A Critical Examination of Domestic Criminal Accountability for International Crimes in Kenya: a Case Study of Accountability for 2007-2008 Post Election Violence

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Declaration and Approval

Declaration

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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Approval

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Abstract

This study critically examines Kenya's domestic criminal accountability mechanisms for international crimes, using the 2007–2008 Post-Election Violence (PEV) as a case study. The research addresses three key questions: (1) What is the nature of Kenya's legal framework for domestic accountability of international crimes? (2) To what extent has domestic accountability for PEV-related crimes been realized? (3) What lessons can Kenya draw from Uganda's approach to prosecuting international crimes domestically? The study adopts a doctrinal methodology, analyzing primary and secondary legal sources, including treaties, constitutional provisions, statutes, and case law, supplemented by a comparative analysis of Uganda's International Crimes Division (ICD). Key findings reveal that Kenya's legal framework, particularly post-2010 Constitution, is robust on paper, incorporating ratified treaties like the Rome Statute and domesticating them through the International Crimes Act, 2008. However, implementation has been hindered by political interference, institutional inefficiencies, and lack of specialized mechanisms. Regarding the PEV, domestic prosecutions were limited, focusing on low-level perpetrators while high-ranking officials evaded accountability. Challenges included witness intimidation, evidentiary gaps, and weak judicial independence. Uganda serves as a compelling comparative case study due to its establishment of a specialized domestic mechanism for prosecuting genocide, war crimes, and crimes against humanity. However, Uganda's experience reveals key structural and operational challenges that Kenya must avoid. First, Uganda's ICD lacks a strong legislative foundation, operating instead through executive-driven administrative measures, which leaves it vulnerable to political interference and instability. Second, the ICD has faced chronic delays, as seen in the *Thomas Kwoyelo* case, which took 15 years to conclude due to procedural inefficiencies, weak case management, and over-reliance on donor funding. Third, Uganda's Amnesty Act created legal contradictions, allowing some perpetrators of serious crimes to evade accountability, undermining the credibility of domestic prosecutions. Fourth, the absence of a robust witness protection system and victim participation framework has hindered effective prosecutions. For Kenya, these shortcomings underscore the need for a legally entrenched, independent specialized court with sustainable funding, clear jurisdictional mandates, and harmonized laws to prevent conflicts (e.g., between amnesty provisions and accountability). Additionally, Kenya must prioritize witness protection, judicial capacity-building, and efficient case management to avoid Uganda's pitfalls. By learning from Uganda's challenges, Kenya can develop a more effective domestic accountability system that reduces reliance on international mechanisms and delivers justice for victims of mass atrocities.

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List of Abbreviations

AG	Attorney General
ACHPR	African Commission on Human and Peoples' Rights
AfriCOG	Africa Centre for Open Governance
AU	African Union
CID	Criminal Investigation Department
CSOs	Civil Society Organisations
CIPEV	Commission of Inquiry into the Post Election Violence
DPP	Director of Public Prosecutions
EAC	East African Community
ECHR	European Court of Human Rights
ICMP	International Commission on Missing Persons
ICRC	International Committee of the Red Cross
ICA	International Crimes Act, 2008
ICC	International Criminal Court
ICD	International Crimes Division
ICMP	International Commission on Missing Persons
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ILC	International Law Commission
IMT	International Military Tribunal for Nuremberg
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IRMCT	International Residual Mechanism for Criminal Tribunals
JSC	Judicial Service Commission
KNCHR	Kenya National Commission on Human Rights
KPTJ	Kenyans for Peace, Truth and Justice
LRA	Lord Resistance Army
MP	Member of Parliament
NCT	National Criminalisation Theory
NGO	Non-Governmental Organisation
ODPP	Office of the Director of Public Prosecutions
OHCHR	Office of the High Commissioner for Human Rights
OTP	Office of the Prosecutor of the ICC
PEV	2007-2008 Post-Election Violence
SGBV	Sexual and Gender-Based Violence
SOA	Sexual Offences Act, Cap. 63A, 2006
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNCHR	United Nations Commission on Human Rights
WPA	Witness Protection Agency

List of Legal Instruments

I. International Legal Instruments (Treaties and Conventions)

1. Rome Statute of the International Criminal Court (1998)
2. Geneva Conventions of 1949
    i. *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.*
    ii. *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.*
    iii. *Convention Relative to the Treatment of Prisoners of War.*
    iv. *Convention Relative to the Protection of Civilian Persons in Time of War.*
3. Additional Protocols to the Geneva Conventions (1977)
4. Agreement on Privileges and Immunities of the International Criminal Court
5. Convention on the Prevention and Punishment of the Crime of Genocide (1948)
6. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (UNCAT)
7. International Covenant on Civil and Political Rights (1966) (ICCPR)
8. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968)
9. Universal Declaration of Human Rights (1948) (UDHR)
10. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (2005)
11. Vienna Convention on the Law of Treaties (1969)
12. Bangalore Principles on the Domestic Application of International Human Rights Norms (1988)

II. Kenyan Legal Instruments

1. Constitution of Kenya (2010)
2. Constitution of Kenya (1963, repealed)
3. International Crimes Act, No. 16 of 2008
4. Geneva Conventions Act, Cap. 198, Laws of Kenya

5. The Treaty Making and Ratification Act, No. 45 of 2012
6. The Penal Code, Cap. 63, Laws of Kenya
7. The Criminal Procedure Code, Cap. 75, Laws of Kenya
8. The Judicature Act, Cap. 8, Laws of Kenya
9. National Police Service Act, No. 11A of 2011
10. Office of the Director of Public Prosecutions Act, No. 2 of 2013
11. Prevention of Torture Act, No. 12 of 2017
12. Sexual Offences Act, Cap 63A
13. Witness Protection Act, Cap. 79, Laws of Kenya
14. Victim Protection Act, No. 17 of 2014
15. High Court (Practice and Procedure) Rules, 1952
16. High Court (Organization and Administration) Act, Cap 8C
17. Extradition (Commonwealth Countries) Act, 1968
18. Extradition (Foreign and Contiguous Countries) Act, 1968

III. Ugandan Legal Instruments

1. Constitution of the Republic of Uganda (1995) (as amended)
2. International Criminal Court Act, 2010 (Uganda)
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5. Uganda Penal Code Act, Cap. 120
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1. *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, ICC-01/09-02/11 (Pre-Trial Chamber II, 2011)
2. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 (2012)
3. *Kononov v. Latvia*, Application No. 36376/04, ECHR, (2010)
4. *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T (Trial Chamber, 1999)

Kenyan Case Law

1. *Okunda v. Republic* [1970] EA 453
2. *Rono v. Rono* [2005] eKLR
3. *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 Others* [2013] eKLR
4. *Coalition on Violence Against Women & 11 Others v. Attorney General & 5 Others* [2014] eKLR
5. *Director of Public Prosecutions v. Chrysanthus Barnabas Okemo & Another* [2016] eKLR
6. *Republic v. Mosobin Sot Ngeiywa & Japheth Simiyu Wekesa* [2012] eKLR
7. *Republic v. Edward Kirui* [2014] eKLR
8. *Republic v. Stephen Kiprotich Leting & 3 Others* [2009] eKLR
9. *Republic & 3 Others v. Titus Yoma & 18 Others* (Ongoing, High Court Criminal Case No. 1 of 2018)

Ugandan Case Law

1. *Uganda v. Thomas Kwoyelo*, ICD No. 02 of 2010 (2024)
2. *Uganda v. Jamil Mukulu* (Ongoing before ICD)
3. *Thomas Kwoyelo v. Attorney General*, Constitutional Appeal No. 01 of 2012 (Supreme Court of Uganda)
4. *Uganda v. Kato & 19 Others* [2022]
5. *Attorney General v. Susan Kigula & 417 Others*, Constitutional Appeal No. 03 of 2006 (Supreme Court of Uganda)
6. *Nsimbe Holdings Ltd v. Attorney General & Kampala City Authority* [2006]

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Nyagah, to think that I would not have undertaken this journey had it not been for you feels like a dream I vaguely remember. Thank you for the nudge.

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DEDICATION

To my children.

Chapter 1: Introduction

1.1 Background

The 2007-2008 Post-election Violence (PEV) in Kenya caught the attention of the international community, not because it was the first of its kind in Kenya, but because it was unprecedented in its scale and geographical coverage.[1] Subsequent to the announcement of the 2007 general elections, mass atrocity was witnessed in the form of sexual violence, displacement of civilians, murder, genital mutilation among others.[2] At the time, law enforcement agencies were ill-equipped with the investigation and prosecution of the core international crimes.[3]

Consequently, contrary to popular belief, a number of perpetrators were prosecuted, however, a vast majority of the cases were brought before the courts in the form of public inquiry due to issues related to identification of the perpetrators, lack of supporting medical or documentary evidence.[4] Even though it was never contested that there were gross human rights violations, the domestic legal system failed to institute domestic prosecutions against alleged perpetrators who bore the greatest responsibility. Civil society organisations (CSOs) insisted that a failure to establish accountability measures in response to the violence would only further impunity.[5]

Kenya did not have a codified statute governing the definition of international crimes and prosecution of such crimes, it was however, a member state to the Rome Statute of the International Criminal Court, 2002 (Rome Statute). The constitutional and statutory dispensation in Kenya demanded that for a treaty or international instrument to be enforceable in Kenya, it ought to be ratified and domesticated by way of statute.[6] The legal framework governing

[1] Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007, Kenya Law Reports, 24-25, 2009. The 2007-2008 post-election violence (PEV) in Kenya was not unprecedented; it dates as far back as Jomo Kenyatta's reign from 1964 with politically motivated assassinations to the 1990s during former president Daniel Moi's regime. The underlying causes were and still remain, politically-fuelled. Post-independence politics were negatively influenced and characterized by ethnicity, dictatorship, political alliances, criminal gangs and impunity. These factors had manifested as a recipe for election violence prior to 2007 but however remained unaddressed. The use of violence for political gain, unlawful detention without trial, summary executions and routine torture of political dissenters.

[2] Africa Center for Open Governance (AfriCOG) and Kenyans for Peace with Truth and Justice (KPTJ), *Domestic prosecution of international crimes: lessons for Kenya,* 2015, 2.

[3] AfriCOG and KPTJ, *Domestic prosecution of international crimes,* 2.

[4] AfriCOG and KPTJ, *Domestic prosecution of international crimes,* 2.

[5] AfriCOG and KPTJ, Domestic prosecution of international crimes, 2.

[6] Constitution of Kenya, 1963, Article 2, Constitution of Kenya 2010; and Treaty making and Ratification Act, 2012.

prosecution of crimes in force at the time were predominantly the 1963 Constitution of Kenya; Penal Code, chapter 63 of 1930; Evidence Act, chapter 80 of 1963; Sexual Offences Act, chapter 63A, 2006 (which came into force a year prior to the PEV); Criminal Procedure Code, chapter 75 of 1930; and Witness Protection Act, chapter 22, 2006.[7] Kenya ratified the Rome Statute in 2005, it however did not have a domesticating legislation to enforce its application, until 2008. Despite this reality, the existing domestic legal framework adequately provided a basis for prosecution of not only those responsible for direct perpetration of the atrocities, but also those who bore indirect responsibility, conspirators and abetters of the crimes.

The large-scale nature of the PEV attracted the attention of the international community; consequently, a mediation process was commenced by the former United Nations Secretary General, Kofi Annan. As expected, political interests were given priority in the negotiations aimed at bringing an end to the violence.[8] The agreement for the establishment of a coalition 'power-sharing' government was consequently signed by the contesting political parties on a priority basis.[9] The second significant outcome of the mediation process was the establishment of a commission of inquiry to investigate the atrocities, the historical antecedents and make recommendations on accountability. The Commission of Inquiry into the Post Election Violence (CIPEV) was established, its key recommendation was establishment of a hybrid tribunal to prosecute the perpetrators of the PEV.

The proposal to set up a Special Tribunal for Kenya was presented in parliament as a legislative motion by one of the members of parliament at the time, Honourable Gitobu Imanyara.[10] The proposed Tribunal was intended to have composition of both local and international judges, prosecutors and investigators.[11] As a matter of principle, it was to apply domestic law to prosecute the perpetrators of the PEV. The other recommendation made to ensure sufficiency of the domestic legal framework was the domestication of the Rome Statute.[12]

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[7] Laws of Kenya database, Kenya Law Reports.
[8] Kenya National Dialogue and Reconciliation, Agreement on the principles of the partnership of the coalition government, 2008.
[9] Kenya National Dialogue and Reconciliation, Agreement on the principles of the partnership of the coalition government, 2008.
[10] Materu S, *The post-election violence in Kenya: domestic and international legal responses*, Asser Press, Netherlands, 2015, 73.
[11] Materu S, *The Post-election violence in Kenya*, 73.
[12] Materu S F, *The post-election violence in Kenya*, 74.

On 12th February 2009 the Parliament of Kenya voted against the Constitutional Amendment Bill seeking to create the special tribunal.[13] Efforts towards such creation were defeated by the unwillingness of the political leadership.[14] The failure to set up the tribunal and the apparent unwillingness to achieve accountability led to the intervention by the ICC.

The *proprio motu* application by the ICC Prosecutor was premised on the fact that at the time, Kenya was a signatory to the Rome Statute, having deposited its instrument of ratification in 2005.[15] The intervention by the ICC led to the indictment and prosecution of the infamous *Ocampo six*; that is, Uhuru Kenyatta (former president of Kenya), William Samoei Ruto (presently the president of Kenya), Henry Kosgei, Francis Muthaura, Mohammed Hussein Ali, and Joshua Sang.[16] Five of the suspects were senior government officials at the time, whereas Mr Sang was a journalist in a local radio station. *Prosecutor v. William Samoei Ruto and Joshua Arap* Sang and *Prosecutor v. Uhuru Muigai Kenyatta* cases alleged crimes against humanity, including murder, deportation, and persecution.[17] However, the prosecutions collapsed due to insufficient evidence, witness interference, and withdrawals.[18] The Ruto and Sang case was terminated in 2016, while Kenyatta's case was dropped in 2015.[19] The other suspects' charges were either not confirmed or withdrawn at their onset.[20] No convictions were secured, raising criticism of the ICC's effectiveness in handling high-profile political cases.[21]

[13] Human Rights Watch, *Establishing a special tribunal for Kenya and the role of the international criminal court*, 2009, 2.
[14] Human Rights Watch, *Establishing a special tribunal for Kenya and the role of the international criminal court*, 5.
[15] Kenya became a state party to the Rome Statute on 11th August 1999, deposited the instrument of ratification on 15th March, 2005, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en, retrieved on 1 September, 2020.
[16] "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", International Criminal Court, 2012, 79–83.
[17] *The Prosecutor v. William Samoei Ruto and Joshua Arap* Sang (ICC-01/09-01/11) and *The Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11)
[18] *The Prosecutor v. William Samoei Ruto and Joshua Arap* Sang (ICC-01/09-01/11) and *The Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11).
[19] *The Prosecutor v. William Samoei Ruto and Joshua Arap* Sang (ICC-01/09-01/11) and *The Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11).
[20] *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Decision on the withdrawal of charges against Mr Muthaura (2013).
[21] Jalloh C, 'Kenya vs. the ICC: A Case of Politicized Justice?' *Journal of International Criminal Justice*, 2011), 295–320.

The principle of complementarity requires that the primacy of jurisdiction to prosecute international crimes is vested in the forum state.[22] The state must also demonstrate its willingness and ability to prosecute the crimes in question.[23] The concept of primary of jurisdiction is informed by the fact that the ICC's mandate is limited to the prosecution of persons who bear the greatest responsibility.[24] Despite the efforts by the ICC, Kenya could still have prosecuted those alleged to have borne the greatest responsibility. The institutional capacity to do so was and still remains wanting.

Against this background, this study therefore seeks to analyse the efforts made at the domestic level in pursuit for accountability for the international crimes in Kenya with a case study on domestic accountability for international crimes committed during the PEV. The legacy of impunity from the PEV has set a precedent that shapes public trust in the rule of law and in state institutions, especially during electoral cycles in Kenya. The lack of credible accountability mechanisms has emboldened political actors, perpetuated ethnic tensions, and weakened institutional responses to future violence.

By analysing Kenya's past responses and comparing them with Uganda's experience in establishing a domestic accountability system, the study aims to identify practical reforms necessary to strengthen domestic prosecution of international crimes. While Uganda's establishment of the International Crimes Division (ICD) offers a valuable model for specialized judicial mechanisms, its experience is far from ideal and also highlights key limitations, which Kenya must consider and address in designing a sustainable and credible accountability framework. Ultimately, the study seeks to address the broader goal of ensuring credible, sustainable, and locally driven justice that upholds victims' rights, pursues accountability against perpetrators of atrocity crimes, and deters future violations.

1.2 Problem Statement

In the aftermath of the 2007–2008 PEV, Kenya's existing legal framework could have facilitated the prosecution of both direct perpetrators and those who bore the greatest responsibility. While

[22] Article 1, Rome Statute, 2002.
[23] Article 17, Rome Statute, 2002.
[24] Article 17, Rome Statute, 2002.

some prosecutorial measures were undertaken domestically, these efforts lacked sustainability. The subsequent referral to the ICC failed to deliver meaningful accountability, serving instead to elevate the political profiles of the accused rather than achieve justice for victims. The 2007–2008 PEV remains a compelling and relevant case study nearly two decades later due to its enduring impact on Kenya's legal, political, and institutional landscape. The failure to achieve meaningful accountability in its aftermath has entrenched a culture of impunity, which continues to undermine public confidence in the justice system. On this basis, this study therefore interrogates Kenya's legal and institutional framework for domestic accountability for international crimes in Kenya.

1.3 Research objectives

This study is based on the following research objectives:

i) Examine the legal framework that guides domestic accountability for international crimes in Kenya.

ii) Examine the extent to which domestic accountability for the atrocities committed during the 2007-2008 PEV was realised.

iii) Drawing best practices from the challenges and lessons evident in Uganda's approach to the pursuit for domestic accountability for the perpetration of international crimes.

1.4 Research questions

This study addresses the following research questions:

i) What is the nature of the legal framework that guides domestic accountability of international crimes in Kenya?

ii) To what extent has domestic accountability for crimes perpetrated during the 2007-2008 PEV been realised through prosecution of alleged perpetrators?

iii) What lessons and best practices can Kenya draw from Uganda on domestic accountability for international crimes?

1.5 Hypothesis

Although Kenya has ratified key international legal instruments and enacted domestic legislation such as the International Crimes Act, 2008, it has not effectively operationalized these frameworks

to achieve meaningful domestic accountability for international crimes. This shortfall is largely attributable to institutional weaknesses, political interference, and inadequate implementation and enforcement mechanisms. Strengthening national accountability structures, ensuring prosecutorial and judicial independence, and integrating comparative lessons, particularly from Uganda's experience, can significantly improve Kenya's capacity to meet its international obligations and curb impunity for atrocity crimes.

1.6 Justification of the study

This thesis is premised on the recognition that the enforcement framework for international criminal law in Kenya remains inadequate. It argues that effective accountability for the commission of international crimes must be pursued through the domestic legal framework. By drawing on Uganda's experience in pursuing accountability for the perpetration of international crimes in its domestic courts, the study provides a comparative analysis aimed at informing legal and institutional reforms in Kenya. The findings of this research are intended to benefit key stakeholders, including legal practitioners, prosecutors, investigators, judicial officers, and policymakers, by offering actionable insights for strengthening domestic mechanisms of accountability. Ultimately, the work aspires to contribute to a more robust and accessible justice system towards the pursuit for accountability for the perpetration of international crimes.

1.7 Theoretical framework

This thesis advances the argument for a shift in focus towards domestic criminal accountability by drawing from the national criminalisation theory as advanced by Cherif Bassiouni and Kevin Jon Heller and the deterrence theory by Jeremy Bentham and Ronald Akers. The national criminalisation theory points to the fact that international criminal law cannot function independent of municipal legal systems.[25] For instance, to enforce its criminal sanctions, the international legal order relies on a state's municipal system to provide the necessary mechanisms to carry out functions, such as requiring prosecution or imposing a duty of extradition and developing rules on extradition and cooperation in penal matters. Since all sources and aspects of international criminal law ultimately lead to the right or duty of a municipal system to prosecute, for internationally

[25] Heller K J, What is an International crime? (a revisionist history*), Harvard International Law Journal*, 58, 2, 2017.

defined crimes, by relying upon the theory of universality, or in the alternative, the duty to extradite to another municipal system for such prosecution.[26] The deterrence theory on the other hand focuses on the psychological nature of human beings and the efficacy of punishment as a factor that contributes to deterrence from perpetration of crime.

1.7.1 National criminalisation theory

The crux of the International Military Tribunal (IMT) for Nuremberg was premised on the principle that international obligations can transcend national duties, meaning that international criminal law can bypass municipal legal order.[27] However, the reality is that the original source of international criminal law is municipal law as practised by various states.[28] International criminal law is heavily dependent on municipal law for its enforcement, for instance the extradition of perpetrators, interpretation of the scope of application of universal jurisdiction and the implementation of the applicable mode of cooperation in criminal matters.[29] It is therefore unrealistic to treat international criminal law as law that transcends municipal law as a basis of enhancing accountability. This reality requires a shift in focus from the enforcement of international criminal law, to understanding municipal law and its application to the accountability for perpetration of international crimes. The national criminalisation theory (NCT) rejects this interpretation of international criminal law and advances instead the theory that focuses on the criminalisation of international crimes in the municipal system.

In the draft international criminal code of 1980, the underpinning of the code was that international criminal law had developed through direct criminalisation of certain acts at the domestic level.[30] The principle of universality as applies to international crimes was derived from the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (DASR).[31] In its original definition, the ILC described an international crime as an *"[a]n internationally wrongful act which results from the breach by a state of an international obligation*

[26] Stahn C, *A Critical Introduction to International Criminal Law*, Cambridge University Press, Cambridge, 2019 and Bassiouni M C, *Universal Jurisdiction for international Crimes: Historical Perspectives and Contemporary Practice*, Va J International Law Association, 42, 2001.
[27] IMT, Judgment of the Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, (1946) 447.
[28] Bassiouni C, '*International criminal law: a draft international criminal code'*, Springer, (1980), 24.
[29] Bassiouni C, 'International criminal law', 24
[30] Bassiouni C, 'International criminal law', 24.
[31] Heller K, 'What is an international crime? A revisionist history', *Havard International Law Journal*, (2017), 8.

so essential for the protection of the fundamental interests of the international community that its breach is recognized as a crime by that community as a whole".[32] The presupposition that an act can be recognised universally as a crime by all states without pre-existing norms or state practice is an unrealistic expectation, especially with regard to the enforcement of international criminal law.

