on the ICC was adopted. The statute became binding in 2002 when 60 countries ratified the treaty. The first bench of 18 judges was elected by the Assembly of State Parties in February, 2003. The court issued its first warrants in 2005 and commenced pre-trial briefings in 2006. Article 5 of the Statute provided the jurisdiction of the Court over the most serious crimes of concern to the international community as a whole. The court exercises jurisdiction where:

1 The person accused of committing a crime is a national of a state party;
2 The alleged crime was committed in the territory of a state party;
3 Where a situation is referred to the court by the UN Security Council.

The court is a forum of last resort and is supposed to investigate and prosecute crimes where the national authorities have failed to do so. The Court is intended to remedy the deficiencies of the *ad hoc* tribunals and deter perpetrators of heinous crimes. The Court operates on the principle of complementarity where it functions in concert with national legal systems and does not act as a substitute or replacement. Moreover, the prosecutor cannot commence investigations without permission from a pre-trial chamber. The Court allows individuals to be tried fairly and in conformance with international fair trial guarantees.

A case is inadmissible if:

i. it is under investigation or prosecution by a state which has jurisdiction over it;
ii. it has been investigated by a state which has jurisdiction and a decision has been reached not to prosecute unless the decision resulted from unwillingness or inability of the state to prosecute;
iii. the accused person has been tried for the alleged offence;
iv. It is not of sufficient gravity to justify action by the court.

The establishment of the court is a positive development as the court acts as an international check on governments and militia groups to desist from engaging in human rights violations. During the negotiations for the treaty, some states wanted the court to be conferred with universal jurisdiction. This is where states or international tribunals claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence or any other relation to the prosecuting authority. The principle is justified on the basis that the crimes are considered crimes against all states which any state is authorised to punish. States with such laws include Belgium, Israel, Germany, Spain and the United Kingdom.

The court has four organs; the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry. The Assembly of States Parties consists of one representative of each state party. The Assembly elects judges and prosecutors, determines and approves the courts budget, adopts important texts such as Rules of Procedure and Evidence and provides oversight over organs of the court. The Assembly may remove a judge or prosecutor who has committed serious misconduct or serious breach of duty.

The Prosecutor is responsible for conducting investigations and prosecutions. The office of the Prosecutor acts independently.

The prosecutor opens investigations where a situation is referred to him by a state party, the UN Security Council, acting to address a threat to international peace or where the pre-trial Chamber authorises him to open an investigation on basis of information received from other sources. The current prosecutor, Luis Moreno Ocampo, was elected into office in April, 2003 for a term of nine years. If the case in referred to the court by the UN Security Council, all states are obliged to co-operate with the Court. The court is financed by contributions from the member states. The situations under investigation by the Court are:

1. Uganda

The Government of Uganda referred to the Prosecutor the situation concerning the Lord's Resistance Army in Northern Uganda. The court issued warrants of arrest in July, 2005 against Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ogwen. These LRA leaders have repeatedly sought immunity from the Court in return for end of insurgency. Mediation talks were conducted with a view to reaching a solution. However the final agreement was not signed by the LRA.

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Uganda is considering setting up a local tribunal to try the suspects.

2. Democratic Republic of Congo

The Government referred to the prosecutor the situation of crimes committed anywhere in its territory which fall in the jurisdiction of the Court. Thomas Lubanga was the first person to be arrested under a warrant issued by the Court for conscripting and enlisting children under the age of fifteen years. The trial is expected to commence in January, 2009. Two other suspects Germaine Katanga and Mathieu Ngudjolo Chui have been surrendered to the Court by Congolese authorities.

3. Central African Republic

The situation was referred by the Government in December, 2004. The court issued a warrant of arrest against Jean Pierre Bemba, a former Vice President of Democratic Republic of Congo, charging him with war crimes and crimes against humanity in May, 2008. He was arrested in Belgium and surrendered to the Court.

4. Darfur

The UN Security Council passed resolution 1593 in March, 2005 referring the situation prevailing in Darfur to the prosecutor. The prosecutor announced that Ahmed Harun, a Minister for Humanitarian Affairs and Ali Kushayb were key suspects accused of war crimes and crimes against humanity. In May, 2007, the Court issued warrants against the two men. Sudan has stated that the court does not have jurisdiction over the matter and has refused to hand over the suspects. In July, 2008, the Prosecutor accused President Omar El Bashir of war crimes, genocide and crimes against humanity and requested the court to issue a warrant of arrest.

The United States had signed the Statute in December 2000. However, in 2002, the country purported to unsign the treaty stating that it did not intend to become a state party to the treaty. The country has passed a law prohibiting cooperation with the Court. The United States has been signing Bilateral Immunity Agreements with other countries vesting immunity on United States Citizens from the jurisdiction of the Court. United States has argued that its officials and soldiers would be targets of politically motivated prosecutions thereby hampering peace keeping efforts.

Sovereignty and the Court

Whereas every country should have supreme dominion, authority or rule over its territory, the court with international criminal jurisdiction ensures the security of all human beings and combats impunity by ensuring all perpetrators of most serious crimes are prosecuted. Where a country prosecutes the perpetrators, The Court has no jurisdiction. The court will curtail concepts of sovereignty which are outdated under the existing international human rights legal order. Part of the challenge for the Court and the international criminal tribunals is to ensure that the evolving system of international justice is not seem as an instrument of Northern power- with only leaders of poor weak countries being held to account. The establishment of the International Criminal Tribunal on the former Yugoslavia is an indication that the right against impunity is not restricted to Africa.

