

# The Rule of Law, Transitional Justice and Human Rights: Lessons Learnt Following the 2007-2008 Post Election Violence in Kenya, the 2013 and 2017 Elections and the Role of the Judiciary, as the Country Prepares for yet another Election on 26th October 2017

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**Abstract-** Transitional Justice is the full range of Judicial and non-judicial processes and mechanisms that assist a society to address past human rights abuses, victims' concerns and accountability, justice and reconciliation, while strengthening the rule of law. This paper adopts the United Nations' approach to transitional justice that looks at the full range of a society's attempt to address past human rights violations. The UN approach to transitional justice ensures accountability on the part of the perpetrators, the search for the truth, justice and reparation for the victims. In addition, the approach advocates for the reconciliation of the entire society. Within this context, courts have an important role in ensuring transitional justice by upholding the rule of law, addressing victims' concerns and punishing offenders, while ensuring that the penal approaches aim at restoring the peace that existed before the conflict.

This paper explores how the Kenyan courts can play an effective role in the transitional justice process, following the 2007/2008 post-election violence that left thousands of Kenyans dead, several displaced and property worth millions of shillings destroyed. The subsequent elections in 2013 left many Kenyans confused and in doubt as to the ability of the supposedly reformed judiciary to effectively handle presidential disputes impartially and independently. The August 2017 Presidential election that was annulled by the Supreme Court has further deepened the political and ethnic divisions in the country. The paper discusses lessons learnt from the 2007, 2013 and 2017 elections and explores mechanisms such as special tribunals, special courts, local courts and traditional methods of justice that the judiciary can utilize in addressing the post-election violence concerns that remain as painful wounds afflicting many Kenyans. Also discussed is the dichotomy of praise and disappointment with the performance of the Supreme Court in the 2013 and August 2017 Presidential dispute resolutions. The lessons learnt may assist the Judiciary in the preparation for any possible violence in the coming elections in October 26th 2017 in Kenya.

The paper concludes that the Kenyan Judiciary, in exercising judicial authority on behalf of all Kenyans, has a constitutional duty to uphold peace, unity, human rights, equality, freedom, democracy, social justice and the rule of law. If the Judiciary asserts its impartiality and independence, remains accountable to the people of Kenya, on whose behalf they exercise judicial

authority, and not the political class, the injustices caused by the previous election violence should be addressed to the satisfaction of all affected. In addition, the Judiciary has a duty to ensure that Kenya does not witness any form of election violence ever again.

**Index Terms-** election, human rights, transitional justice, rule of law, violence

## I. INTRODUCTION

This paper focuses on the important role of the judiciary in dispute resolution, against the background of the low levels of confidence in the courts in Kenya, during the period preceding the 2007 general elections and currently high confidence levels following the Supreme Court's nullification of the August 2017 Presidential election.

According to CIPEV<sup>1</sup>, the Kenyan judicial system has for long time been vilified for its failure to effectively discharge its vital function in the democratic governance of Kenya. The report found that of the three arms of government, namely the judiciary, executive and the legislature, the judiciary is least understood and therefore remains a mystery to the citizens who depend on it to settle disputes amongst themselves and with the government.

The first lesson therefore is that the Judiciary needs to unravel the mystery that characterizes the institution. One way of doing this is to interact more with the public and conduct public education on the role of the judiciary in dispute resolution. This must be a deliberate effort conducted to cover the entire county. Where necessary, such awareness programs need to be conducted in the language that each community understands best, including the local languages. The exercise must involve the existing administrative structures at the lowest level of government. This will ensure that every Kenyan has an opportunity to understand and ask questions on the important role of the 'mysterious' arm of the government. It is important that this role is undertaken by judicial officers, namely judges and magistrates, not support officers. Judicial officers must be seen as the real face of the

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<sup>1</sup>Government of Kenya, *Report of the Commission of Inquiry into Post Election Violence*, (Government of Kenya, 2008,) 462-463.

judiciary. The judiciary has so far taken steps through its transformative agenda to open up to the public. This includes conducting judiciary open days and engaging the public through the court users' committees. This is a step in the right direction, however it is not sufficient and public education on the role of the judiciary is a powerful tool that empowers the citizens and enhances their knowledge on the functions of the judiciary. This has the positive effect of enhancing citizens' participation in the process of dispute resolution that is key in electoral violence management and prevention.

The second lesson learnt is that long before the 2007-2008-post election violence erupted in Kenya, the public confidence and trust in the judiciary had gradually dropped over a long period of time. The low levels of confidence and trust by the public in the courts then, was also attributed to the perception that as an institution, it was not independent, even though some of its members were seen to be independent in their decision making. The CIPEV report concluded that it was due to the public perception of the lack of independence of the judiciary, that

*"...The leadership and members of the Orange Democratic Movement (a political party whose presidential candidate disputed the presidential election results), refused to submit to the jurisdiction of the courts to resolve the dispute that arose after the 2007 general election, in relation to the Presidential results."*<sup>2</sup>

Public confidence in an institution is so important that all efforts must be geared towards building and maintaining the same. The Judiciary must therefore explore ways of establishing what factors contributed to the gradual decline of public confidence in the institution. Understanding of such factors is important so as to adequately address them. In addition it is the only way of ensuring that the mistakes are not repeated. One of the ways of doing this is through an academic research that shows the nature and trend in public confidence in the Judiciary over the last couple of years, explanations for the same and recommendations to deal with the concerns raised by the research findings. The second way is through frank public engagement that may take many forms.

The third lesson learnt is that a judicial system characterized by delays in the administration of justice and non-transparency in its functions is a ticking time bomb that only requires a catalyst's reaction to be rejected by the public. This is a recipe for disaster, anarchy and breakdown of the rule of law. The fact that Kenyans resorted to the streets instead of filing the disputed 2007 presidential election in court was a major indictment on the judiciary for failing to play its role in the democratic governance of the country. The CIPEV report noted that violence had been a part of Kenya's electoral system during the one party rule, increasing after the restoration of the multi-party politics in 1991. Whereas the election violence before 2007 preceded the elections, much of the 2007/8 election violence followed after the elections and affected almost the entire country, in both rural and urban areas. The state security agencies failed to contain the violence, which spread fast in most parts of the country. The CIPEV report found that individual members of the state security took part in gross violations of citizens' human

rights and acts of violence.<sup>3</sup> Although much of the 2007/2008 violence was spontaneous in some parts of the country, it was shocking that the violence was a result of planning and organization in some areas often by politicians and business leaders.<sup>4</sup> In some areas, what began as spontaneous protest of perceived rigged election degenerated into well organized attacks by and against different ethnic communities divided along political party support lines. The big unanswered question is why a disputed presidential election degenerated into ethnic violence that overwhelmed the police due to the massive number of attackers and relative effective coordination of the attacks? Does the criminal justice system work as a system or some uncoordinated group of agencies and bodies that do not appreciate the need to work as a functioning system? Upon the declaration of the incumbent president as the president-elect, opposition supporters protested by demonstrating on the streets in Nairobi, Kisumu and Mombasa, but this was met by heavily armed police force that violated several rights of citizens exercising their constitutional right. At least 24 people are reported to have died including a six months year old, Baby Pendo in Kisumu, and a ten year old girl in Nairobi. No criminal charges have been preferred against the perpetrators. The Attorney General, the chief legal adviser to the government and protector of public interest, who doubles up as a member of the judicial service commission has not discharged his functions in this respect.

There is need for the Judiciary and other criminal justice agencies' work to be coordinated as the country prepares for the 26<sup>th</sup> October 2017 Presidential elections. Violence related to elections can be addressed only through strict application of the relevant laws, coordinated work of the criminal justice system and eventual punishment of convicted individuals. Coordination includes capacity building of all criminal justice officers, availability of resources, early warning systems and measures, prevention, preparedness, management strategies and mitigation of any negative outcomes amongst other measures. The Judiciary must take the lead in this respect as the arm of government charged with dispute resolution. One way of doing this is through the Judicial Service Commission, whose membership comprises the Attorney General as the chief legal adviser to the government. One of the functions of the Judicial Service Commission is to set up specialized courts. This is discussed later in this paper.

