

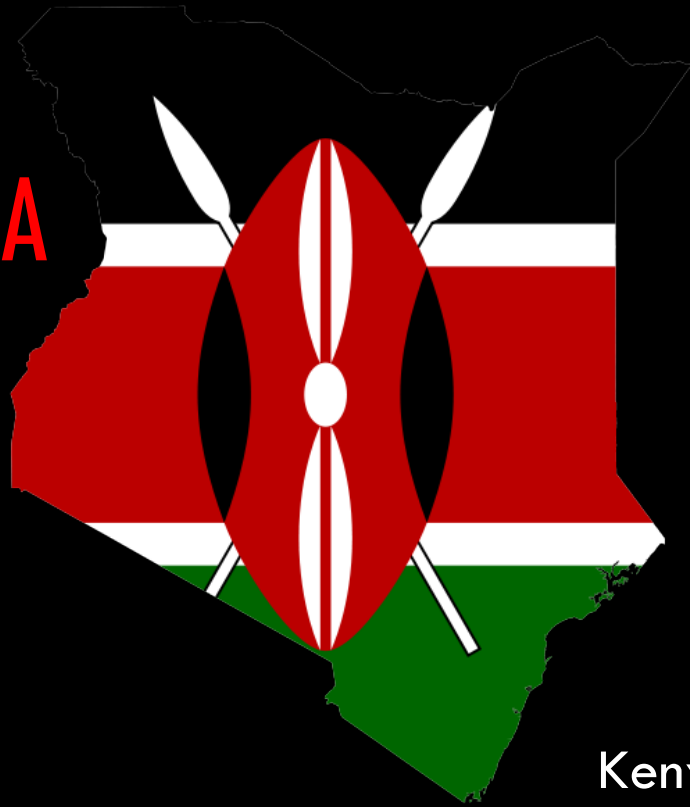


**CRITICAL ANALYSIS OF INTERNATIONAL LEGAL
MECHANISMS OF POST-CONFLICT AND ACCESS TO
JUSTICE FOR THE VICTIMS**

THE KENYAN SITUATION

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KENYA



Kenya is a country in East Africa, former British colony. Has a population of 44.4 million people. With 42 ethnic communities. The 9th Largest economy in Africa with a GDP of 53.4 billion and is a non-natural resource driven economy however large quantities of Oil deposits estimated around 10 billion barrels.

Kiswahili and English are the official languages.

2007-2008 POST-ELECTION VIOLENCE



It was not unprecedented (Human Rights Watch 2008) This was not a new concept as in 1992 Africa watch reported 1,500 people dead and 300,000 internally displaced only in Rift Valley. Africa watch 1993 Divide and Rule: report on state sponsored ethnic violence in Kenya. Human Rights Watch New York.

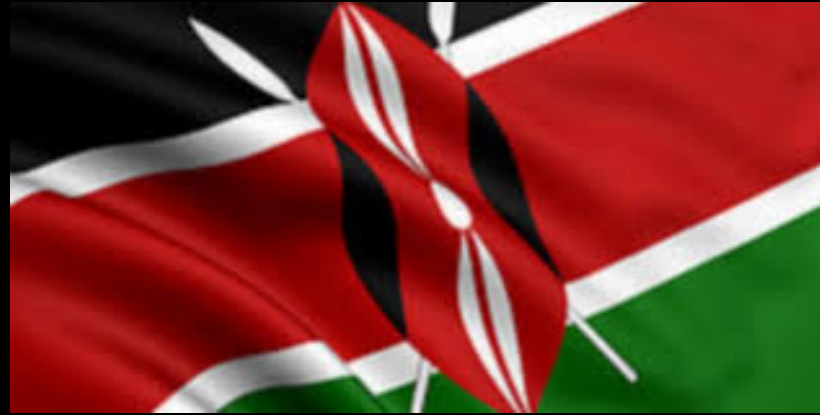
Human Rights Watch 2002 report indicates 2,000 dead and 400,000 internally displaced after the 1997 elections.

From 1963 -2008 there have been 25 commissions of inquiry. A parliamentary committee 'Kiliku' formed after 2002 elections "found in its report that the ruling party and Moi's government was responsible for financing the violence" Materu 2015

A judicial commission Akiwumi found the same after the 1997 elections.

In 1998 the Law society of Kenya wrote to Koffi Anan the UN secretary General at the time asking him to open investigations into the crimes perpetrated after the elections. This was unsuccessful however 10 years later Kofi Anan arrives in Kenya representing the AU to mediate, after 2007-2008 election.

NEW CONSTITUTION



The New Constitution was enacted in 27th August 2010. Article 2 provides that International law is directly applicable and enforceable by the domestic courts without domestication provided it is not in contradiction with the constitution.