International criminal trials promote awareness of the atrocities at an international level and allow the international community to condemn the actions. The tribunals clarify and develop precedents at an international level and may give the international community a false sense of exculpation for earlier inaction to prevent or minimise atrocities. However, these advantages resonate with the international community and not the victims. The trials are not visible to victims since they are held far away

The ICC has jurisdiction to try suspects in Kenya. Kenya is a state party to the Rome Statute of International Criminal Court having ratified the treaty in 2005. The International Crimes Bill was introduced in Parliament in 2005 to apply the provisions of the treaty locally. However, the Bill was not enacted. In case of failure by Parliament to set up the Tribunal as required under the CIPEV report, the Chief Mediator, Kofi Annan is expected to hand over the report to the Prosecutor of the ICC. The Prosecutor has power under the Statute to apply to the Pre-trial Chamber of the Court for permission to open investigations on reports of violations received from other sources. Once the court grants the permission, the Prosecutors will be able to investigate the circumstances of the post election violence and seek warrants of arrest for culprits.

The main argument in opposition to a trial at the ICC has been that Kenya is a sovereign country. International law is a limit to a nation's sovereignty. By ratifying the Rome Statute, Kenya subjected itself to international scrutiny and the jurisdiction of the ICC. The International tribunal may be seen as an intrusion of sovereignty. However, the Waki report provides the Government with an opportunity to try the suspects of the violence at the local courts in a tribunal. Failure to take action will be an indication of failure or unwillingness by the state to investigate the violations and promotion

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Crimes against humanity are crimes under international law but not under the Kenyan Law. One challenge will be the protection of the suspects from being tried for offences that did not form part of Kenya's penal laws at the time of their commission. This challenge can be surmounted by enshrining the court and its jurisdiction under the Constitution. Crimes against humanity are part of the customary international law. Kenya has a duty under international law to undertake prosecution of violators.

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of the culture of impunity and hence the need for the ICC to investigate the violations. ICC operates on a principle of complementarity whereby if a state is willing to investigate and prosecute the violators, the ICC will not simultaneously investigate such a case. Conversely, the International Criminal tribunal for Rwanda CTR incorporates a primacy provision that confers priority to the international tribunal over domestic courts.

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Special Court for Sierra Leone

In 1991, a partly indigenous rebel group invaded Sierra Leone from Liberia and plunged the country into a civil war. Cease fire was declared in 2002. A bloodless coup was executed in 1992 and a violent coup in 1997. In 1996, elections were held though large parts of the country were in control of rebels. The rebel group, known as Revolutionary United Front led by Foday Sankoh, was allegedly supported by Charles Taylor, the then warlord and later President of Liberia. It is suggested that Taylor supported the rebels to facilitate access the diamond rich mines in Sierra Leone. The rebel's campaign was marked by systematic violence against civilians and forced recruitment of combatants. In the 1996 election, Ahmed Tejan Kabbah won the elections and later signed the Abidjan Peace Accord with the rebels.

This Government was overthrown in 1997 but restored by in 1998 with the help of Nigeria led ECOMOG forces. This was followed by a period of intense fighting until July, 1999 when the parties agreed to a peace agreement in Togo. The agreement contained a provision for blanket amnesty for all fighters from all factions for all crimes. This clause was rejected by the UN. In January 2002, the United Nations and the Government of Sierra Leone signed an agreement establishing the court. In the 1800s, the British settled freed slaves in the country hence the capital city is called Freetown. In 2000, the UN set up a mission foe Sierra Leone with the mandate of disarmament, demobilisation and reintegration.

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Katiba briefs

Nov 2nd...Even before Justice Philip Waki's damning report on post-election violence took centre stage, it was clear from pronouncements, and the lack thereof, that the issue of constitutional review had been put on the back burner.
Most politicians have blocked from their minds the memories of the violence and, as they focus on 2012, the danger of its recurrence seems lost on them or they simply do not care.

Nov 5th...Parliament passed a crucial Bill to jumpstart the constitutional review process. The civil society, religious-groups and other interest groups will form part of the process in order to give it a public outlook. The number of local experts has also been increased from four to six. There will be three foreigners on the team. The chairman of the parliamentary committee on the Administration of Justice and Legal Affairs, Abdikadir Mohamed, said this gives ownership of the process to Kenyans.

Nov 6th...Parliament showed its determination to give Kenyans a new Constitution by passing a bill that gave directions on how to complete the process that started over 17 years ago. The front and back benchers closed ranks to pass the constitution of Kenya Review Bill through the committee of the whole House stage.

Nov 9th...The country needs a new Constitution and not a patched up document, former Constitution of Kenya review Commissioner, Ms Kavetsa Adagala, told a workshop in Eldoret. She said the current Constitution has taken away the rights of marginalised groups.

