KLRC

KENYA LAW REFORM COMMISSION

A vibrant agency for responsive law reform

THE LAW REFORM

Newsletter

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Exit With Heads High:
Life After Service

Ms. Leila Kulah &
Mr. John Kariuki

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"The Law Reform Newsletter targets the policy makers at the two levels of government (National and County Governments), legislators, Civil Society, Development Partners, Academia and the general public who are the ultimate beneficiaries of our work"

The Kenya Law Reform Commission (KLRC) is glad to publish the 3rd issue of the Law Reform Newsletter (LRN). The issue comes at a time when the world and the country have braved the COVID 19 pandemic. Subsequently, KLRC like other organizations has taken proactive measures in line with the Ministry of Health guidelines to tackle the pandemic. The Law Reform Newsletter thus highlights the key legislative, policy and administrative initiatives taken to address the pandemic and guarantee normalcy. It also captures KLRC`s contributions to its mandate of law reform and shares critical experiences and lessons. Part of this issue has also been dedicated to the recent work done by KLRC in close collaboration with our stakeholders and partners.

It is worth noting that the Law Reform Newsletter has been instituted so as to enhance public awareness and access to information on law reform in Kenya as well as across the borders.

The Law Reform Newsletter targets policy makers at the two levels of government (National and County Governments), Legislators, Civil Society, Development Partners, Academia and the general public who are the ultimate beneficiaries of our work.

The articles are selected from a plethora of contributions and are meant to address the unique readership and needs of our stakeholders. The Law Reform Newsletter editorial team did subject the articles to peer- review before final publication. The team equally made deliberate efforts to guarantee that the language and design is user friendly for a great reading and compatibility with user's needs.

We have confidence that our experts and the contributors to the newsletter have been alive to the issues reflected in the body politic and have penned inspiring experiences and possible policy solutions where applicable for the betterment of society. The editorial team will continue to work on your feedback in the upcoming Law Reform Newsletter issues.

Joash Dache, MBS
Editor-In-Chief, Law Reform Newsletter

EXIT WITH HEADS HIGH: LIFE AFTER SERVICE

KLRC over the years has been blessed to have personnel who have exited service with grace and with a lot of institutional knowledge and memory. The editorial team was able to reach out to some of them and found out their highlights and lessons while at KLRC.

Who is Ms. Leila Kulah?

"Leila Kulah is a Kenyan, librarian by profession hailing from Kakamega County, born, bred & schooled in Nairobi County, married in Kwale County, currently farming & living in Machakos County."

Most memorable experience while at the KLRC?

"Most memorable moments in the Commission was when I reported to work on a Monday morning and I was asked to pick an air ticket from procurement for the 3.00pm flight to Mombasa for a retreat at Leisure lodge in South coast. What a luxury! I was on the same flight with the heavy weights in government then. It was my first air trip; you can imagine the anxiety at same time excitement.

What are the major highlights working at the Commission?

- *Managing successfully a one-person department (the Commission's Library);*
- *Initiating the process of book classification, where all the books were classified using the DDC classification scheme;*
- *Subscription to E- Newspapers;*
- *Being on record as the first & only member elected trustee to serve on the KLRC;Pension Scheme & later nominated to serve as chairperson before retirement;*
- *Though not being my mandate, I took down minutes of the HOD meetings;*
- *Served in the welfare committee that ensured an honorable send off for retirees and staff exiting the Commission."*

What is the most important thing in retirement?

"One thing: Ensure you have a side hustle that is a source of income. It is important to start a side hustle early on before you retire. Identify the opportunities, gaps and start a business. Complaints are opportunities. Embrace them and start something today that is why I am a farmer and owner of an eatery."

How is life after exiting service?

"How I'm handling life after my exit is by running an eatery called BIJU SPOT at the local shopping centre in Machakos County. It is open from 7.00am – 7 pm, 6 days a week. We offer food deliveries, outside catering and dine in services for our customers. Being a farmer by default, we sell farm produce through social media sites of the eatery and owing to the demand for our delicious food & the interest to know how to prepare such food, plans are at an advanced stage to start cooking classes at the same eatery."

What is your parting shot?

"Never get comfortable in your current position. Constantly reinvent yourself with the world so you remain relevant."

Ms. Leila Kulah

"I believe having liquidity and having paid all your loans are the two most important things".

Mr. John Kariuki former head of accounts KLRC

Who is Mr. John Kariuki?

"Mr. John Kariuki is a married man with children. He is a senior Kenyan citizen and an accountant by profession who has worked in accounts department in various Government Ministries, Departments & Agencies for over thirty years."

Most memorable experience while at the Commission?

"When I joined the Commission in the year 2016, there were so many pending bills to be settled and have the accounting systems aligned. It had reached a time when I felt like going back to where I had come from because there was a lot of pressure on how to handle these issues. I thank the Almighty God who gave me perseverance to handle most of the problems which were in the accounting section. As I leave the Commission, the pending bills are maintained at less than 1%."

What are the key highlights of your service while at the Commission?

"The notable achievements during my tenure in the Commission are as follows:

- *Real time payments through our bank unlike before we used to issue cheques;*
- *The customers did not need to visit the section unless the payment had an issue or the National Treasury had not funded the Commission;*
- *Through Enterprise Resource Planning (ERP), we were able to generate reports on time."*

What is the most important thing in retirement?

"I believe having liquidity and having paid all your loans are the two most important things. I think people mistake liquidity for investments. It's okay to have investments but take a pension scheme or annuity so that you assured of monthly stipends to sustain you. I insist on telling people to ensure all their loans are paid before retirement. Because sustaining payments after retirement is such a challenge. You don't have a regular source of income it can strain you and your family to ensure repayment."

What is your parting shot?

"I feel a happy man to have left the Commission in a better place though there's a lot of improvement which can be done in terms of:

- *Integration of the systems- Human Resource, Procurement, Finance & Accounts module into one;*
- *To recruit more staff into the section for internal control; and*
- *Fully embrace the ERP system for effective reporting."*

Written by:
David Munene & Catherine Gatetua

DEALING WITH THE COVID-19 PANDEMIC- THE NEW NORM?

"You can't build an adaptable organization without adaptable people—and individuals change only when they have to, or when they want to."

The COVID-19 pandemic has disrupted the way of life across the world. It has in equal measure introduced challenges with respect to how people work, socialize and carry out their duties. In response to the outbreak, medical researchers and medical institutions have come up with vaccines to build up immunity to fight against the virus and thereby avoid the spread and the societal havoc it has caused. The emergence of vaccines is proportionately aimed at normalcy.

To prevent the virus from spreading at the workplace, organizations including the Kenya Law Reform Commission turned to remote work as a necessary step to continue their day-to-day operations. This unpredicted new reality presented uncharted territory for many organizations and people managers accustomed to having their employees onsite, raising questions such as, "How do I know my workers are actually working?", "Do my employees have the tools they need to do their jobs remotely?" and "What impact does remote work have on my people's productivity?"

The KLRC sought different approaches to safeguard the employees whilst delivering its mandate. Scaling down on physical and out of office meetings were the most notable of changes. Adoption of ICT has helped immensely to bridge the gap in service delivery. Automation of processes like use of secure internet banking, implementation of an ERP like Microsoft Dynamics for accounts, procurement and finance departments to reduce handling of physical documentation, increase reliability and transparency has been a big boost in service delivery whilst observing MOH guidelines.

KLRC also established a schedule for staff to allow working in shifts. It is now a common saying, not business as usual. Change is inevitable and gladly the KLRC swerved the waves safely and continues to build this great nation from behind a desk in the office to behind a laptop at home.

"You can't build an adaptable organization without adaptable people--and individuals change only when they have to, or when they want to." --Gary Hamel

Written by:
David Munene
ICT Department

HAS KENYA MISSED THE MARK ON THE INTERPRETATION OF ARTICLE 2(5) OF THE CONSTITUTION?

The Kenyan Constitution was promulgated in the year 2010. With it came about a major leap as it recognized international law as part of the law of Kenya. Prior to the 2010 Constitution, Kenya was viewed as a 'dualistic'' State as any International Instrument had to be domesticated before it acquired the state of law in the country. Article 2(5) of the 2010 Constitution of Kenya states that; 'The general rules of International Law shall form part of the laws of Kenya.' As a result of this provision, courts have been provided with the leeway to use non municipal legal framework in decision making. This article examines the textual and contextual status of article 2(5) of the Constitution, the manner in which it has been incorporated in the laws of Kenya, how the courts have interpreted this Article and the challenges that courts have faced in its implementation.