International law encompasses legal tools to which implementation of state accountability for the perpetration of international crimes may be drawn. Despite this reality, this accountability, from a foreign international perspective, is heavily reliant on the pursuit for individual criminal responsibility. One of the underlying reasons behind this is that customary international law only recognises individual criminal responsibility for the perpetration of crimes. The point of deviation lies in the fact that human rights can only be enforced by states; the international community lacks and effective enforcement mechanism to do so. The enforceability or lack of thereof is not only a state function, but also a state responsibility.

While states are obligated to fulfill their duties in executing or facilitating individual criminal accountability, there remains a lack of recognition for the role of state policy as an independent legal basis for attributing responsibility in cases of mass human rights violations.[33] It is for this reason that the pursuit for accountability for the perpetration of international crimes should be a state responsibility as opposed to merely focusing on individual criminal responsibility. The predominant factor that contributes to this reality is international law itself. The modern international legal system has developed to disaggregate consideration of both individuals and states as culpable actors in international law.[34]

State measures of legal responsibility lie outside the ambit of international justice.[35] Additionally, positive law does not make provision for *state* crimes. This notwithstanding, a state could be held responsible for the perpetration of international crimes through the doctrine of State responsibility.[36] Enforcing state responsibility *erga omnes* would impose legal obligations

[32] Article 19 (2), A/35/10 (1980), UN report of the International Law Commission on the work of its 32nd session.
[33] Fletcher L, 'A wolf in sheep's clothing? Transitional justice and the effacement of state accountability for international crimes' *Fordham International Law Journal* (2016), 467.
[34] Fletcher L, A wolf in sheep's clothing?, 467. .
[35] Fletcher L, A wolf in sheep's clothing?, 467.
[36] Fletcher L, A wolf in sheep's clothing?, 467.

culpability and blameworthiness on states. Remedies for justice would further be legally grounded as opposed to pursuing such measures merely as peacekeeping or policy options.[37]

International law scholars such as Georg Schwarzenberger advanced this theory in 1959 by insisting that international criminal tribunals, particularly the IMT was an extension of the normal range of municipal jurisdiction in the field of criminal justice. Years later, Hans-Heinrich Jescheck insisted that "one of the most important legacy of the Nuremberg judgment is the recognition of criminal liability for serious offences against the international law… and the obligation on states to prosecute them".[38] More recently, Roger O'Keefe has acknowledged that the IMT judgment provides that "a crime under international law could be characterised as a function of state responsibility and additionally, as ultimately arising not under international law itself, but under national law".[39]

In further support of the national criminalisation theory, Herbert Packer advances the view that the essence of criminal justice can be understood through two models: the 'crime control model' and the 'due process model'.[40] This study places greater emphasis on the crime control model, which is grounded in the notion that the criminal process functions as a positive guarantor of social freedom. In the context of domestic accountability for international crimes, the crime control model underscores the critical role of national legal systems in enforcing criminal law as a means of preserving public order and deterring impunity.[41] By strengthening domestic mechanisms to prosecute international crimes, states not only uphold internal stability but also contribute to the maintenance of international peace and justice.

1.7.2 Deterrence theory

The deterrence theory is premised on the idea that a rational being, knowing fully well the consequences of committing a crime and the punitive implication, will refrain from such

[37] Fletcher L, A wolf in sheep's clothing?, 468.
[38] https://academic.oup.com/jicj/article-abstract/2/1/38/935202?redirectedFrom=fulltext, retrieved on 13th March, 2019.
[39] https://academic.oup.com/jicj/article-abstract/2/3/735/841572?redirectedFrom=fulltext, retrieved on 13th March, 2019.
[40] Packer H L, 'Two models of the criminal process' *University of Pennsylvania Law Review* (1964), 133.
[41] Packer H L, 'Two models of the criminal process', 133.

commission.[42] This theory was conceived from the perspective of the utilitarian school of thought complemented by the study of the human cognitive process of making decisions.[43] The cost-benefit analysis that applies to the decision to commit crimes, in particular international crimes, must therefore be analysed so as to determine the factors that would render the risk of prosecution seem less aggravating in comparison to the benefit that could potentially be gained in the actual perpetration of gross human rights violations.[44] The failure to address these factors only further enables the perpetration of international crimes.

The threat of criminal prosecution for international crimes is one that is seemingly able to deter potential perpetrators of gross human rights from engagement in international crimes. However, the fact that international crimes are repeatedly perpetrated demonstrates that deterrence will never be achieved if the perceived benefit that emanates from perpetration of gross human rights violations is greater than the likelihood of criminal prosecution, risk of punishment or the severity of punitive measures likely to be imposed.[45] The reality however is such that the threat or actual prosecution of persons who bear the most responsibility in the perpetration of gross human rights violations before international criminal tribunals, propels a reward of senior political leadership or the accused persons become celebrated heroes by the same allegedly aggrieved societies

Deterrent factors in respect to domestic prosecution *vis a vis* prosecution before international criminal tribunals differ. The difference predominantly lies in the perspective of the afflicted state, and that of the perpetrators, in determining the legitimacy of the internal conflict.[46] Therefore, merely addressing the perpetration of gross human rights violations by way of criminal prosecution cannot achieve sustainable peace, neither does it fully offer redress to the international crimes committed.[47] A strict approach to deterrence is therefore handicapped because of its inability to address the underlying factors leading to the perpetration of international crimes *ab initio*.

[42] Marinelli S, 'The approach to deterrence in the practice of the International Criminal Court', *International Law Blog*, 2017.
[43] Akers R, 'Rational choice, deterrence, and social learning theory in criminology: the path not taken' *Journal of Criminal Law and Criminology* (1990), 65.
[44] Akers R, 'Rational choice, deterrence, and social learning theory in criminology', 654.
[45] Akers R, 'Rational choice, deterrence, and social learning theory in criminology', 654-655.
[46] Marinelli S, 'The approach to deterrence in the practice of the International Criminal Court'.
[47] Marinelli S, 'The approach to deterrence in the practice of the International Criminal Court'.

The Rome Statute of the ICC does not have a specific provision or article on deterrence.[48] However, in its preamble, the words 'to put an end to impunity' are included as an indication of the intent to prevent the perpetration of international crimes.[49] Deterrence before the ICC can be interpreted through, first, the selection of cases brought before the ICC and secondly, the determination of sentences.[50] To illustrate, in the case of *the Prosecutor versus Thomas Lubanga* the Pre-Trial Chamber stated that in order to strengthen the deterrence effect intended by the ICC, the Court should only focus on the persons who bear the greatest responsibility because only such persons can prevent or stop the commission of international crimes.[51] The Appeals Chamber on the other hand had a different view. The Appeals Chamber proclaimed that the deterrent effect sought by the Court would only be guaranteed through the avoidance of *a priori* exclusion of categorisation of perpetrators who should be brought before the Court.[52] This latter position is also evident in the selection of cases by the former Prosecutor of the ICC. Therefore, all perpetrators – low level or otherwise are potentially liable for prosecution before the ICC.

The interpretation by the Appeals Chamber is one that is flawed in the sense that it is practically impossible to prosecute every alleged perpetrator of international crimes before the ICC. Domestic accountability mechanisms on the other hand have the liberty and arguably the capacity to prosecute several if not all perpetrators of atrocity crimes.[53] This position has been is supplemented by current events as international criminal tribunals which have begun appreciating the need for collaboration with domestic courts to prosecute the lower level perpetrators.[54] An example of such collaboration is the establishment of the International Residual Mechanisms for Criminal Tribunals (IRMCT). If this current state of affairs was to be applied and more emphasis laid on domestic prosecutorial measures the resultant effect would be a deterrence from perpetration of atrocity crimes.[55]

1.8 Literature review

[48] Rome Statute of the ICC, 2002.
[49] Marinelli S, 'The approach to deterrence in the practice of the International Criminal Court'.
[50] Marinelli S, 'The approach to deterrence in the practice of the International Criminal Court'.
[51] *Decision on the Prosecutor's Application for a Warrant of Arrest against Thomas Lubanga*, ICC Reports, 10 February 2006, 54.
[52] *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" of the Rome Statute of the ICC, 13 July 2006, para 73.*
[53] International Commission of Jurists (ICJ), *'The future of international criminal justice in Africa'*, 2020.
[54] Ibrahim T, 'Prosecuting atrocity crimes nationally: the role of domestic jurisdictions in addressing genocide, war crimes and crimes against humanity', in ICJ, *The future of international criminal justice in Africa*, 2020, 10.
[55] Ibrahim T, 'Prosecuting atrocity crimes nationally', 10-11.

Sosteness Materu in "*Post-election violence in Kenya: domestic and international legal responses"* advances the argument that the Kenyan substantive criminal law as it was during and after the 2007-2008 PEV was adequate for the prosecution of core crimes under international law despite the impossibility to apply the International Crimes Act, Cap 60 of 2008 retrospectively.[56] His work is valuable in demonstrating the legal sufficiency of Kenya's framework, highlighting the potential of domestic institutions to handle international crimes.

Evelyne Asaala, in *Prosecuting the 2007 Post-election Violence-related International Crimes in Kenyan Courts: Exposing the Real Challenges*, highlights the limitations of Kenya's judiciary, such as political interference and weak investigative capacity.[57] Her work provides an insightful analysis of systemic barriers within Kenya's legal system and brings attention to the structural changes needed for effective domestic prosecution.[58] While she critiques the judiciary's inefficiency, she does not fully explore how institutional reforms could improve domestic accountability.

Morris Mbondenyi in *Human rights and democratic governance in post-2007 Kenya: an introductory appraisal*, contends that Kenya's pursuit for accountability post-2007 was pegged on five factors – accountable and transparent electoral system; effective handing over of power from one political leadership to the next one; strengthening and legitimising the independence of the three arms of government; regulation and supervision of the conduct of public and state officers; effective resource management and equitable distribution; and fostering peace and security by adhering to the rule of law and democratic governance.[59]

Mbondenyi in *Unclogging the wheels of justice: a review of judicial transformation in the post-2007 period* highlights the inefficiencies that the Kenyan judiciary faced during the transformative phase of Kenya after the 2007-2008 PEV, including its impartial nature towards the reigning political leadership at the time, and whether there have been any significant reforms

[56] Materu S F, *The post-election violence in Kenya*, 86.
[57] Asaala E, 'Prosecuting the 2007 post-election violence-related international crimes in Kenyan courts: exposing the real challenges' in Mbondenyi M, Asaala E, Kabau T and Waris A, *Human rights and democratic governance in Kenya: A post-2007 appraisal*, Pretoria University Law Press, (2015), 345-362.
[58] Asaala E, 'Prosecuting the 2007 post elect violence-related international crimes in Kenyan courts', 345-362.
[59] Mbondenyi M, *Human rights and democratic governance in post-2007 Kenya: an introductory appraisal*, Pretoria University Law Press (2015), 1-13.

subsequently.[60] Mbondenyi acknowledges the progress made through these reforms but also cautions that challenges remain. He emphasizes the need for continuous evaluation and adaptation of the reforms to ensure that the judiciary remains effective and responsive to the needs of the Kenyan populace.[61]

Elise Keppler in *Justice for serious crimes before national courts: Uganda's International Crimes Division*, provides a summary of the prosecution of international crimes in Uganda's national courts and further advances the principle that domestic courts are the principal forums for prosecution of international crimes.[62] She also gives a snapshot into Uganda's International Crimes Division, its creation and operation since 2008, the challenges and lessons that may be of use to the pursuit of accountability through domestic mechanisms.[63] Keppler identifies several challenges facing Uganda's International Crimes Division (ICD), including legal framework inconsistencies, particularly the tension between the Amnesty Act and the prosecution of international crimes; limited impartiality due to a focus on Lord Resistance Army (LRA) crimes over those committed by government forces; and inadequate support for defense rights, such as lack of resources and delayed evidence disclosure.[64] Structural and operational issues, including high staff turnover and weak witness protection, further hampers the ICD's effectiveness.[65] From these challenges, key lessons emerged: the need for a robust legal foundation, impartial and inclusive prosecutions, proper support for fair trial rights, institutional capacity building, and strategic public engagement to foster trust and awareness.[66]

Worship Asiimwe Tadeo, a Registrar of the International Crimes Division in Uganda, submitted a paper titled *Effecting complementarity challenges and opportunities: a case study of the International Crimes Division of Uganda, 2012* in Entebbe.[67] The paper highlights the challenges encountered by the Division including but not limited to dualism, retrospective application of the

[60] Mbondenyi M, 'Unclogging the wheels of justice: a review of judicial transformation in the post-2007 period', *Pretoria University Law Press*, (2015), 327-344.
[61] Mbondenyi M, 'Unclogging the wheels of justice', 342-344.
[62] Keppler E, 'Justice for serious crimes before national courts: Uganda's International Crimes Division', *Human Rights Watch (Organization)* (2012).
[63] Keppler E, 'Justice for serious crimes before national courts'.
[64] Keppler E, 'Justice for serious crimes before national courts'.
[65] Keppler E, 'Justice for serious crimes before national courts'.
[66] Keppler E, 'Justice for serious crimes before national courts'.
[67] Tadeo A, 'Effecting complementarity challenges and opportunities: a case study of the International Crimes Division of Uganda', *International Justice Monitor* (2012), 1.

ICC Act, procedural and evidential challenges.[68] The practical aspects of prosecuting international crimes in domestic courts encompass challenges related to procedural law. This is informed by the fact that international criminal law may not necessarily conform to a state's procedural laws, thus, interpretation and judicial pronouncements on admission of evidence is potentially problematic.[69]

Supplementary proposals are also made from Magnus Killander and Mkhululi Nyathi in *Accountability for the Gukurahundi atrocities in Zimbabwe thirty years on: prospects and challenges.*[70] The authors contend that legal hurdles put in place by perpetrators of mass atrocities can be overcome through the exploration of both municipal and international channels regardless of lapse of time.[71]

Cherif Bassiouni in *Searching for peace and achieving justice: the need for accountability*, gives a concise reasoning behind the need for domestic accountability in respect to the underwhelming performance of international criminal justice mechanisms.[72] He further addresses the question why only very few instances of prosecutions and other accountability mechanisms exist and their inability to determine the basic truths underlying international crimes.[73] He also advances punitive accountability mechanisms such as lustration to prevent the persons bearing the greatest responsibility for gross human rights violation from contending for elective positions or political appointments.[74]

Yuval Shany's proposals on *The Role of National Courts in Advancing the Goals of International Criminal Tribunals* contends that national courts are critical to the pursuit for accountability for mass atrocity situations.[75] He adds that the overreliance on international criminal tribunals for accountability begun changing shortly after the implementation of completion strategies by the ICTY and ICTR and began paying more attention to the possibility of cooperating with municipal

[68] Tadeo A, 'Effecting complementarity challenges and opportunities', 2.
[69] Tadeo A, 'Effecting complementarity challenges and opportunities', 2.
[70] Killander M and Nyathi M, 'Accountability for the Gukarahundi atrocities in Zimbabwe thirty years on: prospects and challenges', *Comparative and International Law Journal of Southern Africa*, University of Pretoria (2015), 463-487.
[71] Killander M and Nyathi M, 'Accountability for the Gukarahundi atrocities in Zimbabwe thirty years on', 463-487.
[72] Bassiouni C, 'Searching for peace and achieving justice: the need for accountability', *Duke Law Scholarship Repository* (1996), 4.
[73] Bassiouni C, 'Searching for peace and achieving justice', 21.
[74] Bassiouni C, 'Searching for peace and achieving justice', 21.
[75] Shany Y, 'The role of national courts in advancing the goals of international criminal tribunals', *Cambridge University Press*, (2017), 103.

courts and entities.[76] However, no coherent and comprehensive mechanism has been developed to date as to what constitutes the appropriate modality for the relations between international and domestic criminal courts.[77] He proposes the Domestic Criminal Procedures in Mass Atrocity Cases (DOMAC) project, which seeks to address the challenge of state cooperation in enforcing international criminal justice.[78] Additionally, this study seeks to complement this proposal by advancing an appropriate modality for fostering domestic criminal accountability for international crimes, relative to Kenya.

Noluthando Ncame in *Justice in conflict: principle of complementarity or principle of competition?* opines that the ICC's prosecutorial approach conflicts with the intention of the drafters of the Rome Statute.[79] He highlights a disregard for primacy of jurisdiction in respect to the domestic courts by the Prosecutor in the situations in Sudan and Kenya. He further uses the case against Simone Gbagbo as a case study to demonstrate ICC's dictatorial approach to the selection of charges with undue regard to those selected by the state concerned.[80] He further highlights that the wanton disregard for the forum states hinders good will and effective cooperation with the ICC.[81] He advances that the role of the ICC should be more focused on supporting domestic institutional capacity to prosecute the crimes themselves and steer away from dictating the specific crimes that should be prosecuted at the domestic level.[82] In addition, failure by the domestic courts to prosecute crimes recommended by the ICC Prosecutor does not warrant its intervention.[83]

In 2003, a team of experts from the Department of Common Services at the International Criminal Court submitted an informal expert report titled *The principle of complementarity in practice*.[84] The paper highlighted that the states have the primacy of jurisdiction and responsibility to

[76] Shany Y, 'The role of national courts in advancing the goals of international criminal tribunals', 103.
[77] Shany Y, 'The role of national courts in advancing the goals of international criminal tribunals', 104.
[78] Shany Y, 'The role of national courts in advancing the goals of international criminal tribunals', 104.
[79] Ncame N, 'Justice in conflict: principle of complementarity or principle of competition?' *African Human Rights Law Journal* (2023), 23.
[80] *The Prosecutor v Simone Gbagbo*, Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Simone Gbagbo, 2 March 2012, ICC-02/11-01/12-2.
[81] Ncame N, 'Justice in conflict: principle of complementarity or principle of competition?', 23.
[82] Ncame N, 'Justice in conflict: principle of complementarity or principle of competition?', 23.
[83] Ncame N, 'Justice in conflict: principle of complementarity or principle of competition?', 24.
[84] ICC, 'The principle of complementarity in practice', *Informal Expert Paper*, ICC-OTP 2003.

investigate and prosecute the perpetrators of crimes within the jurisdiction of the ICC.[85] In addition, the experts recognised that states ordinarily have better access to evidence and technical resources and, unlike the ICC, they are not limited in the number of persons who can be prosecuted for gross human rights violations.[86] Olympia Bekou in *Complementarity principle* supplements the concept by advancing the positive complementarity approach which has gained significant development since the Kampala Review Conference in 2010.[87] She argues that the realization of sovereign equality of states renders domestic courts as the best avenue in the fight against grave atrocity and ending impunity in post-conflict societies.[88]

Carsten Stahn in *Fair and effective investigation and prosecution of international crimes* contends that the interplay between domestic institution and international entities has significant importance in establishing a multi-faceted accountability mechanism.[89] He further opines that only in appreciating the ineffectiveness of a 'one-approach suits all' method can there be effective implementation of accountability structures.[90]

Eric Witte in *Putting complementarity into practice: domestic justice for international crimes in DRC, Uganda and Kenya* gives a concise reasoning on how developing post-conflict societies and states can be capacitated to conduct authentic investigations and prosecutions.[91] He further addresses the integration of such efforts into policies geared towards fostering the rule of law; donor participation in supporting the realization of these efforts; and the sustainability of the mechanisms in favour of complementarity.[92] Monetary capacitation of domestic accountability is critical to its success. The author advances solutions on how donors as well as international partners can navigate through while maintaining the independence of the accountability mechanisms.

[85] ICC, 'The principle of complementarity in practice', 5.
[86] ICC, 'The principle of complementarity in practice', 3.
[87] Bekou O, 'Complementarity principle', *Oxford Bibliographies* (2013).
[88] Bekou O, Complementarity principle.
[89] Stahn C, 'Fair and effective investigation and prosecution of international crimes', *International Nuremberg Principles Academy* (2014), 3.
[90] Stahn C, 'Fair and effective investigation and prosecution of international crimes'3.
[91] Witte E, 'Putting complementarity into practice: domestic justice for international crimes in DRC, Uganda and Kenya, *Open Society Foundations (*2011), 58.
[92] Witte E, 'Putting complementarity into practice', 58.

The foregoing literature provides a rich foundation for understanding the landscape of domestic accountability for international crimes in Kenya and beyond. Scholars such as Sosteness Materu and Evelyne Asaala have addressed the adequacy and limitations of Kenya's legal framework and judicial capacity in responding to post-election violence. Others, including Elise Keppler and Worship Asiimwe Tadeo, have offered valuable insights from Uganda's experience, highlighting both the promise and practical challenges of domestic prosecution of international crimes. Comparative studies and theoretical contributions from authors such as Cherif Bassiouni, Yuval Shany, Olympia Bekou, and Carsten Stahn further underscore the evolving discourse on complementarity, domestic capacity, and the interplay between international and national justice mechanisms.

However, a discernible gap emerges in the literature: while the normative and structural challenges of Kenya's domestic accountability system have been widely acknowledged, there is limited scholarly focus on how Kenya can effectively integrate international criminal law norms into its existing municipal framework particularly through a reform-oriented, context-specific, and institutionally grounded approach to achieving domestic accountability for the perpetration of international crimes. Moreover, although Uganda's International Crimes Division has been examined in isolation, there has been insufficient comparative analysis to draw concrete lessons for Kenya's potential adaptation of similar mechanisms.

This study seeks to fill this gap by critically analysing the prospects and challenges of strengthening domestic accountability for international crimes in Kenya, using Uganda's experience as a point of reference. It contributes to the discourse by proposing a context-sensitive framework that addresses legal, institutional, and procedural reforms necessary for Kenya to prosecute international crimes effectively at the national level. In doing so, it advances the principle of positive complementarity and affirms the critical role of domestic courts in achieving justice for victims, deterring future atrocities, and reinforcing the rule of law in a post-conflict setting.

1.9 Research Methodology

This is a doctrinal research which adopts a desktop approach. This research relies on primary and secondary sources. The primary sources include the Constitution, statutory legislation, the Rome

Statute, case law and scholarly opinions. Secondary sources include books, book chapters, journal articles, reports and news articles.