Nov 10th...Political leaders who were agitating for a new Constitution in the last elections have suddenly become quiet after joining the Government, an assistant minister said. Trade assistant minister Omingo Magara said little attention was being given to constitutional reforms as those previously lobbying for reforms are now in plum Government positions.

Nov 25th...Visiting British MPs came face to face with destitution in camps for internally displaced persons when they toured Naivasha. They witnessed the reality of “democracy gone wrong” and called for constitutional, institutional and parliamentary changes.

Still nowhere to call home

A scene reminiscent of the concentration camps during the independence struggle.

Our correspondent audits the resettlement programme for the internally displaced persons (IDPs) and asks the Government some very tough questions regarding their incessant dithering on this life and death matter.

By Jennifer Wokabi

After the 2007 general election violence broke out in many parts of the country. Six of the eight provinces were affected by the violence which led to an estimated 1133 deaths and displaced about 350,000 persons. Previously, Kenya had ethnic clashes prior to elections in 1992 and 1997 and to a smaller extent 2002. However, the post election violence in 2008 was of unimaginable proportions. The Government devised the Operation Rudi Nyumbani Programme to assist in resettlement of the displaced persons and developed the National Reconciliation and Emergency Social and Economic Recovery Strategy which was designed to provide a temporary policy framework on IDPs.

The plight of African refuges and internally displaced persons is a glaring evidence of flagrant violation of human dignity and human rights and a threat to peaceful and orderly development. African states, including Kenya should adhere to international treaties and ensure their implementation in law and in practice. Majority of the population affected by conflict are women and children who bear the brunt of atrocities. The right of return of IDPs and the principle of voluntary repatriation including local integration and third country resettlement are part and parcel of successful resettlement programmes that respect the rights of the IDPs and implement international human rights standards. Repatriation must be accomplished in conditions of safety and dignity.

The international community has underscored the vulnerability of internally displaced persons. The United Nations formulated in 1998 Guidelines on Internally Displaced Persons. These Guidelines are supposed to inform efforts by States in formulating policies ands programmes targeting internally displayed persons. Assertion of sovereignty by national governments and the lack of clear international assistance mechanisms have hampered the adequacy of protection of IDPs.

The 1992 and 1997 resettlement programmes

The implementation of the resettlement programmes in Kenya since 1992 have failed to meet the prescribed human rights standards. Consequently, the displaced persons have lived in deplorable and precarious conditions. Indeed, until 2007 when more than 350,000 persons were displaced as a result of the post election violence, no concerted efforts have been initiated by the Government to resettle displaced persons. In the 9th Parliament, Hon Koigi Wamwere and Hon G.G Kariuki were notably vocal on the need to resettle persons who were displaced in the 1992 and 1997 ethnic clashes largely in the Rift Valley Province. Hon G. G. Kariuki sponsored the Squatters Bill to facilitate this process though the Bill was not enacted. The resettlement programmes in 1992-1997 were largely implemented by humanitarian agencies with minimal support from the Government. Many IDPs were rendered squatters as they were unable to return to their land. The Government took no steps to resettle the squatters.

The United Nations Development Programme was charged with the duty of resettling IDPs in Kenya. Thousands of IDPs remained displaced when the programme ended and the underlying issues relating to the displacement remained unaddressed. The injustices and hostilities were not redressed. The programme aim was the reintegration of displaced populations in local communities,

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prevention of renewed tensions and promotion of reconciliation. Human Rights Watch noted that the violence after the reintroduction on multiparty politics in 1991 was not spontaneous.

The Government provoked terror and expelled certain ethic communities for political; and economic gain. The theatre of the violence was the Rift Valley. The historical land questions were used to fuel the violence. The UNDP programme was implemented jointly with the government. Three groups were identified: those who had returned and were in the process of rehabilitating their homes and land; those who were commuting to their farms to cultivate but were not willing to return due to perception or experience of continued hostility and those who would probably never be able to return due to hostility or who were squatters. There was demonstrated lack of political will to ensure success of the programme.

The instigators and perpetrators of the violence enjoyed complete impunity. Where reintegration occurred, it was through the efforts of the communities. The government took no steps to ensure application of the rule of law or to protect the displaced. The UNDP did not push for land reform programme. Land was identified to be at the centre of the ethnic clashed. Fraudulent land transfer and pressurised land sales continued during the programme period. The government condoned illegal occupation of land by its political supporters. The government never sought to redress fully the destruction and loss and did not address the political grievances that led to the clashes. The government harassed and dispersed the IDPs, in some cases loading them onto lorries and ferrying them to their 'ancestral lands'. The government should have sought alternative sites to the IDPs.

Successes and failures of the 2007 resettlement programme

The IDPs live in a state of insecurity and lack adequate food, water, shelter, quality health care, educational facilities and services. The IDPs who moved into camps in 2007 were provided with tents which have since worn out. The Operation Rudi Nyumbani was launched in May, 2008 to facilitate the return of displaced persons. This led to the creation of transit camps from which the IDPs could be enabled to access their farms. The Government also constructed 32 new police stations in the hotspots of the violence.