The fourth lesson learnt concerns the presidential powers and the control of the country's resources and allocation of the same. One argument advanced by the CIPEV report is that since independence, the presidency has been associated with advantages for the president's ethnic community, due to the immense power that the president held under the old constitution, in terms of appointments to key government positions, whose holders determined other government appointments and resource allocation. Subsequently, the ethnic background of the President and political allegiance to the political party of the president were perceived to determine development in different regions in the country.

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<sup>3</sup> *ibid* p xiii.

<sup>4</sup> *ibid* p xiv.

<sup>2</sup> *Ibid.*

The big question to be answered is, whether the scenario changed under the new Constitutional dispensation. While appreciating the strengths of the Constitution 2010 in creating a devolved system of government and its benefit of ensuring that all the 47 counties are allocated revenue, it is important to point out that, there still exists glaring inequalities between counties, especially in terms of allocation of resources. The variables and processes used to determine how much resources should be allocated to each county are questionable, not transparent and lack accountability mechanisms. They fail to take into consideration the different levels of development stages each county was at the onset of the devolved system of government. As a result, development inequalities still exist between counties. In addition, development projects controlled and managed by the central government seem to benefit mostly regions of the country that are perceived to support the political party allied to the President. In contrast, areas perceived to be sympathetic to the opposition party are not as developed as areas perceived to support the President.

The Presidency is thus still powerful and determines where development takes place in Kenya. This is more evident since the county governments do not have power to enter into bilateral agreements with donors, but must do so through the central government. The argument is that the county governments are not independent entities, but must operate under the authority of the central government. In effect therefore, not much changed with the new constitution in terms of the President's control of resources and their allocation, a factor that is proven to make the presidency very competitive, as it is viewed as an important factor and determinant in uplifting the standard of living in Kenya. In this respect, the CIPEV report concluded that;

*"...The 2007/2008 post election violence was more than a mere juxtaposition of citizens-to-citizens opportunistic assaults. These were systematic attacks on Kenyans based on their ethnicity and political leanings. Attackers organized along ethnic lines, assembled considerable logistical means and travelled long distances to burn houses, maim, kill and sexually assault their occupants because these were of particular ethnic groups and political persuasion. Guilty by association was the guiding force behind deadly revenge attacks, with victims being identified not for what they did but for their ethnic association to other perpetrators. This free for all was made possible by the lawlessness stemming from an apparent collapse of the state institutions and security forces."*<sup>5</sup>

The big question is, where was the criminal justice system in the midst of all this? Did the perpetrators not fear being arrested, prosecuted and punished? The 2007/2008-post election violence plunged the country into chaos that replaced the rule of law to an extent that had never before been experienced. The effect was felt far and wide beyond the nation. Many African countries that neighbor Kenya were affected in different ways as some Kenyans sought refuge in those countries while supply of goods and services from Kenya to these countries were interrupted. The violence was not only a Kenyan affair, but an African concern as well. After the declaration of the presidential results following the August 2017 election, another round of post election violence affected the opposition strongholds. Does this

have to happen after every five years that Kenyans go to the ballot box? The justice system must uphold the rule of law and protect citizens from electoral violence.

As Kenya prepares for the repeat election in August 2017, many are concerned about the possibility of election violence and the ability of the judiciary to contain the situation. The party primaries preceding the August 2017 election witnessed violent incidences in both major political parties. Unfortunately, the violence is associated with the major political affiliations in the 2007 election in which the incumbent president came from the same ethnic community as the current president, who is defending his seat, having been declared the president in the 2013 election, elected in the August 2017 election, but nullified by the Supreme Court. In all the 2007, 2013, the annulled August 2017 and now October 2017 elections, the main opposition party candidate is the same personality, coming from the same community. Does ethnicity play any role in Kenya's electoral violence? Cases filed in court in which politicians are accused of inciting their supporters by use of ethnic language meant to incite one ethnic community against another have not been successful, often prematurely terminated or withdrawn. This is a clear indication of the lack of independence and impartiality of the entire criminal justice system, which appears not to be accountable to the people of Kenya, but to the political class.

The National Cohesion and Reconciliation Commission, established under the new constitution did little to reconcile Kenyans following the 2007 post election violence. Majority of Kenyans still bear the pain of past election violence. All agencies involved in the justice sector must work together towards a peaceful Kenya. At the center of this function is the Judiciary that must take its rightful position to ensure that the rule of law prevails. No politician should get away with incitement, hatred or other charges that threaten peace in Kenya. The Judiciary must save the country from acts of impunity by individuals who manipulate the system. Court decisions must be based on the law alone. Those who do not meet the requirements of leadership and integrity as stipulated by chapter six of the constitution should not use the courts to clear them to contest for public offices. Court records are public documents that outlive the author. Judicial officers who bend the law to serve ethnic or political interests while sacrificing the rule of law and peace in Kenya, will be judged very harshly by history

The fifth lesson learnt is that Kenya must establish strong institutions and solve its own problems as opposed to looking up to the international community. This is not to say that the international community has no role in Kenya. Far from it, Kenya needs the international community in many ways. However, Kenyans, more than anyone else understand the circumstances that lead to election violence and they know the planners and executors. They are affected directly by election violence. They must therefore take charge of their country and stop any attempts to cause electoral violence, which in any case only serves the interest of politicians. Kenyans must hold their leaders and politicians accountable for their action as envisaged by the Constitution of Kenya 2010.

Had Kenyans believed in their judicial system, there would have been no need to refer the prosecution of the six Kenyans, ( Uhuru Kenyatta, then a Deputy Prime Minister and currently the President of Kenya, William Samoei Ruto, then the Minister of

<sup>5</sup> ibid p xiv.

Agriculture and today the Deputy President, Joshua Arap Sang, then a radio journalist with Kass FM, Henry Kosgey, then a senior opposition leader, Francis Muthaura, then the Cabinet Secretary and Hussein Ali, then the Police Chief), suspected to bear the greatest responsibility for the 2007 post election violence to the International Criminal Court at the Hague. Uhuru Kenyatta, Francis Muthaura and Hussein Ali were perceived to be sympathetic to the then government of President Mwai Kibaki, while William Samoei Ruto, Joshua Arap Sang and Henry Kosgey were supporters of the opposition presidential candidate, Raila Amolo Odinga.

The referral of the six to the Hague only deepened the already existing tension amongst Kenyans, between the supporters of the then incumbent president and the opposition candidate. The country remained tense and divided along the two political alignments. Immediately upon being charged at the Hague, both Uhuru Kenyatta and William Ruto teamed up to contest for the posts of President and Deputy President respectively under one party against the opposition Presidential candidate, Raila Amolo Odinga in the 2013 presidential race. The outgoing president, Mwai Kibaki, supported Uhuru's presidential bid. Uhuru Kenyatta was declared the winner of the 2013 presidential race amidst claims of rigging. Subsequently, the opposition candidate, Raila Amolo Odinga, filed a presidential dispute petition at the Supreme Court.

Unlike in 2007 when the opposition disputed the presidential election results, but refused to file their complaint in court for adjudication, in 2013, the opposition confidently filed Presidential Election Petition No.5 of 2013 at the Supreme Court of Kenya, an institution created by the new constitution promulgated in 2010 as a result of reforms following the 2007 post election violence. The setting up of the Supreme Court and the appointment of new judges to fill in the vacancies, and the reformation of the electoral body gave hope to Kenyans about a more transparent, accountable electoral and judicial systems. The Supreme Court was seen and expected to uphold the rule of law, protect the values of the new constitution and ensure that their decision conforms to the values and principles of the new constitution.