This research further draws from a comparative analysis of Uganda's approach in prosecution of international crimes within the domestic courts. The selection of Uganda as a case study is based on the legal and institutional framework it has in place to ensure domestic accountability for international crimes. Uganda serves as the primary comparator in this study due to its regional, legal, and institutional proximity to Kenya, offering a relevant benchmark for examining domestic accountability for international crimes within a similar socio-political and legal context. Both countries are common law jurisdictions, members of the East African Community (EAC), and state parties to the Rome Statute, which requires them to pursue accountability against the perpetration of the core international crimes.

Despite its relevance, the Ugandan system is not without limitations. The ICD has faced significant challenges, including lack of judicial specialization in international criminal law, weak legal infrastructure for victim participation and reparations, procedural uncertainties, and political interference. These institutional and practical shortcomings are not ignored but rather critically examined in this study to extract lessons, both positive and cautionary, that may guide Kenya's efforts.

The particular interest relevant to this study is what are the lessons that can be drawn from Uganda's approach towards achieving accountability for the perpetration of international crimes related to elections, and how can these lessons be applied in Kenya to ensure that there is effective enforcement of international criminal law as well as municipal law on international crimes.

1.10 Limitations of the study

This research is not concerned with the causes of the Kenyan 2007-2008 PEV, the reasons that led to *proprio motu* application by the ICC prosecutor or the politics revolving around the same. It is limited primarily to the prosecution and jurisprudence emanating from the domestic courts on the atrocities perpetrated during the 2007-2008 PEV and the evaluation on the different approaches – domestic and international – in correspondence to international criminal law. It further addresses the efficacy of criminal prosecution as a measure of accountability.

1.11 Outline of chapters

To achieve its objectives, this study is organised into five chapters.

Chapter 1 introduces the study and gives it its general overview by highlighting the immediate responses to the 2007 PEV, underscores the research questions and objectives and sets the context by identifying the problem sought to be addressed by the study *vis-à-vis* the existing literature on domestic accountability for international crimes in Kenya and generally.

Chapter 2 addresses the first research question and identifies the legal framework that guides domestic accountability for international crimes and addresses complementarity, its practice and application to Kenya as well as the inter-play between Kenya's legal framework and the enforcement of international criminal law.

Chapter 3 addresses the second research question on the extent to which domestic accountability for international crimes perpetrated during the 2007-2008 post-election violence was realised through prosecution of alleged perpetrators and analyses Kenya's obligation to prosecute international crimes prescribed by the Rome Statute, the jurisprudence and domestic prosecutorial approach to the crimes related to the 2007-2008 PEV in Kenya. It further addresses the likelihood of a state to punish perpetrators of international crimes in domestic courts regardless of lack of pre-existing domestic laws criminalising international crimes. It further analyses whether Kenya could have utilised its domestic laws to effectively prosecute and punish the alleged main perpetrators.

Chapter 4 addresses the third research question and undertakes a comparative analysis of the domestic accountability measures in Uganda, with a particular focus on the establishment, mandate, and operational experience of the International Crimes Division (ICD) of the High Court of Uganda. The chapter critically examines the legal, institutional, and procedural interventions adopted by Uganda in implementing international criminal law standards within its domestic framework, and most importantly, the evident challenges from its approach to domestic accountability. By assessing Uganda's domestic accountability efforts, the chapter develops a set of lessons that are applicable to Kenya's legal and institutional context.

Chapter 5 outlines the conclusions and recommendations of the research and concludes the study by addressing suitable mechanisms that may be adopted in Kenya towards the pursuit for domestic accountability for the perpetration of international crimes.

Chapter 2: Kenya's Legal Framework on Domestic Criminal Accountability for International Crimes

2.1 Introduction

This chapter examines the domestic legal framework in Kenya, both prior to and following the 2007–2008 PEV, that governs accountability for international crimes. It provides a structured analysis of the relevant treaty obligations, constitutional provisions, and statutory instruments that collectively form the basis for domestic prosecution of such crimes. The chapter outlines the key elements of this legal architecture, including Kenya's ratification of international instruments such as the Rome Statute, the enactment of the International Crimes Act, 2008 (ICA, 2008), and constitutional developments under the 2010 Constitution, particularly provisions on the domestication of international law.

While acknowledging the existence of legal mechanisms that could facilitate accountability, the chapter focuses on mapping the institutional and procedural structures established to support the implementation of the principle of complementarity at the national level. Rather than evaluating the effectiveness of these frameworks during the PEV period, the analysis remains centered on their scope, evolution, and potential utility in guiding domestic accountability for international crimes.

By tracing the historical and legal trajectory of Kenya's obligations and responses, the chapter aims to provide a foundational understanding of the normative and institutional landscape within which international crimes can be prosecuted domestically.

2.2 Treaty law

Kenya's treaty framework for the accountability of international crimes is grounded in several core international legal instruments, most notably the Rome Statute, the four (4) Geneva Conventions of 1949 and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968).[93] These treaties form a foundational part of Kenya's international obligations in ensuring domestic accountability for international crimes.

[93] Laws of Kenya, Treaties section, retrieved on 20 March, 2025.

The four (4) Geneva Conventions of 1949 which establish obligations for the humane treatment of individuals during armed conflict, were ratified by Kenya and domesticated through the Geneva Conventions Act, Cap. 198, enacted in 1968.[94] This Act incorporates the core obligations of the Conventions into Kenyan law and explicitly confers universal jurisdiction, allowing Kenyan courts to prosecute grave breaches regardless of the nationality of the accused or the place where the crime was committed.[95]

Similarly, Kenya acceded to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity in 1972.[96] While this Convention has not been domesticated through specific implementing legislation, it remains binding under Article 2(6) of the 2010 Constitution, which affirms that all ratified treaties form part of Kenyan law.

It is important to note that Kenya is not a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Kenya has neither signed nor ratified this treaty, and as of the date of this study, no steps have been taken toward its ratification or domestication. Despite this, Kenya remains bound to prevent and punish genocide under customary international law and the Rome Statute of the ICC, to which it is a State Party.

2.2.1 The Geneva Conventions of 1949 and Additional Protocols

Kenya ratified the four Geneva Conventions of 1949 and their Additional Protocols in 1968. These treaties form the cornerstone of international humanitarian law and set out obligations for the humane treatment of civilians and combatants during armed conflict. The Geneva Conventions Act, 1968 domesticated these obligations and criminalizes grave breaches including wilful killing, torture, and inhuman treatment.[97] The Act also provides for universal jurisdiction, enabling Kenyan courts to prosecute individuals for violations, regardless of where the crimes occurred or the nationality of the perpetrator.[98]

[94] Geneva Conventions Act, Cap 198 of 1968, Laws of Kenya.
[95] Section 3, Geneva Conventions Act, Cap 198.
[96] United Nations Treaty Collections, Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968.
[97] Section 3(1), Geneva Conventions Act, Cap 198.
[98] Section 3, Geneva Conventions Act, Cap 198.

While no high-profile case has yet been adjudicated in Kenya under the Geneva Conventions Act, 1968 its provisions have been recognized by Kenyan courts as binding. In the case of *Mukazitoni Josephine v Attorney General*, the appellant, Mukazitoni Josephine, was the wife of Félicien Kabuga, who was indicted by the International Criminal Tribunal for Rwanda (ICTR) for alleged involvement in the 1994 Rwandan genocide.[99] In response to United Nations Security Council (UNSC) Resolutions, including Resolution 1534 (2004), Kenya was called upon to cooperate with the ICTR by tracing and freezing Kabuga's assets.[100] Consequently, the Kenyan Attorney General (AG) sought and obtained orders from the High Court to preserve property jointly owned by Mukazitoni and Kabuga in Nairobi.[101] In doing so, the AG relied upon by the Geneva Conventions Act, 1968 as one of the pieces of legislations informing the application.[102]

The Court did not refer to the Geneva Conventions Act, 1968 in making its pronouncement. However, the Court of Appeal upheld the High Court's decision, and underscored the principle that international obligations, particularly those arising from UNSC Resolutions, are binding on member states and can have direct implications on domestic legal matters, including property rights.[103] This case is particularly significant as it underscores the potential for litigants to invoke the Geneva Conventions Act, 1968, as a basis for enforcing rights arising under international humanitarian law. Although the statute was not expressly cited, the Court of Appeal's recognition of Kenya's binding obligations under international law, specifically its duty to cooperate with international criminal tribunals, implicitly affirms the domestic justiciability of treaty-based obligations. The case thus signals a litigative openness to the enforceability of international criminal and humanitarian law within Kenya's domestic legal system, thereby laying doctrinal groundwork for future litigants to rely on the Geneva Conventions Act, 1968, thus advancing the jurisprudence on the subject matter.

[99] Criminal Appeal No. 128 of 2009, *Mukazitoni Josephine v Attorney General Republic of Kenya* (2015) eKLR.
[100] *Mukazitoni Josephine v Attorney General Republic of Kenya* (2015) eKLR.
[101] *Mukazitoni Josephine v Attorney General Republic of Kenya* (2015) eKLR.
[102] *Mukazitoni Josephine v Attorney General Republic of Kenya* (2015) eKLR.
[103] *Mukazitoni Josephine v Attorney General Republic of Kenya* (2015) eKLR.

2.2.2 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968)

Kenya acceded to this Convention in 1972, affirming that war crimes and crimes against humanity should not be subject to statutes of limitations, regardless of when they were committed.[104] This aligns with the *jus cogens* nature of such crimes, meaning they are peremptory norms of international law from which no derogation is permitted.[105]

This treaty reinforces the principle that failure to pursue accountability for the perpetration of international crimes cannot be justified by the mere passage of time, and supports retrospective prosecution where applicable, provided due process guarantees are upheld.[106] The case *Kononov v. Latvia* adequately addressed this principle. In this case, Vassili Kononov, a former Soviet partisan, was convicted by Latvian courts for war crimes committed during World War II.[107] He led a unit that killed nine (9) civilians in the village of Mazie Bati in 1944. Kononov appealed to the European Court of Human Rights (ECHR), arguing that his conviction violated Article 7 of the European Convention on Human Rights, which prohibits retroactive criminal punishment.[108] The ECHR held that the application of the principle of non-retroactivity did not prevent prosecution of war crimes committed during World War II, as these were already crimes under international law at the time of commission.[109]

Comparatively, in *Prosecutor v. Tadić*, the Appeals Chamber emphasized that the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) extended to violations of customary international law, even if they were not spelled out in a treaty at the time of the acts.[110] This is highly relevant when compared to *Kononov v Latvia*, where the ECHR upheld a conviction for World War II-era war crimes by relying on pre-existing customary norms, even though the specific domestic criminalization came later.[111] Both decisions assert the principle that Customary

[104] United Nations Treaty Collections, Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968.
[105] Article 53, Vienna Convention on the Law of Treaties, 1969.
[106] *Kononov v. Latvia*, European Court of Human Rights Judgment of 17 May 2010, para. 37.
[107] *Kononov v. Latvia*, para. 49.
[108] *Kononov v. Latvia*, para. 49.
[109] *Kononov v. Latvia*, para. 50.
[110] *Prosecutor v Dusko Tadic alias "Dule"* Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction Decision, 2 October 1995.
[111] *Kononov v. Latvia*, para. 51.

international humanitarian law can create individual criminal responsibility, even in the absence of specific treaty provisions or domestic legislation at the time of the acts.

By acceding to this Convention, Kenya committed itself to the timeless nature of accountability for war crimes and crimes against humanity. This treaty obligation implies that no statutory time limit may prevent the investigation or prosecution of individuals accused of committing war crimes or crimes against humanity, irrespective of how much time has elapsed, thus creating the possibility of retrospective prosecutions, particularly for atrocities such as those committed during the 2007–2008 PEV.

2.2.3 The Rome Statute of the International Criminal Court (2002)

Kenya acceded to the Rome Statute on 15 March 2005, thereby undertaking international legal obligations to investigate and prosecute genocide, crimes against humanity, and war crimes.[112] Under the principle of complementarity enshrined in Articles 1 and 17 of the Rome Statute, State Parties bear the primary responsibility to prosecute such crimes domestically, with the ICC acting only when national jurisdictions are unwilling or unable to genuinely carry out investigations or prosecutions.[113]

To operationalize this obligation, Kenya enacted the International Crimes Act (ICA), No. 16 of 2008, which came into force on 1 January 2009.[114] The ICA, 2008 domesticated the core provisions of the Rome Statute and established a comprehensive framework for the prosecution of international crimes within Kenya's domestic legal system. Specifically, the Act codifies the offences of genocide, war crimes, and crimes against humanity, aligning domestic law with international definitions; provides a legal basis for cooperation with the ICC, including arrest, surrender, and transfer of suspects; criminalizes obstruction of justice, including perjury, bribery of officials, and witness tampering, in accordance with Article 70 of the Rome Statute; and grants Kenyan courts jurisdiction over crimes committed both within and outside Kenyan territory, subject to the principles of universal and extraterritorial jurisdiction.[115]

[112] Assembly of State Parties to the International Criminal Court, retrieved on 10 March, 2025.
[113] ICC-01/09-19-Corr, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 2010.
[114] International Crimes Act, Cap 60, No. 16 of 2008, Laws of Kenya.
[115] International Crimes Act, Cap 60, No. 16 of 2008.

The significance of the ICA, 2008 was highlighted in the "Kenya Situation" before the ICC. In *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohamed Hussein Ali*, the Pre-Trial Chamber acknowledged Kenya's legal capacity to prosecute international crimes domestically under the ICA.[116] However, it criticized the lack of genuine investigative and prosecutorial effort, which justified the ICC's assertion of jurisdiction under the complementarity principle.[117]

Domestically, the case of *Republic & 3 others v Titus Yoma & 18 others* depicts the first prosecution of an international crime in Kenya's domestic courts.[118] In this landmark case, the Director of Public Prosecutions brought charges against nineteen (19) police officers under the ICA, 2008 and Article 28(b) of the Rome Statute for crimes against humanity, including murder, rape, and torture.[119] These crimes were allegedly committed in Kisumu's Nyalenda area during the PEV of August 2017.[120] Among the victims was Baby Samantha Pendo, whose death had previously led to a judicial inquest assigning liability to named officers.[121] The charges were grounded in the accused persons' effective command responsibility during a police operation dubbed *Operation Post-Election Mipango*. [122] The matter is presently *subjudice*.

While the interlocutory issues raised during the trial are not relevant to this study, the High Court's determination affirming the High Court's jurisdiction under the ICA, 2008 highlights Kenya's evolving capacity to prosecute international crimes domestically, reflecting a shift from reliance on international forums like the ICC toward strengthening local mechanisms for accountability and justice.

In addition to the Rome Statute, Kenya is a party to other international human rights treaties that contribute to the domestic accountability framework. These include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified in 1997.[123] While not incorporated through the ICA 2008, this treaty enhances Kenya's domestic legal

[116] *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohamed Hussein Ali* (ICC-01/09-02/11).
[117] *Prosecutor v. Francis Kirimi Muthaura Uhuru Muigai Kenyatta & Mohamed Hussein Ali*.
[118] *Republic & 3 others v Titus Yoma & 18 others* [2024] KEHC 151 (KLR).
[119] *Republic & 3 others v Titus Yoma & 18 others*.
[120] *Republic & 3 others v Titus Yoma & 18 others*.
[121] *Republic & 3 others v Titus Yoma & 18 others*.
[122] *Republic & 3 others v Titus Yoma & 18 others*.
[123] United Nations Human Rights Instruments, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, retrieved on 10 April, 2025.

environment, particularly regarding the prohibition of torture and cruel treatment, especially in post-election contexts involving state security actors. Secondly, the International Covenant on Civil and Political Rights (ICCPR), ratified in 1972, imposes obligations to respect and protect the right to life and freedom from torture and ill-treatment.[124] This position is aptly supported by the *International Court of Justice (ICJ) Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory*.[125] The ICJ affirmed that international human rights treaties, including the ICCPR, continue to apply even during armed conflict and in territories under occupation.[126] Specifically, the Court stated:

> *"The Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."*[127]

These rights are applicable to the enforcement of international crimes under both treaty law and the Kenyan Constitution.

Collectively, these instruments form part of Kenya's evolving treaty-based legal framework for domestic accountability. The Rome Statute, in particular, now forms part of Kenyan law by virtue of its ratification, even independent of the ICA, 2008 although the latter remains essential for procedural guidance and institutional coordination.

2.3 The Constitutional Dispensation

The relationship between international law and municipal law is traditionally conceptualized through the legal theories of monism and dualism. Under monism, international law and domestic law form part of a single, unified legal system, such that ratified treaties are directly enforceable within national courts without the need for separate legislative acts. In contrast, dualism maintains that international and domestic legal systems are distinct; therefore, international treaties must be domesticated through enabling legislation before they acquire legal effect at the national level.

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[124] Article 6 & 7, ICCPR, 1966.
[125] ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ Reports 2004, 136–137, para. 111, 127.
[126] ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 127.
[127] ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 111.

Kenya's legal tradition prior to the promulgation of the 2010 Constitution was firmly dualistic, as the 1963 Constitution did not provide for the automatic incorporation of international treaties.[128] Consequently, the domestic accountability for international crimes such as genocide, crimes against humanity, and war crimes, even where Kenya had ratified relevant treaties like the Geneva Conventions or the Rome Statute, could not proceed without legislative domestication.

2.3.1 Constitutional Dispensation under the Repealed Constitution

Kenya adhered to a strict dualist approach under the 1963 Constitution, meaning that international treaties and conventions, including those addressing genocide, war crimes, and crimes against humanity, had no legal effect domestically unless specifically incorporated into national law through an Act of Parliament.[129] This meant that despite Kenya's ratification of several international instruments (the Geneva Conventions, the Convention on the Non-Applicability of Statutory Limitations, and the Rome Statute), they could not be relied upon in court unless explicitly domesticated. As a result, international legal obligations were largely symbolic, with little or no enforcement mechanism available in domestic courts during this period.

This principle was judicially affirmed in *Okunda v Republic*, where the High Court held that international conventions could not override domestic laws in the absence of enabling legislation.[130] The Court further made the following pronouncement:

> *"International law as such does not form part of the law of Kenya."*[131]

Similarly in the case of *Pattni and Another v Republic*, the High Court reiterated the position that international treaties were not applicable unless made part of the law, aligning with the precedent set in *Okunda v Republic*.[132]

Another hurdle that impeded domestic accountability for international crimes under the 1963 Constitution was the concentration of prosecutorial power in the Attorney General (AG).[133] Article 86 of the 1963 Constitution, vested full and exclusive prosecutorial discretion in the Attorney

[128] Constitution of Kenya, 1963, Laws of Kenya.
[129] Mutunga W, *Elements of Progressive Jurisprudence in Kenya: a Reflection*, Kenya Law Reports, 2012.
[130] *Okunda v Republic* [1970] EA, 453.
[131] *Okunda v Republic*, 453.
[132] Pattni & another v Republic [2001] KEHC 833 (KLR).
[133] Article 86, Constitution of Kenya, 1963.

General, who was also a political appointee and member of the Cabinet. This structure raised serious concerns about lack of independence.[134] The Attorney General was not shielded from political influence, especially in cases involving senior state actors or politically sensitive allegations. The AG had unfettered discretion to institute, take over, or terminate any criminal proceedings without oversight, making it easier to suppress politically inconvenient prosecutions, including those potentially involving international crimes.[135]

This centralized prosecutorial authority undermined the impartiality and effectiveness of criminal justice mechanisms, particularly in cases related to state violence or high-level impunity.[136] Scholars such as Chacha Murungu (2011) observed that the AG's dual role "inhibited accountability for international crimes, as prosecutions could be halted or not pursued altogether for political reasons.[137]

Despite this rigid framework, there were isolated instances of judicial activism. In *Rono v Rono* [2005] eKLR, the Court of Appeal applied provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), referencing the Bangalore Principles, which encourage the use of international human rights instruments in interpreting domestic law.[138] While the *Rono v Rono* decision did not *directly* address the Rome Statute or its enforcement in Kenya. However, it significantly contributed to a progressive judicial attitude toward the use of international treaties in domestic adjudication, which *indirectly laid a foundation* for future enforcement of international legal obligations, including those under the Rome Statute.[139] This was a pivotal moment in Kenyan jurisprudence, as it challenged the strict dualist approach inherited from the 1963 Constitution. It demonstrated that courts could invoke ratified but unincorporated treaties in interpreting domestic legal disputes. Additionally, Kenya's judiciary was open to infusing international human rights norms into local law, even in the absence of

[134] Murungu C and Biegon J (ed), *Prosecuting international crimes in Africa*, Pretoria University Law Press, 2011
[135] Article 86, Constitution of Kenya, 1963.
[136] Murungu C and Biegon J, *Prosecuting international crimes in Africa.*
[137] Murungu C and Biegon J, *Prosecuting international crimes in Africa.*
[138] *Mary Rono v Jane Rono & another* [2005] eKLR.
[139] Orago N, The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective, *Africa Human Rights Law Journal*, 2013.

express statutory domestication. Most importantly, it laid precedential groundwork for the constitutional transition in 2010.[140]

2.3.2 The Constitutional Dispensation under the 2010 Constitution

The promulgation of the Constitution of Kenya, 2010 marked a significant shift toward constitutional monism. Article 2(6) explicitly provides that:

"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

This provision means that all ratified treaties are now self-executing, unless their enforcement requires specific implementing measures. Most importantly, ratified treaties, including the Rome Statute, now automatically form part of Kenyan law without requiring enabling legislation. This development significantly alters the legal landscape, strengthening the enforceability of international criminal law within domestic courts. Although the ICA, 2008 remains essential for procedural clarity, the Rome Statute itself now has constitutional force following ratification.

Further reinforcing this shift, Article 2(5) incorporates general rules of international law into the domestic legal system. While the practical application of customary international law remains subject to judicial interpretation, its constitutional recognition provides a broader normative foundation for enforcing international legal obligations. The enforceability of international law in Kenya was aptly surmised in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others*.[141] In this landmark case, the Supreme Court of Kenya decisively addressed the role of international law in Kenya's legal framework, particularly in safeguarding socio-economic rights. The case stemmed from the unlawful eviction of informal settlers near Wilson Airport, where residents were forcibly removed without court orders, adequate notice, or alternative housing—violating both constitutional and international protections.[142] The High Court had already affirmed the relevance of ratified treaties like the ICESCR, but the Supreme Court's ruling went further, cementing the principle that:

[140] Orago N, The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system.
[141] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others* [2021] eKLR, para 82-98.
[142] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others*, para. 82.