The Kenya Human Rights Commission conducted an audit of the *Operation Rudi Nyumbani*. Their report and other reports by civil society groups have faulted the programmes on a number of grounds:

1. The programme has not redressed the widespread gender violence in the form of rape and defilement that was perpetrated during the post election violence. The victims of gender based violence have not been availed the specialised attention necessary to enable them move on with their lives coupled with the arrest and prosecution of the offenders. Many victims are therefore unwilling to return. The only attempt to investigate this type of violence was by the Commission of Inquiry on Post Election Violence which could not sufficiently investigate all cases given its limited time and resources. Female IDPs remain exposed to sexual harassment and sexual violence in the camps, including from officials of the humanitarian agencies.
2. The resettlement programme has been carried out without participation and consultation with the IDPs. The programme is centrally designed by the Government without any input from the displaced persons.
3. The token payments of Kshs. 10,000/- per family for travel and related expenses and Kshs. 25,000/- for families whose houses were destroyed have been paid to a minority of the IDPs. The reparation procedures should be elaborate and accountable. The current amount of compensation is a flat rate that does not recognise the level of loss between different IDPs.
4. The Government did not prepare and authenticate a register of all IDPs as required by international standards. This has affected the efficient in resettling the IDPs. Such a register should contain disaggregated details of IDPs including the specific causes of displacement, time of displacement, and type of needs.
5. After the commencement of the resettlement programme, the humanitarian agencies and the government have terminated provision of essential supplies to IDPs. Many displaced persons remain in the camps or transit camps without any source of essential supplies. The Government bears the primary responsibility in providing humanitarian assistance to IDPs and providing protection. This includes provision of psycho-social services. The Government should safeguard the right of IDPs to access and control use of their land.
6. The Government has not taken steps to resettle IDPs who are

Naomi Shaban, Minister for Special Programmes

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unwilling or unable to return to their land. Some of the land vacated by IDPs has been occupied by other persons. It is difficult for IDPs to evict such persons without the tacit support of the Government. Peace building and reconciliation efforts must precede return. The land lord-tenant issues in urban slums are yet to resolved, where tenants forcibly occupied houses and refused to remit the monthly rent.

7. The Government should develop urgently an early warning system for displacement. Violence has recurred in all elections since 1991. This means that the Government should have implemented and used such a system to prevent the violence from recurring or mitigate the effects of the displacement.
8. The Government should urgently redress the root causes of the displacement including:

   a. Develop a comprehensive policy and legal framework for protection and provision of assistance to IDPs to deal with matters of all IDPs in Kenya
   b. Implement the National Land Policy to deal with historical land injustices and repugnant land governance and administration systems.
   c. Develop a policy of disaster preparedness and response.
   d. Develop a national security and peace and conflict resolution policies to ensure that the security of IDPs is adequately provided at the camps and at their farms and homes upon their return.
   e. Transitional justice, constitutional reform and institutional strengthening. This will involve the setting up of the Truth Justice and Reconciliation Commission and the recommended Special Tribunal to try those bearing the greatest responsibility for the post election atrocities. The Tribunal will bring closure the 2007 post election violence by ensuring justice for the victims. This should be coupled with appropriate reparation framework. The completion of the Constitution will lead to setting up of stronger and independent institutions that will cushion Kenya from the post election violence witnessed ion 2007. Other measures will include outlawing hate speech and ethnic incitement.

International best practice on resettlement of IDPs

Internal displacement affects about 20 million persons in various parts of the world. National governments have the primary responsibility of protecting the displaced persons. However, the international community is increasingly being involved in protecting IDPs in crisis and conflict situations. The UN developed Guiding Principles on Internal Displacement based on the existing principles of human rights and humanitarian law. The principles are intended to raise awareness on the difficulties of the IDPs, mobilise support within the humanitarian community and help field colleagues to find solutions when confronted with the protection and assistance needs of the IDPs. IDPs suffer from severe deprivation, hardship and discrimination.

The displacement of persons may occur due to violence, fear of persecution, civil strive, political reasons or natural disasters. Other reasons include displacement due to development projects. For example, the construction of the Three Gorges Dam in China resulted in the displacement of 1.2 million persons.

To correct the effects of internal displacements, governments resort to resettlement and rehabilitation. Resettlement is the physical implantation in a new colony while rehabilitation is total reestablishment of lost livelihood including the recreation of physical, social and cultural environment necessary for living their lives in dignity.

International guidelines on resettlement of IDPs

Protocol of the International Conference on the Great Lakes Region on IDPs

The Protocol was signed by Great Lakes countries to further clarify and strengthen the UN Guiding Principles on the IDPs. The Protocol contains a draft Bill that can be used to domesticate the protocol and the UN Guiding Principles. Kenya is a signatory to the Protocol.

The Protocol defines IDPs as persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or man made disasters, and who have not crossed an internationally recognised border. The term also refers to persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of large scale development projects, and who have not crossed an internationally recognised border.

States undertake to prevent arbitrary displacement and to eliminate root causes of displacement and to mitigate the consequences of displacement caused by natural disasters and other causes. States bear the primary responsibility for the protection and safety of internally displaced persons during flight, in places of displacement and upon return or resettlement. The states shall register the displaced persons and maintain a national database of IDPs and assess their needs. States shall facilitate rapid and unimpeded humanitarian access and assistance to IDPs and ensure the security and safety of humanitarian personnel in areas of displacement.