At the time of the 2013 elections, the level of public confidence in the judiciary had risen as a result of the constitutional reforms and judicial reforms. As part of the accountability process and procedure, the expectation was that the Supreme Court would ensure that substantive justice is upheld and any procedural defects are cured. Such a procedure has the effect of making the court decision acceptable to all parties to the case, including the loser. Procedural justice and fairness are indeed the hallmarks of a just and fair court decision, for they are the steps that lead to a decision which determine its validity, acceptability and indeed legitimacy. This is important considering that the Supreme Court is the highest court of the land, its decisions are final and binding on the rest of the lower courts. It therefore technically makes law on behalf of the rest of the Judiciary in cases of presidential elections due to the exclusive nature of the jurisdiction.

In its ruling of the Election Petition No.5 of 2013, the Supreme Court upheld the presidential election results as announced by IEBC, declaring Uhuru Kenyatta as the winner of the 2013 presidential election. Subsequently, Uhuru and Ruto,

both being suspects facing charges at the Hague occupied the two most powerful seats in Kenya, controlling all the country's resources. They were therefore able to mobilize resources towards the Hague trial, including services of the Attorney General, yet they had both been charged in their private capacities and not as President and Deputy President of the Republic of Kenya. This illustrates that despite the new constitutional dispensation, the Presidency in Kenya is still powerful and controls resources and their allocation.

Was there any benefit gained by referring the cases to the Hague? One great advantage was the fear of possible punishment of the suspects if found guilty. By the 2013 election, the feeling of 'Big Brother is watching' helped to deter election violence in Kenya as the cases of Uhuru Kenyatta and William Ruto were yet to be determined. Finally however, all the six Hague suspects' cases were terminated after a waste of resources, time and energy in the prosecution process. This has left the country as divided as it was when the cases were referred to the Hague.

An important concern is that referring the 2007 post election violence suspects for prosecution to the Hague did little in terms of restorative justice for Kenya. Although the government of Kenya has paid monetary compensation to some victims, not all have received the money. In addition, the concept of justice for victims of crime goes beyond financial compensation that only addresses the material loss. What of emotional, psychological, mental, social and other concerns?

The trauma and resulting conflict, hatred and animosity associated with violence are yet to be addressed. As Kenyans prepare for subsequent elections, any associated electoral violence only adds up to the already existing feeling of despair due to the unresolved internal conflict experienced by victims of 2007 violence and the August 2017 violence at an individual and societal level. Left unresolved, this conflict continues to build up like pressure in a 'pressure cooker' without a release valve. Such 'pressure' must eventually find an escape route, but with destructive results. In this respect, the Judiciary, as the only arm of government tasked with justice administration needs to consider ways of professionally allowing the 'pressure' to be released from the 'pressure cooker' without any destructive effects. It may take a longer time, but the process is long overdue and should begin as a priority.

It is important to note that there are 44 ethnic communities in Kenya today. Since Independence in 1963, the country has had four presidents. The first, was Jomo Kenyatta, the second, Daniel Arap Moi, the third, Mwai Kibaki and the current being Uhuru Kenyatta. The first and the fourth Presidents being father and son respectively, while the first, second and fourth Presidents are from the Kikuyu community. The second president is from the Kalenjin community. The August 2017 presidential race was still largely a competition between the incumbent, President Uhuru Kenyatta and Opposition leader, Raila Amolo Odinga who comes from the Luo community. It is the apparent dominance of the presidency by two communities as against the other ethnic communities that appears to be one of the major sources of discontent amongst Kenyans. Considering the perceived power and benefit associated with being from the President's community or political alignment, it becomes clear why the Presidential race is a hotly contested seat in Kenya.

The Judiciary cannot ignore political alignments and ethnic tension as it carries out its role in nurturing a young democracy. Statements from the opposition party leaders that if the 2017 presidential election is “stolen” again, they will not go to the courts cannot be taken lightly. Such statement reveals a worrying state of low levels of public confidence in the judiciary. Although members of the Judiciary are Kenyans who belong to specific ethnic communities, in the discharge of their duty and exercise of judicial authority, they must rise above ethnic and political divisions, be impartial and steer the county towards a real and not perceived democracy. This calls for deliberate efforts by the Judiciary to uphold the rule of law and stay true to the allegiance of loyalty to the Constitution of Kenya, protecting the principles and values enshrined therein, for only then, will Kenyans trust the Judiciary again. In this respect, the Supreme Court is commended for upholding the rule of law by nullifying the August 2017 presidential election which was characterized by irregularities and illegalities. The Director of Public Prosecutions must now investigate and prosecute those who carried out the irregularities and illegalities.

As part of public confidence re-building in the institution of the judiciary, all judicial officers, including the Chief Justice, must desist from public pronouncements of whatever nature, in their judicial capacity, except when pronouncing their judgments/rulings. This is important considering the political alignments in the country currently and the ethnic divisions and existing tension. Any public statement by a judicial officer, not made while reading a court decision may be misconstrued to reflect the judiciary’s stand on an issue that may be brought to court for determination. It is also not uncommon for the public to develop perceptions and misconceptions about judicial officers making decisions, based on their ethnic background and political alignments. When this occurs, it erodes public confidence in the judiciary. It goes against the old age principle of law that justice must not only be done, but be seen to be done. This calls for extra care on the part of the judicial officers as they conduct themselves in public or private domain. The greatest responsibility is however, on the Chief justice/deputy, who must act and be seen to be impartial throughout his/her conduct, as the face of the judiciary.

It is now almost ten years since Kenyans experienced the effects of the 2007 disputed presidential election violence, yet no effective deliberate efforts have been undertaken by the Government to help Kenyans come to terms with the negative effects of the violence. Instead, Kenyans have experienced electoral violence yet again after the declaration of the Presidential results on the August 2017 elections. One bitter lesson learnt is that violence is not a solution to any dispute. From the previous discussions in this paper, it is clear that as a country, Kenya has not yet addressed the root cause of the violence that culminated into the 2007 attack on innocent Kenyan by their neighbors and the attack of Kenyans by the police who are paid by their tax to protect them. This is a major concern that needs to be resolved.

During the 2007/8-post election violence, the police received at least 13,416 complaints in relation to the violence, but only 1337 of the cases were taken to court.<sup>6</sup>Victims of known

<sup>6</sup> *ibid* p 464.

attackers made several reports to police stations, but investigations were never completed and few prosecutions followed.<sup>7</sup>As a result, many victims of the post election violence still bear the emotional and psychological burden of knowing that the perpetrators may never be brought to book, and justice for the victims remains elusive. This is a major concern today since Kenya promulgated the new Constitution in 2010. The period after the promulgation of the constitution witnessed a series of judicial reforms aimed at enhancing public confidence levels in the judiciary. However, the judicial reform measures forgot to address the concerns of the 2007 post election violence victim’s concerns. To the victims therefore, they are a forgotten group of Kenyans with no space in the justice reform initiatives. Although the government resettled some victims commonly referred to as the internally displaced persons (IDPs) in some parts of the Rift Valley, the mere allocation of land and some financial assistance does not, in the absence of holding the perpetrators of the violence accountable, amount to justice. In addition, there still exists IDPs from other parts of the country such as Nyanza and the Coastal regions who were never allocated land or given any financial assistance by the government. Many of such IDPs relocated to their ethnic communities and have struggled to pick up and rebuild their lives without any government assistance. Justice demands that the perpetrators of the violence be held accountable punished and the victims compensated. The process of holding perpetrators accountable cannot occur without putting in place deliberate investigative, prosecutorial, punitive and compensatory measures to ensure a functioning and restorative judicial system. The current judiciary does not have any restorative justice measures, but still operates under the adversarial system of trial. The biggest lesson learnt is that the Kenyan Judiciary is still ill prepared to effectively handle conflicts and disputes in a restorative manner. It is time that the Judicial Service Commission and the Judicial Training Institute considers other approaches to the dispensation of justice aimed at conflict resolution and not merely finding out who is at fault and punishing the defaulter. The CIPEV and Krieglars<sup>8</sup> report had both strongly recommended far reaching reform initiatives that included constitutional reforms. There are more reform recommendations that the judiciary can undertake towards nurturing a young democracy such as Kenya in the transitional period. In the next section the paper discusses the role of the Judicial Service Commission.

