

Justice seeking lessons for Kenyan Parliamentarians

By Ndung'u Wainaina

Accountability may appear distant for the post-election violence victims. It may also seem as though Kenyans' innocent lives are collateral damage. But that might only be a hiccup. Those Parliamentarians engaging in unsolicited and misinformed propaganda against the Special Tribunal for Kenya Bill are mistaken and hardly do they learn from the past experiences. Thinking your future political career hinges on a warlord is like desperately clinging on a sinking boat. Calls for an end to impunity for perpetrators of human rights violations in Kenya and for those responsible to be brought to justice are not an exercise in futility.

Kenya's consistent failure to respect human rights has been well documented. In the face of such clear, well-documented and large-scale violations, the African Union and United Nations have a duty to ensure that the recommendations of Commission of Inquiry into Post-Election Violence (CIPEV) are implemented in order to address the deprivation of justice to victims, and deter harmful practices in the future. The silence of African Union and United Nations-both played critical role during post election crisis- on the non-implementation of CIPEV, and in the face of the grave suffering caused by post-election violence, has created the regrettable impression of tacit approval of human rights violations as a policy option.

Kenyan National Assembly must assume a historical and moral proportion in ensuring and guaranteeing justice for the post-election violence victims. However, due to blind political considerations it has no feelings and sense of injustice. But several lessons from other parts of world suffice analyzing for their learning. Though dictator Augusto Pinochet died without ever facing trial, the local courts were within a month of actually beginning formal trial proceedings against him on human rights and corruption-related charges. Over a hundred of his subordinates have been convicted within a very short time. Also, thirty-five generals are now facing trial and others are under investigation.

The amnesty law (1978) that Pinochet and his cohorts thought would protect them has been severely limited. Several courts have held that the amnesty law never applied to cases involving forced disappearance, or other gross violations of human rights and that only applied at the end of all trial proceedings. It is only when established that the person is guilty can you think about amnesty. Moreover, great judges have held that it does not apply at all because it violates international law. The only reason Pinochet succeeded in evading justice for long was that international law jurisprudence was limited. If it was today, Pinochet could have nowhere to hide or run to. Kenyan warlords and their ardent sycophantic supporters are walking a narrow path.

In Argentina, 'the due obedience' amnesty law was declared unconstitutional in 2005 by the Argentinean Supreme Court. Pardons granted by the then President Menem in 1989 and 1990 were also annulled by the Supreme Court in 2007. The Argentine legislature also passed a law annulling all of the amnesty laws. Several low-level operatives have been convicted, and trials are under way against the surviving top brass, including both the military and police. Evading justice through 'political amnesty compromise' like what cabinet did on July 30, 2009 doesn't apply either.

Peruvian Truth and Reconciliation Commission presented its report a couple of years ago with a dossier of forty-three cases to the country's Prosecutor's Office. The Prosecutor, although reticent at first, has now moved forward on a significant number of cases. In some cases, people are under investigation for trial and there have actually been trial convictions in some of the emblematic cases. The amnesty law was also annulled in Peru. Former President Fujimori, who found his way back from Japan to Peru via Chile, was arrested in Chile on a Peruvian arrest warrant. He was extradited back to Peru, prosecuted and sentenced.

Uruguay was one of the last holdouts. The Uruguayans passed an amnesty law right after the return to civilian government. There was a plebiscite in Uruguay to decide whether the amnesty law was valid. The military threatened new violence if the amnesty laws were found invalid. The plebiscite came out approving the amnesty. That held for only about two years ago. There are now cases opening in Uruguay against a number of high ranking military, and also against the ex-President and the ex-Foreign Minister.

In Mexico, a Special Prosecutor's Office was created about five years ago, which indicted ex-President Echeverría and the former Chief of the Federal Police on genocide charges. The case has gone back and forth around the question of whether the statute of limitations can be tolled on grounds that for the period of time that Echeverría was Head of State, he had immunity and could not be prosecuted. But new grounds are being broken. In Bolivia, General García Meza, one of the first prosecutions in 1993, was convicted and sentenced to thirty years in jail. García Meza fled to Brazil for a number of years, but eventually was caught and extradited back to Bolivia where he is serving his sentence. Another president, Sánchez de Lozada, is being investigated for incidents in which troops opened fired on demonstrators a couple of years ago.

Numerous ex-heads of state have been investigated or convicted on human rights charges. And if you look more broadly, not just at human rights, but if you look also at corruption charges, you can add another dozen or so who have either been investigated or jailed. The lesson is that there is the confluence of the domestic and the international jurisprudence. Domestically, there is the persistence of human rights movements. There are people who have not given up in seeking justice. These people continue to document the abuses from the beginning and keep the files. They also file habeas petitions even when is absolutely clear that the petitions were not going anywhere. They look for loopholes and get around the limitations. For instance, the theory of overcoming the statute of limitations and amnesty issues in disappearance cases has traveled around the world.

There are also legal theories and influences that have come from international law. For example, crimes against humanity are not subject to a statute of limitations. The source of this rule is international treaties and jurisprudence as it goes from state to state. There are transnational prosecutions either based on passive personality jurisdiction i.e. victims who have the nationality of the state that is prosecuting, or based on universal jurisdiction. The effect of these cases was to start changing the political context. What is interesting about this activity is that, from the judicial point of view, it has often outstripped and contradicted executive policies in the human rights realm. The cases reveal a potential for judiciary. Due to public interest in, and the close press coverage of, the cases presented a window of opportunity.

The attempt to try Pinochet in Spain exemplified and publicized a trend to use 'externalized justice' to tackle impunity for human rights crimes. It also demonstrated the possibilities and limitations of externalized justice initiatives, in terms of securing democracy at the national level, and of advancing accountability for serious crimes under international law. In Chile, Argentina and Spain the Pinochet affair served to restart stalled impulses towards accountability, accelerate democratic reform and challenge the legitimacy of compromises conceded during earlier democratic transitions.

With regard to the wider role of international law in limiting impunity the International Criminal Court (ICC) provides a new mechanism for external justice. However, at the domestic level the ICC may have similar indirect effects to the Pinochet litigation, boosting domestic enforcement prospects and strengthening democratic commitment. International justice play key role of stimulus or back-up. This suggests that progress in tackling impunity depends on incremental and dynamic interaction between domestic and international law, and between national and transnational actors. The lesson to Kenyan Parliamentarians is that self-serving political games are destructive and have extremely limited orbit.

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