Where the government lacks the capacity to assist and protect IDPs, it shall accept the obligation of the international community to provide protection. States shall observe

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principles of international human rights and humanitarian law in providing protection to IDPs. Special protection shall be afforded to communities, pastoralists and other groups with a special dependency to their land and to women, children, persons with disabilitiesand other vulnerable groups. States shall ensure safe location of IDPs in satisfactory conditions of dignity, hygiene, water, food and shelter and away from areas of armed conflict and danger and facilitate family reunification and afford special protection to families of mixed ethnic identity.

Where States undertake large scale development projects which occasion displacement, such projects must be justified on compelling and overriding public interest. Feasible alternatives to the development shall be explored in order to avoid displacement. Such displacement shall not be arbitrary and shall be minimised and mitigated. The state shall obtain free and informed consent of the displaced persons and full information shall be provided on reasons and procedures on the development and on compensation and relocation. Proper accommodation shall be provided to displaced persons. Such accommodation shall be effected in safety, nutrition, health and hygiene.

Displaced persons shall be afforded ample opportunity to participate in planning and management of their relocation and the return and reintegration or resettlement. The states shall enact national legislation to domesticate the Guiding Principles and provide a framework for their implementation nationally. Such legislation would include a definition of IDPs, procedures for undertaking development induced displacement, create organs responsible for providing protection and assistance to IDPs, and provide channels of engagement and co-operation with the international community.

UN guiding principles on internal displacement

The Guiding Principles were developed by the UN Special Rapporteur for Displaced persons in 1998. The

Is this what self rule was about!

Principles provide the human rights framework for protection of IDPs and are the most comprehensive framework for protection of IDPs from a human rights perspective. The UN Guiding Principles set for the rights of IDPs and the obligations of governments and other actors towards these populations. The Principles cover all phases of displacement including providing protection against arbitrary displacement, protection and assistance during displacement and for safe and dignified return or resettlement and reintegration. The Principles help identify instances where the displacement may be arbitrary and hence in violation of international human rights standards. The principles identify human rights that need to be observed in the course of resettlement process, even where relocation has been lawful.

The principles define IDPs as 'persons or groups of persons who have been forced or obliged to flee their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognised state border'.

The principles state that IDPs shall enjoy, in full equality, the same rights and freedoms under international and domestic law like other persons. The principles shall be applied without discrimination. IDPs shall have the right to request and receive protection ands humanitarian assistance, whose provision shall be a primary duty and responsibility of the national authorities. Children, unaccompanied minors, expectant mothers, mothers with young children, female headed households, persons with disabilities and elderly persons shall be entailed to special protection. States shall take measures to prevent conditions that precipitate displacement of persons. Arbitrary displacement shall be prohibited and it includes displacement based on policies of apartheid, ethnic cleansing or such practices aimed at altering the composition of the affected population, situations of armed conflict, large scale development projects, disasters and its use as collective punishment. Displaced persons shall be afforded effective remedy.

IDPs shall be protected against genocide, murder, summary or arbitrary executions and enforced disappearances. Attacks and other acts of violence against IDPs shall be prohibited and they shall be protected against starvation as a method of combat, direct or indiscriminate attacks, and

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Can't pay, won't pay

The message has been loud and clear from the leaders who we shamelessly die for after every five years. Apart from a few lone voices, our members of Parliament believe that they are a privileged lot and trying to make them pay tax like everybody else is an insult to the hard work they put to make this country equal! We look at the case for equality and fairness in taxation, including the constitutional and legislative provisions on taxation of MPs in Kenya.

By John Mwangi

Section 99 of the Constitution provides that all revenues or other monies raised or received for the purpose of the Government of Kenya shall be paid into the Consolidated Fund. Moneys can only be withdrawn from the fund where authorised by the Constitution or an Act of Parliament or by a vote on account passed by the National Assembly. Section 100 of the Constitution provides that the Minister for Finance shall cause to be prepared and laid before the National Assembly estimates of revenues and expenditure of the Government of Kenya for the following financial year. Section 104 of the Constitution provides that the salary payable to the holder of the office of judge of the High Court, judge of the Court of Appeal, member of the Public Service Commission, member of the Electoral Commission, the Attorney General and the Auditor General, other than allowances that are not taken into account in computing under any law the pension payable in respect of service, shall not be altered to his or her disadvantage.

This section is intended to protect office holder who enjoy security of tenure under the Constitution from application of undue pressure in rendering their services through manipulation of remuneration. However, the section does not protect the remuneration of MPs and no provision in the constitution exempts MPs from paying tax. Among the duties of the Parliamentary service Commission under Section 45 B of the Constitution is to appoint an independent body to review and make recommendations on the salaries and allowances of MPs in 2001. This report formed the basis for the appointment of the Cockar Commission that recommended increases in MPs salaries and allowances. The recommendations were implemented after the 2002 general election.