"international law is not only persuasive but forms part of Kenyan law under Article 2(5) and (6) of the Constitution."[143]

The Supreme Court explicitly rejected the rigid dualism of *Okunda v Republic*, instead holding that Kenya's constitutional order:

"...mandates courts to apply ratified treaties and customary international law as part of domestic jurisprudence, particularly where constitutional rights require elaboration."[144]

Citing the UN Basic Principles on Evictions, the Court emphasized that evictions carried out without procedural safeguards, such as consultation, resettlement plans, and judicial oversight, are unconstitutional. It further ruled that victims of such violations are entitled to reparations aligned with international standards, including restitution, compensation, and guarantees of non-repetition.[145]

This judgment marked a paradigm shift, anchoring Kenya's legal system in *"transformative constitutionalism,"* where international human rights norms actively shape the interpretation and enforcement of domestic rights.[146] By declaring that the Constitution has moved Kenya beyond the narrow dualist approach, the Supreme Court affirmed that international law no longer requires domestic legislation to take effect.

A supplementary statute to Article 2(6) of the Constitution is the Treaty Making and Ratification Act of 2012. The latter statute sets out procedures for ratifying treaties and enhancing parliamentary oversight.[147] Together, these developments facilitate a more coherent and accountable legal framework for domestic implementation of Kenya's international obligations.

It is also worth noting that the Constitution of Kenya, 2010 revised the role of the AG and the Director of Public Prosecutions (DPP) became the national prosecuting authority.[148] Pursuant to Article 157 of the Constitution of Kenya, 2010 the Office of the Director of Public Prosecution (ODPP) was de-linked from the Office of the Attorney General as an independent office, thus

[143] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others*, para. 82.
[144] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others*, para. 84.
[145] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others*, para. 95-98.
[146] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others*, para. 95.
[147] Preamble to the Treaty Making and Ratification Act, Cap 4D, 2012.
[148] Article 157, Constitution of Kenya, 2010.

giving the latter autonomy over the conduct of criminal matters. This autonomy was tested in the case of *Director of Public Prosecutions v Chrysanthus Barnabus Okemo (former Finance Minister), Samuel Gichuru (Formerly Managing Director Kenya Power and Lighting Company), Attorney General and 2 others*. The Supreme Court held that, the authority to prosecute any criminal matter is the prerogative of the Director of Public Prosecutions, including the issuance of the 'authority to proceed' in extradition cases.[149] This particular provision is relevant to accountability for international crimes because it reinforces prosecutorial independence.

These constitutional reforms have profound implications for domestic accountability. As aptly postulated by legal scholars such as Manisuli Ssenyonjo, elevating ratified treaties to constitutional status enhances the enforceability of international legal norms and aligns Kenya's municipal framework with its global commitments.[150] However, while the legal foundation for prosecuting international crimes is now firmly in place, effective implementation remains contingent on political will, institutional independence and capacity.

2.4 Statutory Framework on Accountability for International Crimes

A principal difference between international crimes as codified by the Rome Statute vis-à-vis Kenya's penal municipal law is the fact that the threshold to warrant prosecution differ. In Kenya, the principal differences between the codification of international crimes vis-à-vis crimes under municipal law are the contextual elements. Under municipal law, for a crime to be prosecuted, for example, murder, the context in which the act of killing was perpetrated is not relevant provided that the elements of *actus reus*, *mens rea* and *malice aforethought* are evident.[151] Prosecution of murder as a crime against humanity on the other hand requires that the act of killing was perpetrated as part of a widespread or systematic attack targeted at a civilian population; consequently, merely the intention to kill and the act itself do not meet the threshold for prosecution of the act as an international crime.[152]

[149] Supreme Court Petition No. 14 of 2020.
[150] Ssenyonjo, M, Analysing the economic, social and cultural rights jurisprudence of the African Commission on Human and Peoples' Rights: 30 years after the adoption of the African Charter, *Netherlands Quarterly of Human Rights, 29*(3), 358–386.
[151] Section 203 as read with section 204, Penal Code.
[152] Section 7, International Crimes Act, Cap 60, Laws of Kenya.

2.4.1 Penal Code, Cap 63

The Penal Code is Kenya's predominant statute on criminalisation of acts, omissions and the applicable penalties; otherwise referred to as substantive law. It is further supplemented by procedural laws which include the Criminal Procedure Code and the Evidence Act. In the period subsequent to the 2007-2008 PEV, the Penal Code was predominantly used to draft charges against the alleged perpetrators because at the time, the Rome Statute did not have a domesticating statute. The Penal Code is, however, not the only statute that criminalises unlawful conduct in Kenya.

It is worth noting that the penalties provided under the Penal Code differ in comparison to` those under the Rome Statute with respect to gravity; the former imposes severe punishment such as life imprisonment and death penalty, whereas the penalties imposed in the latter statute are relatively more lenient, the maximum penalty being imprisonment for thirty (30) years. It would therefore be fair to conclude, bearing in mind the deterrence theory, prosecution for crimes prescribed under the Penal Code would arguably more effective as far as deterrence is concerned.

The crimes committed during the PEV were unequivocally crimes under the existing Kenyan legal framework, regardless of the differing categorisations. The variations, however, on the standards of proof proved problematic, particularly to the agencies responsible for investigation. Prior to the *proprio motu* referral of the situation in Kenya to the ICC, the then ICC Prosecutor, Moreno Ocampo, imposed a steadfast view that it was mandatory that the crimes committed during the PEV ought to have been prosecuted as codified by the Rome Statute and not as *ordinary* crimes under Kenyan Penal law.[153] Consequently, the efforts by the then AG to prosecute the crimes domestically were dismissed, particularly considering the fact that those who were alleged to have held the most responsibility were never prosecuted.[154] This reality evokes another inquiry into the role of the principle of complementarity as envisioned by the drafters of the Rome Statute.

The principle difference between the crimes codified under the Penal Code and those under the Rome Statute is the contextual elements required to prove the offences. The crimes under the Kenyan Penal Code are limited to elementary considerations of *mens rea,* that is the intention or purpose of an act or omission, and the act itself (*actus reus*). It is only the crime of murder that has

[153] Materu, *The post-election violence in Kenya*, 4.
[154] Materu, *The post-election violence in Kenya*, 8.

an additional evidentiary threshold of *malice aforethought*, which essentially means the presupposition of a guilty mind. The Rome Statute on the other hand provides a more elaborate consideration of elements of the crimes under the Court's jurisdiction.[155] The crime of genocide, for instance, requires proof that a specific group, defined by race, ethnicity, tribe or other categorisation, is intentionally destroyed or otherwise exterminated.[156] Crimes against humanity, on the other hand, are defined by the large-scale or widespread nature of their perpetration aimed at a civilian population, in addition, there must be a demonstrable existing organisational structure responsible for the perpetration of the enlisted acts under the statute.[157]

The highlighted elementary considerations are not codified under the Kenyan Penal Code, neither are they present in the Evidence Act nor the Criminal Procedure Code. This lacuna gravely affects the extent of accountability measures against the perpetration of the core international crimes, particularly in instances of restrictive enforcement of these laws.[158]

The enforcement of human rights was, at the time, limited to judicial review applications seeking declaration and conservation of legislated rights.[159] The courts in which penal law was enforced did not have the capacity to pronounce themselves on the existence of rights, or human rights violations, this was a preserve for the High Court.[160] To date, the enforcement of human rights is a matter for civil litigation as opposed to criminal enforcement. This means that a court adjudicating over a criminal matter cannot pronounce itself on the existence of rights.[161] It can, however, note that there may be a likely violation of an existing right, but it cannot thereafter proceed to make a declaratory order to remedy such violation.

Save for the ICA, 2008 another factor of international law that is not codified under Kenyan penal law is command responsibility. Command responsibility as a factor determining criminal liability is not recognised under the existing domestic provisions. This limitation does not, however, mean that the instigators and financiers of the atrocities cannot be held accountable, the Penal Code and

[155] Elements of Crimes, Rome Statute of the International Criminal Court.
[156] Article 6, Rome Statute of the International Criminal Court.
[157] Article 5, Rome Statute of the International Criminal Court.
[158] Human Rights Watch, Turning pebbles: evading accountability for the post-election violence in Kenya, 2011, 45.
[159] Constitution of Kenya, 1963.
[160] Article 22, Constitution of Kenya, 2010.
[161] Section 3, Judicature Act, 1967.

the Evidence Act are aptly sufficient for purposes of lodging charges against persons most responsible and indirect perpetrators.

2.4.2 Sexual Offences Act, Cap. 63A of 2006

Prior to the enactment of the Sexual Offences Act, 2006 (SOA) the criminalisation of sexual offences was codified under the Penal Code as offences against morality.[162] The legislation of a separate statute contributed significantly towards the regulation of crimes related to sexual violence. The SOA codifies a wide scope of offences, which include defilement (sex with minors), rape, gang rape, sexual assault, indecent acts with both minors and adults, and other related inchoate offences.[163] Under the SOA, the penalties range from ten (10) years imprisonment, to life imprisonment.[164] There are a few similarities between the SOA and the Rome Statute with regard to codification of inhumane acts; but there are a number of differences particularly related to the elements required to prove perpetration of a sexual crime.

While the Rome Statute itself does not expressly state that medical evidence is unnecessary, it does not require corroboration or medical proof for sexual offences.[165] In the case of *Prosecutor v. Dominic Ongwen*, the ICC demonstrated the position by convicting the former LRA commander of crimes including forced marriage and rape without requiring medical evidence to substantiate the charges.[166] The Trial Chamber based its decision primarily on three key evidentiary pillars: first, the court relied on detailed and coherent survivor testimonies that were internally consistent and cross-verified by multiple accounts.[167] Second, it considered admissions by other LRA fighters who acknowledged the systematic use of sexual violence as part of the group's operations.[168] Third, the judgment incorporated an understanding of the cultural context, recognizing how stigma and the realities of armed conflict often prevent survivors from seeking medical documentation.[169] The Chamber explicitly stated:

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[162] Penal Code, 1963, Laws of Kenya.
[163] Sexual Offences Act, Cap 63A, 2006, Laws of Kenya.
[164] Sexual Offences Act, 2006.
[165] Rule 63 (4), Rules of Procedure and Evidence, International Criminal Court, 2002.
[166] ICC-02/04-01/15, *Prosecutor v Dominic Ongwen*, 2021.
[167] *Prosecutor v Dominic Ongwen*, para. 2699.
[168] *Prosecutor v Dominic Ongwen*, para. 2701.
[169] *Prosecutor v Dominic Ongwen*, para. 2705.

"Medical evidence is not a prerequisite for proving sexual violence. The Chamber assesses the credibility of witnesses and the contextual plausibility of their accounts."[170]

The Ongwen judgment thus reinforces the principle that credible testimony, when supported by circumstantial and pattern evidence, can sufficiently prove sexual violence crimes without medical corroboration. This position is quite contrary to that provided under the SOA which expressly provides that for a person to be not only convicted for the offence of rape or defilement, but also to meet the threshold for prosecution, there must be demonstrable medical evidence on penetration, lack of consent (for rape cases), identification of the perpetrator and age of the victim (for defilement cases).[171] The threshold under the SOA is seemingly too high under in comparison to the Rome Statute which does not prescribe the cited requirements as elements of sexual crimes. The same rationale is adopted in the Kenyan International Crimes Act, however, to date there have been no successful prosecutions of sexual offences under the said Act.

2.4.3 International Crimes Act Cap. 60 of 2008

Kenya became a signatory to the Rome Statute on 11th August, 1999 and subsequently deposited its instrument of ratification on 15th March, 2005.[172] It was only until 1st January 2008 that the Rome Statute was domesticated thus enforcing said Statute.[173] The International Crimes Act (ICA, 2008) of Kenya provides in its preamble as follows:

"An Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court…"

The ICA is broadly similar to the Rome Statute with respect to codification of crimes with the exception of the crime of aggression. Key differences include the definition of crimes against humanity as encompassing acts defined as such under customary international law.[174] This means that crimes against humanity in Kenya are not limited to the definition provided in the Rome

[170] *Prosecutor v Dominic Ongwen*, para. 2702.
[171] Section 3 and 8, Sexual Offences Act, Cap 63A, Laws of Kenya.
[172] https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/kenya.aspx, retrieved on 14th September, 2019.
[173] International Crimes Act, Act No. 16 of 2008, Laws of Kenya.
[174] Section 6(4), International Crimes Act, 2008.

Statute but also include those recognised as such provided that they are *jus cogens* in nature. This position supplements retrospective application of international criminal law, earlier demonstrated in this chapter - Kenya could aptly pursue accountability for the 2007-2008 PEV, retrospectively.[175]

The jurisdiction to prosecute crimes under the ICA, 2008 entails the place where the crime was committed, citizenship of the perpetrator and victims, existence of conflict between Kenya and perpetrator's state of origin.[176] The High Court, which has unlimited and original jurisdiction, is the competent court to issue warrants of arrest, pursuant to requests from the ICC.[177] Such requests shall be received by the Executive and thereafter transmitted to a High Court judge for execution. Other complementary statutes on surrender of accused or convicted persons include the Extradition (Commonwealth Countries) Act, 1968 and the Extradition (Foreign and Contiguous Countries) Act, 1968.

Prior to the enactment of the ICA, 2008 there was no statutory recognition of the fact that the offences of murder, enforced disappearance, torture, sexual violence, displacement or forced transfer of civilians, among others, could exist as crimes against humanity.[178] There was further no specific categorisation of offences related to widespread or systematic attacks on a civilian population.[179] The codification of the ICA fostered enforceability of international crimes domestically, however, prosecution of offences prescribed under the Act remains minimal.

The shortcomings exemplified by the existing penal laws are easily cured by the enforcement of the ICA, 2008 which recognises gross human rights violations through the domestication of the Rome Statute. The onus, therefore, to seek accountability for gross violations of human rights is vested on the DPP, the investigative agencies and the courts. It is worth-noting that pursuant to Article 157 of the Constitution of Kenya and section 5 (3) of the Office of the Director of Public Prosecutions Act (ODPP Act), the DPP has the power to conduct prosecution-guided

[175] Materu S, *The post-election violence in Kenya*, 123.
[176] Section 8, International Crimes Act, 2008.
[177]Section 20, International Crimes Act, 2008.
[178] Penal Code, Cap 63, Laws of Kenya.
[179] Penal Code, Cap 63, Laws of Kenya.

investigations. This power is very crucial towards accountability for not only the perpetration of international crimes, but also, the enforcement of human rights violations.

In light of the challenges posed, the most effective approach towards curbing institutional barriers to domestic accountability for international crimes involves specialisation in the field of investigating, prosecuting and adjudicating international crimes. In order to adequately complement the ICC, Kenya would require establishing an International Crimes Division within the judiciary (as is the case in Uganda, addressed in Chapter 4) and undertake robust specialised training to enhance institutional capacities. In addition to the ICA, 2008 a supplementary legal framework or set of rules should be established to govern the composition of the judges, procedures on admission of evidence, independence of the Prosecutor, protection of witnesses, victim participation, filing of pleadings and appeals.[180]

2.5 Conclusion

This chapter has examined the legal framework that governs domestic accountability for international crimes in Kenya, highlighting the interplay between treaty obligations, constitutional provisions, and statutory law. At the treaty level, Kenya has ratified a number of key international instruments, including the Geneva Conventions and the Rome Statute of the ICC. These treaties form the normative foundation for ensuring accountability for war crimes, crimes against humanity, and genocide. While Kenya did not initially have a direct constitutional mechanism for the automatic application of international law, this changed significantly with the promulgation of the 2010 Constitution.

The 2010 Constitution, particularly Article 2(6), marked a transformative moment in Kenya's legal history by recognizing all ratified treaties and conventions as part of the law of Kenya. This provision, together with the enactment of the Treaty Making and Ratification Act (2012), institutionalized the process of incorporating international law into the domestic legal framework. Furthermore, Article 157 restructured the prosecutorial authority by vesting independent prosecutorial powers in the DPP, thereby reinforcing institutional capacity for pursuing international crimes.

[180] Wayamo Foundation, *Complementarity in practice*, 4.

Statutorily, the passage of the ICA, 2008, was a significant milestone. It domesticated the Rome Statute and codified the core international crimes within Kenyan law, thereby providing a clear legal basis for prosecution and cooperation with the ICC. In contrast, traditional domestic statutes such as the Penal Code, Criminal Procedure Code, and Evidence Act, though applicable, were limited in scope due to their failure to capture the contextual elements that define international crimes. The ICA, 2008 filled this gap and aligned Kenya's domestic legal framework with its international obligations on accountability for international crimes.

In sum, Kenya's legal framework for domestic accountability of international crimes is now rooted in a robust blend of international treaties, constitutional authority, and specialized statutes. While challenges remain in implementation and enforcement, the legal infrastructure to pursue international crimes within Kenya's domestic courts has been firmly established. The effectiveness of this framework now rests on the commitment of institutions to apply it consistently and with integrity.

Chapter 3: Domestic Accountability for Crimes Committed During the 2007-2008 PEV

3.1 Introduction

This chapter provides a detailed analysis of the legal and institutional responses to the PEV by the criminal justice system in Kenya. It further highlights the issues related to the prosecution and jurisprudence that emanated from the adjudication of the predicate offences to the PEV, and an evaluation on the possibility of prosecuting the PEV crimes retrospectively. This chapter further analyses the successes, failures, and systemic obstacles that hindered the prosecution of the alleged main perpetrators. While international mechanisms, such as the *proprio motu* referral to the ICC, were invoked, this chapter focuses on Kenya's domestic efforts to address these crimes through its criminal justice system.

3.2 Immediate Legal Responses in the Aftermath of the 2007-2008 PEV

In the aftermath of the 2007-2008 PEV in Kenya, the AG directed the Director of Public Prosecutions in June 2008 to constitute a team to undertake nation-wide review of the cases related to the PEV.[181] At the time, the AG was the chief prosecutorial authority.[182] The Commission of Inquiry into the Post-election violence (CIPEV) report and the reports of other organizations such as Human Rights Watch, attributed most of the violence to the police.[183] Despite this revelation, most if not all, the cases pending conclusion of investigations had been in respect to relatively minor offences and mostly relating to property, caused by civilians.[184] As at 27th February 2009, no single case had been concluded with regard to the offence of murder.[185] There was further no mention of any sexual violence related offence from the AG's report of 2009. The number of murder cases reported were two, comparatively too few in view of the high number of deaths reported during the violence.[186] This was not reflective of a seriousness and willingness to pursue

[181] Materu S, *The post-election violence in Kenya*, 76.
[182] Article 26, Constitution of Kenya, 1963.
[183] No.4473, Kenya Gazette Notice, cx-4.
[184] Statistical information presented by Materu S on the report of the Kenya Attorney-General on the review of post-election violence related cases, 8-27, 2009.
[185] Report by the Attorney General of Kenya, Republic of Kenya, 2009, 35-37.
[186] Materu S, *The post-election violence in Kenya*, 107.

domestic criminal accountability. Consequently, the report was quickly dismissed by the ICC Prosecutor.[187]

In March 2011, two years after the first report, a "follow-up progress report" was prepared showing that 399 investigations against 311 persons had been started in respect to offences related to sexual violence - rape, defilement, attempted rape, attempted defilement and gang rape.[188] It was quickly discovered that the report was inaccurate. The report did not contain comprehensive information, it was compiled in only 10 days, primarily because the Kenyan government sought to submit it to the ICC to support its challenge on admissibility [189]. The rest of the report was a duplication of the 2009 report. As such, Human Rights Watch, for instance, dismissed it as unreliable, "compiled hastily with little concern for accuracy".[190]

Domestic accountability potentially saw new light upon the promulgation of the 2010 Constitution. An independent principal prosecutorial authority namely the Office of the Director of Public Prosecutions in Kenya was constituted with the mandate to institute, undertake, take over and/or control criminal proceedings within the Republic as spelled out in Article 157 of the Constitution. Prosecutors were statutorily mandated to either have been advocates of the High Court of Kenya or in the event that such persons were not, they ought to have express authorisation from the Director of Public Prosecutions to prosecute any criminal matter in court. In addition, the Director of Public Prosecutions was empowered to direct the Inspector General of the National Police Service to investigate any criminal matter.

In February 2012, after the promulgation of the Constitution of Kenya, 2010 the Director of Public Prosecutions in exercise of the State's prosecutorial powers established a taskforce to review the 2007-2008 PEV related cases.[191] This was in furtherance of the initiative begun in January 2008 by the then Attorney General and Commissioner of Police addressing the violence by constituting

[187] ICC-01/09-3, Prosecutor's request for authorisation of an investigation, Situation in the Republic of Kenya, 26th November, 2009.
[188] Report of the Kenya Attorney-General on the review of post-election violence related cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces, Republic of Kenya, Nairobi, 2009; Materu, The post-election violence in Kenya, 2015.
[189] Terms of Reference, Report of the Kenya Attorney-General on the review of post-election violence related cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces, Republic of Kenya, Nairobi, 2009; Materu, *The post-election violence in Kenya*, 2015.
[190] Human Rights Watch, *Turning pebbles; evading accountability for post-election violence in Kenya*, 2011.
[191] Kenya Gazette Notice No. 5417, 20th April, 2012.

a team to investigate and prosecute PEV cases.[192] A Multi-Agency Task Force was constituted to undertake an all-inclusive review, re-evaluation and re-examination of all the cases arising out of the 2007-2008 PEV and make appropriate recommendations to the Government.[193]

3.2.1 Mandate of the Task Force

The Taskforce was constituted on the 6th February 2012 and gazetted on 20th April 2012 with Terms of Reference which include the following: -

i) Undertake a countrywide review, re-evaluation of all the cases arising out of the 2007/2008 PEV and make appropriate recommendations on expeditious disposal;

ii) Review any report, publications and judicial decisions that are relevant to PEV cases, advise on their implementation, and guide any investigations and prosecutions being undertaken in relation to the PEV;

iii) Recommend the co-option of any other relevant person or agency with expertise for specific tasks as may be necessary to facilitate prosecution and other alternative dispute resolution mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms;

iv) Recommend any legislative, administrative, institutional and regulatory reforms and liaise with any Government agency or institution in furtherance of its mandate; and

v) Make appropriate periodic reports to the Director of Public Prosecutions for directions and ensure public participation where appropriate.[194]

In performing its duties, the Taskforce called for all PEV related cases from the Inspector General and the Director of Criminal Investigations for review, re-evaluation and re-examination.[195] The Taskforce made a finding that a total of 6081 cases were reported for investigations to the police

[192] Materu S, *The post-election violence in Kenya*, 108.
[193] Kenya Gazette Notice No. 5417, 20th April, 2012.
[194] Terms of Reference, Report of the Kenya Attorney-General on the review of post-election violence related cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces, Republic of Kenya, Nairobi, 2009; Materu, The post-election violence in Kenya, 2015.
[195] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, Office of the Director of Public Prosecutions, 2013, 8.

arising out of PEV.[196] The Taskforce only received a total of 4576 case files from the DCI for review, re-evaluation and re-examination.[197] However, not all reported cases were taken to court. The Taskforce further noted that there were numerous cases where perpetrators could not be specifically identified by the victims and could generally describe them as their neighbours or members of a particular ethnic community.[198] The Taskforce recommended that such cases be dealt with by way of alternative dispute resolution mechanisms including the establishment of Standing Peace Committees.[199] The committees would promote reconciliation through mediation and arbitration.