## II. THE ROLE OF THE JUDICIAL SERVICE COMMISSION IN TRANSITIONAL JUSTICE

The Constitution 2010 created an independent Judicial Service Commission (JSC)<sup>9</sup> whose main function is to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent

<sup>7</sup> *Ibid*.

<sup>8</sup> Government of Kenya, *Report of the Independent Review Commission on the General Elections held in Kenya on the 27<sup>th</sup> December 2007*, (Government of Kenya, 2008).

<sup>9</sup> Article 172 of the Constitution of Kenya 2010.

administration of justice. This reflects the importance of the JSC in addressing the key concern of lack of independence of the judiciary in the period preceding the 2007 general election as already discussed.

The Judicial Service Commission has a constitutional mandate to ensure that the 2007/2008 and August 2017 post election violence perpetrators are held accountable, victims' concerns are addressed and the various communities in Kenya are reconciled as part of measures towards transitional justice in Kenya. In order to discharge its constitutional duty of promoting and facilitating effective administration of justice in this respect, the Judicial Service Commission is further obligated by Article 172(e) to advise the national government on improving the efficiency of the administration of justice. One of the ways of improving the efficiency and effectiveness of the administration of justice in post 2007/8 and August 2017 election violence in Kenya is to ensure that all cases relating to the violence are effectively and efficiently investigated, perpetrators held accountable and victims' concerns are addressed while various communities are reconciled. The Judicial Service Commission must therefore discharge this constitutional obligation by advising the national government to revive the unresolved post election violence cases and take appropriate measures to the satisfaction of all affected.

One of the fundamental constitutional functions of the JSC is to recommend to the president persons to be appointed as judges, while it retains the power to appoint all other judicial officers and prepare and implement programs for their continuous education. In respect to transitional justice, JSC has a role in developing and implementing programs geared towards transitional justice, by incorporating aspects of transitional justice in the administration of justice, especially in cases related to election violence.

In this respect, the Attorney General, who is a member of the Judicial Service Commission has a key role to play. Although appointed by the President with the approval of the National Assembly, the Attorney General is the principal legal adviser to the government and has the constitutional obligation to promote, protect and uphold the rule of law and defend the public interest.<sup>10</sup> The Attorney General must therefore correctly advise the national government of the need to ensure that all cases of post election violence, both civil and criminal matters are properly investigated, perpetrators held accountable and victims' concerns are addressed satisfactorily as per the law. The constitutional obligation of defending public interest implies that the Attorney General must advocate for measures that will ensure that victims, as members of the public, and the 2007/8 and August 2017 post election violence, as a matter of public concern, is effectively and efficiently dealt with in a manner that builds the public confidence in the judicial system. It is about a decade since the 2007/2008-post election violence and almost two months since the August 2017 election violence, yet there are still victims of the violence who are yet to see that justice is done. This is despite the fact that the Kenyan judiciary is perceived to have undergone major reforms to improve its efficiency and effectiveness in the administration of justice. The question that needs to be answered is, is the judiciary as an

institution, adequately reformed to ensure justice for victims of the 2007/8-post election violence any other election violence victims? Does the judiciary indeed have a role in transitional justice?

It is worthy to note that although Kenyans had started the process of reviewing the constitution several years' back, the major push for a new constitution was the aftermath of the 2007/8-post election violence. The Constitution of Kenya 2010 therefore aimed at amongst other concerns, to address issues that may have contributed to the 2007/2008 post election violence and ensure that such violence does not recur. At this point, it is important to appreciate the fact that since the promulgation of the constitution of Kenya 2010, Kenya has had an election in 2013, but like the 2007 election, the presidential results were disputed. However, unlike the 2007 situation, the presidential candidate who disputed the election results submitted to the authority of the courts to determine the dispute, thereby avoiding another violent situation. Interestingly, the presidential candidate who disputed the 2007 election is the same one who also disputed the 2013 presidential election results. The only difference is that in 2013, the public confidence in the judiciary seemed to have risen and there was a lot of trust by the public that the Supreme court, created under the Constitution 2010, with exclusive jurisdiction to determine presidential election dispute, would conduct its proceedings and determine the dispute in a fair and just manner according to the rules of natural justice, guided by the constitution 2010.

The decision of the Supreme Court on the 2013 presidential election dispute<sup>11</sup> drew mixed reaction from within the country and amongst legal professionals. It was supported by a section of Kenyans allied to the Presidential candidate who was declared the winner of the 2013 presidential election, while heavily criticized by the presidential candidate who was declared the loser, and his party supporters. Although no violence followed the pronouncement of the Supreme Court decision, the country experienced an unusual uneasiness. The disappointed section of Kenyans whose party presidential candidate lost the election, felt defeated yet again, let down by the Supreme Court on grounds of procedural injustice.

Since Kenyans did not want a repeat of 2007/8-post election violence, they accepted to move on with their lives despite the Supreme Court decision. This paper is not concerned about the merits or the demerits of the supreme court decision, but that without having put in place adequate mechanisms at the national level to address the plight of the 2007/2008 post election violence victims, the 2013 presidential election results brought with it yet another concern about the role of the judiciary in transitional justice. Suffice it to say that the lack of violence following the 2013 presidential election may not totally mean that all is well. To the contrary it could imply negative peace in which the disappointed citizens feel helpless while opting not to engage in any violence. In the absence of any specific measures to address the emotional and psychological stress that can result from such a situation, people are more likely to be prone to violence at the slightest provocation, while mental health diseases are likely to increase.

<sup>10</sup> Article 156 (4) (a) and (6) of the Constitution of Kenya 2010.

<sup>11</sup> *Raila Odinga and Two Others v IEBC and Three Others*, Petition no. 5 of 2013(e KLR)

Kenya concluded the August 2017 election in which the Supreme Court annulled the presidential election. The decision was based on irregularities and illegalities. The decision has left the country further divided. A repeat presidential election is due on the 26/10/2017. Will the situation be any different? The process of making a judicial decision must also account for the exercise of judicial authority. In this way, people can understand reasons leading to court decisions.

The last three elections have shown that Kenya as a country is divided on ethnic lines and political party affiliations which is not healthy for a developing country and a young democracy. The Constitution 2010 recognized this fact and set guiding principles that must be followed in its implementation. Transitional justice is therefore core to the path to full recovery of the country from the effects of the 2007/8 and August 2017-post election violence. The judiciary is by far the biggest actor in implementing the Constitution and ensuring that the rule of law and democracy are upheld as key pillars of governance in Kenya. What therefore is the role of the Judiciary in Transitional justice in Kenya? The following section discusses judicial authority and how it is to be exercised within the context of transitional justice under the Constitution 2010.

### III. JUDICIAL AUTHORITY, CONSTITUTIONAL PRINCIPLES THAT GOVERN THE EXERCISE OF JUDICIAL POWER AND TRANSITIONAL JUSTICE IN KENYA

The Constitution of Kenya 2010 is the supreme law of the land and must be observed by all persons and state organs, which include the judiciary.<sup>12</sup> The judiciary can only exercise judicial authority as authorized by the Constitution. Any act or omission in contravention of the constitution is invalid. In this respect, any action or omission by the judiciary must be as authorized by the constitution. Otherwise it is invalid.

In adopting and enacting the Constitution of Kenya 2010, Kenyans expressed their desire and commitment, as provided by the Constitution's Preamble, to live in peace and unity as one indivisible sovereign nation. Transitional justice aims at ensuring peace in post conflict societies. The Preamble of the Constitution of Kenya 2010 therefore provides the constitutional basis for transitional justice in Kenya, following the 2007/8 and August 2017-post election violence.