What are the general rules of International Law?

The general rules of International Law are those laws that are accepted by all nations in their domestic law systems.

They include but are not limited to; principles of procedure, principles of natural justice, principles of good faith, principles of *res judicata* among others.

The main aim of the general principles and rules of international law is to fill gaps in International Law where treaties or customary international law do not provide for a rule or decision. The main aim of these general principles and rules is for their implementation in the municipal jurisdiction. For a general rule to qualify for its incorporation in International Law, it must:

(I) be a general principle of law as distinct from a legal rule of a more limited functional scope;

(ii) be recognized by civilized nations; and

(iii) be shared by a fair number of nations including the principal legal system of the world.

From a textual and contextual perspective, two points can be raised with regard to the general rules of international law. First, it is not readily apparent what that phrase means. Second, even if it means what it has commonly been thought to refer to; that is, customary international law, no rules exist to guide our courts on how to apply such legal norms. This contextual problematization assumes the implication that 'general principles of international law' and 'general principles of law recognized by civilized nations' are one and the same thing which they are not. The issue becomes more pertinent when one considers the complete omission of customary international law from the sources of law under the Constitution.

One may be hard-pressed to find 'general rules of international law' as a regime of law recognized as part of the established sources of international law.

Article 38 of the Statute of the International Court of Justice (ICJ), which may be taken to provide a generalized appreciation of sources of international law, lists the following: (i) international conventions, (ii) international customs, (iii) general principles of law recognized by civilized nations and (iv)subject to the provisions of *article 59*, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

From this list of sources, the closest that Article 2(5) reference to 'the general rules of international law' comes to is, 'the general principles of law recognized by civilized nations'. This, however, begs the question of whether that is what the drafters of the Constitution had intended. Such conclusion would be hard to support for various reasons. First, under Article 38 of the Statute of the ICJ, the general principles recognized by civilized nations appear to be of lesser in the hierarchy of norms than that of International Customary Law.

Some commentators have argued that Article 2(5) refers to International Customary Law. However, this begs the question of why then did the drafters not use this term. As we have noted there is a great textual problem with the phrase 'general rules of International law'. In the context of legal norms of International law, this phrase is ambiguous and non-existent.

The ambiguity in context.

The ambiguity of Article 2(5) of the Constitution has made the judicial appreciation of its import rather difficult. From the cases so far decided, it is clear that determining the correct place of international law in Kenya has not been an easy task, with courts sometimes reaching different positions.

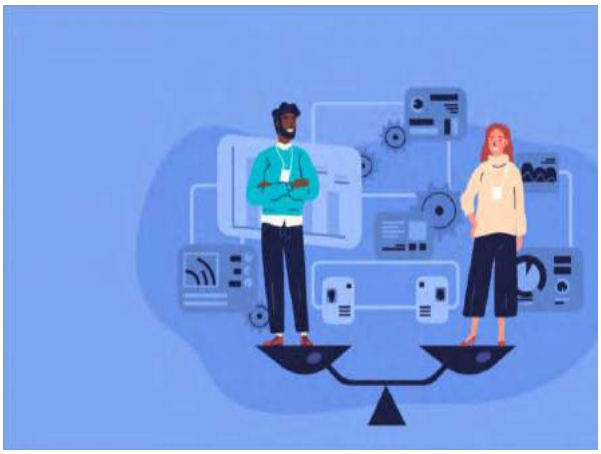
While some courts have contemplated a very robust role for international law domestically, others have ordained a status that is hardly different from that of local statutes. The difference in opinion may largely be attributed to ambiguous drafting of the Constitution. By stating that international law is part of Kenyan law and failing to specify where it falls in the hierarchy of norms, the Constitution brought interpretative confusion in the courts.

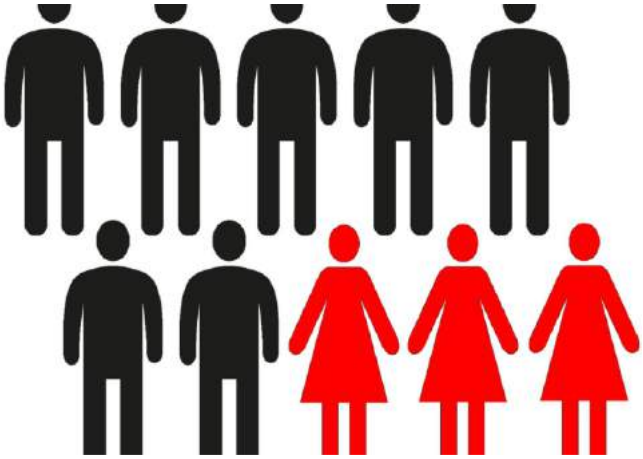
A good example is the case of *Kituo cha Sheria v. The Attorney General*. The court seemed to merge different legal concepts into one. The issue before the court was whether a Government directive requiring the relocation of all refugees from urban centers to refugee camps in North Eastern Kenya, was unconstitutional. The court held that indeed it was, because it violated not only statutory and treaty law, but also because it was an abrogation of the principle of *non-refoulment*, which forms 'part of international customary law'. But the analysis that the court employed to reach this conclusion is in itself problematic.

Evidently, the phraseology of the Constitution creates significant uncertainty in relation to the application of international customary law, such cannot be resolved by a matter-of-factly equation of 'general rules of international law' to customary international law. It is important that legislators take into account these loopholes and seek ways to amend the Article in order to deal with the problems currently faced as a result of the of the application of this Article.

Written by:
Mathew Kimanzi,
Assistant Director, Legislative Services and Head of Public Education, KLRC

PUBLIC SERVICE DELIVERY FOR WOMEN IN KENYA: THE IMPORTANCE OF GENDER-INCLUSIVE APPROACHES IN SERVICE DELIVERY





Among the values and principles of public service delivery espoused in Article 232 of the Constitution of Kenya is the promotion of responsive, prompt, effective, impartial and equitable provision of services. In this regard, service delivery that considers gender parity as a fundamental element in ensuring the ultimate satisfaction of all persons is necessary. Since gender is a basic classification category by which human beings are classified, it is pivotal to consider how gender disparities influence the quality and experiences of men and women in service delivery.

The Constitution of Kenya through the Bill of Rights creates an obligation for the State to guarantee the provision of necessary services towards the enjoyment of basic human rights by Kenyan citizens. To this extent, services relating to access to education, healthcare, water and sanitation, may be considered as basic services that are key to securing all other legal rights and freedoms.

Further, the Constitution of Kenya devolved the government and created county governments in Kenya under Article 6 and provided for their mandate in the Fourth Schedule to the Constitution. This had the effect of devolving services to enhance accessibility and inclusivity by all citizens. The devolution of the Government was a means of enhancing the provision of quality services to citizens, increasing autonomy in the management and administration of county resources, and empowering citizens through their enhanced participation in decision making, planning and management of their resources. This makes the access to public services paramount to achieving the purpose of a devolved government. The improvement of service delivery by enhancing oversight and accountability has been one of the key benefits of having a decentralized system of government.

In the governance structure, it is important to recognize that gender, governance and basic

service delivery are essentially interlinked. Therefore, since basic services are central to ensuring that citizens meet their basic needs, the State must offer equal access to all social groups, including women. Having cognizance of the fact that women's and men's needs are often different, and the extent of their access to basic services varies, the need to mainstream gender into the activities of service delivery is fundamental. To achieve this, all State agencies providing public

services should review their operations to ensure that their services to all citizens are provided on the same terms and meet the needs of women and men alike.

A gender-sensitive approach to the delivery of basic services is needed. Currently services often fail to reach women or address their needs. This is as a result of having service design and delivery mechanisms that are ignorant of the specific challenges that women face in trying to access services, and the specific obstacles that are unique to women thereby excluding them in the ultimate enjoyment of public services.

It is argued that since those who design services are typically men, their assumptions about users tend to reflect the situation of male users. Although women have different needs and face different constraints, they have little involvement in the processes that determine which services will be provided to them and how this shall be achieved leading to their being marginalized or left out,

Given that governments are bound to offer services equally to all citizens, a gender-sensitive approach should be embraced in service delivery mechanisms. Although women submit a larger need for a differential approach in providing basic services, they continue to face the greatest barriers to access. Failure to take these difficulties into account through a gender-sensitive approach to the design and delivery of services inevitably results in women's unequal access to basic services.