The 2010 constitution provided rights to minority groups and marginalised communities.

INTERNATIONAL MECHANISMS



Despite prosecutor's preference for self-referral, he used his *prioprio motu* powers under Article 15 of the Rome statute.

Prosecutor's request "not limited to the time period between 27th December and 28th February 2008." however only an investigation "in relation to the post-election violence 2007-2008" was granted by the Pre-Trial Chamber.

On 4th March 2011, the Kenyan government under Article 16 requested the UNSC to have the cases deferred unsuccessfully.

On 31st March 2011, Kenya under Articles 19(2)(b) and 17 of the Rome statute filed an admissibility challenge arguing that it had the ability and willingness to investigate and prosecute in view on the constitutional reforms t the judiciary and police reforms. The Pre-Trial Chamber dismissed Kenya's admissibility challenge.

INTERNATIONAL MECHANISMS



On 4th March 2013, Uhuru Kenyatta won the presidential elections garnering 50.07% of votes cast: Kenyatta and Ruto (ICC suspects).

On 21 October 2013 Kenya filled a second deferral request that was denied by the UNSC despite citing terrorism threat alert after the Westgate Mall Attack on the 21 September 2013 which 67 people were killed.

Uhuru Kenyatta's Case was dismissed

Impact of the ICC's intervention is both positive and negative; "the USA validated Prosecutor's hypothesis that it did contribute to peaceful 2013 elections." (Materu 2015)

Financial implications?

On the other hand justice for the victims was not delivered.

ACCESS TO JUSTICE FOR VICTIMS



November 2012 Dr. Willy Mutunga the Chief Justice stated that the Judicial Service Commission was at an advanced stage of establishing the “International Crimes Division” (ICD) of the High Court. It implied that the 2007-2008 post-election violence crimes would be given first priority however that proved false in April 2013 when the AG pronounced that the ICD would have a prospective effect.

The ICC process became focused on states, political parties in Kenya and the victims were somehow forgotten in the process. Kenya was busy campaigning on the deferral and dismissal of the cases that the victims’ rights to justice was completely swept under the carpet.

ACCESS TO JUSTICE FOR THE VICTIMS



Republic vs. Kiprotich Letting & 3 others(2009) eKLR,p.15: The presiding judge pointed out “casual manner” in which the investigation and prosecution was conducted.

November 2011 302 police prosecutors only 6 of them had a law degree. (Daily Nation, 19 November 2011) the proposal to phase out police prosecutors was announced in 2011 however implementation is yet to be realized.

“I must say there has been some prosecution for the post-election violence, but it was minimal and did not make any impact. The people perceived to have been perpetrators were not investigated and accordingly, were not prosecuted.” Amos Wako AG 3-4 December 2010.

Attorney- General’s Report of March 2011; there are 3,479 cases still under investigation, 94 convictions, 57 acquittals, 180 withdrawn, 17 pending arrests of known suspects.

Human Rights Watch conducted a survey in 2011 on the status of national investigations and prosecutions. Those “involving politicians, police, business people or other influential citizens” were classified as high profile cases. Gravity of the offences charged; “murder, robbery with violence, rape, defilement and assault causing bodily harm.

AFRICAN LESSONS: ACCESS TO JUSTICE IS CRUCIAL FOR SUSTAINABLE PEACE.

ACCESS TO JUSTICE IS KEY IN CREATION OF SUSTAINABLE PEACE.



1,958,634 cases tried through Gacaca, 169,442 judges, 10 years period, 87.3% level at which it contributed to national unity, \$48.5 million cost of the gacaca courts.”
gacaca.rw

Post-election violence reoccurs because justice for the victims is never delivered, impunity and permissiveness for such atrocities have been condoned and even accepted by others. History will keep repeating itself until this changes.

PROPOSAL MODEL



MAKING IT ALL ABOUT THE VICTIMS

COMMUNITY BASED APPROACH: A local process that involves effected communities, its main objective is reconstruction and reconciliation.

Traditional and national ceremonies marking reconciliation and nationalism.

Reparation for the individuals and communities that lost what can be considered extreme in comparison to others.

Investigation and prosecution of the perpetrators of grievous acts within the local system

Using leaders and Civil society groups to support, lobby and facilitate the process.

Companies in operation in these areas contribution to the community development fund.

PROPOSED MODEL



The positive fact about this model is that it is more about reconciliation and development than about politics and international relations.

Business opportunities aimed at national cohesion.

Politicians will be focused to support it as it involves the communities and opposing it will be opposing the voters.

Deterrence: first by showing commonalities of the different ethnic groups in a community, secondly by making it about the victims it shows that victims matter regardless of their class and influence.