The violence negatively affected the well being of many individuals, as families were disrupted or lost their loved ones and breadwinners.<sup>13</sup> Communities turned against each other disrupting their previous peaceful coexistence.<sup>14</sup> In the August

2017, innocent citizens were brutally attacked by members of the police force. The entire nation was subjected to anxiety, fear and apprehension.<sup>15</sup> This explains why in the Preamble, Kenyans committed themselves to the protection of the well being of individuals, families, communities and the nation. The judiciary must therefore exercise judicial authority in a manner that is consistent with the commitment of Kenyans to protect and nurture the well being of its people. The Preamble of the Constitution further recognizes the aspiration of all Kenyans for a government based on the essential values of human dignity, equality, freedom, democracy, social justice and the rule of law, which are guiding principles in transitional justice too.<sup>16</sup>

The Judiciary is part of the government and so must be guided by the above essential values in its administration of justice. In this respect, all Kenyans have a right to justice in respect of the 2007/8 and August 2017-post election violence. They have a right to a judicial process that enables them to know the truth of what happened during the 2007/8- and August 2017-post election violence. They have a right to proper investigation of all reported cases under the rule of law. They have a right to hold perpetrators to account for their action or inaction. All victims of the violence have a right to have all their concerns addressed satisfactorily. All Kenyans have a right to mechanisms that will ensure the communities that attacked each other during the 2007/8- and the police that violated the rights of peaceful Kenyans during the August 2017- post election violence are reconciled. Rights cannot exist without duties.<sup>17</sup> It is the duty of the judiciary, as the government arm whose function it is to administer justice, to ensure justice for all, in respect of the 2007/- post election violence. The judiciary has an obligation to discharge this vital function, so that the country can peacefully continue with the development agenda as envisaged in Vision 2030<sup>18</sup>. All those affected by the 2007/8- and August 2017-post election violence have a constitutional right to access to justice from the judiciary, under Article 47 of the Constitution. The judiciary therefore has a pivotal role in transitional justice in post 2007/8-August 2017-election violence in Kenya.

The judiciary exercises judicial authority that is vested in it and derived from the people.<sup>19</sup> The exercise of judicial authority must therefore be in the interest of the people. Judicial administration must have as paramount, the interest of the people of Kenya, on whose behalf judicial authority is exercised. In this respect, Article 159(2) of the Constitution of Kenya 2010 stipulates FIVE fundamental guiding principles that courts and tribunals must observe in the exercise of judicial authority;

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<[http://ndpmetrics.com/papers/Kenya\\_Conflict\\_2007.pdf](http://ndpmetrics.com/papers/Kenya_Conflict_2007.pdf)>

accessed 28 October 2014.

<sup>15</sup> Kenya National Commission on Human Rights (n 14).

<sup>16</sup> Simon Roberts, Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Post conflict Nepal, *The International Journal of Transitional Justice*. Vol.5, 2011,75-98,doi: 10.1093/ijtj/ijq027.

<sup>17</sup> Brian Orend, *Human Rights: Concept and Context* (Broadview Press, 2002) 35.

<sup>18</sup> Government of Kenya, Vision 2030, Government Printers Press.

<sup>19</sup> Article 159 of the Constitution of Kenya, 2010.

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<sup>12</sup> Article 2 of the Constitution of Kenya, 2010.

<sup>13</sup> Kenya National Commission on Human Rights, *On the Brink of Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence* (Kenya National Commission on Human Rights, 2008) Available at <[http://www.knchr.org/portals/0/reports/knchr\\_report\\_on\\_the\\_brink\\_of\\_the\\_precipe.pdf](http://www.knchr.org/portals/0/reports/knchr_report_on_the_brink_of_the_precipe.pdf)> accessed 28 October 2014.

<sup>14</sup> Mara Roberts, *Conflict Analysis of the 2007 Post-Election Violence in Kenya*, 2009. Available at

The first principle is that justice shall be done to all, irrespective of status. Victims of the 2007/8-and August 2017-post election violence are yet to find justice. Does their status as victims have anything to do with their elusive search for justice? The judiciary must adopt mechanisms that ensure justice for the victims of the violence.

The second principle is that justice shall not be delayed. Since 2007/8-post election violence, it is almost ten years for victims of 2007/8-post election violence wait for justice. The unexplained delay amounts to a violation of their constitutional right to access justice without undue delay under Article 48 of the Constitution.

The third principle is that alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, so long as they do not contravene the Bill of Rights, are not repugnant to justice and morality, and are consistent with the Constitution or any other written law. This principle is very important to transitional justice in Kenya, since it goes beyond the criminal justice prosecution, and provides other mechanisms of addressing concerns arising out of conflict situations. Therefore, where prosecution fails or is not possible, the Constitution provides for other applicable transitional justice mechanisms to conflict resolution. The Kenyan judiciary therefore has more than one option of judicial mechanisms that can be applied to address the concerns arising from the 2007/8 and August 2017-post-election violence and any other election violence.

The fourth principle is that courts must administer justice without undue regard to procedural technicalities. This is important since the concern of victims of 2007/8- and August 2017-post election violence, is the accountability of the perpetrators and community reconciliation as substantive issues, which should not be affected by procedural technicalities. It is well known that courts have often applied procedural technicalities to dismiss cases. The Constitution of Kenya 2010 is very clear that access to justice should not be hindered by procedural technicalities. Where such technicalities arise, they should be cured and the case allowed to proceed to its logical conclusion of substantive issues that are of public concern

The fifth principle states that, the purpose and principles of the Constitution 2010, namely human rights, equality, freedom, democracy, social justice and the rule of law, must be protected and promoted. Article 10 of the Constitution stipulates the national values and principles of governance that bind all state organs, including the judiciary, in the interpretation of the Constitution 2010 and in the administration of justice. They include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development.

The drafters of the Constitution of Kenya 2010 must have envisaged the pivotal role of the Kenyan judiciary in transitional justice in post 2007/8- election conflicts in Kenya. Indeed, as Kenyans promulgated the Constitution on the 27<sup>th</sup> August 2010, the excitement at Uhuru Park was an expression of the expectation that all concerns about the 2007/8-post election

violence, amongst other issues would be addressed.<sup>20</sup> The principles of governance and national values as enshrined in Article 10 and the preamble of the Constitution of Kenya 2010, echo the Guiding Principles of the United Nations' Approach to Transitional Justice. In particular, the following principles are common to both: the rule of law, human rights and accountability. In the next section the paper discusses judicial mechanisms in transitional justice that can be adopted by the judiciary in Kenya.

#### IV. JUDICIAL MECHANISMS OF TRANSITIONAL JUSTICE IN KENYA AS COMPLEMENTARY TO THE INTERNATIONAL CRIMINAL COURT PROCESS

Article 2 (5) and (6) of the Constitution provides that the general rules of international law and any treaty or convention ratified by Kenya form part of the law of the country. Kenya is a signatory to the Rome Statute<sup>21</sup>, which is thus part of the applicable laws. While taking cognizance of the fact that six Kenyans faced trial at the International Criminal Court (ICC) as a transitional justice measure, this paper argues that the ICC process did not, and cannot replace national mechanisms of transitional justice. The ICC process should be seen as complementary, not substitution of the national process of dealing with concerns of the post election violence in Kenya. The ICC is concerned with those perceived to bear the greatest responsibility of the 2007/8-post election violence in Kenya.<sup>22</sup> The ICC cannot therefore deal with all suspected perpetrators of the violence. The ICC cases of the last three Kenyans on trial on the 2007/8 post election violence were terminated. A section of the Kenyan society was satisfied while another section of Kenyans was not satisfied due to ethnic and political party lines along which the country has been divided as already discussed.

A question that may be asked is why Kenya needs transitional justice now, when the country seems to have settled after the 2007/8-post election violence, promulgated a new constitution, undertaken constitutional reforms and conducted an apparently peaceful election in 2013? In answering this question, several factors need to be considered. Firstly, any national debate such as whether or not to conduct a referendum to amend certain parts of the constitution, reform IEBC, remove IEBC commissioners, or any matter of national importance appears to divide the country into two groups, along the two main political alignments and ethnic divisions. The two divisions again appear to be on political party and ethnic divisions as was the case in 2007,2013 and 2017. Such tension is not healthy for the country since the effects of the post election violence have not been fully addressed. Secondly, some of the key institutions created as a result of constitutional reforms, following the 2007/8-post

<sup>20</sup> The Daily Nation Newspaper, 27<sup>th</sup> August 2010.