A key strategy in ensuring the inclusion of women in the process of formulating service delivery tools and frameworks is by conversing with them, finding out what their needs are, taking into account the differential factors that lead to discrimination of various groups of women, and finally, incorporating their voices in the built in structures of service delivery to make them gender sensitive and inclusive.

"If we want to understand what women's lives, experiences and challenges are, we must begin asking the women themselves. They know. And if we want to know what women think or what their experiences with the world are, we have to look for new methods, for new ways of finding out and understanding their thoughts and experiences." – Prof. Wanjiku Mukabi Kabira.

Women's voices must reach decision makers, guide program design and implementation, and achieve their active participation in monitoring and evaluation. While accountability to women is vital at every stage of the process of service delivery, mechanisms for their participation and information are lacking. Therefore, information on and indicators of women's needs are essential. The result of not having women's voices in generating gender sensitive mechanisms is that services may be inappropriately designed and consequently fail to address barriers that reduce women's access to public services.

Therefore, it is important that in the development of frameworks for the assessment of effectiveness of service delivery mechanisms, gender sensitive indicators must be incorporated in order to understand the extent to which women have benefited from public services. According to the UNDP Users Guide to Measuring Gender-Sensitive Basic Service Delivery, key questions that may guide the assessment as to whether gender sensitive tools have been used are: "Is the data gender sensitive?, Is the data analysis sex-disaggregated?, Is there a diverse set of input, output and outcome indicators of service delivery in the database and If not, consider alternative sources of data and indicators."

For effective gender sensitive service delivery framework the country should:

a) Put in place frameworks for gender related disaggregated data to ensure further analysis and understanding of gender needs to inform gender-sensitive policy-making and programming;
b) Adopt participatory mechanisms of planning service delivery systems to include the needs of women and ensure that the delivery of services reflects their needs;
c) Build the capacity of women to be aware of their rights and empower them to articulate their concerns and needs;
d) Reinforce advocacy for affirmative action implementation in the public service sector since this shall result in a direct positive impact on the quality of service delivery;
e) Public service delivery programmes should identify the barriers to access by women; acknowledge the importance of a needs and vulnerabilities assessment in the development of frameworks; and
f) Adopt the use of disaggregated data in the development of frameworks and continually assess the extent to which service delivery structures and mechanisms have successfully met the needs of women.

Written by:
Sandra Akama

THE CONCEPT OF QUALITY LEGISLATION?

"In modern society, legislation has the primary function of acting as legal instruments through which certain goals are realized".

Although most people have an idea about what constitutes good legislation, still hardly any agreement exists about what it really is. The fact that ideas about the quality of legislation depend so heavily upon one's point of view explains why such a high degree of disagreement exists. According to G.J Veerman in his discussion on the definition of quality, 'the quality of a product or service is the degree in which all its properties combined satisfy the user expectations of the customer, limited by the price and delivery time which he is willing to pay or accept, and the ethical and professional values of the supplier.' The operative term is 'satisfying user expectations'.

In modern society, legislation has the primary function of acting as legal instruments through which certain goals are realized. This occasions several users of legislation among them: politicians, civil servants, legislative drafters, advisory boards, judges, attorneys, public prosecutors, officials from national and county government agencies, citizens and businesses. If we consider the law makers (legislators), chances are they are likely to use the law to meet their political ends. This has previously happened in a number of occasions such as the review of salaries and benefits accruing to them. Other integral users are those who carry out, interpret or apply the law in an official capacity. Above all, the citizens are a critical consumer of the law as they are expected to adhere to and must live according to laws in order to, for example, get things done, receive subsidies or merely stay out of trouble.

Inevitably, these users have different expectations of the law. Some of them emphasize effectiveness, others stress clarity and legal certainty, and still others might seek legislation that is easily applicable and without undue burdens.

A sound legislative policy has to reconcile all the various points of view. However, at times the views may conflict. Such conflicts sometimes simply don't arise when legislation is considered on the theoretical level. It is conceivable to think about legislation which is legally sound, well-written, effective and efficient, carefully drafted and whatever else one might imagine would be necessary. When these aspirations are put into practice, however, contradictions may emerge. The careful drafting of an Act of a Parliament, for example, might run counter to the aim to promulgate the law expediently and efficiently. Likewise the effectiveness of a law might be impaired by the necessity to make it constitutionally sound – for example, guaranteeing the rights of minorities might create an obstacle which keeps the majority from achieving its chosen goals. In addition, achieving clarity in the provisions of an Act is an inherently difficult task in that even a legal phrase which might be clear to the legal professional is hardly ever easily understood by the layman, while, vice versa, a sentence which seems sufficiently clear to the uninitiated may raise many questions in the eyes of those who deal with the problem professionally.

Such conflicts make it in principle impossible to draft laws which fulfil all the potential demands regarding quality. Ideal legislation simply cannot be achieved! The legislator has to perform a balancing act and find a workable compromise which offers an optimal mix of the most important requirements in every given case. And even then, the legislator has to be aware of the impact of time. What might have been appropriate yesterday may no longer provide the best solution for tomorrow. This necessitates the need for continuous law reform that is alive to social, cultural, economic and political changes.

Written by: Kelvin Mwenda,
Planning Department.

GENDER MAINSTREAMING THROUGH LEGISLATION

"Gender equality refers to equal rights, responsibilities and opportunities".

Ms Milly Lwanga, poses a question during a gender mainstreaming session in Naivasha.

Gender mainstreaming through legislation is a key pillar in addressing laws that discriminate against women and girls in Kenya.

KLRC in collaboration with IDLO and UN Women undertook a capacity building initiative to train legal officers from KLRC & OAG on gender sensitive legislative drafting in Naivasha in 2021.

The capacity building was informed by the lack of awareness and training amongst drafters on gender sensitivite laws and policies that still exist with gender imbalance towards women and girls.

The training was spearheaded Dr. Johnson Okello a lawyer of 20 years experience in policy development and analysis, law reform, legislative drafting and drafting of international agreements. Additionally, Mr. Gad Awuonda a lawyer of over 25 years' experience specialized in legislative drafting, legal research, law reform, general policy formulation and legal audits was also a facilitator in this exercise.

Gender equality refers to equal rights, responsibilities and opportunities. Gender sensitive legislation is part of gender mainstreaming into the legal system. It is the integration of gender perspectives into components of the legislative processes. The first step to achieve gender sensitivity in legislation is to conduct a gender based analysis of the existing laws to identify gender inequalities and address them.

IDLO recognizes the significant contribution that KLRC makes towards legislative review and reform which is a key enabler to access to justice. The additional support will ensure that the three drafting; Institutions namely KLRC, the Office of the Attorney General (OAG) and Parliament tasked with advising and offering technical assistance in legislative review process have the capacity to spearhead the review of relevant discriminatory law against women and girls in Kenya.

Kenya Law Reform Commission in carrying out its principal mandate of keeping under review all the law of the land and recommend its reform has always embraced the aspect of collaboration and partnership. In its recent past, KLRC has partnered with key development partners like IDLO, USAID among others in matters of enhancing public participation and devolution.

KLRC shares the vision that the report after its implementation will seal the identified gaps through law reform and proposed policy action and ultimately the full enjoyment of rights and fundamental freedoms of women and girls without discrimination and the realization of the country's Vision 2030 Blueprint.

Written by:
Lucy Mutua,
Procurement Department

SERVICE DELIVERY AND LEGAL AID IN KENYA

"It is imperative to appreciate that the National Legal Aid Service is one of the bodies that offers legal aid to vulnerable persons in a range of cases".

Legal aid in Kenya is a common phenomenon most especially among the vulnerable groups, including but not limited to persons with disability, women, children, youth, accused persons and marginalized communities. Pursuant to Section 2 of the Legal Aid Act, legal aid includes: – legal advice, legal representation, assistance in resolving disputes by alternative resolution, drafting of relevant documents and effecting service incidental to any legal proceedings, reaching or giving effect to any out of court settlement, creating awareness through the provision of legal information and law-related education and recommending law reform and undertaking advocacy work on behalf of the community.

The wisdom behind this legislation is to establish a legal and institutional framework to promote access to justice by:- providing affordable, accessible, sustainable, credible and accountable legal aid service to indigent persons in Kenya in accordance with the Constitution of Kenya, 2010, providing a legal aid scheme to assist indigent persons to access legal aid, promoting legal awareness, supporting community legal services by funding justice advisory centers, education and research and promoting alternative dispute resolution methods that enhance access to justice in accordance with the Constitution of Kenya, 2010.