The basis for exemption from taxation of MPs is the National Assembly Remuneration Act, Chapter 5 of the Laws of Kenya. Section 5 of the Act states that all allowances payable under the Act shall be exempt from income tax notwithstanding the provisions of other laws on income tax. This provision excludes the allowances paid to the President, Vice President, Ministers, Assistant Ministers, the Speaker and Deputy Speaker of the National Assembly, the Leader of Official Opposition and The Chief Whip. This is the section that the Minister for Finance intended to amend in the Finance Bill, 2008 to ensure that MPs are involved in the primary civic duty of paying tax on their allowances. Among the allowances the MPs are paid and which are exempted from taxation include accommodation allowance, attendance allowance, paid for attending committee meetings of the National Assembly wherever Parliament is not sitting, constituency allowance, transport allowance and a sitting allowance. These allowances when paid to persons who are not protected under the Act are treated as income under the Income Tax Act and are taxed accordingly.

Under the Constitution, MPs are not constitution office holders since they hold terms for a specific period which is subjected to review at the elections. Three MPs have offered to pay taxes and have been lauded by the Speaker. However, without amending Section 5 of the Act, most MPs will not pay tax as they are not legally obliged to pay. The Kenyan economy is undergoing a lean phase precipitated by the post election violence at the beginning of the year, the high fuel prices, food shortages and the global financial meltdown. The government is has a Kshs. 120 billion budget deficit.

The personal financial obligations of MPs such as car loans and mortgages that have been used widely to argue against taxation by MPs have nothing to do with revenue collection or promotion of public good. Whereas the Cockar Commission fixed the remuneration terms for MPs, the basis for taxation of the MPs or exemption thereof is the law. Since most MPs are in support of non taxation, it is difficult to successfully amend the law to ensure payment of tax. The exemption of MPs from taxation undermines the principle of

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Taxpayers queue to make their annual returns at KRA offices in Nairobi.

Making a living by any means necessary.

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fairness and equality in taxation. With the setting up of the Constituency Development Fund, the obligations of MPs to assist the public through public fundraising have been significantly reduced.

Comparative analysis of taxation of MPs in other countries

In the early periods when America was a British Colony, Americans were not represented in British Parliament which authorised the imposition of taxes in America. The Americans argued that the English Parliament had no more right to pass laws for the colonies than the colonial legislature had the right to pass laws for England. The constitutionality of these laws was challenged in the 1760s and 1770s. The English Bill of Rights had forbidden imposition of taxes without the consent of Parliament. This impasse between the English and the Colonists precipitated the American declaration of independence in 1776.

Article 1, Section 8 Clause 1 of the US Constitution provides that the Congress has power to impose taxes, duties, imposts and excises but such duties, imposts and excises shall be uniform through out the country. Initially, taxes were to be distributed in proportion to each state. The role of Parliament in taxation was that it was composed of representatives of the people who could be removed through regular elections. However, the members of the Congress were also subject to taxation. In 1913, the constitution was amend to read that the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among several states, and without regard to census or enumeration. While interpreting this amendment in court, it was held that income includes 'gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, or gains or profits and income derived from any source whatsoever.' By applying this definition to the MPs salaries, it is clear that in America, the allowances of MPs would be taxable. Taxes are required to abide by the law of geographical uniformity.

In the United Kingdom, tax was first imposed in 1798 to pay for weapons and equipment in preparation for Napoleonic wars. The categories for taxation included income from land, from commercial occupation of land, from public securities from trading income and from employment income. The types of taxes include income tax, corporation tax and national insurance contributions. A cardinal principle of taxation is equity, equality and fairness in taxation. All income is therefore subject to taxation in the United Kingdom. The benefits of an MP in the UK are subjected to taxation. MPs in the United Kingdom receive an annual salary and allowances to cover costs of running an office and employing staff, house allowance and cost of travelling. The opposition political parties are paid to enable them to carry out their parliamentary roles.

Proposals for constitutional reform to stem abuse by MPs on taxation

The remuneration of MPs should be fixed as a percentage of the Gross Domestic Product in the constitution or alternatively a percentage of the National budget. Any increase of MPs pay should only occur with an overall growth of the economy. This will eliminate the frequent and huge increase of MPs salaries and protect Kenyan from exploitation by a greedy and increasingly autocratic parliament. Sadly, the Constitution does not have any provision on taxation. During the review, a clause should be inserted to ensure that taxation is fair and all persons, including the President, Vice President, Speaker and MPs, are subject to taxation. Taxes should be levied without discrimination. Exemptions from taxation should be well considered on a caser by case basis and only undertaken for the public good in a clearly spelt out procedures.

The principle of no taxation without representation cannot hold water where the MPs who are expected to represent the citizenry in parliamentary debate on taxation are themselves exempt from paying tax. All measures to increase or reduce tax must be approved by Parliament. Parliament must therefore be at the centre of demonstrating the good of paying taxes by providing for taxation of their allowance. The MPs must set a good example for payment of taxes. MPs must not justify non payment of tax on the basis of a law, which they have the power to rectify and amend. Failure by MPs to support the Finance Bill is an indication that MPs are not willing to pay tax. If MPs from developed countries have their allowances taxed, there is no justification for exemption for Kenyan MPs. KN

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The Court is an independent judicial body set up to try those who bear the greatest responsibility for war crimes and crimes against humanity committed in Sierra Leone after 30th November 1996. The court is a hybrid court and is composed of international judges, attorneys and staff. The court mandate is to try cases in national justice system with the assistance of the international community. The court implements a narrow focus concentrating on those bearing the greatest responsibility thereby allowing a more efficient and limited approach.