The more the communities embrace reconciliation the easier investigations and prosecutions will get.

IMPLEMENTATION OF THE PROPOSAL

PHASE ONE

(Rift-Valley Province.)

Hold a conference with all traditional, religious and political leaders

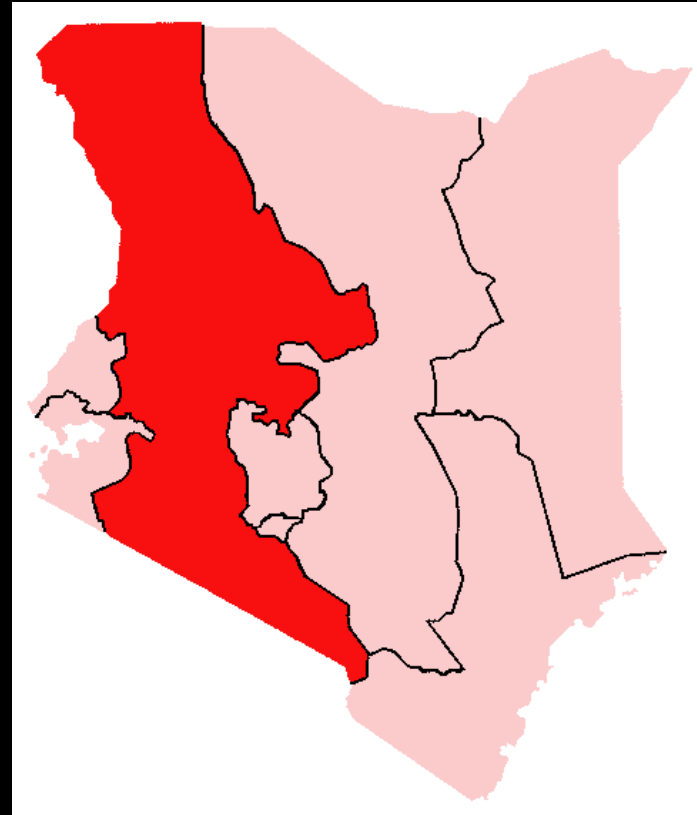
Discuss ethnic differences, historical injustices and sustainable peace

Elect an oversight committee from the members present to oversee the

Agreed mechanisms within the counties.

Discuss business and development proposals by corporations on how to

Further National cohesion.



IMPLEMENTATION OF THE PROPOSAL

PHASE TWO

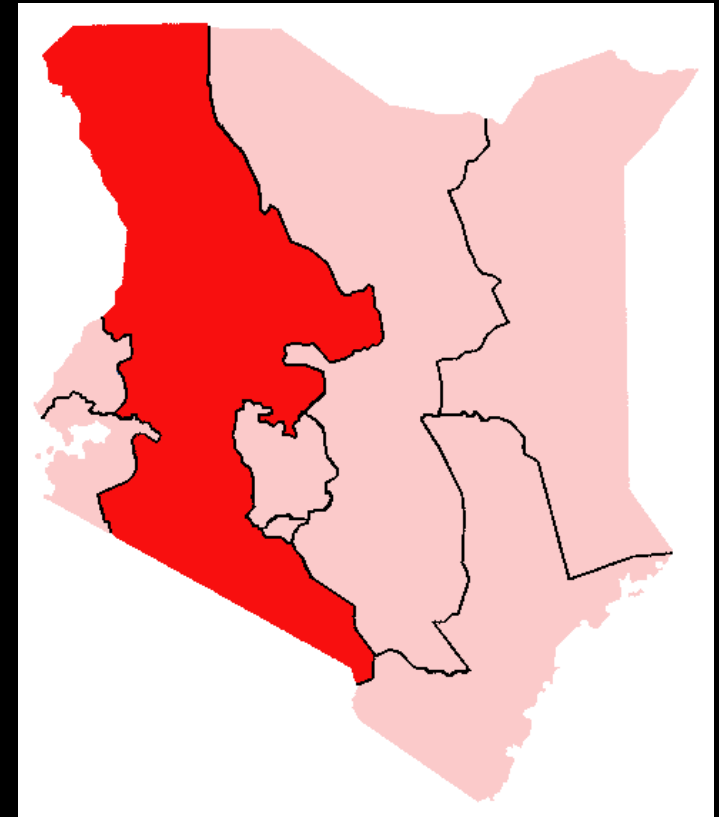
(Rift-Valley Province.)

Budget formulation and Revenue raising Discussions.

PHASE THREE

Commencement of the Project.

Evaluation every six months by the committee, government,
Private business stakeholders and the public through the media and the
monthly meetings(Baraza)



THANK YOU