Upon the enactment of this legislation, the National Legal Aid Service (NLAS) was established vide Section 5 of the Legal Aid Service Act No. 6 of 2016, as the successor of the National Legal Aid and Awareness Program under the Office of the Attorney General & Department of Justice, whose principal mandate is to further the objects of the Act for the benefit of the general public and particularly the vulnerable members of the society.

It is imperative to appreciate that the National Legal Aid Service is one of the bodies that offers legal aid to vulnerable persons in a range of cases.

Other organizations include: Kituo cha Sheria, FIDA-Kenya, Center for Rights Education and Awareness (CREAW), Law Society of Kenya through pro bono services and Legal Awareness programs, Program for Legal Empowerment and Aid Delivery in Kenya (PLEAD), HAKI Africa and Schools of Law through legal clinics, among others.

All these bodies have their principal purpose pegged on the various results in the quest to realize Vision 2030 for sustainable development by contributing to the building of effective, accountable and inclusive justice system. The said results include: the improvement of coherence and cooperation throughout the justice sector, strengthening court administration and case management, improved access to justice particularly for the vulnerable persons in the society and most importantly, increased quality and efficiency in the justice system in Kenya.

Barriers to effective service delivery in legal aid

All the legal aid institutions under the administration of the National Council on the Administration of Justice (NCAJ) and the Judiciary have been progressively working towards the realization of effective access to justice for vulnerable persons to the best of their ability. However, these efforts have been countered with various hurdles ranging from: rampant corruption cases which undermines public faith in the justice system in Kenya, long distances that some people have to cover in some counties to get these services and even access to courts, backlog of court cases leading to prolonged trials, limited public sensitization on people's rights, limited knowledge of the existence of legal aid institutions thus making people feel helpless, limited capacity of Civil Society Organizations (CSOs) to provide legal aid services, among others.

Notwithstanding all the hurdles experienced in the realm of legal aid thus barring effective service delivery, there is still hope as there are people even in their individual capacities who have been progressively trying to sensitize people and making them aware of the existence of these institutions and where they can find help. In the era of Covid-19, there has been an increase in domestic violence thus creating more need for legal aid hence a new challenge has evolved. Social media however has contributed so much in the sensitization of victims' rights and some of the institutions where they can find help. It is therefore safe to state that if only there is proper sensitization, more people and institutions carrying out this noble course and faster dispensing of court matters, the future of legal aid is promising.

Written by: Everlin Kogi, Legal Intern, KLRC

SERVICE DELIVERY, A ONE-STOP-SHOP IN KENYA

"The inception of Huduma Centers has been feted as one of the most innovative and progressive ideas which has been implemented since independence".

Service delivery has been inherently applied in an array of organizations, and sometimes in personal statements. It has become a differentiating factor on how the government and private institutions run their day-to-day affairs. While it has been widely spoken and written about, the practice of service delivery has always been met with untold challenges. Though it is deeply enshrined in the constitutions that govern various bodies, service delivery has not reached its optimal measure in an array of organizations and government institutions across the globe. Service delivery is aimed at ensuring efficiency, legality, coordination, legitimacy, and a near-perfect corporate image.

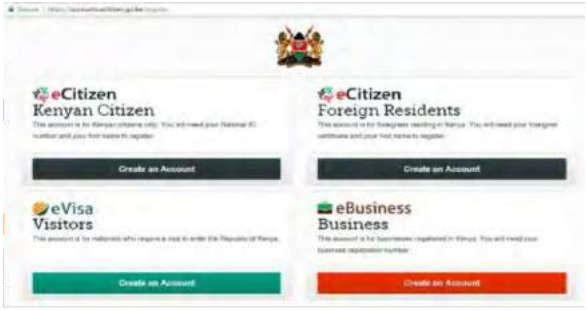
Service delivery in Kenya is modeled by Article 10 (2) of the Constitution which entails the national values and principles of governance. These national values and principles are: good governance, integrity, transparency, and accountability all of which are tenets of effective service delivery. The government has instituted measures to ensure that Kenya citizens have access to unrivalled and equal service delivery across the country. The government instituted the one-stop-shop model, herein referred to as Huduma Centre, in November 2013. Since inception, it has been heralded as the ideal model to devolve effective service delivery in Kenya.

The services that were being offered by the centers were initially limited to a few services, but this has since been expanded to cover an array of government services. The inception of Huduma Centers has been feted as one of the most innovative and progressive ideas which has been implemented since independence. Huduma centers are mandated to deliver governmental services from "a single location, online e-Huduma web and mobile portal to provide integrated services offered by various government Ministries, Departments and Agencies and a unified and integrated channel Huduma payment gateway to facilitate ease of payment for government services." (Huduma Kenya, http://www.hudumakenya.go.ke/).

The services offered in the centers include but are not limited to issuance of national identity cards and birth certificates, issuance of police abstracts, registration of business names, issuance of certificate of good conduct, KRA and NHIF services. To cement the fact that Huduma Center has been a success in service delivery in Kenya, the initiative was awarded the United Nations Award in 2015 under "Improving the Delivery of Public Services category." Be that as it may service delivery in Kenya is not only highlighted by the Huduma Center initiative. The government has further enhanced its presence online which has made it possible to have efficient service delivery.

(Huduma center services accessed virtually)

In the wake of increased online services both in private and public firms, the Government has been on the forefront in ensuring that citizens receive high end virtual service delivery. The e-Citizen platform is one such initiative. It offers Kenyan Citizens and Foreign Residents a way to apply for Government to Citizen (G2C) services and pay via mobile money, Debit & Credit cards and e-Citizen agents. Effective service delivery does not only benefit the receiver but also benefits the government in terms of revenue. In 2015, for instance, the government collected 2.3B through the e-Citizen portal. Until 2018, the platform has cumulatively raked in a total of 60 billion in fees from 18 million applications since its inception.



At Kenya Law Reform Commission, we pride ourselves in face-to-face and virtual service delivery. Since its inception, the Commission has been at the forefront in ensuring effective service delivery to all its clients, both National and County Governments. KLRC has a mandate to ensure that it prepares legislation that gives effect to the Constitution. In carrying out this mandate, effective service delivery has been the driving force. Though there may be shortcomings in service delivery within and outside government, KLRC is committed to ensuring smooth and unmatched delivery of its services since it's a core mandate of the Commission.

Written by:
Alex Matheri,
Planning Department, KLRC

EFFECTIVENESS OF VIRTUAL MEETINGS A FAÇADE?

"Effective virtual meetings can be an effective and efficient reality rather than a facade".

The year 2020 was a first of many for everyone globally with operation of businesses marred with limitations to contact and restriction of movement. COVID-19 pandemic moved us online with most chairs in meetings new to the virtual setup feeling overwhelmed by the said mode as opposed to the face to face set up with participants in the same physical space.

Having to run virtual meetings can be 'hectic' right? There's no room for small talk, ambiance is a façade as you can't really feel the virtual environment, the flow and communication in the meeting is also affected with "your voice keeps breaking up" and "I think I have connectivity issues".

Amid, the foregoing challenges, institutions have been forced to embrace virtual meetings regardless of the industry they operate in. This has catapulted the agencies to meet their goals and targets. What to do with the new norm but to embrace, regardless of the industry or region you operate in, virtual meetings are critical to achieving organizational success. In addition, it has helped business leaders, professional service agencies, and project managers achieve cross-functional collaboration, deliver project outcomes, and build talented, creative, and technical teams across multiple time zones.

However, just because virtual meetings are easy to set up and not limited by geographical space and time-zones doesn't mean meeting hosts should misuse

access to others' time and work hours. They should remember to consider how virtual meetings work, and act accordingly. Zoom fatigue, a term coined and popularized during the COVID-19 mandatory work from home period, is a mental exhaustion that occurs when people have to participate in several virtual meetings for an extended period.

It's tough on both the meeting hosts and participants most of whom are trying this new platform /tools for the first time, and you have to give them time out of your meeting to learn. Sensitization on use of these tools is a must to reduce time spent on technical issues.

"Multiple Platforms/Tools = Overwhelmed Participants"

There are plenty of options out there, and being able to pick a solution that is optimized to meet all (or most of) your requirement plays a major role in participation. As a convener dictate a platform that can be common across all participants for familiarization.