The cases reviewed were categorised as cases pending before court, cases pending further investigation, pending arrest of known suspects, cases withdrawn, public inquests, murder and sexual offences.[200] In respect to Sexual and Gender Based Violence Cases, although there were 368 cases reported, the Taskforce received 215 files from the Director of Criminal Investigations that were substantively reviewed and re-evaluated.[201] A review of the said files revealed that a large number of the victims were gang raped by assailants who were not known or could not be identified.[202] These files were returned to the Director of Criminal Investigations with recommendations made by the Taskforce to conduct further investigations.[203] Upon re-submission, it was unfortunate to note that further investigations yielded no positive results.

3.2.2 Summary of the Findings from the Multi-Agency Taskforce

The Multiagency taskforce further prepared a summary of all the reported cases related to the PEV. The tables below are summarised extracts from the report, prepared by the Office of the Director of Public Prosecution and presented by the Multi-agency Task force on the 2007-2008 Post-election Violence. The same was done pursuant to Gazette Notice No. 5417 of 20th April 2012.

[196] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 20.
[197] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 20.
[198] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 21.
[199] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 9.
[200] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 20.
[201] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 21.
[202] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 21.
[203] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 22.

Figure 3.1 **Annex from the report of the 2007-2008 multi-agency taskforce: summary of general cases reviewed[204]**

S/ NO.	OFFENCE	FILES OPENED	FILES RECEIVED BY TF	TAKEN TO COURT	CONVICTED	ACQUITTED	WITHDRAWN	PBC	PAKA	PUI
1.	Armed in Public	21	7	3		2		1		
2.	Arson	3768	2576	49	10	17	16	6	75	2403
3.	Assault	44	44	22	8	5	8	1		
4.	Conveying/handling suspected stolen property	98	98	49	23	9	14	3		
5.	Creating Disturbance	10	4	2	1	1				
6.	House Breaking and Stealing	671	580	54	27	11	15		25	448
7.	Incitement to violence	20	20	10	2	3	5			
8.	Inquests (Murder)	611	115	34				34		75
9.	Malicious Damage to Property	71	51	9	5				9	28
10.	Murder	19	19	10	4	4	1			
11.	Obstructing a police officer	2								
12.	Possession of Offensive Weapons	38	38	19	13	2	4			
13.	Preparation to commit a felony	37	23	12	5	3	3			
14.	Publishing false information	3	3							3
15.	Robbery and allied offences	47	38	21	9	8				
16.	Setting crops on fire	8	8	3	3	2				
17.	Stealing	250	250	31	14	3	1		21	180
18.	Stock Theft	271	180	18	9	3	5	1	22	122

[204] PAKA refers to cases where accused persons are known but have never been arrested although cases have been registered in court and warrants of arrest issued and cases which were taken to court accused were granted bond and absconded. The warrants of arrest are still in force and have never been executed. PUI refers to cases that are still under investigation by the police.

19.	Taking Part in a riot	38	38	19	5	5	4	5		
20.	Theft of Motor Vehicle Parts	2	2	1			1			
21.	Unlawful assembly	21								
22.	Theft of farm produce	17	16							16
23.	Defilement	3	3							
24.	Rape	8	4							
25.	Bond to Keep Peace	2								
26.	Threatening to Kill	1	1							1
27.	**TOTAL**	**6081**	**4118**	**366**	**138**	**78**	**77**	**51**	**152**	**3276**

Figure 3.2 **Annex from the report of the 2007-2008 multi-agency taskforce: summary of sexual offences related to the violence reviewed**

S/no	Offence	Received by TF	Taken to Court	Convictions	Acquittals	Discharge	Withdrawn	Closed NFPA	PBC	PAKA	PUI
1.	Rape	52	8	1	1		1	25	3	2	19
2.	Gang Rape	86	3	1			2	63			19
3.	Attempted Rape	10	6	1	1		1	1	2		4
4.	Defilement	49	39	15	9	2	6	2	5	2	8
5.	Attempted Defilement and Assault	6	5	1	1		2			1	1
6.	Incest	4	4	2	2						
7.	Attempted Incest	1	1							1	
8.	Sodomy	1									1
9.	Attempted Un natural Offence	1									1
10.	Child Prostitution	1									1
11.	Assault/Indecent Assault	4	3	2		1		1			
Total		215	69	23	14	3	12	92	11	6	54

3.3 Prosecutorial Responses

More often than not, crimes under international law are viewed in isolation of the crimes found in the domestic laws. There are many points of convergence and only a few areas of divergence.[205] Crimes under international law as such entail two main additional elements which are not elements of purely domestic *ordinary* crimes. First, for crimes to qualify as international crimes, they must entail a large-scale perpetration of violence.[206] Secondly, individual acts such as murder, form part of a *bigger picture*, thus may be referred to as predicate offences to the crimes under international law.[207] Certain contextual elements must be met for crimes to qualify as international.

[205] Materu S, *The post-election violence in Kenya*, 89.
[206] Judge Anita Usacka's Dissenting Opinion on Kenya's Appeal against Pre-Trial Chamber's Decision on Kenya's Admissibility Challenge, 25.
[207] Materu S, *The post-election violence in Kenya*, 89.

The crimes committed in Kenya during the post-election violence were not only domestic crimes, but also international crimes due to the large-scale nature in which they were perpetrated. It was/is not mandatory that such crimes must be prosecuted under international law, just because they are of international concern.[208] The domestic legal framework is more often than not, sufficient. Some authors may argue the contrary - Kenya did not have any laws that would have enabled it to prosecute international crimes effectively since the International Crimes Act, 2008 domesticating the Rome Statute had not passed into law.[209]

To state that Kenya's substantive criminal law was "unavailable" merely because crimes against humanity, genocide or war crimes as such could not be charged at the domestic level at the time of the violence would be contrary to the *spirit* of international law. The Preamble to the Rome Statute and Article 1 of the same acknowledge the role of national jurisdictions in pursuing accountability by emphasizing that the domestic framework has primacy when it comes to criminal accountability.[210]

The prosecution of crimes against humanity proved to be more applicable to the situation in Kenya, due to the fact that the contextual elements necessary to prove genocide and war crimes had not been established.[211] Specifically, in the case of *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* the Pre-trial Chamber held that there was sufficient evidence to suggest that a coordinated and systematic assault was carried out against civilians.[212] However, the available evidence indicated that the assault did not target any specific national, ethnic, racial, or religious group with the intention of eliminating that group in whole or in part.[213] Secondly, Kenya was not in a state of war or armed conflict, consequently, the contextual elements necessary to invoke prosecution of war crimes had not been established.

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[208] Materu S F, Post-election violence in Kenya, 145.
[209] Okuta A, National legislation for prosecution of international crimes in Kenya, *International Criminal Justice*, 7, 2009.
[210] Preamble to the Rome Statute and Article 1 of the Rome Statute, 2002.
[211] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-336, 20 September 2011
[212] ICC-01/09-02/11, Decision on the admissibility of the situation in Kenya to the ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 2011.*
[213] *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 2011.*

3.3.1 Prosecuting the Crimes Related to the 2007-2008 PEV

Under the 1963 Constitution, prosecution of criminal offences was vested in the Kenyan police (police prosecutors). The police would investigate and thereafter prosecute. According to Keriako Tobiko, Kenya's Director of Public Prosecutions as at November, 2011, there were only 72 trained prosecutors (state counsels) serving in the courts.[214] The police were not lawyers, the only knowledge that they were equipped with was that of prosecution of *ordinary crime* under the existing domestic legal framework.[215] The biggest weakness is that acts which could have constituted serious crimes were charged as less serious crimes due to the lack of appreciation of the nature of the crimes.[216] The following are illustrative examples of this shortcoming:

Forced circumcision: Despite reports by the Kenya National Commission on Human Rights (KNCHR) on genital mutilation/circumcision of persons belonging to the Luo community, the offence was prosecuted as merely assault or grievous harm.[217] A significant case in this context is the *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others*, where survivors of post-election sexual violence sought redress from the Kenyan government.[218] The High Court acknowledged the state's failure to protect citizens from sexual violence during the unrest.[219] While the petition encompassed various forms of sexual violence, including forced circumcision, the Court's findings did not isolate forced circumcision as a separate prosecutable offense.[220] The local dailies also reported children as young as 15 had their genitals crudely cut with blunt objects such as broken glass; in some reported cases the victims bled to death.[221]

[214] Daily Nation, 19th November 2011.
[215] Materu S F, The post-election violence in Kenya, 101.
[216] Human Rights Watch, "Turning Pebbles": Evading accountability for post-election violence in Kenya, *Human Rights Watch*, New York, 2011.
[217] Constitutional and Human Rights Petition No. 122 of 2013, *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission(Interested Party); Kenya National Commission on Human Rights &3 others(Amicus Curiae)* [2020] eKLR.
[218] Petition No. 122 of 2013, *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others;* [2020] eKLR.
[219] *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others*.
[220] Petition No. 122 of 2013, *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others;* [2020] eKLR
[221] Al Jazeera, *Kenya ethnic clashes intensify*, 28th January, 2008.

Arson, destruction of property and forced displacement: Widespread incidents of arson, property destruction, and forced displacement followed the outbreak of the PEV, leading to the mass uprooting of residents who were herded into temporary camps under deplorable conditions.[222] According to a report by Human Rights Watch, Nairobi alone recorded approximately 75,000 internally displaced persons.[223] In the chaos, landlords were forcibly evicted from their own properties, and tenants turned against one another along ethnic lines.[224]

Despite the gravity of these offenses, including the wanton destruction of both private and public property, prosecutions were largely pursued under the narrow charge of *malicious damage to property*, which under the Kenyan Penal Code, 1930 carries a maximum sentence of five (5) years' imprisonment.[225] These charges failed to reflect the scale of devastation or the broader social and economic consequences of such acts.

Illustrative case law demonstrates the systemic failure to hold perpetrators accountable and the state's broader inability to offer redress. In *Charles Murigu Muriithi & 2 others v Attorney General*, victims who suffered loss and damage during the violence brought suit against the state for its failure to act.[226] They asserted violations of their constitutional right to property.[227] The Court's analysis focused primarily on the adequacy of the state's response, but ultimately stopped short of imposing liability for the destruction.[228]

Similarly, in *Florence Amunga Omukanda & another v Attorney General & 2 others*, petitioners claimed the state had abdicated its constitutional duty by failing to protect citizens during the unrest, resulting in significant property loss.[229] The Court acknowledged the claims but once again emphasized procedural challenges and the evidentiary threshold required to establish state culpability.[230] While the court engaged with the claims and the state's responsibility to protect, the

[222] Human Rights Watch, 'Turning Pebbles', 2011.
[223] Human Rights Watch, 'Turning Pebbles', 2011.
[224] Human Rights Watch, 'Turning Pebbles', 2011.
[225] Section 339(1), Penal Code, Cap 63, Laws of Kenya.
[226] Civil Appeal 258 of 2015, *Charles Murigu Muriithi & 2 others v Attorney General* [2019] eKLR.
[227] *Charles Murigu Muriithi & 2 others v Attorney General* [2019] eKLR.
[228] *Charles Murigu Muriithi & 2 others v Attorney General* [2019] eKLR.
[229] Petition 132 of 2011 & 197 of 2012 (Consolidated), *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR.
[230] *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR.

outcome reinforced the judicial reluctance to provide meaningful reparations for destruction and displacement.

These cases underscore the disconnect between the magnitude of the violations and the state's legal and prosecutorial response. Despite thousands of victims and massive property losses, the Kenyan justice system largely reduced the accountability process to minor criminal classifications, neglecting to address the deeper societal and structural failures that allowed such violence to flourish.

Sexual and related offences: there seems to be a lack of consensus on the use of rape and sexual violence related offences as a tool to further the PEV. Some reports, such as the Waki report, made findings that the use of sexual violence was perpetrated as opportunistic offences facilitated by general chaos.[231] The United Nations Office of the High Commissioner for Human Rights (OHCHR) Mission sought information from a variety of sources as to the existence, extent and nature of Sexual and Gender Based Violence (SGBV).[232] The finding was that whilst there was little hard evidence that there had been widespread and systematic use of SGBV as a tool for intimidation of members of different ethnic groups, there remain very serious concerns in this area.[233]

Hospital reports indicate that between 27 December 2007 and 29 February 2008, 322 cases of sexual assault and rape of women and girls were reported to Nairobi Women's Hospital, while 26 were reported to the Moi Teaching and Referral Hospital and two cases to Nyanza Provincial Hospital.[234] Information gathered during interviews conducted with victims of rape and sexual violence suggests that by and large, most of the reported cases of rape seem to have been "opportunistic", perpetrated in the urban setting by groups of youth taking advantage of the chaotic and violent situation.[235] Though instances of victims allegedly raped on the basis of belonging to a particular community may have occurred, sexual violence does not appear to have been used as

[231] Report of the Commission of Inquiry into Post-election Violence (CIPEV), Government Printer, Nairobi, 2008.
[232] OHCHR Fact-finding mission to Kenya, 6-28 February 2008.
[233] OHCHR Fact-finding mission to Kenya, 6-28 February 2008.
[234] OHCHR Fact-finding mission to Kenya, 12, 6-28 February 2008.
[235] OHCHR Fact-finding mission to Kenya, 13, 6-28 February 2008.

a systematic tool to target specific victims on the basis of their political allegiance or ethnic background.[236]

The PEV period presented numerous challenges to investigators charged with the investigation of Sexual Gender Based Violence Cases. This was partly attributed to the massive displacement of the population in the affected areas that presented difficulties in securing evidence necessary for any ensuing prosecution.[237] Indeed, the statistics show that most of the victims were gang raped by large groups of attackers.[238] This made it difficult for the victims to identify the assailants with adequate or fair precision. In effect, majority of these cases could therefore not meet the evidential test of a prosecutable case. However, in appropriate cases where there was sufficient evidence, offenders were charged in court and the cases effectively prosecuted as shown in the annexure below.[239] As at the time of expiry of its term, the Taskforce had reviewed 215 files relating to SGBV.[240]

3.4 Significant cases relative to the PEV

One of the biggest setbacks in respect to criminal accountability, particularly in the period following the 2007-2008 PEV, was the lack of a centralised record system within the criminal justice actors.[241] This deficiency was highlighted by the Director of Criminal Investigations in a letter dated 17th January, 2014, which cited challenges such as the inability to trace complainants, many of whom had been displaced or relocated, and the absence of comprehensive records to support prosecutions.[242] The letter emphasized that, despite ongoing efforts, the status of the 4,576 cases reviewed was unlikely to change due to these systemic issues.[243] This was/is a costly impediment. In addition, judgments particularly at the subordinate courts are not easily retrievable, neither are they published in the Kenya Law Reports website. The judgments before the High Court, Court of Appeal and Supreme Court on the other hand are published, therefore the cases

[236] OHCHR Fact-finding mission to Kenya, 13, 6-28 February 2008.
[237] Human Rights Watch, *Turning pebbles*, 2011.
[238] Human Rights Watch, *Turning pebbles*, 2011.
[239] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 21.
[240] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 21.
[241] Human Rights Watch, *Turning pebbles*, 2011.
[242] Ombati C, 'Police: why post-election violence cases cannot be prosecuted in Kenya', *Standard Newspaper*, April 7, 2016.
[243] Ombati C, 'Police: why post-election violence cases cannot be prosecuted in Kenya', 2016.

are available to the public through various publishing platforms, including online.[244] The rationale behind the failure to centralise the publication of judicial pronouncements by subordinate courts is that, the precedent from such courts is not binding.

The other challenge that hindered prosecutions of perpetrators of the PEV was the lack of proper identification of the suspects.[245] Consequently, most cases were disposed of by way of public inquest, that is, a trial without an accused person.[246] The following is a summary of the notable cases related to the 2007-2008 PEV that were determined:

i. Republic vs. Mosobin Sot Ngeiywa and Japheth Simiyu Wekesa

In this case, the accused persons were convicted of murder under Section 203 as read with Section 204 of the Penal Code. [247] They were sentenced to death on Count 1, while sentences for Counts 2, 3, and 4, also for murder, were held in abeyance, due to the imposition of the death sentence in Count 1.[248] The case involved multiple victims and acts of violence, including the burning of houses and killings during the 2007-2008 PEV. [249]

This case is significant as one of the few successful murder prosecutions arising from the 2007–2008 post-election violence and further illustrates the gravity of the crimes committed during that period.

ii. Republic vs. Edward Kirui

This case is a pivotal example of the challenges faced in prosecuting state agents for crimes committed during Kenya's 2007–2008 PEV. On January 16, 2008, in Kisumu's Kondele area, two unarmed demonstrators, George William Onyango and Ismael Chacha, were fatally shot.[250] A KTN news crew captured footage of a lone police officer shooting the two individuals, which led

[244] http://kenyalaw.org/kl/, retrieved on 4th March, 2020.
[245] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 15.
[246] Report of the multi-agency taskforce of the 2007/2008 post-election violence related cases, 21.
[247]Kitale 811/30/2008, Kitale HRCC NO. 19 OF 2008, *Mosobin Sot Ngeiywa & another v Republic* [2016] KECA 106 (KLR).
[248] *Mosobin Sot Ngeiywa & another v Republic* [2016] KECA 106 (KLR).
[249] *Mosobin Sot Ngeiywa & another v Republic* [2016] KECA 106 (KLR).

[250] *Republic v Edward Kirui* [2010] KEHC 3656 (KLR).

to the arrest and prosecution of police officer Edward Kirui on two counts of murder under Section 203 as read with Section 204 of the Penal Code.[251]

During the trial at the High Court in Nairobi, the prosecution presented video evidence and witness testimonies aiming to establish Kirui's culpability.[252] However, the defense challenged the identification of Kirui as the shooter, citing inconsistencies in witness accounts and procedural lapses in the investigation.[253] On June 21, 2012, the High Court acquitted Kirui, citing insufficient evidence to conclusively link him to the shootings.[254]

The acquittal sparked public outcry and was perceived by many as a failure of the justice system to hold state agents accountable.[255] The Director of Public Prosecutions appealed the decision, and on October 17, 2014, the Court of Appeal partially allowed the appeal, ordering that Kirui be arrested and retried for murder.[256]

This case underscores the complexities involved in prosecuting law enforcement officers for crimes committed, especially in contexts marked by political unrest. It highlights the necessity for thorough investigations, proper evidence handling, and the challenges in balancing state authority with individual accountability.

iii. Republic vs. Stephen Kiprotich Leting & 3 Others

This case stands out as one of the most significant prosecutions arising from the 2007–2008 post-election violence in Kenya. The case involved the tragic attack on the Kiambaa Church in Eldoret on January 1, 2008, in which approximately 30 people were burned to death after a mob set the church ablaze. [257] The accused, Stephen Kiprotich Leting, Emmanuel Kiptoo Lamai, Clement Kipkemei Lamai, and Julius Nyongio Rono, were jointly charged with multiple counts of murder

[251] *"Not yet uhuru for murder suspect Edward Kirui"*, Daily Nation, 27 October, 2014.
[252] *Republic v Edward Kirui* [2010].
[253] *Republic v Edward Kirui* [2010].
[254] *Republic v Edward Kirui* [2010]
[255] *"Not yet uhuru for murder suspect Edward Kirui"*, 2014, Nation.
[256] *"Not yet uhuru for murder suspect Edward Kirui"*, 2014, Nation.
[257] Nakuru HCCR No. 34 of 2008, *Republic v. Stephen Kiprotich Leting & 3 Others* [2008] KLR.

under Section 203 as read with Section 204 of the Penal Code.[258] The trial was held at the High Court in Nakuru and presided over by Justice David Kenani Maraga.[259]

Despite acknowledging the gruesome and organized nature of the attack, Justice Maraga found that the prosecution failed to link the accused to the crime beyond reasonable doubt. In his judgment delivered on April 30, 2009, he criticized the state for producing only four suspects out of a crowd reportedly numbering up to 4,000.[260] He questioned the quality of the investigation and the lack of a coherent theory explaining the accused's roles in the massacre.[261] Due to these evidentiary gaps, all four accused were acquitted.

The acquittals in this case highlighted serious shortcomings in the state's investigative and prosecutorial efforts. The judgment brought to the fore the broader systemic failures of Kenya's criminal justice system to hold perpetrators accountable for post-election atrocities. These failures included poor evidence collection, inadequate witness protection, and lack of coordination among state agencies.[262] Ultimately, the outcome of the Kiambaa Church case became emblematic of the broader challenges in securing justice for victims of the post-election violence and contributed to public disillusionment over the state's capacity or willingness to prosecute politically and ethnically charged crimes.

