

POST-ELECTION CRISIS IN KENYA AND THE IMPLICATIONS FOR THE INTERNATIONAL CRIMINAL COURT'S DEVELOPMENT AS A LEGITIMATE INSTITUTION

Elizabeth Kimundi*

Kenya plunged into a dark period of post-election violence following the highly contested presidential elections of December 27, 2007. The violence that occurred, though unprecedented, was not entirely unforeseen. Since achieving independence, elections have not served as a watchdog in the democratic process.¹ Instead Kenya became a "bureaucratic-executive" state with an all-powerful presidency.² Ethnic identity in Kenya had become salient because it embodied other societal divisions, such as regional inequalities, control over land, and access to political opportunity.³ This article explores how the post-election unrest, over which the International Criminal Court claimed jurisdiction in 2010, was grounded on the deep fissures in Kenyan society. The analysis will be done against Kenya's historical background and show how tribalism had become deep seated in the Kenyan political sphere,⁴ arising out of competition for land and resources. Coming from this analysis, the article addresses the problem of whether the International Criminal Court's decision to claim jurisdiction for the Kenyan post-election violence was viable.

I. HISTORICAL BACKGROUND

The factors that led to the post-election violence in Kenya had been festering since the end of colonial rule by Britain. Following the Mau Mau revolt of 1952–1960 (comprised predominantly of Kikuyus),⁵ Kenya achieved internal self-governance (*Madaraka*)⁶ on June 1, 1963, and gained independence on December 12, 1963. On December 12, 1964, it became a republic. Mzee Jomo Kenyatta (a Kikuyu) was named Kenya's first president. This was in part because the British were anxious to prevent another Mau Mau revolt.⁷ Jaramogi Oginga Odinga (a Luo⁸) became the

* Elizabeth Kimundi is a practicing attorney in New York. She holds a BSL and LL.B from Pune University, India, and an LL.M. in International Legal Studies from NYU School of Law, USA. Ms. Kimundi is admitted to practice in the State of New York, and is an Advocate of the High Court of Kenya.

¹ Karuti Kanyinga, Duncan Okello, and Akoko Akech, TENSIONS AND REVERSAL IN DEMOCRATIC TRANSITION 3 (Karuti Kanyinga & Duncan Okello eds., 2010).

² Daniel Branch and Nic Cheeseman, *Democratization, Sequencing, And State Failure in Africa: Lessons from Kenya*, 108 AFR. AFF. 1, 3 (2008).

³ *Id.* at 3.

⁴ Godfrey M. Musila, *Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions*, 3 INT'L J. TRANSITIONAL JUST. 445, 445 (2009).

⁵ The Mau Mau were a militant African nationalist movement active in Kenya during the 1950s whose main aim was to remove British rule and European settlers from the country.

⁶ Madaraka is the Swahili word for internal self-governance.

⁷ Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accounta-*