The court has four divisions: the Registry, Prosecutor, the Chambers and the Defence. The prosecutor investigates crimes and gathers evidence and submits indictments to judges. The court has twelve judges, with seven trial judges and five appellate judges. Thirteen people have been indicted so far for war crimes, crimes against humanity and other violations. Three of the inductees, including Foday Sankoh, have since died and charges consequently dropped. Nine of the indictees are in custody of the court while Charles Taylor is in custody at The Hague.

Taylor, the former President of Liberia, was indicted in 2003, but was given asylum in Nigeria after fleeing Liberia. in March, 2006, he was submitted to the Court. Due to the political instability in the region, the Court requested that he should be tried by the Court at the ICC facilities in The Hague. The trial started in June 2007. Five of the defendants have been found guilty and sentenced. After the arrest of Taylor, the UN Secretary General stated that the capture and trial will send a powerful message to the region and beyond that impunity will not be allowed to stand and that rule of law must prevail.

The Court has kept its costs low as compared to the International Criminal Tribunal for Rwanda or for former Yugoslavia. This is partly due to the low number of defendants being tried by the Court. A number of cases have been concluded at the court. The Court has facilitated the emergence of precedents for international criminal trial. For example, the Court was the first to define forced marriage as a crime against humanity.

Some of the challenges identified in regard to the Court and its mandate are:

a) Domestic and international perceptions on the impact of the court vary. In Sierra Leone, there is a view the mandate of the Court is narrow as only eleven persons have been charged before the court. The Court therefore needs to run an efficient outreach programme and complete its mandate in an efficient manner.
b) At the local level, there is a legitimacy crisis as the court is perceived to be an international court. Very few Sierra Leoneans serve at the court at senior level. The government has appointed international experts to positions that could have been held by locals. The court is therefore perceived to be an anomaly with little impact on locals.
c) The defence counsels at the court have enjoyed high level international support. However, there are questions on the level of resources availed to the defence and how to ensure quality and capacity of defence counsel.
d) The narrow mandate of the court has assisted in the overall efficiency of the court and minimised the costs and time required to determine cases. The court has demonstrated the need for fewer trials and lower costs whilst adhering to international standards. The court has insulated itself from the difficulties of the domestic courts. The system of voluntary contributions to fund operations of the Court has adversely affected the planning of the activities of the Court. The freedom from stringent UN rules has assisted in the efficiency of the court, especially in terms of recruitment.
e) Efforts at creating a lasting legacy of the court have been affected by the frosty relationship with the domestic legal profession. The court is viewed as an international court with little relevance to the local circumstances.

International Criminal Tribunal for Rwanda

The tribunal is a temporary court established by the UN Security Council to investigate and prosecute persons responsible for the Rwandan genocide between 1st January and 31st December, 1994. The court is staffed by international jurists and was empanelled when national courts are unable or unwilling to try suspects charged with war crimes and other serious offences. The tribunal is mandated to try suspects bearing the greatest responsibility over the Rwanda genocide of 1993-4. The tribunal sits in Arusha, Tanzania. The mandate of the Court has been extended to December, 2009. Rwanda has set up local tribunals known as Gacaca to try suspects. The Tribunal has completed 21 trials and convicted 28 persons.

Eleven other trials are in progress and 14 individuals are awaiting trial in detention. The trial of Jean Akayesu established that rape is a crime of genocide and that sexual assault formed and integral part of destroying the Tutsi ethnic group. The rape had been systematic and had been perpetrated against Tutsi women only manifesting the specific criminal intent required to constitute genocide. The Tribunal consists of 16 judges in three trial chambers and one appeal chamber. A further 9 ad litem judges are assigned to the trail chambers. The office of the Prosecutor is responsible for investigations and prosecution. The Prosecutor is Hassan Jallow of The Gambia who was appointed in 2003. The court is expected to complete all trials in 2008 and all appeals by 2010.

Conclusion

The Special Tribunal for Kenya is modelled on the Special Court for Sierra Leone. Failure by the Government, including parliament to enact the required law to set up the tribunal will mean that the jurisdiction of the ICC will be invoked. The prosecution of the perpetrators of the post election violence is a significant step in curbing the culture of impunity which has been prevalent in Kenya and ensure that justice is availed to the victims of ethnic clashes. The implementation of the report will, hopefully, deter repeat of the post election violence in future elections. KN

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attacks against camps. IDPs shall be protected against rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment and other outrages upon personal dignity, slavery and acts of violence intended to spread terror.

IDPs shall have the right to seek safety in another part of the country, leave the country, seek asylum in another country and to protect against forcible return or resettlement where their life, safety, liberty or health would be at risk. The national authorities that establish the fate and Whereabouts of IDPs reported missing and inform the next of kin of the progress of the investigation. All steps shall be taken to reunite families, particularly where children are involved. IDPs shall be provided with safe access to essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services and sanitation. Efforts shall be made to ensure full participation of women in planning and distribution of these basic supplies.