<sup>21</sup> Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court on 17<sup>th</sup> July 1998.

<sup>22</sup> *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11; *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11.

election violence, namely the (Independent Electoral and Boundaries Commission (IEBC) and the Supreme Court are perceived by a section of the Kenyan society not to have met their expectations. As Kenyans went to the polls in 2013 and August 2017-,they were hopeful that the IEBC would conduct the elections through a fair and credible procedure, with the aid of the biometric voter registration machine (BVR). However, the BVR machines reportedly failed on the material day of voting and many polling stations reverted to the manual voting system, a major factor in the disputed 2007 presidential election results.<sup>23</sup> Although the BVR reportedly malfunctioned on the material day of voting in 2013, Kenyans still cast their votes peacefully in the hope that any presidential election dispute would be fairly resolved by the Supreme Court, a new institution created under the constitutional reforms, with exclusive and final jurisdiction on presidential electoral disputes. Although the 2013 voting process was relatively peaceful, almost devoid of violence, the electoral irregularities that characterized the presidential election after the votes were cast left many people questioning the ability of IEBC to conduct another Presidential election in 2017. Indeed this lead to the removal of the IEBC commissioners who conducted the 2013 elections and their replacement with a new team to conduct the 2017 elections.

The Supreme Court, as the highest court of the land, had the greatest opportunity to convince Kenyans and the world that the judicial reforms undertaken after the 2007/8 post-election violence would guarantee all parties appearing before it of procedural justice as guided by the spirit and values of the Constitution and transitional justice. Under such fair procedures that uphold the rule of law, all parties are satisfied with both the procedure and the court decision. It is of utmost importance that both the winner and loser in such a contest agree that the process of hearing was procedurally fair to both parties. The decision would thus be acceptable to both parties. Indeed this is the essence of transitional justice in conflict resolution.

However, without going into details of the merits and demerits of the Supreme Court judgment in the 2013 presidential election dispute,<sup>24</sup> it is important to point out that the court process ignored a fundamental constitutional principle of transitional justice as stipulated by Article 159(2) (d) of the Constitution of Kenya 2010. This is the principle that justice shall be administered without undue regard to procedural technicalities. By failing to admit the applicant's affidavit on ground of procedural technicality, the Supreme acted ultra vires the Constitution in conducting the court's proceeding. Within the context of both procedural and transitional justice, such procedural technicalities are curable to ensure substantive justice in the interest of the public. Further, as is the practice in Commonwealth jurisdiction, Kenyans needed to know and understand how the Supreme Court reached its decision. This can only happen where the court outlines the disputed issues, arguments by both parties and the court's analysis of the evidence presented before it. It is ONLY after such analysis that

the court can make a decision, giving reasons as to why and how it arrived at the decision. This is the process through which every court must account to the public how it exercises judicial authority vested in them.

Accountability is a key aspect of transitional justice by all arms of the government. As a result of the Supreme Court's failure to account to Kenyans how it arrived at its decision in the 2013 presidential dispute, a section of Kenyans allied to the applicant, and other non Kenyans have questioned the independence of the judiciary and its ability to preside over any dispute that could arise in 2017 presidential election. Of course the composition of the bench has since changed as three judges who determined the 2013 presidential election petition have retired and were replaced.

The annulled August 2017 presidential election has equally left the country divided into two just like the 2013 presidential election decision. The concern for this paper is where do Kenyans who feel aggrieved with the Supreme Court decision turn to for justice? This is particularly worrying considering utterances by the politicians that the will of the people is determined at the ballot box and not by the courts. Transitional justice is therefore very vital in rebuilding Kenya today. The judiciary still has a lot of room to improve and build full public confidence. It is only under such circumstance that its decisions will be acceptable to both losers and winners. This is by far the greatest challenge for the Supreme Court and the entire judiciary.

So far, the ICC played an important function as a transitional justice mechanism following the 2007/8-post election violence in Kenya. It effectively deterred any potential perpetrators of election violence in 2013 election, although the supporters of the Hague suspects then, argued that the ICC was a political court set up to try African leaders only and settle political scores.<sup>25</sup>The decision of the ICC was celebrated by one section of Kenyans while another section remained disappointed. This is despite the various constitutional reforms undertaken after the 2007/8-post election violence. The implication is that the ICC process alone is not adequate as the only judicial mechanism of transitional justice for Kenya, following the 2007/8-post election violence. While recognizing the important role of the ICC as a mechanism of transitional justice, this paper argues that there is need for local/national mechanisms to hold accountable perpetrators who bear different levels of responsibility, for their role in the violence. This is consistent with the principle of accountability under the Constitution of Kenya 2010 and the guidelines on UN Approach to Transitional Justice. Such local mechanisms complement the ICC process and ensure a satisfactory resolution of conflict and other electoral violence concerns. The August 2017-post election violence that violated the rights of innocent Kenyans came against the background of 'NO BIG BROTHER WATCHING' since the ICC cases had been withdrawn, unlike in 2013 when 'BIG

<sup>23</sup>Independent Review Commission, *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Independent Review Commission, 2008).

<sup>24</sup>*Raila Odinga and Two Others v IEBC and Three Others*, Petition no. 5 of 2013 (eKLR).

<sup>25</sup>Bala Liman, *The International Criminal Court of Justice: International or African in Nature* (2012), Available at <<http://eprints.lse.ac.uk/81888/1/The%20International%20Criminal%20Court%20of%20Justice%20%E2%80%93%20International%20or%20African%20in%20nature.%20%20International%20Affairs%20at%20LSE.pdf>> Accessed 28 October 2014.

BROTHER WAS WATCHING'. In the next section, the paper discusses recommendations of optional judicial mechanisms that can be explored by the judiciary in Kenya.

#### V. RECOMMENDATIONS ON JUDICIAL MECHANISMS OF TRANSITIONAL JUSTICE IN KENYA

The Judicial Service Commission needs to consider the following judicial mechanisms of transitional justice; a special tribunal, special courts, local courts and traditional methods of dispute resolution.

##### (a) Local Courts

Article 162 of the Constitution of Kenya establishes the local court system in Kenya. The subordinate courts have jurisdiction to try criminal offences as well as civil matters. There are subordinate courts in all counties in Kenya, making them the most suitable institution to deal with disputes. Several offences under Kenya's domestic law were committed during the 2007/8 and August 2017-post election violence in Kenya. Some offences were committed in the run up to the August 2017 election as at the time of writing of this paper. They include murder, manslaughter, attempted murder, conspiracy to commit murder, grievous bodily harm, robbery with violence, arson, malicious damage to property, theft and related offences, incitement to violence, illegal oath-taking, illegal possession of firearms, sexual offences such as rape and defilement.<sup>26</sup> The local courts can conduct trials with or without the help of the international community. In the former case, specific officers may be identified and trained to handle electoral disputes, election offences as well as criminal cases arising from campaigns and elections. It is important to build their capacity and ensure their competence, impartiality and effectiveness as well as efficiency. In the second option, where there exists a lot of mistrust of the judiciary by the public, leading to low levels of public confidence in the system, the Judicial Service Commission may consider hiring judicial officers drawn from other jurisdictions, to sit with local judges and magistrates, in order to ensure impartiality of the bench. This however must be strictly for the purpose of resolving the electoral violence, crimes and offences, considering that Kenya as a country is largely divided along political and ethnic lines as already discussed in this paper. This proposal is not new in resolving disputes in Kenya. In 2009, the Independent Constitutional Dispute Resolution Court that resolved disputes related to the Constitutional reform process that led to the promulgation of the new Constitution of Kenya 2010, comprised of six judges drawn from Kenya and three drawn from other Commonwealth jurisdictions. The commissions that investigated the post election violence comprised of experts from Kenya and other jurisdictions.