3.6 The Failures in Prosecuting the PEV Crimes in Kenya

As demonstrated in chapter two, to a certain extent, the existing legal framework enabled domestic prosecution of the crimes perpetrated during the PEV. Due to the *ex post facto* nature to which the International Crimes Act, No. 16 of 2008 was enforced, such prosecution was, or is, only possible through the application of domestic law in force at the onset of the PEV. However, the willingness and ability of the existing institutions, at the time, to institute criminal charges against those who were most responsible for the perpetration of international crimes, proved problematic.[263] As such

[258] *Republic v. Stephen Kiprotich Leting & 3 Others* [2008] KLR.
[259] *Republic v. Stephen Kiprotich Leting & 3 Others* [2008] KLR.
[260] *Republic v. Stephen Kiprotich Leting & 3 Others* [2008] KLR.
[261] *Republic v. Stephen Kiprotich Leting & 3 Others* [2008] KLR.
[262] *Republic v. Stephen Kiprotich Leting & 3 Others* [2008] KLR.
[263] Materu SF, The post-election violence in Kenya, 101.

the failures in prosecuting and ensuring accountability for post-election crimes was attributable to many factors including the following:

3.6.1 Impunity

Kenya's post-colonial governance has been marked by the entrenchment of structures, which prioritized control and suppression over accountability and inclusion.[264] Rather than dismantling these oppressive institutions at independence, over time, impunity became normalized, particularly for state actors and political elites, creating a system where accountability was selective and often absent. [265] This culture of impunity not only shielded perpetrators of human rights abuses and corruption but also undermined public confidence in the rule of law.

Compounding this problem was the politicization of ethnicity, which became a key tool for mobilization and state patronage.[266] Despite the scale and brutality of PEV, prosecutions have been rare and largely ineffective, reinforcing the perception that violence is a viable political strategy.[267] In this context, Kenya's failure to address historical injustices and enforce meaningful accountability has deepened social divisions and weakened democratic governance, leaving the country vulnerable to recurring cycles of unrest and inequality.[268]

3.6.2 Challenges Related to Obtaining evidence

It is widely acknowledged that the investigation and prosecution of international crimes cannot be simply compared to ordinary criminal proceedings.[269] Judge Kaul's dissenting opinion on the admissibility of the situation in Kenya to the ICC demonstrated that there is a certain threshold on the quantitative and qualitative requirement in respect to investigation and prosecution of international crimes.[270] This decision, though was not the view of the majority, illustrates that the amount of evidence owing to the large scale, widespread or systematic perpetration of the crimes

[264] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[265] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[266] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[267] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[268] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[269] Stahn C, 'Fair and effective investigation and prosecution of international crimes', 9.
[270] *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-3).

in question is pivotal to the admissibility of a situation before a tribunal or court vested with the mandate of adjudicating international crimes.

Another significant obstacle is the volatile security environment in which such crimes typically occur.[271] Investigators often operate in post-conflict or active conflict zones, where access is limited, infrastructure is destroyed, and witnesses or victims may have fled, been displaced, or be unwilling to cooperate due to fear of reprisals.[272]

In addition, loss or destruction of physical evidence in mass atrocity settings, complicates verification of allegations.[273] Delays in accessing crime scenes can result in tampering, and in some instances, state actors may be complicit in erasing evidence.[274] The lack of cooperation from national authorities, especially where the state may be implicated in the crimes under investigation, creates additional hurdles for international investigators who rely on local enforcement to collect documents, make arrests, or facilitate access.[275]

3.6.3 Witness and Victims' Intimidation and Protection

Victims and witnesses of international crimes, particularly sexual violence or ethnically charged atrocities, may fear retaliation from perpetrators, many of whom remain in power or maintain influence within their communities.[276] The ICC and other tribunals have recognized that this fear can lead to reluctance in providing testimony or outright recanting of earlier statements.[277] In the Kenyan cases before the ICC, for instance, the withdrawal of witnesses and reports of coercion and threats severely undermined the prosecution's ability to proceed, ultimately contributing to the collapse of the cases.[278] The collapse of the ICC cases, partly due to witness interference and lack of cooperation, has been seen as a setback for justice and has raised concerns about the

[271] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[272] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[273] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[274] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[275] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[276] ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future, 2016.
[277] ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, 2016.
[278] ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, 2016.

effectiveness of international mechanisms in holding powerful individuals accountable, particularly, in Kenya.

3.6.4 Complexity of Establishing Command Responsibility

Pursuant to Article 7 of the Rome Statute, the existence of a state or organizational policy, necessitates substantial documentary evidence or insider testimony, resources that are often difficult to obtain in politically sensitive contexts.[279] These factors collectively underscore the intricate and high-stakes nature of investigating international crimes and reinforce Judge Kaul's concerns about the evidentiary rigor required at the admissibility stage before international tribunals.[280] The challenges in meeting the evidentiary standards for crimes against humanity at the international level have significant implications for domestic accountability.[281] However, in contexts where the State is unwilling or unable to prosecute, often due to political interference or lack of resources, victims are left without recourse to justice.[282] This gap highlights the importance of strengthening domestic legal systems and ensuring their independence, to effectively investigate and prosecute international crimes, thereby complementing the role of international tribunals.

3.7 Conclusion

The analysis in this chapter demonstrates that, despite numerous challenges, Kenya made efforts to pursue domestic accountability for crimes committed during the 2007–2008 PEV. In the immediate aftermath, institutions such as the AG's Office, Director of Public Prosecutions, and later the Multi-Agency Taskforce undertook wide-ranging initiatives to investigate, review, and prosecute PEV-related offences. These included the review of over 6,000 cases, some of which proceeded to court and resulted in convictions. The promulgation of the 2010 Constitution and the subsequent operationalization of an independent Director of Public Prosecutions further strengthened the institutional framework necessary for the pursuit of justice. These reforms helped

[279] Lest we Forget: the faces of impunity in Kenya, *Kenya Human Rights Commission*, 2011.
[280] ICC-01/09-01/11-2, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's *"Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang"*, 2011.
[281] Stahn C, *A Critical Introduction to International Criminal Law,* 121.
[282] Stahn C, *A Critical Introduction to International Criminal Law,* 121.

professionalize prosecution, provided clarity of mandate, and laid the groundwork for a more victim-centered and independent criminal justice process.

While the outcomes may not have matched the scale of the crimes or the public expectation for justice, the domestic legal system demonstrated a degree of willingness, albeit constrained, to confront complex and politically sensitive crimes. The prosecution of cases such as *Republic v. Mosobin Sot Ngeiywa & Another* illustrate that, under certain circumstances, it was indeed possible to hold individuals accountable through Kenya's existing legal frameworks. These efforts are further reflected in the review of sexual and gender-based violence cases, where, despite significant evidentiary and logistical hurdles, a number of prosecutions were initiated and some resulted in convictions.

Ultimately, Kenya's approach affirms the principle that domestic systems can, and should, be the primary forum for accountability, provided they are supported by strong institutions, sound legal framework and adequate resources. The country's experience serves as a learning opportunity on the value of building and investing in local capacity for the adjudication of mass atrocity crimes.

Chapter 4: Domestic Accountability for International Crimes in Practice: Lessons from Uganda

4.1 Introduction

Uganda's pursuit of domestic accountability for international crimes through its International Crimes Division (ICD) of the High Court represents an ambitious effort to localize justice for mass atrocities. However, this approach has encountered significant structural, legal, and operational challenges that undermine its effectiveness. As Elise Keppler observed in her analysis of Uganda's ICD, while the establishment of specialized domestic mechanisms for international crimes is commendable, their success depends on overcoming systemic barriers, including political interference, procedural delays, and contradictions in legal frameworks.[283]

These challenges offer critical lessons for Kenya as it considers strengthening its own domestic accountability mechanisms. Uganda's experience demonstrates that without clear legislative grounding, judicial independence, and harmonized legal frameworks, even well-intentioned specialized courts risk becoming ineffective or politically compromised. Addressing these shortcomings will be essential for any domestic system seeking to deliver credible justice for international crimes.

This chapter examines Uganda's domestic legal framework for prosecuting international crimes and the establishment and operation of the ICD. It analyzes Uganda's relevant treaties, constitutional provisions, and statutory instruments, and assesses key case law that demonstrates the application of international criminal law at the national level. Drawing from Uganda's experience, the chapter identifies lessons that Kenya can adopt to strengthen its own domestic accountability mechanisms for international crimes.

4.2 Uganda's Legal Framework on Accountability for International Crimes

The supporting legal framework on domestic accountability in Uganda may be categorised as follows: treaties, constitutional provisions, and supplementing statutory law. Uganda is also a dualist state - international laws and treaties require domestication for enforcement.[284] In addition,

[283] Keppler E, 'Delivering on Domestic Justice in Africa for Atrocity Crimes', *International Commission of Jurists*, 2022.
[284] Tadeo W, 'Effecting complementarity: challenges and opportunities: a case study of the International Crimes Division of Uganda', *Forum on International and Transitional Justice* (2012), 6.

the judiciary in Uganda has, in some instances, relied on customary international law and ratified, but *undomesticated,* treaties to guide judicial interpretation, especially in cases involving international crimes.

4.2.1 Treaty Law

The treaties governing Uganda's domestic enforcement of international criminal law are predominantly three (3) – the 1949 Geneva Conventions, the Rome Statute and the Vienna Convention on the Law of Treaties.

Uganda is a State Party to four (4) 1949 Geneva Conventions.[285] In October 1964, Uganda domesticated the Conventions vide the Geneva Conventions Act, 1964, Cap 363. The Geneva Conventions Act, 1964 conferred universal jurisdiction upon Uganda, to try all grave breaches under the Geneva Conventions in an International Armed Conflict, irrespective of nationality and location of perpetration.[286] In March 1991, Uganda became a state party to Additional Protocol II to the Geneva Conventions, 1977, the Protocol has never been domesticated to date.[287]

The fact that the Geneva Conventions were domesticated in 1964 paves way for discourse into whether Uganda had the requisite legal framework to prosecute war crimes. The only hinderance to this possibility was whether or not the conflict in Uganda had the status of an international armed conflict. Uganda's ICC Act, 2010 and the GCA, 1964 expressly provide that the prevailing enactments only apply to international armed conflicts.[288] Uganda's judiciary on the other hand has demonstrated a progressive approach and commitment to upholding international legal obligations, exemplified in a few landmark cases, despite the dualist nature of enforcement of international treaties.

An illustrative example of Uganda's commitment to the enforcement of international criminal law domestically is the case of *Thomas Kwoyelo v. Uganda*.[289] Kwoyelo was charged with grave breaches of the Geneva Conventions.[290] The case exemplified Uganda's efforts to fulfil its

[285] Geneva Conventions Act, 1964, Laws of Uganda.
[286] Section 2, Geneva Conventions Act, 1964, Laws of Uganda.
[287] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977.
[288] Human Rights Watch, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division*, 2012.
[289] *Uganda v Thomas Kwoyelo,* Constitutional Appeal 1 of 2012, [2015] UGSC 5.
[290] *Uganda v Thomas Kwoyelo,* [2015].

international obligations by prosecuting serious crimes under international law, reinforcing the applicability of international treaties in domestic prosecutions. The Court emphasized that Uganda's Constitution does not prevent the use of unwritten international norms and that, at the time of the alleged offenses, crimes such as those against humanity and serious violations of Common Article 3 were clearly established in both treaty and customary international law.[291] As such, the accused could reasonably have foreseen being held individually responsible for these acts.

The case of *Nsimbe Holdings Ltd v. Attorney General & Anor* is another significant Ugandan decision that underscores the enforcement of international treaty obligations within the domestic legal framework, particularly concerning accountability for international crimes.[292] The High Court acknowledged that Uganda's international obligations, particularly under the Vienna Convention on the Law of Treaties, cannot be disregarded.[293] The Court further emphasized that Uganda cannot invoke its internal laws to justify non-compliance with its treaty obligations, reinforcing the principle that ratified treaties have a binding effect on the state.[294]

Similarly in the case of *Uganda v. Kato & 19 others* the principal issue that was determined was Uganda's domestic enforcement of its international obligations relative to the Rome Statute, and how the latter may be applied in instances where there is a lacuna in the domestic law.[295] In this pre-trial ruling, the Ugandan ICD addressed the standard of proof required for confirming charges in the absence of explicit guidance in domestic procedural law.[296]

Justice Susan Okalany, presiding over the case, noted that the ICD Rules and the High Court (International Crimes Division) Practice Directions, 2011, did not stipulate a specific standard of proof for pre-trial hearings.[297] To address this gap, the court adopted the "substantial grounds to believe" standard from Article 61(7) of the Rome Statute.[298] This approach demonstrated the

[291] *Uganda v Thomas Kwoyelo,* [2015].
[292] *Nsimbe Holdings Ltd v. Attorney General & Another,* Constitutional Petition No. 2 of [2006].
[293] *Nsimbe Holdings Ltd v. Attorney General & Another,* [2006].
[294] *Nsimbe Holdings Ltd v. Attorney General & Another,* [2006].
[295] *Uganda v. Kato & 19 Others* (Session Case No. 4 of 2021) [2022], UGHCICD 5.
[296] *Uganda v. Kato & 19 Others,* [2022].
[297] *Uganda v. Kato & 19 Others,* [2022].
[298] *Uganda v. Kato & 19 Others,* [2022].

court's willingness to incorporate international treaty provisions into domestic proceedings to ensure the effective prosecution of international crimes.

In the case of *Attorney General v. Susan Kigula & 417 Others*, the Supreme Court referred to international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), to inform its interpretation of its statutory provisions.[299] This case illustrates the progressive nature of the judiciary's, in particular its apex court, willingness to consider international treaties in its interpretation of law and international obligations, even if they have not been formally incorporated into domestic law.

In January 2009, Uganda ratified the Agreement on Privileges and Immunities of the International Criminal Court, there is however no domesticating statute available in Uganda's schedule of laws. The ICC Act, 2010 expressly provides that the president in Uganda shall not be liable to any criminal or civil proceedings whilst in office, he or she may however be liable to prosecution upon end of tenure or for any other reason, ceases to hold office.[300] This provision contradicts that of the Rome Statute which expressly states that immunity or official capacity is not a bar to criminal prosecution.[301] In Kenya, the ICA, 2008 provides that immunities and special procedural rules pegged on an individual's official capacity shall not be a bar to criminal proceedings.[302]

4.2.2 Constitutional Framework

The Constitution of Uganda, 1995 (revised in 2005) does not have an express provision on the applicability of customary international law, the same is subject to judicial precedent and interpretation. Uganda gained independence from British rule in October, 1962; it has had three (3) constitutional regimes – 1962, 1967 and 1995.[303] Under the 1962 constitutional framework, there was no express provision on the applicability of international law or its enforcement.[304] This constitutional regime mainly served to distribute ruling powers mainly amongst four (4) kingdoms, that is Buganda, Ankole, Bunyoro and Toro.[305] Of importance, was Article 82 of the 1962

[299] *Attorney General v. Susan Kigula & 417 Others*, Constitutional Appeal No. 3 of 2006.
[300] Section 25, International Criminal Court Act, 2010, Laws of Uganda.
[301] Article 27, Rome Statute, 2002.
[302] Section 27, International Crimes Act, 2008, Laws of Kenya.
[303] Constitutionnet, *Constitutional history of Uganda*, 2016.
[304] Constitution of Uganda, 1962.
[305] Constitutionnet, *Constitutional history of Uganda*, 2016.

Constitution which established the ODPP, whose powers were to institute, discontinue and take over criminal proceedings, save for court martial trials.[306]

In 1988, the Uganda Constituent Assembly was established paving way for the promulgation of the 1995 Constitution of Uganda, presently in force, and repealed the 1967 Constitution.[307] Unlike its predecessors, the 1995 Constitution had a number of provisions on the enforcement of international law.

Article 28 of the Constitution of Uganda plays a critical role in upholding the rights of individuals prosecuted for international crimes before domestic courts. It guarantees procedural fairness, ensuring that accused persons are afforded due process, including the right to a fair, speedy, and public hearing before an impartial tribunal.[308] The provision also enshrines the presumption of innocence, which aligns with international human rights standards such as Article 14 of the ICCPR, reinforcing the foundational principle that an accused person is innocent until proven guilty. Furthermore, clause (12) of Article 28 supports the principle of legality (*nullum crimen sine lege*), stipulating that no person shall be convicted of a criminal offence unless the offence is defined and the penalty prescribed by law at the time of its commission. This clause is particularly significant in the context of international criminal law, where retrospective application of legal provisions is strictly prohibited.

Article 141 of the 1995 Constitution gives the Chief Justice and the Principal Judge, acting under delegated authority, the power to establish a court. It was pursuant to this article that the War Crimes Division (presently the ICD) was established. Article 123 of the Constitution, 1995 provides that the discretion to execute treaties, conventions and agreements is vested in the president or any person delegated to do so by the president. Article 287 affirmed that Uganda would still be a state party to any treaties or agreements in force prior and post 1967. The latter Article reinforces the continuity of treaty obligations, ensuring that treaties Uganda had already ratified before 1995 remain binding and operational unless expressly repealed or denounced. This includes the Geneva Conventions of 1949 and other treaties Uganda was a party to prior to 1995.

[306] Constitutionnet, *Constitutional history of Uganda*, 2016.
[307] Constitutionnet, *Constitutional history of Uganda*, 2016.
[308] Article 28, Constitution of Uganda, 1995.

This provision prevents a legal vacuum or the need to *re-ratify* earlier treaties upon the adoption of a new constitutional order.

Article 139(1) vests the High Court (under which the ICD operates) with unlimited original jurisdiction in all matters, giving it the authority to adjudicate serious crimes, including those of an international nature. Additionally, Article 141 allows for the establishment of divisions of the High Court, which provided the legal foundation for the creation of the ICD in 2008. This enables the Ugandan judiciary to enhance institutional capacity for handling complex international crimes within the domestic legal system.

While Uganda's Constitution does not expressly state that international law is self-executing, Ugandan courts have interpreted constitutional provisions in line with international legal standards. Illustratively in the case of *Thomas Kwoyelo v Attorney General*, the Constitutional Court considered whether Kwoyelo's rights had been violated by the denial of amnesty.[309] Although the Court initially ruled in his favour, the Supreme Court later overturned the decision, affirming the legality of prosecuting international crimes domestically and the non-applicability of amnesty under Uganda's constitutional order.[310] This case affirmed Article 141's role in enabling the ICD's jurisdiction and clarified the limits of amnesty in the face of serious international crimes.

Additionally, in *Uganda Law Society v. Attorney General*, the Constitutional Court recognized the role of international human rights instruments in the interpretation of constitutional provisions.[311] The Court emphasized that although Uganda is a dualist state, international obligations that align with the Constitution can be considered in adjudicating domestic cases, thereby reinforcing constitutional openness to international law.[312] This recognition is critically important for ensuring domestic accountability for international crimes, because it strengthens the normative framework within which accountability for international crimes can be pursued domestically.

[309] *Thomas Kwoyelo v Attorney General*, Constitutional Petition No. 036 of 2011.
[310] *Attorney General v. Thomas Kwoyelo*, Constitutional Appeal No. 01 of 2012.
[311] *Uganda Law Society v. Attorney General* (Constitutional Petition No. 2 of 2002).
[312] *Uganda Law Society v. Attorney General,* [2002].

4.2.3 Statutory Framework

In addition to the Geneva Conventions Act, Cap 363, ICC Act, 2010 and the Constitution of Uganda, 1995 (revised in 2005) the other principal statutes applicable to the enforcement of international law in Uganda are the Penal Code Act, Cap 120, Evidence Act, Cap 6, Criminal Procedure Code Act, Cap 116, Trial on Indictment Act, Cap 23, the Judicature Act, Cap 13 and the Amnesty Act, Cap 294.[313] In addition, trials before the ICD are conducted pursuant to Uganda's Rules of Procedure and Evidence, with due consideration to certain provisions espoused in the Trial on Indictments Act and the Judicature Act.[314]

Similar to the Kenyan Penal Code, Cap 63 Uganda's Penal Code is the substantive law that codifies criminal conduct. Offences under the Code are categorised as offences against public order and state, morality, property, individuals and provisions on criminal responsibility.[315] Pursuant to section 19, the Act does not distinguish between direct perpetrators of a crime from aiders and abetters; both parties are considered principal offenders and the punishment applicable is not subject to variation. This provision is important due to the fact that there is no express recognition of command responsibility under the Penal Code. However, persons bearing responsibility for the perpetration of crimes, and more particularly international crimes, may be prosecuted not only under domesticated international instruments, but also under domestic law. Therefore, much like the Kenyan Penal Code, persons bearing the greatest responsibility for the perpetration of international crimes can be prosecuted not only under the International Crimes Act, but also under the Penal Code.

A stark deviation of the Ugandan Penal Code from that in Kenya is the fact that Uganda does not have a specific legislation on sexual offences, offences such as rape and defilement are codified in the Penal Code, as offences against morality; whereas in Kenya sexual offences are codified under the Sexual Offences Act, Cap 63A. In 2019, a Sexual Offences Bill was passed in Uganda's parliament, only to be vetoed by the president.[316]

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[313] International Crimes Division, Judiciary, Republic of Uganda, https://judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html, retrieved on 10th March, 2025.
[314] International Crimes Division, Judiciary, Republic of Uganda.
[315] Uganda's Penal Code Act of 1950, Chapter 128, Laws of Uganda.
[316] Parliament Watch, *'Museveni rejects new law on sexual offences'*, 2021.

Much like Kenya's Criminal Procedure Code and the Evidence Act, Uganda's rules on procedure and evidence before the ICD are substantively informed by the two (2) pieces of legislation, more particularly before the lower courts. Uganda's Criminal Procedure Code Act regulates the manner in which arrests, searches, seizures, appeals and revisions.[317] The Evidence Act on the other hand provides the manner in which facts and other corroborating factors may be adduced during trial, this includes, admission of facts, documents, statements by witnesses and their examination.[318] Unlike in Kenya, the Ugandan Evidence Act does not have any express provisions on submission of computer generated or digital evidence during trial, neither does the ICC Act, 2010 contain a proviso on digital evidence. This gap is one that is likely to impede admission of evidence before the courts due to the continuous evolution of the platforms for perpetration of crime in digital spaces; additionally, due to the grave nature of international crimes and vastness of geographic coverage, digital solutions such as testifying online or admission of computer-generated documents contribute significantly to the overall pursuit for accountability.[319]

The Trial on Indictment Act, Cap 25 determines the jurisdiction of the High Court over criminal matters and the conduct of trials before it. In Uganda, indictments apply only to criminal cases within the jurisdiction of the High Court, similar to an 'information' in Kenya. In Uganda, the crimes that fall under the jurisdiction of the High Court include terrorism, piracy, cattle rustling, offences under the Firearms Act, rape, aggravated defilement, corruption and other related offences.[320] The Act further legislates the conduct of proceedings before the High Court pertaining to powers of the High Court related to issuance of warrants of arrest, sentencing including the Director of Public Prosecutions' power to institute and discontinue proceedings by entering a *nolle prosequi*.[321] The equivalent of this legislation in Kenya is a combination of the High Court (Practice and Procedure) Rules issued vide Gazette Notice 1356 of 1952, supplemented by the Criminal Procedure Code, Cap 75 and the High Court (Organisation and Administration) Act, Cap 8C.