"I miss being in a room with other people and collaborating with them." This is a sentiment most people express. What meeting hosts and participants are missing is not just the collaborative and safe ambiance and the physicality of the experience, but also the spontaneity and serendipity that physical spaces allow. Should we be trying to recreate the physical experience of meetings virtually at all?

Experts say

"Capture the ambiance of a physical environment and innovate, based on the strengths of a virtual meeting."

I say

A virtual environment is actually great for independent thinking, as everyone is seated in front of their own laptop, a fair set up. And it is also harder for someone with more authority to influence others as public speaking can be influenced by many factors more so in a physical space.

MOH interim guidelines on gatherings are here to stay having considered vaccine availability and the low uptake to ease restrictions. The Kenya Law Reform Commission has been able to embrace effective use of ICT resources to deliver its mandate by adhering to basic principles of effective virtual meetings by ensuring roles have been played with discipline by all parties involved from the meeting-Chairs' sending clear instructions on time, exercising effective authority and moderation during the virtual meetings to secretaries to those meetings notifying members well in advance on the agenda for preparation and members being available and prepared in regards to material, participation, having steady internet connectivity and awareness to their environment in regards to etiquette of the meeting, dress code and best practice by having the VIDEO- ON while participating in the process to bridge the physical andvirtual space.

Ladies and gentlemen, Effective virtual meetings can be an effective and efficient reality rather than a facade.

Written by:
David Munene
ICT Department

COMPLIANCE WITH PROCUREMENT LAWS AND REGULATIONS IN KENYA

"Work environment is an important aspect in achieving compliance".

The Public Procurement and Asset Disposal Act, 2015, operationalizes Article 227 of the Constitution; to provide procedures for efficient Public Procurement and for Assets Disposal by Public entities. With the introduction of Devolved System of Governance, business pressures are ever increasing and public entities are now faced with persistent public outcry over poor procurement performance. Some of the key issues related to compliance include: a. professional ethics, b. awareness c. budgetary allocations and d. training.

In trying to understand this paradox, research has identified Professional Ethics, Staff Awareness and Budgetary Allocation as important pillars to achieving compliance. Existence of Professional Code of Ethics is paramount in detecting and abetting unethical behavior. Training on the requirements of the Code of Ethics should therefore form the core of any organization targeting to achieve full compliance with the requirements of Procurement Laws and Regulations. This should be complimented by Internal Control mechanisms for detecting and mitigating unethical behavior.

Related to professional ethics is staff awareness. Work environment is an important aspect in achieving compliance. Environment can act as possible inducement leading to noncompliance. Irrespective of the existence of Professional Code of Ethics and/or Internal control mechanism, organizations are still likely to report noncompliance if the situation (work environment) so allows. It's therefore important that organizations exhibit concerted effort in eliminating work environment likely to promote noncompliance by adopting tighter work flows.

Finally, Budgetary Allocation and Pending Bills should be keenly underscored in any organization working to achieve full compliance. Pending bills are a clear indication that suppliers were not paid on time. Failure to address the issue of Pending Bills while budgeting is likely to lure service providers to compromise staff as they seek undue favors for payment of goods and services rendered. Pending bills should therefore be part and parcel of departmental budgeting process. They should be clearly captured in the budgeting process. By so doing, it shows commitment to pay and relieves undue pressure from employees.

Written by:

Mary Onyango

Administration Department

THE VACCINATION DRIVE, A FIRST IN THE KENYA LAW REFORM COMMISSION

"KLRC still ensures the provision of a well ventilated, secure and conducive work environment for its officers and stakeholders".

KLRC in ensuring effective service delivery in the months of June and August 2021 carried out a vaccination exercise for its staff and members of the public at its offices in Nairobi in collaboration with MoH. In the first leg of this CSR activity, the KLRC administered the doses of the AstraZeneca Vaccine on the 8th–.10th of June 2021 in its premises. This three day exercise was necessitated by the rise of Covid –19 infections in the country and the emergence of the Delta variant which further hindered normal operations in the country and globally. As a result, approximately 500 individuals who comprised of staff, stakeholders (from various MDAs and non–state agencies) and the general public received the vaccine during the exercise. Among them were CEO's, directors and other heads of various State corporations.

In its second leg, the KLRC following the a directive from the Head of Public Service on vaccination of public servants on or before 23rd August administered the first doze of AstraZeneca Vaccine on the 18th of August 2021 in its premises. This one day drive despite being geared towards the KLRC staff attracted approximately 100 individuals drawn from both its staff and members of the public.

The CSR activity not only pivoted the KLRC's presence but also provided an avenue for stakeholder engagement and sensitization on its mandate and core functions. Further, there have been less reported cases of COVID–19 infections in the KLRC as a result.

Further, KLRC through collaboration with NYS, provided masks, gloves and hand sanitizers to its staff. It also ensured that each office and common area had a bottle of hand sanitizer together with a surface disinfectant and that there was social distancing for the staff.

(Dr. Ezekiel Mutua former CEO, Kenya Films Board Commission and Mr. Joash Dache, CEO, KLRC)

All this was done with a view to minimize the risk of transmission. KLRC still ensures the provision of a well ventilated, secure and conducive work environment for its officers and stakeholders. KLRC will continue to follow the COVID 19 Guidelines and Protocols as provided for by the Ministry of Health.

Written by:
Catherine Gatetua
Corporate Communications Department

KLRC`S COMMITMENT TO ACCESS TO INFORMATION (ATI)

Did you know that Article 35 of the Constitution mandates you as a citizen to seek and receive information from any public agency? Under Article 35 of the Constitution, every citizen has a right of access to information held by the State (subject only to the limitations under the Constitution and other legislation). On the basis of this provision, KLRC has taken proactive measures to ensure that information about its work is publicly available and can be accessed.

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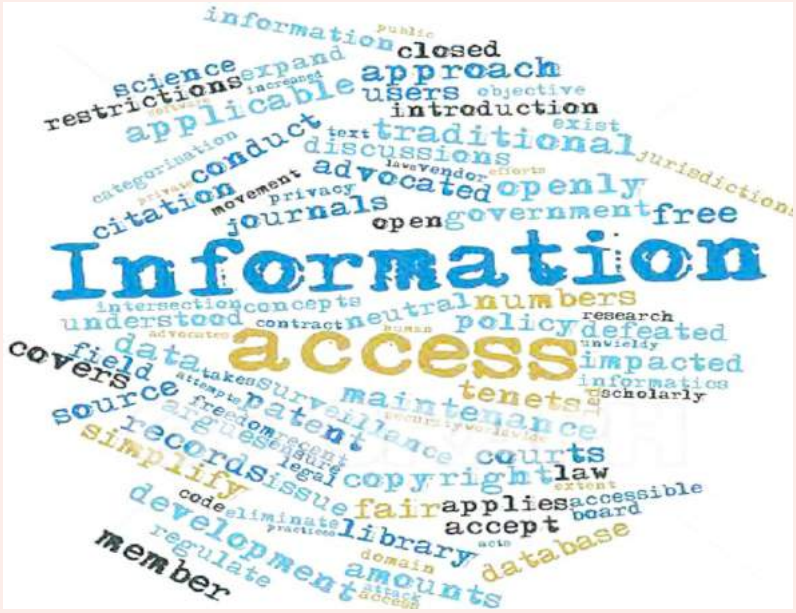

These measures include the establishment of an access to information office and development of guidelines to facilitate ATI. During a recent workshop in Naivasha, the CEO reiterated KLRC`s commitment towards ensuring that citizens are assisted to access information. He observed KLRC`s steadfastness towards the implementation of the Access to Information Act, 2016. He noted the enhanced information sharing tools and platforms notably: Information Education and Communication Materials (IEC) such as periodic reports; and the adoption of digital media platforms to enhance information dissemination

Of significance are the ATI guidelines which are aimed at:

(i) the reduction of the informational asymmetry between KLRC and citizens;
(ii) facilitating ease of access to information held by KLRC; and
(iii) Proactive disclosure.

In addition, KLRC also makes regular ATI reports to the Commission on Administrative Justice on ATI progress, successes and the requests handled.

Compiled by:
Bertha Omari
Corporate Communications Department

REPLACEMENT AND INDUCTION OF NEW OFFICERS

"New officers are often inducted so as to promote staff synergy and team effectiveness".