Apart from the composition of the local courts, there is need to interrogate the system of trial that may be appropriate in resolving electoral violence related disputes. The adversarial nature of the criminal justice process seems to have hindered the

progress of investigation and prosecution of many of the cases reported to the police following the 2007 violence. Subsequently, fewer cases were successfully prosecuted while majority of the cases collapsed. On the 20<sup>th</sup> April 2012, a multiagency Task Force was appointed by the Director of Public Prosecutions to review, re-evaluate and re-examine all cases arising out of 2007/8 and August 2017- post election violence and make appropriate recommendations. Out of the 6081 cases reported to the police for investigation, only 4336 (4118-general cases and 218 sexual gender based violence) cases were reviewed by the task force within the appointment period of six months, which was inadequate. Out of the 6081 cases, only 366 were filed in court for prosecution. Out of the cases filed in court, 138 of them had the perpetrators convicted (held accountable), while in 78 other cases, the perpetrators were acquitted (found not guilty). 77 cases were withdrawn while 52 were still pending before court as at the time when the taskforce compiled its report. In 152 cases, the accused persons were taken to court, granted bond/bail but never appeared in court again and so the courts issued arrest warrants. 3276 cases are still under investigation almost a decade since being reported.

As regards the sexual offences, the task force found that only 368 cases were reported and only 123 had been finalized, convicted 51, acquitted 35, withdrawn 37, pending before court 38, police files open but unable to proceed with investigation of 177 cases. Investigation of sexual violence cases is often characterized by many challenges such as gang rapes in which the victims are unable to identify the attackers with precision. Such cases therefore fail to meet the evidentiary threshold under the adversarial system of procedure in the absence of forensic evidence. The criminal justice system, as it is currently in Kenya, may therefore not ensure justice to all victims of sexual violence in 2007/8 and any other electoral violence. The victims whose perpetrators were acquitted, or the cases cannot be prosecuted are still waiting for justice.

Courts are however limited in handling criminal matters under the adversarial trial procedure. The judicial officer presiding over the case must be an impartial, passive umpire who waits for the parties to collect and present evidence before it. Much of the success in prosecuting criminal cases therefore depends on how equipped the prosecution is and the availability of witnesses to provide evidence in court. Some of the challenges faced in prosecuting the 2007/8-post election violence cases include the following: the number of cases reported in a short time during the violence period was overwhelming to most police stations. Many of the victims who reported the cases became internally displaced by the violence and so could not be easily traced by the police. Some of them were resettled in other areas apart from where the offences occurred.

The police in Kenya still face the problem of inadequate provision of necessary facilities to aid their investigation such as vehicles, and forensic laboratories. Some police stations exceeded their cell holding capacity. As a result, suspects had to be released on police bond only to disappear completely. Some victims were and still are afraid to pursue their cases for fear of revenge attacks by the perpetrators. The crime scenes in some cases were already interfered with, making it very difficult to gather strong evidence. Some offences were not reported immediately due to the violence, and by the time the reports were

<sup>26</sup>Kenya National Commission on Human Rights (n14).

made, the suspects had escaped. Some crimes committed during the 2007/8 post election violence required special skills to investigate, especially sexual abuse. The police were however overwhelmed by the violence and the few specialists could not adequately handle all the reported complaints. The office of the Director of Public Prosecutions also faces a shortage of prosecutors. These, amongst other factors have greatly affected the ability of the local courts to adequately deal with the 2007/8-post election violence cases.

In order to improve the capacity of the local courts to handle post-election violence cases, there is need to enhance the capacity of the existing prosecutors and investigators while recruiting specialists in investigation and prosecution of certain violence related offences such as sexual assault. The entire criminal justice system must work as a system and address all the challenges mentioned above. Indeed this is the core function of the Commission on Administrative Justice.

Apart from the already discussed factors that limit the local courts' ability to adequately administer justice in post-election violence cases, the principal domestic law in Kenya is the Penal Code Cap 63 of the laws of Kenya. It does not make direct recognition of gross human rights violations as crimes punishable under the domestic law. Widespread systemic attacks on civilian population causing several deaths were therefore not crimes against humanity, but only murder of several people. In addition, the penal code only recognizes the role and culpability of the executor of the crimes, but not the planner, instigator or financier. This has however now been improved by the passing of the International Crimes Act 2009.

#### **(b) Special Courts**

Due to the challenges associated with the local court system, already discussed, the post-election violence cases need special courts to resolve the associated conflicts effectively and efficiently. While perpetrators must be held accountable, the victims' concerns must be addressed while ensuring that the search for the truth leads to reconciliation of the nation. The nature and sensitivity of the cases require experts in various fields such as prosecution, investigation and cross-examination. Whereas the local courts apply the adversarial system of procedure, the special courts are able to adopt a special procedure that ensures that justice is done to the victims while the suspects are tried through a fair procedure that protects their fair trial rights as guaranteed by Article 50 of the Constitution of Kenya 2010. The Krieglert report indeed recommended the establishment of an Electoral Dispute Resolution Court with final jurisdiction to handle electoral disputes. The report did not specify the level of this court in the hierarchy of the court systems. This recommendation needs to be pursued by the Judicial Service Commission.

The JSC must be commended for appointing a committee that recommended the establishment of an International Crimes Division of the High Court.<sup>27</sup> Such a division of the High Court has jurisdiction to try crimes under the International Crimes Act,

<sup>27</sup>Kenya for Peace with Truth and Justice, "A Real Option for Justice? The International Crimes Division of the High Court of Kenya" <[http://kptj.africog.org/wp-content/uploads/2014/08/A\\_Real\\_Option\\_for\\_Justice\\_The\\_International\\_Crimes\\_Division.pdf](http://kptj.africog.org/wp-content/uploads/2014/08/A_Real_Option_for_Justice_The_International_Crimes_Division.pdf)> accessed October 07, 2014.

2009. The committee observed that there is public demand to deal with pending post 2007/8 election violence effectively and efficiently to the satisfaction of all those affected. This paper therefore recommends that the Judiciary should implement the report and establish the special court as a division of the High Court to try many of the cases of gross violations of human rights and crimes against humanity, which could not otherwise be tried under the local courts as already discussed. In establishing the special court, it should be modeled along the ICC. In particular, it should adopt flexible hybrid procedures that protect the rights of suspects to a fair trial while balancing the same with concerns for the victims of the 2007/8 post election violence. The establishment of the special court needs wide consultations with various stakeholders. It must attract specialists in various skills and be free from any form of interference. In this respect, the special court needs independence and should be adequately financed well in advance of its commencement of hearings. Although prosecutorial power, constitutionally vests in the office of the Director of Public Prosecutions, there is need to ensure that the prosecutors attached to the special court are independent. In this respect, prosecutors may be independently hired from the best experts while those from the DPP's office may be seconded to the court. Of importance is that the Chief Prosecutor be an expert from outside Kenya in order to ensure his/her independence. Indeed, Parliament has the power to enact a legislation conferring prosecutorial powers on anyone else other than the DPP.<sup>28</sup> The establishment of the special court therefore remains one of the greatest tasks in institutional reforms in the judiciary towards transitional justice after the 2007/8-post election violence in Kenya. The court would have three specific functions namely: holding perpetrators accountable, addressing concerns of all victims of 2007/8 post election violence and reconciliation of the nation.

#### **(c)**

#### **(d) Alternative forms of Dispute Resolution (ADR)**

The constitutional basis for ADR in Kenya is Article 159(2) (c) which allows courts to use alternative methods of dispute resolution. They include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The traditional methods must however, be consistent with the Constitution and any written law. They must not contravene the Bill of Rights under the Constitution. In addition, they must not be repugnant to justice and morality. There is need to integrate ADR into the formal justice system

The most applicable form of ADR in transitional justice is reconciliation whose goal it is to deal with trauma suffered by victims through forgiveness, public apology and restoration of relationships that existed before the violence.<sup>29</sup>

Reconciliation was applied with some measure of success in transitional justice in South Africa after the collapse of the apartheid rule.<sup>30</sup> Reconciliation, however, must go hand in hand

<sup>28</sup> Article 157(12) of the Constitution 2010.

<sup>29</sup> Andrew Shaap, "The Time of Reconciliation and the Space of Politics in Law and Politics" in Scott Veitch (ed) (Ashgate Publishers 2007).