The IDPs shall receive medical care and attention they require and have access to psychological and social services. Special attention shall be afforded to the special needs of women including access to female health providers and to reproductive health services. Appropriate counselling shall be afforded to victims of sexual abuses. National authorities shall issue to IDPs all documents necessary for the enjoyment of their rights and facilitate issuance of new documents which were lost in the course of displacement, without imposing unreasonable conditions such are demanding the IDPs to return to their habitual area of residence before replacement of the documents. Women and men shall have equal rights in seeking and obtaining replacement of documents. The property of IDPs shall be protected against pillage, indiscriminate attacks, destruction or use as the object of reprisal.

IDPs shall be entitled to freely participate in economic activities and associate and participate freely in community affairs. Displaced children shall receive education which shall be free and compulsory at the primary level. Education shall respect their cultural identity, language and religion. National authorities bear the obligation to provide humanitarian assistance to IDPs and shall grant free passage and protection from attacks to persons engaged in provision of such assistance. IDPs shall be allowed to return voluntarily to their places of habitual residence or to resettle in another part of the country and the authorities shall facilitate reintegration of returned or resettled IDPs. The IDPs shall participate fully in the design of resettlement, return or reintegration plans. IDPs who have chosen to return shall be protected from discrimination as a result of their previous displacement. National authorities shall assist IDPs to recover their property and possessions which they were dispossessed upon their displacement. Where recovery of such property is not possible, the authorities shall provide of assist the IDPs in obtaining appropriate compensation and reparation. International humanitarian organisations shall be granted unimpeded access to IDPs to assist in their return or resettlement and reintegration.

The case for a policy and legal framework on resettlement in Kenya

The Government has failed to develop and implement a comprehensive legal framework on IDPs. The root causes of violence in the 1992, 1997 and 2007 pre and post election violence are similar. Failure to redress the causes in 1992 led to violence of grater and widespread scale in 2007. Despite frequent recurrence of displacement, the reaction by the government to the violence was not timely and coordinated. To date, some IDPs who were displaced more than fifteen years ago have not been resettled. Advocacy efforts for the framework should be commenced. The contents of the policy should be guided by the UN Guiding Principles on IDPs. This will facilitate quick response by the Government in protection and rendering assistance to IDPs. The *ad hoc* resettlement programmes implemented by the Government do not respect Kenya's human rights obligations and are not properly designed, well coordinated and responsive.

Lastly, the policy and legal framework would:

a) Set up disaster preparedness and early warning systems.
b) Create appropriate institutions for managing the provision of assistance and protection to IDPs.
c) Ensuring protection of human rights by facilitating the access of IDPs to a remedy to redress violations and hold the Government to account.
d) Creating a platform for engagement between the Government and civil society and international donors on matters of IDPs.
e) Creating a framework for ensuring that IDPs participate in planning and implementing repatriation and resettlement programmes regarding matters of safety, education, social and economic facilities and access to settlement and use of land.
f) Create mechanisms to redress root causes of displacement and create conducive environment for return in safety and dignity.
g) Ensure adequate and effective security in refugee hosting areas including protection against personal violence. Violators should be punished in accordance with the applicable law.
h) Ensure urgent humanitarian assistance to displaced persons respecting the impartiality and neutrality of humanitarian aid.
i) Provide psycho-social needs of IDPs which should be identified as of equal importance as the material needs. KN

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THE KONRAD ADENAUER FOUNDATION IN KENYA

Konrad-Adenauer-Stiftung is a German political Foundation which was founded in 1955. The Foundation is named after the first Federal Chancellor, Prime Minister and Head of Federal Government of the then West Germany after World War II. Konrad Adenauer set the pace for peace, economic and social welfare and democratic development in Germany.

The ideals that guided its formation are also closely linked to our work in Germany as well as abroad. For 50 years, the Foundation has followed the principles of democracy, rule of law, human rights, sustainable development and social market economy.

In Kenya, the Foundation has been operating since 1974. The Foundation's work in this country is guided by the understanding that democracy and good governance should not only be viewed from a national level, but also the participation of people in political decisions as well as political progress from the grass roots level.

Our aims

Our main focus is to build and strengthen the institutions that are instrumental in sustaining democracy. This includes:

- Securing of the constitutional state and of free and fair elections;
- Protection of human rights;
- Supporting the development of stable and democratic political parties of the Centre;
- Decentralisation and delegation of power to lower levels;
- Further integration both inside (marginalised regions in the North/North Eastern parts) and outside the country (EAC, NEPAD); and
- Development of an active civil society participating in the political, social and economic development of the country.

Our programmes

Among other activities we currently support:

- Working with political parties to identify their aims and chart their development so that democratic institutions, including fair political competition and a parliamentary system, are regarded as the cornerstones for the future development in Kenya.
- Dialogue and capacity building for young leaders for the development of the country. Therefore, we organise and arrange workshops and seminars in which we help young leaders to clarify their aims and strategies.
- Reform of local governance and strengthening the activities of residents' associations. These voluntary associations of citizens seek to educate their members on their political rights and of opportunities for participation in local politics. They provide a bridge between the ordinary citizen and local authorities, and monitor the latter's activities with special focus on the utilisation of devolved funds.
- Introduction of civic education to schools and colleges. We train teachers of history and government in civic education. In addition, we participate in the composition of a new curriculum on civic education.

Our principle is: Dialogue and Partnership *for Freedom, Democracy and Justice.*

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