[317] Uganda's Criminal Procedure Code Act of 1950, Chapter 116, Laws of Uganda.
[318] Uganda's Evidence Act of 1909, Chapter 8, Laws of Uganda.
[319] Hellwig K, 'The potential and the challenges of digital evidence in international criminal proceedings, *International Criminal Law Review* (2021), 1-3.
[320] Section 16, Trial on Indictment Act, 1971, Laws of Uganda.
[321] Section 133, Trial on Indictment Act, 1971, Laws of Uganda.

The Judicature Act in both Kenya and Uganda is the governing legislation on the mode of exercise of jurisdiction in the High Court, Court of Appeal, subordinate courts and for Uganda, the Supreme Court. The Ugandan Judicature Act is notably more detailed than that of Kenya, going as far as prescribing remedies and modality of court sittings.[322]

Uganda's Amnesty Act of 2000 authorises the pronouncement of amnesty for "war-like" offences perpetrated by Ugandans. This legislation is unique because unlike the Rome Statute and Kenya's International Crimes Act, 2008 amnesty is inapplicable to the perpetration of international crimes. Section 3(4) of the Amnesty Act provides that the Director of Public Prosecutions shall investigate all criminal cases and subsequently take the necessary steps to ensure that amnesty is appropriately meted out in favour of all those who renounce criminal activities. In Kenya, the Director of Public Prosecutions has the autonomy to decide whether or not to charge individuals; this power does not extend to a grant of amnesty.[323]

4.3 Establishment of the International Crimes Division of the High Court in Uganda

In January, 2004 the ruling government referred its situation to the ICC, also known as a self-referral.[324] The ICC undertook investigations and focused mainly on the alleged war crimes and crimes against humanity perpetrated during the armed conflict between the LRA and the national authorities subsequent to the ratification of the Rome Statute.[325] In December 2023 the ICC Prosecutor, Karim Khan, announced that the investigation into the situation in Uganda, particularly, Northern Uganda had been concluded.[326]

Prior to the conclusion of investigations, the ICC issued warrants of arrest against the alleged leadership of the LRA in 2005, that is, Dominic Ongwen, Raska Lukwiya, Okot Odhiambo, Vincent Otti and Joseph Kony.[327] Mr Ongwen surrendered before the ICC in 2015. The ICC terminated proceedings against Okot Odhiambo, Vincent Otti and Raska Lukwiya following their demise; the other two (2) suspects remain at large to date.[328]

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[322] Section 18, Judicature Act, Cap 13 of 1966, Laws of Uganda.
[323] Article 157, Constitution of Kenya, 2010, Laws of Kenya.
[324] https://www.icc-cpi.int/uganda, retrieved on 20th March, 2025.
[325] ICC-02/04, *Situation in Uganda*, International Criminal Court, retrieved on 5th March, 2025.
[326] ICC-02/04, *Situation in Uganda*, International Criminal Court, 2025.
[327] ICC-02/04, *Situation in Uganda*, International Criminal Court, 2025.
[328] ICC-02/04, *Situation in Uganda*, International Criminal Court, 2025.

The indictment of the five (5) suspects culminated into peace talks between the government of Uganda and LRA representatives in Juba, Southern Sudan held between 2006 and 2008.[329] During the peace talks, it became apparent that the cornerstone for justice and reconciliation was to pursue accountability for the crimes allegedly committed after July 2002.[330] Though the Agreement was never implemented fully by the Ugandan government or the LRA due to disagreement of terms, the peace talks culminated into the establishment of a distinct division within the High Court of Uganda, thus leading to the creation of the International Crimes Division of Uganda *(previously known as the War Crimes Division of the High Court)*.[331] In addition, the government of Uganda was tasked to create appropriate institutions of justice and corresponding legal framework to undertake domestic prosecutions of perpetrators of crimes within the jurisdiction of the Ugandan ICD.[332]

ICC Act of 2010 conferred jurisdiction upon the Ugandan ICD over genocide, crimes against humanity and war crimes. Vide Legal Notice No. 10 of 2011 under the ICD's Practice Directions, the jurisdiction of the court was extended to terrorism, piracy, human trafficking and other international crimes provided for under Uganda's penal law, international conventions and the Geneva Conventions Act, Cap 363.

The inaugural trial before Uganda's ICD was that against Thomas Kwoyelo in July 2011. Kwoyelo was allegedly an LRA leader. Pursuant to the Amnesty Act, 2000 he applied for amnesty, subject to renouncing the rebellion.[333] The Constitutional Court in Uganda declared that Kwoyelo had the right to be granted amnesty; the ruling was however overturned on appeal to the Supreme Court.[334] The charges against Kwoyelo were instituted pursuant to Common Article 3 of the Geneva Conventions, 1949, Uganda's Penal Code and customary international law.[335] In August 2024, Kwoyelo was convicted for crimes against humanity, war crimes and other predicate offences.[336]

[329] KPTJ, 'Domestic prosecution of international crimes', 8.
[330] KPTJ, 'Domestic prosecution of international crimes', 8.
[331] KPTJ, 'Domestic prosecution of international crimes', 9.
[332] KPTJ, 'Domestic prosecution of international crimes', 9.
[333] Kasande S, 'Uganda's long road to accountability: the Kwoyelo verdict and lessons for future international crimes prosecution', *ICTJ*, (2024).
[334] Kasande S, 'Uganda's long road to accountability'.
[335] Kasande S, 'Uganda's long road to accountability'.
[336] Kasande S, 'Uganda's long road to accountability'.

4.3.1 Jurisdiction and Structure of Uganda's ICD

In 2011, the Chief Justice of Uganda issued Practice Directions for enforcement before the ICD.[337] The Directions conferred jurisdiction upon the ICD to hear and determine all crimes related to war crimes, genocide, crimes against humanity, human trafficking, piracy, terrorism and any other prescribed offences under the Geneva Conventions Act, Cap 363 ICC Act, 2010 and any other law prescribing penal sanctions.[338] The ICD has the status of a High Court within the judiciary, and it is not autonomous from Uganda's judicial system and the proceedings before it are open to both the public and the media.[339]

Section 4 (1) of the High Court (International Crimes Division) Practice Directions, 2011 provides that the Court shall have a minimum of three (3) judges. The decisions by the ICD may be appealed against before the Court of Appeal and thereafter, the Supreme Court.[340] The decision by the Supreme Court shall be final and binding. The administration of the ICD is overseen by an appointed judge, also the head of the Division, who works in unison with a registrar of the High Court.[341] The judges are also assigned legal assistants.[342] Given the fact that adjudication over international crimes is periodic, the judges also adjudicate over other reported cases.

Unlike the ICC, there is no specialised administrative or legal framework for protection and participation of witnesses or victims, however Section 9 of the Directions establishes a Court Users' Committee to ensure adequate representation within the Division.

The Director of Public Prosecutions in Uganda has an established specialised prosecution unit within the ICD, although this is not expressly provided for under the Directions.[343] There are at least six (6) prosecutors assigned to the unit; this number is reported to vary depending on the exigency of work at the ICD.[344]

[337] Legal Notices Supplement 5, The High Court (International Crimes Division) Practice Directions, 2011, Uganda Legal Notice 10 of 2011.
[338] Section 6, Legal Notice 10 of 2011.
[339] Section 8, Legal Notice 10 of 2011.
[340] Section 20, Judicature Act, Cap 13, Laws of Uganda.
[341] Section 3, 5, High Court (International Crimes Division) Practice Directions, 2011.
[342] Section 2, High Court (International Crimes Division) Practice Directions, 2011.
[343] KPTJ, 'Domestic prosecution of international crimes', 10.
[344] KPTJ, 'Domestic prosecution of international crimes', 10.

The Criminal Investigation Department (CID), within Uganda's police force has the sole mandate to conduct investigations into the perpetration of international crimes.[345] Though lacking a specific framework on the modality of conducting investigations, administrative arrangements within the force are made to ensure focal senior investigators conduct investigations into ICD related crimes.[346] The investigation into international crimes is however not exclusively limited to the focal police officers.

In Uganda, persons accused of capital offences are guaranteed a state appointed defence counsel. Capital offences are those in which the punishment is death.[347] The appointment of a defence counsel is done by the state and it is also cost-free by virtue of the 'state brief' system.[348] The ICD receives its funding from the government of Uganda as well as international donors.[349]

4.4 Case Law on Uganda's Enforcement of Domestic Accountability

The aftermath of the establishment of the ICD was that a number of cases related to the armed conflict in Uganda were investigated and prosecuted domestically. In some instances, the ICC did not have the jurisdiction to try some cases due to the fact that the crimes alleged were reported to have been perpetrated prior to the establishment of the ICC. Consequently, such cases fell under the jurisdiction of the ICD. The following is a summary of the two (2) international crimes' cases that have been adjudicated before the ICD.

4.4.1 *Uganda v Thomas Kwoyelo*[350]

Thomas Kwoyelo was allegedly a former rebel commander of the LRA. It was alleged that Kwoyelo had been conscripted into the LRA as a child soldier, his trial was unique because considerations were made on whether he should have been treated as a victim as opposed to a perpetrator.[351] His trial marked the first of the core international crimes to be prosecuted before the ICD. The ICC lacked the jurisdiction to adjudicate over his case because the reported crimes had been perpetrated prior to 2002, before establishment of the Court. The accused person was

[345] KPTJ, 'Domestic prosecution of international crimes', 10.
[346] KPTJ, 'Domestic prosecution of international crimes', 10.
[347] KPTJ, 'Domestic prosecution of international crimes', 10.
[348] KPTJ, 'Domestic prosecution of international crimes', 10.
[349] KPTJ, 'Domestic prosecution of international crimes', 11.
[350] *Uganda v Kwoyelo Thomas alias Latoni* (Criminal Session Case 2 of 2010) [2012] UGHCICD 4.
[351] *Uganda v Kwoyelo Thomas alias Latoni*, [2012].

charged in May 2016 before the ICD with war crimes and crimes against humanity, among other predicate offences, reportedly perpetrated by the LRA.[352]

The most dire challenge affecting the trial was the inordinate amount it took to conclude the proceedings. Kwoyelo was convicted and sentenced fifteen (15) years after his arrest. Some of the factors that contributed to the delay involved the unprecedented nature of the trial; Kwoyelo's application for amnesty, an issue that was determined before the Supreme Court; as well as operational and administrative challenges.

The case of *Uganda v. Thomas Kwoyelo* is pivotal in understanding the enforcement of international criminal law within Uganda's domestic legal framework. Illustratively, the Supreme Court of Uganda addressed the interplay between the Amnesty Act and the prosecution of international crimes in its 2015 decision, whereby it held as follows:

> *"The Amnesty Act is therefore not inconsistent with the Constitution... it does not grant blanket amnesty for all crimes. The Geneva Conventions Act still applies, and the indictment of the respondent under Article 147 thereof does not violate the Constitution of Uganda."* [353]

This affirmed that while the Amnesty Act provides for amnesty in certain circumstances, it does not preclude the prosecution of serious international crimes. Further, in a 2017 ruling, the ICD addressed objections regarding the applicability of customary international law. The court stated:

> *"The Constitution of Uganda does not prohibit the application of customary international law in Uganda's legal order and that to the contrary, it is open to the application of non-written law. Moreover, the offences charged... do not contravene the legality principle, because, at the time of their alleged commission, the said crimes were well-established bases for individual criminal liability both under treaty law and customary international law, thus giving the accused reasonable foreseeability."*[354]

This underscores the Court's recognition of customary international law as part of Uganda's legal system, particularly in prosecuting crimes against humanity and war crimes.

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[352] *Uganda v Kwoyelo Thomas alias Latoni*, [2012].
[353] *Uganda v Kwoyelo Thomas alias Latoni*, [2012].
[354] *Uganda v. Kwoyelo*, Criminal Case No. 002 of 2010, [2018] UGHCICD 2.

In October 2024, the ICD delivered its final judgment, convicting Kwoyelo on 44 counts, including murder, rape, and enslavement, and sentenced him to 40 years in prison.[355] The Court acknowledged his status as a former child soldier but emphasized the gravity of his crimes.

4.4.2 *Uganda v Jamil Mukulu*

Jamil Mukulu is an alleged rebel leader of the Allied Democratic Forces (ADF). In April 2015, he was arrested in Tanzania and extradited to Uganda to face trial for war crimes, Geneva Conventions Act breaches, terrorism and murder under Uganda's domestic law.[356] He is further reported to have orchestrated a rebellion against Uganda's government and caused terror amongst the people of Rwenzori in Uganda.[357] The matter is presently *subjudice* as at the date of this thesis.

4.5 Challenges in Pursuing Domestic Accountability for International Crimes in Uganda

Uganda's efforts on domestic accountability through the ICD have encountered significant obstacles. These challenges, which span legal, procedural, political, and operational dimensions, have hindered the effectiveness of the ICD. Below is a detailed outline of each key challenge.

4.5.1 Normative Contradictions in Uganda's Legal Framework

A fundamental challenge to Uganda's domestic accountability regime arises from unresolved tensions between its national legislation and international legal obligations. The ICC Act, 2010 preserves presidential immunity under Section 25, stipulating that the President "shall not be liable to any criminal or civil proceedings" while in office. This directly conflicts with Article 27(2) of the Rome Statute, which explicitly states that immunities cannot bar the Court's jurisdiction over heads of state. This normative contradiction creates a dual accountability gap that operates at both international and domestic levels. At the international level, Uganda's reservation undermines its obligations under the Rome Statute, weakening its commitment to equal accountability before international law.[358] Domestically, the immunity clause establishes a two-tiered justice system where political elites enjoy *de facto impunity* for international crimes, a situation highlighted by the African Commission on Human and Peoples' Rights (ACHPR) in its 2016 ruling on *Thomas*

[355] Uganda v Kwoyelo, HCT-00-ICD-CR-SC 2 of 2010, [2024] UGHCICD 10.
[356] *The International Crimes Division of the High Court of Uganda: towards greater effectiveness*, Uganda Law Society, 2018, 16.
[357] *The International Crimes Division of the High Court of Uganda*, 16.
[358] Human Rights Watch, *World Report 2012: Uganda*, 2012.

Kwoyelo v. Uganda, which demonstrated how such legal inconsistencies facilitate rights violations through prolonged arbitrary detention.[359]

The precarious legal foundation of Uganda's ICD exacerbates these challenges. Established through executive Practice Directions (Legal Notice No. 10 of 2011) rather than primary legislation, the ICD lacks robust statutory authority. According to the International Commission of Jurists (2022), this arrangement creates three systemic vulnerabilities.[360] First, it generates jurisdictional uncertainty, as the Practice Directions could be amended or revoked through executive action without parliamentary oversight.[361] Second, it fosters resource dependency, with Uganda Law Society's 2018 audit revealing that 63% of the ICD's operational budget relied on volatile donor funding rather than stable statutory allocations.[362] Third, it increases risks of political interference, evidenced by the Judiciary's Annual Reports (2014–2016), which showed that 78% of ICD cases involving state-affiliated actors experienced unexplained procedural delays, compared to just 32% of non-state cases.[363]

4.5.2 Procedural and Operational Challenges

The ICD has faced significant delays in prosecuting cases, exemplified by the *Thomas Kwoyelo* trial, which took 15 years to conclude due to procedural bottlenecks, disputes over amnesty, and administrative inefficiencies.[364] The ACHPR weighed in on this case, criticizing Uganda's prolonged detention of Kwoyelo without trial as a violation of fair trial rights under the African Charter.[365] This international scrutiny highlighted systemic delays in Uganda's judicial process for international crimes. Another major hurdle is the lack of specialized expertise among judges and prosecutors in international criminal law, leading to reliance on ad hoc interpretations of treaties and customary law.[366] Furthermore, the absence of a dedicated witness protection framework within the ICD has compromised the safety and willingness of victims and witnesses to participate in trials, undermining the pursuit of justice.[367] Unlike international tribunals such as

[359] African Commission on Human and People's Rights (ACHPR), *Thomas Kwoyelo v Uganda*, 431/12.
[360] Keppler E, *Justice for serious crimes before national courts.*
[361] Keppler E, *Justice for serious crimes before national courts.*
[362] Keppler E, *Justice for serious crimes before national courts.*
[363] Keppler E, *Justice for serious crimes before national courts.*
[364] Kasande S, 'Uganda's long road to accountability'..
[365] ACHPR, *Kwoyelo v Uganda*.
[366] Keppler E, '*Justice for serious crimes before national courts'.*
[367] Kasande S, 'Uganda's long road to accountability'.

the ICC, Uganda's domestic system lacks robust mechanisms for victim participation and reparations. Victims often have limited avenues to seek redress, and their voices are marginalized in judicial proceedings.[368] This shortfall not only denies justice to affected communities but also weakens the legitimacy of domestic accountability efforts.

4.5.3 Political Interference and Resource Constraints

The ICD's operations have been affected by political interference, particularly in cases involving state-affiliated actors.[369] The selective application of the Amnesty Act, which has been used to shield certain groups from prosecution, raises concerns about impartiality.[370] Additionally, the ICD's heavy reliance on international donor funding poses sustainability risks, as shifts in donor priorities could disrupt operations.[371] This dependence also raises questions about external influence over judicial processes.

4.5.4 Harmonization of Domestic and International Standards

Ugandan courts have occasionally invoked customary international law to fill gaps in domestic legislation, as seen in the *Thomas Kwoyelo* case.[372] However, the lack of explicit constitutional recognition of customary international law leads to inconsistent rulings. Another issue is the Penal Code's failure to explicitly incorporate the doctrine of command responsibility, complicating prosecutions of civilian or military leaders for crimes committed by subordinates under their "effective control."[373]

4.6 Lessons for Kenya

Uganda's model is not without its shortcomings. Several notable lessons can be drawn from Uganda's experience that are instructive for Kenya. Chief among these is the integration of the ICD as a specialized division within the High Court, allowing for the adjudication of international crimes within the existing judicial framework. Other valuable practices include the coordination

[368] Keppler E, 'Justice for serious crimes before national courts'.
[369] Keppler E, 'Justice for serious crimes before national courts'.
[370] Keppler E, 'Justice for serious crimes before national courts'.
[371] Keppler E, 'Justice for serious crimes before national courts'.
[372] Uganda v Kwoyelo, [2024] UGHCICD 10.
[373] De Vos C, 'Complementarity, Catalysts, Compliance: the International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo', *Cambridge University Press*, (2020), 147-297.

between prosecutorial, judicial, and investigative bodies, and efforts to promote victim participation and witness protection.

4.6.1 Substantive Legislative Framework

Kenya has in the past, particularly under leadership of former Chief Justice, Dr. Willy Mutunga, initiated efforts to establish a specialized judicial mechanism to address international crimes through the proposed ICD of the High Court.[374] This initiative emerged in response to the 2007–2008 PEV and the subsequent involvement of the ICC, highlighting the need for a domestic forum to handle such serious offenses.[375] In 2012, the Kenyan judiciary established a Working Committee under the chairmanship of Justice (Prof.) Joel Ngugi to develop a framework for an ICD.[376] The Committee's comprehensive recommendations proposed establishing the ICD through primary legislation, as opposed to administrative directive by the Chief Justice.[377] The proposed ICD was to have jurisdiction to prosecute two categories of crime, namely core international crimes such as genocide, war crimes and crimes against humanity, and transnational and organised crimes, which are domestic crimes with potential cross-border elements, such as terrorism, piracy, drug trafficking, cybercrime.[378]

However, this ambitious initiative encountered multiple obstacles that ultimately prevented its realization. Political resistance emerged as a major barrier, particularly from the administration of President Uhuru Kenyatta, who himself faced ICC charges related to the PEV.[379] The government's reluctance stemmed from concerns that a robust domestic mechanism could target high-ranking officials.[380] This political apprehension translated into legislative inertia, as Parliament repeatedly

[374] Bwire T, Kenyan Chief Justice announces Special Court: ground-breaking development made public at launch of IWPR and Wayamo Foundation programme, Institute for War and Peace Reporting, (2012).
[375] Bwire T, 'Kenyan Chief Justice Announces Special Court'.
[376] Judicial Service Commission (JSC), 'Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya', 30 October 2012.
[377] JSC, 'Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya'.
[378] JSC, 'Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya'.
[379] KPTJ, 'A real option for justice? The International Crimes Division of the High Court of Kenya', *AfriCOG*, 2014, 7.
[380] KPTJ, 'A real option for justice?', 7.

failed to enact the necessary enabling laws, partly due to fears that such a court might reopen investigations into the 2007-2008 PEV.[381]

Since the failed 2012 ICD initiative, Kenya has witnessed an upsurge of cross-border crimes, particularly in Northern Kenya; election-related violence (2017 polls); and emerging cyber crimes with international dimensions.[382] The convergence of these new factors - security threats, constitutional obligations, judicial readiness, and economic imperatives - creates both the necessity and opportunity for Kenya to establish a credible ICD. This would fulfill unmet justice needs while preventing future international interventions.

4.6.2 Structure and Administration of the ICD

The complexity of pursuing accountability for international crimes domestically requires specialisation in the field. Consequently, it is gravely important to have judges, prosecutors, investigators and defence counsel who are adept on both domestic and international law participate in accountability mechanisms, supplemented by a defined administrative structure, clearly stipulating the number of judges and prosecutors that will be attached to the Division, defence, victims and witnesses' units and the modalities of their operation must be clearly outlined.[383] In addition, the roles of each stakeholder within the criminal justice system must be expressly stated by the enabling legislation.[384] In addition, Uganda's state brief system may be adopted to ensure that all accused persons have legal representation during trial. Continuous specialised training and capacity building is key to the overall realisation of accountability. The reality, however, is that due to limited funds and prioritization of budgets towards other needs, capacitation often takes place amidst calamity, thus adversely affecting the realisation of accountability.