<sup>30</sup> Backer David, "Review of Overcoming Apartheid: Can Truth Reconcile a Divided Nation?" (2006) 39 Comparative Political Studies 1157.

with forgiveness.<sup>31</sup>The victims of the violence need to regain some sense of self-worth, esteem and recognition by others first before the process of rebuilding relationships of trust with the perpetrators.<sup>32</sup>Although forgiveness by the victim is free, it may be conditional or be based upon the attitude of the perpetrator. As an example, victims may demand acknowledgement or confession, accountability and repentance by the perpetrators before they forgive.<sup>33</sup> Forgiveness is a strong aspect of transitional justice since it is the greatest step by victims in overcoming feelings of revenge, moral hatred, indignation or anger.<sup>34</sup>

Apart from the religious aspect of forgiving, the emotional stakes make the process one that must be owned by the victim. It therefore requires a change of heart and attitude by the victim about the perpetrator in a spirit of restoration and humanity. Many victims of violence suffer emotional pain that can be overcome by forgiveness when they come to know the truth of the violence by the perpetrators, who open up, acknowledge their wrongdoing and accept responsibility for their role. This calls for a conference type of process that is presided over by skilled judicial officers through an appropriate procedural justice framework.

The adversarial trial procedure applied in criminal proceedings may fail to yield the truth. In such situations, reconciliation becomes a better option in reconciling a divided nation.<sup>35</sup> Indeed, Section 176 of the Criminal Procedure Code, Cap 75 of the law of Kenya allows courts to reconcile parties in criminal proceedings. This provision may be adopted especially in cases where the victims and perpetrator are known to each other and especially where they live as neighbors. Reconciliation efforts presided over by judicial officers has the force of law in the implementation of the reconciliation outcome. Enforcement of the decision and compliance benefits from legal sanctions. Public debates and public acknowledgement is another way of reconciliation. Kenyans cannot remain in silence and denial of the fact that the 2007 post election violence divided the country and that the cracks may widen if not sealed in time. There is need to talk about the violence publicly as a form of uncovering the truth through public debates. The debates should be broadcasted to reach all counties in both English and Kiswahili so as to reach a wider section of the public in both rural and urban areas. These debates should encourage public participation and be spearheaded by judicial officers. After all, judicial officers exercise judicial authority on behalf of the people. The modalities of how this can be achieved can be discussed between JSC, Commission on Administrative Justice, and the Commission on National Cohesion and Integration amongst other stakeholders. However, the process must be judiciary driven to restore confidence in the judicial system. Kenya will not be the first country to engage judicial officers in such

exercise. In 2004, a series of public debates were conducted with judges and prosecutors of the ICTY, organized by the ICTY outreach office.<sup>36</sup>

Public debates with perpetrators of the violence will help to reveal what drove them into the violence and lessons learnt from their involvement. Such debates were carried out with former combatants in Bosnia, Serbia and Montenegro. This is a perfect way of involving the perpetrators in peace building initiatives.

Photographic exhibitions are also another way of carrying out public discussions on the 2007/8 post election violence. There is need for deliberate efforts to chronicle the 2007/8 post election violence by visiting the various areas affected and preparing a documentary for future generations. In addition, symbolic acts of acknowledgement of responsibility and remorse are part of the healing process. The Kenya government needs to accept responsibility for failing to prevent the 2007/8 violence. There was a government in power at the time of the violence. Such acknowledgement will assist the country in forging the much-needed unity as a nation. The Presidents of Serbia, Montenegro, Croatia and Bosnia-Herzegovina have undertaken such measures.<sup>37</sup>

Community based reconciliation mechanisms through story-telling, psycho-social support programs, sports and cultural activities that focus on the reconstruction of the social fabric of the community cannot be ignored. This exercise can be carried out by different community based organizations.

#### (e) Reparation

Any attempts to reconcile the communities must go hand in hand with reparation for victims of the 2007/8- and August 2017- post election violence. While appreciating the government efforts to resettle the internally displaced victims of the 2007/8 post election violence, there are many more victims who are yet to receive any assistance at all. Some victims who lost their property during the violence have received no form of assistance from the government.<sup>38</sup>The government Of Kenya needs to pay reparations for damages to persons and property of all victims of the violence without any discriminatory treatment as per the national values of the Constitution 2010. This can be done without lawsuits, but through a government program, on the advice of JSC towards an efficient and effective administration of justice.

Traditional methods of justice have been used with a measure of success in many post-conflict societies such as

<sup>31</sup>Ibid.

<sup>32</sup>Ibid.

<sup>33</sup>Van Tongeren, "Impossible Forgiveness" (2008) 2 Ethical Perspectives 76.

<sup>34</sup>C Roberts, "Forgiveness" (2008) 32 American Philosophical Quarterly 289.

<sup>35</sup>Joanna Santa-Barbara, "Reconciliation", *Handbook of Peace and Conflict Studies* (Routledge 2007) 424.

<sup>36</sup>Natascha Zupan, "Facing the Past and Transitional Justice in Countries of former Yugoslavia" <[www.berghof-centre.org](http://www.berghof-centre.org)> accessed 07 October 2014.

<sup>37</sup>Peric Tajtana, "Facing the Past: Religious Communities, Truth and Reconciliation in Post-Milosevic Serbia", *6th Annual Kokkalis Graduate Student Workshop* (2004).

<sup>38</sup>Maureen Opondo who was born, raised and worked in Nakuru, now lives in Kisumu, having lost all her property and business during the violence. Nelson Owegi owned an electrical business in Limuru and was the chairman of the Orange Democratic Movement during the election period. He was attacked and lost all his business and had to relocate to his rural home in Kisumu. He is yet to get any help from the government. The victims were interviewed and featured on KTN 9pm news on the 6/10 2014.

Rwanda's Gachacha courts, that were however criticized for denying suspects fair trial rights. Traditional methods of justice have the advantage of being presided over by the community's chosen elders and so the decisions are more acceptable within the community and easy to enforce. The system provides punitive justice to perpetrators, reparation to victims and reconciliation of the communities. The punishments may vary from fines, community labour, public humiliation, physical punishment or whatever the community leaders find as most suitable for the crimes committed. The traditional justice systems view the perpetrator as a member of the community who needs to be reformed as opposed to incarceration. The perpetrator therefore serves the community while repaying for wrong done in the interest of the whole community.

Different communities in Kenya have very adequate traditional ways of solving disputes that can be tapped on, by the judiciary. Out of the many cases pending trial, a system needs to be developed to classify the ones that can be subjected to traditional methods of dispute resolution. The methods must uphold human rights, be consistent with any written laws and the Constitution of Kenya 2010. In addition, the methods must not be repugnant to justice and morality. Although very appropriate in resolving the 2007/8 post election violence, Parliament may need to enact a legislation that regulates this form of dispute resolution. This is still a big gap in the application of traditional justice methods in dispute resolution, despite the fact that Article 159(2) provides for the system.

#### (f) A Special Tribunal

Although recommended by CIPEV report, but rejected by Parliament, a special tribunal remains one of the best options of dealing with the post-election violence of 2007/8 and indeed any future violence of that kind. Special tribunals have worked successfully in post conflict situations in Rwanda (ICTR), Yugoslavia (ICTY) and Sierra Leone. The special tribunals can either be established in the country, as in Sierra Leone or outside the country, as in the cases of Yugoslavia and Rwanda. It is in my considered opinion that it is not too late to engage in discussions on setting up a special tribunal for Kenya to deal with the unresolved concerns of justice and reconciliation on matters of past injustices that may haunt Kenya in future.

## VI. CONCLUSION

In concluding the discussions in this paper, the JSC must be commended for a job well done so far. However, a lot more needs to be done to ensure sustainable dispute resolution mechanisms. The special court, Division of the High Court on International Crimes remains the best mechanism of transitional justice for Kenya, followed by reconciliation and the traditional mechanisms of justice. Any mechanism must however ensure that perpetrators are held accountable, victims' concerns are addressed and the various communities that attacked each other are reconciled.

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