KLRC is ever committed to provide its staff with a good working environment. New officers are often inducted so as to promote staff synergy and team effectiveness. In October, 2020 KLRC did competitively replace staff that had exited from its service. The positions that were filled include: Legal Officer, Senior Supply Chain Management Officer, Senior Telephone Operator, Planning Officer 1&2, Principal Records Officer, Principal Library Officer, 2 Administrative Officers and 2 Drivers.

The successful candidates were welcomed by colleagues and subsequently inducted at the Kenya School of Government. At the induction, they learnt about public service values and operations.

(Officers at the Kenya School of Government during their induction)

Written by: Winnie Mugure
Corporate Communications Department

PROTECTION OF TRADITIONAL KNOWLEDGE IN KENYA

"Kenya has made attempts to legally protect and commercialize traditional knowledge".

Kenya is rich with Traditional Knowledge (TK) which includes: culture (such as the traditional dance among the Maasai), and innovations such as sculptures, rainmaking, and medicine (brain surgery by the Abagusii). This type of knowledge (TK) is usually codified and passed down to future generations mainly by folklore i.e. via stories, cultural practices, songs, artifacts. On this basis, the intellectual property in TK is usually complex and has several concerns which have ethical, cultural, historical, political, and moral dimensions.

These concerns have accrued owing to a number of challenges among them: (i) the inability to translate the linguistic context of a word (ii) the lack of appropriate translations for terms (iii) the presence of non-standard usage of certain terminology and (iv) lack of clarity (amorphous nature).

Defensive and Positive Mechanisms

It is good to reiterate that Intellectual Property (IP) is a legal concept which deals with creations of the human mind or ingenuity. It thus follows that Intellectual Property Rights (IPRs) should accrue for creative, social or technological developments in the society. Kenya has made attempts to legally protect and commercialize traditional knowledge. This has been done through a number of legal, policy, institutional and administrative actions that seek to acknowledge, recognize and protect the intellectual property arising from traditional knowledge. These mechanisms can be categorized into defensive and positive ones. On one hand, defensive protection of TK involves 'taking measures to ensure that unauthorized parties do not unfairly acquire intellectual property rights over other people's TK. They also include measures aimed to ensure that other parties do not successfully obtain IP rights over pre-existing TK. On the other hand, positive protection of TK is achieved through 'existing legal mechanisms', such as 'contracts, access restrictions and IPRs'. Defensive protection includes: (i) the use of databases to identify the prior art (ii) secrecy and (iii) the imposition of a disclosure requirement as a condition for acquiring IP rights.

National Legal, Policy and Institutional Framework

There is an elaborate policy, legal, institutional and administrative framework for the protection of indigenous knowledge in Kenya which includes: the Constitution (Arts 11 and 69), the Copyright Act, 2001, Industrial Property Act 2001, Trade Marks Act Cap 506, The Protection Traditional Knowledge and Cultural Expressions Act 2016, the National Policy on Traditional Knowledge and Genetic Resources and Cultural Expressions 2009, NEMA Biodiversity Regulations, 2006, among others.

International Framework

In addition, by virtue of Article 2(6) of the Constitution, international treaties also form part of Kenyan law. On IP related agreements on TK and Genetic Resources (GR), Kenya has acceded to a number of agreements and conventions including: WIPO, the convention on biological diversity, the Nagoya Protocol and the TRIPS Agreement. Genetic resources (which include plant varieties and animal breeds) have equally attracted attention particularly under the Nagoya Protocol, and additionally the International Treaty on Plant Genetic Resources for Food and Agriculture of the United Nations FAO. Indeed there have been IP and proprietary disputes over genetics resources (especially in the areas of Agriculture, Health, Medicine) amongst biotechnology firms, farmers and researchers. At the African Union level, there has been the model law for the Protection of the Rights of Local Communities, Farmers and

Breeders and for the Regulation of Access to Biological Resources.

The African Charter also has provisions that have been used as both defensive and offensive mechanisms in the protection of TK as well as holders of TK. For instance, Article 1 mandates State parties to: 'recognize the rights, duties and freedoms enshrined in the Charter' and to 'adopt legislative or other measures to give effect to them'. In this regard, Article 14 of the African Charter provides as follows:

> 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

Institutional Framework

There are a number of national institutions that are involved in the process of sourcing, codification, maintenance, retrieval and the protection of TK. These include: research institutions, biotechnological companies, pharmaceutical companies, community elders (via folklore), among others. One of the major institutions is The Kenya Industrial Property Institute (KIPI) which is premised on the national and international policy and treaty frameworks and is established under the Industrial Property Act 2001. KIPI has subsequently established the Traditional Knowledge (TK) and Genetic Resources (GR) Unit, to specifically address issues of intellectual property rights relating to traditional knowledge associated with genetic resources and traditional cultural expressions (TCE). The unit further examines patents and bio piracy issues which have directly resulted from lack of recognition for intellectual property in traditional knowledge and genetic resources.

Intellectual property regime and options

It is evident that intellectual property rights related to TK and GR have evolved drastically. However, it is also apparent that there exist a number of threats and vulnerabilities to the protection of intellectual property rights under traditional knowledge and biodiversity. Such threats and vices exist in the forms of: bio-piracy, compulsory licensing, benefit sharing and in the morality aspect. These specific regimes that can be employed include: patents, utility models, industrial designs, collective trademarks, plant breeders' rights, copyright and trade secrets among others.

Conclusion

To fully protect traditional knowledge, it is evident that no single option or mechanism can be applied in isolation or rather independently. A combination of several mechanisms including IP and non-IP mechanisms are needed for effective community's management and protection of IP rights associated with their GR and TK. In order to address this problem, it will be necessary to gazette and adopt the national draft policy on Traditional Knowledge, Genetic Resources and folklore, institute an effective sui generis system that will properly recognize and protect TK and associated Genetic Resources, fully rectify the ABS Legal Notice No. 160 of 2006 by enforcing the best practices, and continue to lobby for the conclusion of the international regime on access and equitable benefit sharing that will provide disclosure conditions in IP applications.

Written by:
Dr. Otachi Orina.

THE DIFFERENT MODELS FOR ACHIEVING THE GOALS OF INTERNATIONAL CRIMINAL JUSTICE

In order to determine the scope of the above assertion, there are a number of fundamental but closely related issues that require closer reflection. Broadly, these issues relate to a discussion around the aspirations of the international community *vis-a-vis* challenges to global peace and security and the relevant institutional frameworks adopted where the values underpinning these aspirations have been threatened.

In this regard, there ought to be an appreciation of what constitutes international criminal justice, the underlying obligation to enforce it, the implementation mechanisms and the perceived or practical suitability of these frameworks as central in this endeavour. This paper, based on scholarly literature, aims to determine the goals of international criminal justice, examine the approaches through which its realization is manifest, and offer an evaluation of the viability of these frameworks. The paper proposes to do this advisedly for as it recognizes that the notion of international criminal justice, at least as perceived today is fairly recent and dynamic. This paper appreciates that the extensive and diverse literature and sometimes divergent opinions on these matters comprise many variables that cannot be completely addressed within the present confines. In the course of this examination however, our perspectives on the various concepts and constructs that are central features in the international criminal justice agenda are articulated. Overall, the paper intends to determine in this manner, the extent to which based on scholarly reviews, these initiatives have succeeded in delivering the goals of international criminal justice and what measures if any, are required for its long term sustainability. But commencing reviews of this nature requires an appreciation of the meaning of justice and therefore what constitutes international criminal justice for that matter.

A. International Criminal Justice in Context

To contextualize the goals of international criminal justice and the different approaches to their realization, it is imperative that a common understanding of what it entails is formulated. But this may not always be possible. At practical level, international criminal justice fuses and traverses diverse disciplines- ranging from human rights, humanitarian, criminal and international laws to international and domestic relations, victimology, criminology and politics among myriad others. Conceptually, what constitutes 'justice' and by extension 'international criminal justice' is invariably multifaceted and a subject of contestation. Different scholars attribute diverse connotations to and view international criminal justice through a variety of lenses. Consequently, whatever import adopted is often but not limited to a reflection of individual philosophy of justice, the relevant issue or the geo-political circumstances under review. This paper avoids philosophical postulations surrounding the concept, but submit to a generic conceptualization in which it is associated with state obligation under international criminal law. It's persuasive that international law not only imposes obligations on states to punish mass atrocities, it also prescribes the consequences of failure to meet those obligations. This notional regard of international

criminal justice as a function of state obligation under international criminal law to hold individuals accountable for egregious conduct inimical to the values cherished by the international community is widely embraced. Broadly settled also is the proposition that this obligation arises mostly in political or post conflict transitions during which successor regimes seek to address undesirable legacies inherited from the previous political dispensation. It is however important to appreciate that although the underlying features of transitions are largely common, specific international criminal justice framework adopted is a function of unique socio-cultural, political, constitutional and administrative values.