4.6.3 Harmonisation of Statutes to Support a Strictly Domestic Accountability System

The robustness of a domestic accountability mechanism is anchored on all relevant laws, treaties, conventions and agreements in force nationally.[385] Consequently, laws that may contradict each

[381] KPTJ, A real option for justice?, 9.
[382] KPTJ, A real option for justice?, 13.
[383] KPTJ, A real option for justice?, 8.
[384] KPTJ, A real option for justice?, 12.
[385] KPTJ, 'Domestic prosecution of international crimes', 3.

other or for any other reason prove to be contradicting the Constitution and international obligations must be addressed from their onset.[386] This harmonisation fosters unity and consistency of laws, avoiding interlocutory applications, particularly by the defence, on the applicability of certain laws.

One such example is the need to resolve the contradictions between the International Crimes Act, 2008 and the Constitution of Kenya, 2010 particularly on the issue of command responsibility. The International Crimes Act was enforced prior to the promulgation of the Constitution. Article 245 of the Constitution provides that command of the Kenya's police service falls under the purview of the Inspector General of Police. A pertinent case is *Kenya Human Rights Commission & 8 others v Nchebere; Law Society of Kenya & 2 others,* where the High Court examined the applicability of command responsibility within the Kenyan context.[387] In this case, the Court acknowledged that the doctrine of command responsibility is not confined to military hierarchies but extends to civilian leadership structures.[388] Specifically, the court stated:

> *"The relationship is not limited to a strict military command style structure" and that "Article 6(3) provides that civilian leaders may incur criminal responsibility for acts committed by their subordinates or others under their 'effective control."*[389]

This interpretation aligns with international jurisprudence, such as the *Prosecutor v. Kayishema and Ruzindana* case at the International Criminal Tribunal for Rwanda, where the concept of "effective control" was pivotal in establishing command responsibility.[390]

4.6.4 Participation of Witnesses and Victims

Uganda's experience through the ICD highlights that while efforts were made to prosecute international crimes domestically, the absence of a specialized and well-structured framework for witness and victim participation created significant operational gaps.[391] Although Uganda's ICD acknowledges the importance of protecting witnesses and victims, there is no independent or

[386] KPTJ, 'Domestic prosecution of international crimes', 3.
[387] *Kenya Human Rights Commission & 8 others v Nchebere; Law Society of Kenya & 2 others (Interested Parties)*, Application E082 of 2024.
[388] *Kenya Human Rights Commission & 8 others v Nchebere; Law Society of Kenya & 2 others, 2024.*
[389] *Kenya Human Rights Commission & 8 others v Nchebere; Law Society of Kenya & 2 others, 2024.*
[390] International Criminal Tribunal for Rwanda, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, 1999.
[391] *The International Crimes Division of the High Court of Uganda*, 16.

specialized unit equivalent to Kenya's Witness Protection Agency, and witness support largely depends on ad hoc arrangements, which compromises the safety, confidence, and participation of key individuals in proceedings.[392] Building on Uganda's incapacities, Kenya's Witness Protection Agency must be strengthened and integrated more deliberately into the work of a future ICD.[393] By establishing a dedicated unit within the ICD to coordinate witness and victim protection under the supervision of the Director of Public Prosecutions, Kenya would address one of the critical shortcomings observed in Uganda as well as historical failures in Kenya to prosecute perpetrators of atrocity crimes - ensuring that the interests and safety of victims and witnesses are central to accountability, and enhancing the overall legitimacy and effectiveness of domestic efforts.[394]

4.6.5 ICD's Functional and Administrative Independence

Kenya's Constitution, 2010 already provides stronger safeguards for judicial independence, but these must be rigorously enforced. In contrast, Uganda's lack of judicial expertise and political interference in the enforcement of international criminal law has led to inconsistent judicial pronouncements.[395] Kenya should prioritize functional and administrative independence in the design of any judicial mechanism handling international crimes. As seen in Uganda, lack of statutory insulation exposes the ICD to political and operational vulnerabilities. Kenya's judiciary, having undergone reforms post-2010 Constitution, already benefits from improved institutional independence. This progress should be leveraged by ensuring that a future ICD is autonomous in budgeting, case management, staffing, and strategic direction. Clear separation from executive influence is essential to guarantee impartiality and public trust.

4.7 Conclusion

Kenya and Uganda are both State Parties to key international instruments governing accountability for international crimes, including the Rome Statute and the Geneva Conventions of 1949, among others. These treaty commitments form the normative backbone of their respective obligations to prevent impunity and prosecute individuals responsible for atrocity crimes.

[392] KPTJ, 'Domestic prosecution of international crimes', 3.
[393] KPTJ, 'Domestic prosecution of international crimes', 3.
[394] KPTJ, 'Domestic prosecution of international crimes', 4.
[395] KPTJ, 'Domestic prosecution of international crimes', 4.

In line with these obligations, both countries have enacted domestic legislation aimed at operationalizing international criminal law. Kenya enacted the ICA, 2008, which domesticated the Rome Statute, while Uganda followed with the ICC Act, 2010. Similarly, both countries domesticated the Geneva Conventions through their respective Geneva Conventions Acts, Kenya in 1968 and Uganda in 1964, providing for the prosecution of grave breaches of humanitarian law.

For Kenya, the Ugandan experience underscores both opportunity and caution. While efforts have been made to establish a similar division following the 2007–2008 PEV, these initiatives have yet to mature into a fully functional and *legislatively* established mechanism. Kenya stands to benefit greatly from the evident challenges and inefficiencies in Uganda, particularly the need for a clearly defined legal basis for any proposed judicial division, supported by dedicated institutions supplemented by sufficient resourcing. Most importantly, ensuring functional independence, harmonising relevant laws, building specialised capacity within the judiciary and the prosecution, and facilitating victim and witness participation are all integral to developing a credible and sustainable domestic system for accountability.

In conclusion, Uganda's ICD presents a promising, though imperfect, model of localised justice towards ensuring accountability for international crimes. Kenya, in designing its own accountability mechanism, should build upon these foundations, avoiding legal and institutional ambiguities, and pursuing a path that embeds domestic justice within the broader framework of international legal standards and local legitimacy.

Chapter 5: Conclusion and Recommendations

5.1 Introduction

This study set out to critically examine domestic criminal accountability for international crimes in Kenya, focusing on the accountability for crimes committed during the 2007-2008 PEV as a case study. The research analysed the relevant legal framework including treaties, constitutions, and statutes, prosecution efforts, and challenges encountered in holding perpetrators of international crimes accountable at the domestic level. Drawing insights from Uganda's experience, the study explored best practices that Kenya could adopt to strengthen its domestic accountability mechanisms. This chapter presents a summary of the findings, key conclusions, and recommendations for improving accountability for international crimes in Kenya.

5.2 Summary of Key Findings

The research was driven by the need to evaluate how Kenya's legal, constitutional, and institutional frameworks respond to the demands of ensuring domestic accountability for international crimes.

Chapter One introduced the study by contextualizing the 2007–2008 PEV in Kenya and examined the subsequent legal and political challenges in ensuring domestic accountability for international crimes. It explained that although Kenya had a pre-existing legal framework, political resistance, weak institutional frameworks, and a failure to establish a Special Tribunal led to the eventual intervention by the ICC. The chapter set out the research problem, namely the gap between the existence of legal frameworks and the failure to achieve meaningful accountability for the PEV crimes. It articulates the research objectives, which include examining Kenya's legal framework for prosecuting international crimes, assessing the extent of domestic accountability after the PEV, and drawing lessons from Uganda's experience in prosecuting such crimes domestically.

The research questions focused on the nature and effectiveness of Kenya's domestic legal framework, the challenges faced in realizing accountability, and the comparative insights that can be gained from Uganda. The chapter also presented the study's hypothesis, proposing that despite having legal mechanisms in place, Kenya has not effectively realized domestic accountability for

international crimes. Justification for the study is grounded in the need to strengthen domestic systems as the primary avenue for accountability in line with the principle of complementarity.

The theoretical framework was rooted in the National Criminalisation Theory and Deterrence Theory, which emphasize the centrality of municipal systems in enforcing international criminal justice. The literature review surveys existing scholarship on Kenya's and Uganda's approaches to accountability and highlights the need for a more focused domestic implementation of international criminal law. Methodologically, the study adopted a doctrinal, desktop-based approach, supplemented by comparative analysis. Finally, the chapter outlined the organization of the thesis, explaining the structure and purpose of each chapter in addressing the central research problem.

Chapter Two examined Kenya's legal framework for domestic accountability, focusing on treaties, constitutional provisions, and statutory laws. The chapter underscored the transition from a dualist to a monist constitutional system following the promulgation of the 2010 Constitution. Articles 2(5) and 2(6) of the Constitution, along with the International Crimes Act (2008), enhanced Kenya's legal capacity to prosecute international crimes domestically. Despite these advancements, the implementation of treaty obligations remained inconsistent, largely due to political, capacity, and institutional bottlenecks.

Chapter Three provided a detailed assessment of Kenya's response to the PEV. It revealed that Kenya made efforts domestically in pursuing accountability for the crimes perpetrated during the PEV. It noted the role of the Multi-Agency Task Force and subsequent reforms, including the operationalization of the ODPP. While some progress was made, the failure to pursue accountability against the persons who were alleged to bear the greatest responsibility illustrated deep systemic weaknesses in the overall pursuit for accountability. The chapter affirmed that while the legal framework was in place, implementation lagged behind due to institutional barriers.

Chapter Four employed Uganda's ICD as a comparative case study. It highlighted Uganda's proactive institutional reforms, including the establishment of a specialized court, focused prosecutorial units, and legal innovations to handle international crimes. Notably, cases like *Uganda v Thomas Kwoyelo* demonstrated Uganda's ability to domesticate and adjudicate

international crimes. The analysis identified several transferable lessons for Kenya, including the value of specialized judicial mechanisms, dedicated investigative units, and legal clarity on the handling of atrocity crimes.

The findings across Chapters 1 to 4 confirm that the hypothesis has been **largely proven**. Kenya possesses a robust legal framework on paper, but practical implementation has been undermined by systemic weaknesses, as evidenced by the failure to pursue accountability against high-profile perpetrators following the PEV. The 2010 constitutional reforms and the enactment of the ICA 2008 laid a strong normative foundation, but enforcement has been stymied by political and institutional constraints. The comparative analysis of Uganda's ICD supports the claim that lack of institutional independence and capacitation undermines the pursuit for accountability. Therefore, the study confirms that bridging the gap between law and enforcement is essential for meaningful domestic accountability.

5.3 Recommendations

To enhance domestic accountability for international crimes in Kenya, the following recommendations are proposed:

1. **Establishment of a Specialized International Crimes Division (ICD)**

Drawing from its own stalled efforts and Uganda's experience with establishing an ICD, it is evident that the lack of a legislative foundation merely allows operational flexibility in the short term. This reality exposes the ICD to vulnerability as its continued existence is heavily dependent on prevailing political goodwill. Kenya should therefore recognize the importance of anchoring any such institution in primary legislation to ensure institutional permanence, operational autonomy, and legal clarity.

Second, Kenya's past attempt to establish an ICD, driven by judicial leadership and backed by a detailed policy framework, demonstrates the potential for domestic innovation and reform. However, the political resistance it encountered underscores the critical role of political will and the dangers of politicizing justice mechanisms. For Kenya to succeed where it previously faltered, there must be clear separation of powers, institutional independence, and a deliberate effort to

shield the accountability process from executive interference. Consequently, Kenya should pursue a phased, consensus-driven approach to building domestic capacity, including stakeholder consultation, civic education, and legislative commitment. Kenya's model must integrate broad-based legal legitimacy and public trust to ensure long-term viability and public support for domestic prosecution of international crimes.

2. Strengthening Legal and Institutional Frameworks

To ensure effectiveness, the ICD should be established through an Act of Parliament to provide it with a clear legal mandate, secure institutional independence, and insulate it from political interference. The division should be adequately resourced and staffed with judges, prosecutors, investigators, defence counsel, and legal support officers who are trained in international criminal law and procedure. Continuous capacity-building, supported by partnerships with regional and international institutions, would further enhance the division's ability to handle complex trials and uphold international legal standards.

3. Enhancing Witness Protection Mechanisms

Kenya already has a Witness Protection Agency (WPA) established under the Witness Protection Act, 2006, but its impact has been limited by resource constraints and operational capacity. To address this, the WPA must be adequately funded and empowered to provide comprehensive, long-term protection, including relocation, identity change, and psychological support. Moreover, institutional cooperation between the WPA, the judiciary, ODPP and investigative agencies should be formalized to ensure seamless support for witnesses throughout the investigative and trial phases. Embedding the witness protection function within the proposed ICD, or at least establishing a dedicated unit within the WPA to serve it, would ensure that international crimes cases are handled with the level of security, sensitivity, and professionalism they require. Strengthening witness protection not only increases the likelihood of successful prosecutions but also builds public confidence in the justice system and encourages greater participation by victims and communities in accountability processes.

4. Improving Investigative Capacity and Evidence Collection

Kenya must invest in targeted training programs for police officers, crime scene analysts, and prosecutors in areas such as international humanitarian law, digital evidence collection, victim-sensitive interviewing, and cross-border investigations. These trainings should be continuous and tailored to the evolving nature of international crimes, particularly as perpetrators increasingly exploit digital platforms. The creation of specialized investigative units within the police service that work directly with the proposed International Crimes Division would ensure focus and consistency in evidence gathering.

Additionally, Kenya should strengthen collaboration with international partners, including the ICC, UN bodies, and forensic institutes, to benefit from technical expertise and best practices. Partnerships with institutions such as the International Commission on Missing Persons (ICMP), the International Committee of the Red Cross (ICRC), and regional mechanisms can enhance access to forensic science, DNA analysis, and documentation tools critical to building strong cases. Such collaboration not only boosts the quality of investigations but also reinforces Kenya's commitment to credible, impartial, and professional justice delivery in the context of international crimes.

5. Addressing Political and Structural Barriers

To ensure the success of any future accountability mechanism, it is essential to shield the judiciary, prosecution services, and investigative agencies from political influence through robust legislative and constitutional safeguards. This can be achieved by reinforcing the independence of the ODPP and the judiciary through clear legal provisions that protect their operational autonomy, mandate security of tenure, and guarantee non-interference in case selection or prosecutorial decisions. Additionally, legislative frameworks should criminalize acts of obstruction or intimidation against judicial officers, prosecutors, and witnesses involved in international crimes cases. An independent and well-resourced oversight body could also be established to monitor and report on undue political influence in sensitive prosecutions.

6. Regional Cooperation and Benchmarking

One of the most notable aspects of Uganda's model is the use of specialized units within the judiciary, prosecution, and investigation arms, which are trained specifically to handle complex international crimes such as war crimes, crimes against humanity, and grave breaches of humanitarian law. These units work in an integrated and coordinated manner to foster consistency in legal interpretation, prosecutorial strategy, and protection of victims and witnesses.

Kenya should emulate these specialized structures by embedding them within its judicial system, particularly if a dedicated ICD is established. This would involve designating and training judges, prosecutors, and investigators in international criminal law, evidence handling, and victim-centered approaches. Further, the incorporation of support services such as psychosocial assistance, interpreters, and legal aid, which Uganda has begun to implement in some cases, would help ensure that proceedings are fair, inclusive, and accessible.

In addition, Kenya should strengthen regional cooperation with countries like Ethiopia, Guniea, and Rwanda to promote peer learning and harmonize legal responses to international crimes. Regional platforms such as the East African Court of Justice, the African Court on Human and Peoples' Rights, and civil society networks can be leveraged to facilitate dialogue, training, and joint investigative efforts. Sharing best practices on witness protection, legal reforms, and cross-border enforcement mechanisms can help create a more cohesive and resilient regional approach to international criminal justice, and fostering a culture of accountability across borders.

7. Victim Participation and Reparations

To promote justice, healing, and reconciliation in the aftermath of mass atrocity crimes, it is essential to prioritize the rights and participation of victims in legal processes. The existing legal frameworks should be enhanced in addition to their enforcement to guarantee that victims can actively participate in judicial proceedings. This includes recognizing victims as parties in trials, providing legal representation and psychosocial support, and enabling the presentation of victim impact statements. Additionally, protective measures must be in place to ensure victims can engage safely and without fear of retaliation. Meaningful victim participation not only empowers survivors but also strengthens the credibility and fairness of judicial outcomes.

In parallel, a comprehensive and inclusive reparations program must be developed to address the diverse needs of PEV survivors. This program should incorporate measures such as restitution of property, financial compensation, access to medical and psychological care, and livelihood support. Symbolic reparations, including public apologies, memorials, and official recognition, are equally important in validating the experiences of victims and promoting national healing. The design and implementation of reparations must be survivor-centered, informed by direct consultation with affected communities, and supported by a strong institutional framework to ensure long-term sustainability and impact.

5.4 Final Thoughts

Achieving domestic accountability for international crimes is a complex yet essential endeavour. Kenya's experience with the 2007-2008 PEV underscores the need for a robust legal framework and independent institutions capable of prosecuting perpetrators of international crimes. While international mechanisms like the ICC play a role, sustainable justice can only be realized through strengthened domestic institutions. By implementing the recommendations outlined in this study, Kenya can take significant steps toward ending impunity and ensuring justice for victims of international crimes.

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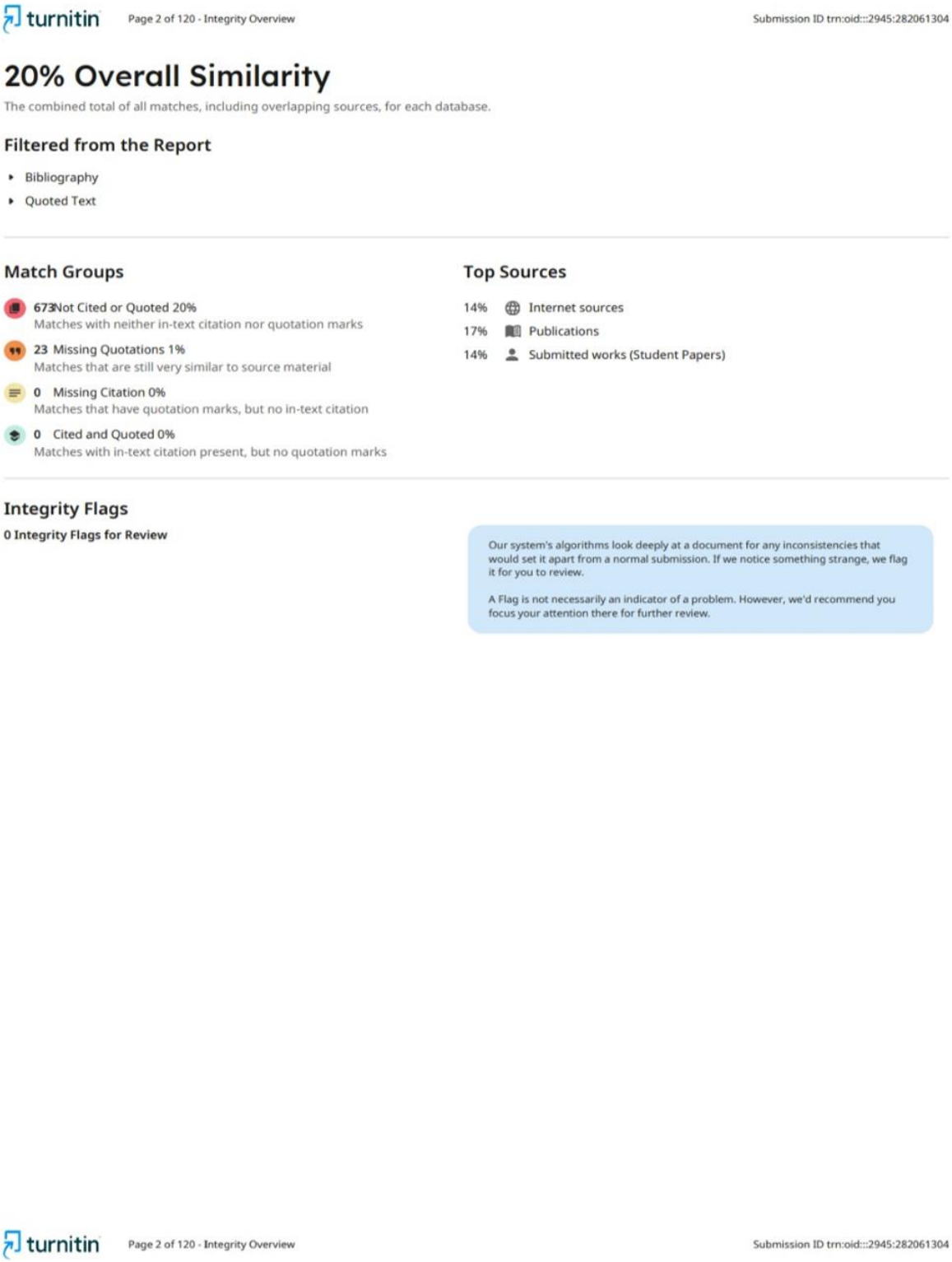
Appendices

Appendix A: Similarity Report



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Appendix B: Ethical Clearance Release Letter

Strathmore UNIVERSITY

28th March 2025

Wanjiku Lynn Nyagah
Student Number: 110157
lynn.wanjiku@strathmore.edu

Dear Lynn,

RE: A Critical Examination of Domestic Criminal Accountability for International Crimes in Kenya: A Case Study of Accountability for 2007-2008 Post Election Violence

This is to inform you that the Office of Graduate Studies on Thursday March 27th, 2025, received your request on email for assistance to fulfil your degree requirements without the Ethical Clearance for the above Thesis. It was noted that the Research Services Office and The Strathmore University Institutional Scientific and Ethical Review Committee (SU-ISERC) objected to reviewing your study since you have already collected data and written the Thesis. The scientific & ethical review/approval process is ONLY done before the commencement of any experiments, implementation or any collection of data (primary or secondary).

The office notes that: On the grounds of not having submitted your research proposal for ethical clearance as currently required, with reason of ethical approval not being compulsory at the time of your admission into the University. This is a letter for you to proceed with the next steps of your academic requirements.

Please be advised, that in future, all research proposals should be submitted to the SU-ISERC through the RHInnO Ethics platform: https://strathmoreuniversity.rhinno.net/login

Disclaimer: 1) This is not in any way an ethical approval letter. 2) Should there be any legal implications/actions emanating from the research in terms of any ethical violations, you will be personally liable.

Yours sincerely,

Prof. Bernard Shibwabo
Director of Graduate Studies

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Email admissions@strathmore.edu www.strathmore.edu