B. State Obligation to Enforce International Criminal Justice

Notwithstanding the broad agreements alluded to above, the precise nature of state obligation under international criminal law in relation to individual accountability has attracted considerable debate Two schools of thought are dominant. The first is the version which postulates that states have a duty under international law to prosecute for mass violations. It conceives of international criminal justice as satisfied through criminal prosecutions undertaken within accepted international legal norms. This conceptualization of justice ordinarily referred to as retributive or punitive justice is based on the reasoning that criminal prosecutions and attendant sanctions can deter future infractions and stem impunity. Therefore justice is an aggregate of prosecution and sanctions. Other variants of this view include the argument that international criminal justice is best achieved where personal accountability and punishment operate to deter criminal behaviour. This view has been faulted primarily on its presupposition that the duty of state to prosecute is absolute. To the contrary, it is been advanced that this perceived legal absolutism is fallacious and is any event amenable to derogation in two circumstances: one, where the stability of the state would be threatened by conduct of criminal trials, implying that states are not required to take action that poses serious threat to vital national interests; and two, where owing to the condition of its criminal justice system, the state is objectively unable to prosecute mass violations, implying that the judicial framework must be capable of handling burdens imposed by the law.

Opponents of the notion of retributive justice subscribe to an alternative view that advocates for restorative justice. The main attribute of restorative justice is that it is victim-centric and generally seeks to restore parties to the conditions obtaining before the violations occurred. This has also been expressed to denote restoration of the moral worth, equal dignity and social equality of all people. Other variants of this view contemplate a situation where victims, perpetrators and the community collectively resolve to deal with the aftermath of violations and anticipate implications for the future

. These views were largely corroborated and validated in the authoritative report of the South African Truth and Reconciliation Commission.

II. GOALS OF INTERNATIONAL CRIMINAL JUSTICE

A. General Goal

Just as it is difficult to compartmentalize international criminal justice owing to the fluidity of possible parameters, its goals too are not settled. This state of affairs as we have demonstrated previously is a function of a number of factors. This paper however isolate a number

of issues which constitute a nucleus of its purposes. Suffice that a narrow conceptualization of international criminal justice inevitably leads to a restricted interpretation of the goals. This paper submits that these goals, where ascertained are intricately linked and limited to the framework defined for their realization, which framework is itself a reflection of the unique geo-political equations of the atrocities in question. A corollary to this assertion is that individual predisposition of justice and politics by parties constituting 'the international community' is also relevant to a determination of these goals. Coupled with the lingering questions over the motivational imperatives in pursuit of international criminal justice, a healthy amount of subjectivity in delineating these goals is inevitable.

A review of relevant literature reveals a correlation between international criminal justice and human rights abuses with the central argument being that formalized international criminal justice emerged in response to these violations. The Nuremberg military tribunal is often cited to illustrate this connection. The point canvassed is that these proceedings were foundational in concretizing the principle that individuals had actionable criminal liability under international law. Significantly, Nuremberg presaged the adoption in short order (a record four years) of a number of human rights-centred legislative initiatives. Top were establishment of the United Nations (1945), adoption of Genocide Convention (1948), the Universal Declaration of Human Rights (1948) and the formulation of Geneva Conventions (1949). The intervening cold war period witnessed a general lethargy in the enforcement of individual accountability during which rogue regimes escaped responsibility for mass violations. This apparent state of reverie was shattered by two significant events which heralded the 'revival' of the international criminal justice. First, the horrendous atrocities committed in the former Yugoslavia and Rwanda in the early 1990s in the wake of which catastrophes, the UN established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). A number of other models were subsequently employed in response to specific atrocities in various localities culminating with adoption of the International Criminal Court (ICC) framework. The second recent development to which renewal of interest is attributable relates to political governance transitions witnessed from the early 1980s invariably accompanied by criminal prosecutions or investigative commissions. The events surrounding South Africa's transition from apartheid to democracy in the early 1990s, stand out in this latter regard.

From the foregoing therefore, it may be surmised that the international community principally invokes international criminal justice to respond to mass atrocities. This in our view is the broad goal of international criminal justice. This paper tests this theory by examining specific elements of this goal.

B. Specific Goals and Counter Arguments

As already alluded to, international criminal justice seeks to establish individual penal responsibility for mass atrocities. The central premise being that by holding individual perpetrators accountable, assignment of collective guilt is avoided. In this way, the myth of collective condemnation of entire peoples is debunked stripping perpetrators of the weapon with which to inflame divisive passions. In the final analysis responsibility for atrocities is not

attributed to the population, but to individuals who ordered or committed the crimes. Although this view is politically useful in stemming possible nationalistic backlash, it is open to challenge. Specifically, the sheer scale of mass atrocities often overwhelms the legal system thus militating against full accountability. This means that only the 'guiltiest' may be indicted sparing many collaborators and bystanders. The point is that by design, commission of mass atrocities involves a large number of perpetrators (sometimes the whole security and political infrastructure of a state) whose penal responsibilities cannot be determined in this legalistic manner. Further, individualizing guilt obscures the systemic nature and policy of mass violations and is thus fundamentally flawed. A counter argument to these critiques which we find persuasive is that the law is not designed to make all law breakers accountable, but that the likelihood and severity of sanctions will always operate as powerful deterrence.

The capacity of international criminal justice to deter commission of mass atrocities is regularly cited. Proponents of this view invariably invoke the centrality of punishment in sending unequivocal message to actual and potential perpetrators and the vulnerable that the international community is by deliberate predisposition, intolerant to impunity. Problems with this theory abound. First, it fails to appreciate the fixed mindsets, entrenched prejudices and the perverse ideological leanings that motivate the militant perpetrators such that threats or actual prosecutions hardly sway them. Equally important is that while such legalistic threats and overtures may cow lower level collaborators, the actual political leaders may, especially where atrocities are already underway, conclude that they have nothing to lose or gain by cessation of violations. In such cases then, only credible threat of or 'ordinarily expected' prosecution accompanied by unambiguous intention to deploy massive military machinery may work.

The view that international criminal justice aids in the development of accurate historical record of atrocities thus establishing truth is also widely accepted. The logic of this proposition is that preservation of a reliable record not only constitutes official acknowledgement of mass atrocities, it also offers indelible lessons thereby preventing recurrence since definitive accounts can always withstand distortions generated by reactionary propaganda, endure the test of time and resist the forces of revisionism. This is especially true of situations in which distortion of the truth is an essential ingredient of the violence. In addition, authentic and legitimate record deprives perpetrators of legacies of martyrdom while ridding victim societies of complacency and self–denial. A number of issues arise with this proposition. First, obtaining a contextual coherent account of the past from retributive justice perspective is near impossible since prosecutions are undertaken on the basis of specific charges. Second, criminal trials are primarily forensic – they determine without more, guilt or otherwise in relation to atrocities. Third, the design of the adversarial system, its rules of procedure and evidence, required degree of proof and the liberty of the defence to advance exculpatory arguments all combine to inhibit discovery of truth and may lead to technical acquittals. Finally, rampant and inevitable destruction of incriminating documents by culpable regimes operates to skew generated records.

International criminal justice it is posited, contributes in the rehabilitation and reconstruction of

states devastated as a consequence of mass atrocities thus facilitating their readmission into the comity of nations. In the context of states emerging from international or non-international armed conflicts, the view is that international criminal justice process would promote the dismantling of the networks and structures through which the mass atrocities were committed especially where the leaders and other cadre of perpetrators are apprehended and publicly made to account. The publicity that accompanies such processes operates to discredit, deflate and shatter the aura of mystery and invincibility surrounding these leaders and therefore engenders shift in public attitude. Outreach programmes and the publicity also instil into popular consciousness the horrors associated with mass atrocities as people are made to relate to what happened. In this way a degree of modification or reform of particular socio-political fabrics and structures or processes capable of eliminating causes of violations can be achieved. The flip side of this argument is that while purging states of criminally bent leaders can be an important part of reforming a country, it may require massive military lay-out and other infrastructural support to stem nationalistic backlash triggered by a perception of foreign imposed justice. The point being canvassed is that while an international criminal justice framework may contribute to the rehabilitation of a country in transition, it must be considered in the context of a broader and deliberate programme of national reconstruction. The complete rehabilitation of Germany after Nuremberg and South Africa after Truth and Justice Commission stand out in this regard.

International criminal justice is also said to diminish the possibility of future abuses perpetrated in the name of revenge–a 'form of primordial and private system of law enforcement premised on hatred and retaliation'. The underlying point is that if perpetrators are not made to account for their egregious conduct by the international community, victims of mass atrocities are likely to resort to vengeful vigilantism in pursuit of alternative justice. The result will be a vicious cycle of violence and further atrocities inimical to peace and reconciliation. It is argued that dispensation of justice assuages victims' call for retribution and may prepare them to reconcile with their tormentors knowing that the latter have accounted for the violations. Our view is that this theory cannot hold for reasons already posited but fundamentally, it must be supplemented by a deliberate policy of reconciliation, rehabilitation and reparations.

The proposition that international criminal justice promotes justice and facilitates the restoration of peace is widely acknowledged but disputed. The debate around this matter especially the competing tensions between the concepts of peace and justice is not new, neither is it settled. While some commentators argue that justice is but one of the various means of achieving peace others, assert that the relevant issue is to determine whether they are mutually exclusive. Yet to others, the issue should be framed such that consideration is given to reconciliation and peace on the one hand and justice and accountability on the other. Throw in 'politics' and you are confronted with a complex impasse. These dilemmas notwithstanding, our view is that this debate is informed by issues revolving around legal and moral imperatives, complete analysis of which is a subject on its own. However some tentative observations will be offered as concluding remarks.

III. DIFFERENT APPROACHES FOR ACHIEVING INTERNATIONAL CRIMINAL JUSTICE

From the previous deliberations, it is fairly apparent the international community has ordinarily invoked international criminal justice to establish and address accountability for mass atrocities. This pursuit has been undertaken through two principal methods: criminal prosecutions leading to criminal sanctions; and truth commissions which investigate situations and submit findings but have no power to impose sanctions. Criminal prosecutions have in turn been undertaken via a range of institutions including military tribunals, national courts, ad hoc international or internationalized tribunals and a permanent International Criminal Court. We propose to offer generic observations in respect of the successes or otherwise of each method and the key factors at play therein. References to specific examples will be limited to illustration of particular issues. We believe that in this manner, we will be in a position to present an aggregate picture thus setting a basis for suggestions where appropriate.

A. International Criminal Justice through Criminal Prosecutions

1. Military Tribunals

As alluded to above, criminal prosecutions have been undertaken through different institutional frameworks spanning diverse historical epochs although each framework has largely been a reflection of the unique historical, social and legal conditions obtaining in a particular situation. The Nuremberg and Tokyo military tribunals are generally regarded as the first criminal prosecutions for mass atrocities in the modern era. Although they were archetypal expressions of victors' justice, raising the spectre of whether criminal justice was merely invoked to jurisprudentially pursue political ends [by 'proceduralizing historical evils' and 'legalizing vengeance'], the prosecutions before these tribunals cemented to this day' the notion of individual responsibility for criminal conduct under international law and in the process catapulted regard for human rights into the modern global movement. Another important highlight in our view was that the tribunals succeeded in amalgamating the principles of common and civil law into the adversarial proceedings thus blazing the trail for the current international format. The tribunals can also be lauded for managing to define crimes which until then were without legal precedent. Although the proceedings were consequently criticized on account of ex post factoism, defining crimes against humanity by jurisdictional extension of war crimes was novel. It should however be noted that both the tribunals and subsequent military trials were ad hoc and ceased to exist after the verdicts and judgements were delivered.

2. National Courts

Prosecution for mass atrocities before national courts is an option that has been exercised in many jurisdictions although two main scenarios emerge: prosecutions within jurisdictions where the atrocities occurred; and prosecutions for same offences in other jurisdictions. Examples of the former include the roundly discredited Leipzig and Istanbul Trials and more recently the Trial of Saddam Hussein. The latter category relates to prosecutions conducted pursuant to provisions of domestic legislation and application of the principle of universal

jurisdiction over international crimes. Adjudicating mass atrocities within jurisdiction enjoy relative advantage in relation to the ease of collection of material evidence and arranging witness testimony. However, the main problem is that ordinarily most large scale atrocities are committed by persons acting at the behest of state or with its connivance. The immediate consequence then is that the entire administration of justice machinery including investigative, prosecutorial and judicial components, typically susceptible to the ravages of conflict may either be too weakened or intimidated to conduct proceedings against people perceived to be part of state apparatus. The trial of Saddam Hussein epitomizes this conundrum.

These problems may not arise where proceedings are conducted in foreign jurisdictions as happened in Australia, France, Israel or Britain. Not that these proceedings were not blemished. In Australia for instance, attempts to undertake further Nazi war crimes prosecutions in the early 1990s under amended legislation flopped largely as a consequence of efluction of time, lack of sufficient evidence, logistical difficulties associated with securing witness testimonies, and unacceptably high costs. Although the Israelis successfully prosecuted Eichmann in 1961 pursuant to the provisions of domestic legislation buttressed by the principle of universal jurisdiction, specific foundational jurisdiction proved controversial especially with reference to the tenuous link between the holocaust, its Jewish victims and the state of Israel. The contention is that the state of Israel was not in existence at the material time and neither were the victims then its citizens. In addition, both the District Court of Jerusalem and Supreme Court of Israel had to dispel allegations that trial was motivated by desire for revenge rather than genuine application of international law to punish mass atrocities.

The Pinochet and Saddam cases are significant in the sense that they involved former heads of state and brought into focus the twin matters of sovereign immunity and implied impunity that for a long time was a grey area under international law. But Pinochet was unprecedented for it pioneered the rejection of the notion of head of state immunity with the House of Lords ruling that 'universal jurisdiction' crimes are not protected by the concept of sovereign immunity neither do they qualify as legitimate acts of a head of state and where established the alleged perpetrator risks prosecution within or outside jurisdiction.

The underlying commonality of the cases outlined is the principle of universal jurisdiction for international crimes. We submit that the principle of complementarity as embodied in the ICC Statute fortifies this principle. However the challenge it presents is that national jurisdictions are enjoined to review domestic criminal legislation to conform to the ICC framework and ensure that judicial and other administrative structures are sufficiently capacitated to exercise the jurisdiction.

3. Ad Hoc Tribunals

The two main ad hoc Tribunals established by the international community to investigate and prosecute mass atrocities are the ICTY and ICTR. Established following mass atrocities in the former Yugoslavia and Rwanda respectively in the early 1990s, the tribunals have been cited as the high watermark in the revival of international criminal justice. The tribunals were established by the UN Security Council with specific prosecutorial mandates in relation to serious violations of international humanitarian law and

genocide Rwanda. Key features of these tribunals include their establishment pursuant to the provisions of Chapter VII of the UN Charter. The relevance being that Security Council resolutions so made are binding and peremptory on member states who are enjoined to take necessary measures under their domestic legislation to effectuate the same including complying with requests and orders of the tribunals. Significantly, the tribunals were set up and governed under separate legal frameworks, but enjoy shared prosecutorial and appeals structure. This commonality is important for it engenders consistency in prosecutorial policy and appellate jurisprudence thus aiding development of international law in this area. It is also instructive to note that the tribunals are hosted extra-territorially although lower ranking operatives are tried within jurisdiction. The extra-territorial locations were plausibly informed by security concerns or inability of the national judicial systems to administer justice in the fragile post-conflict environments. Situating the tribunals away from 'home' has also operated to shield them from the exigencies of local politics therefore guaranteeing considerable impartiality. Further, constituting the tribunals with a mosaic of judges and legal staff from different parts of the world excluding nationals of the affected states preserves their objectivity and neutrality and ensures equality of litigants since different legal traditions are represented.

The ad hoc tribunals have been credited with a number of invaluable developments in the realm of international criminal justice. Development of international law through practical application of fundamental norms and principles and in the process building an impressive wealth of jurisprudence for future references is a case in point. Closely associated is the view that internationalization of the legal procedure has standardized penal sanctions thus achieving some level of consistency. The amalgamation of civil and common law principles in their legal framework has also ensured better adaptation to the challenges posed by prosecuting the complex crimes. The culpability of heads of state for atrocities committed during their watch has also been reinforced with the apprehension and prosecution of the late Slobodan Milosevic regarded as a defining moment in the history of international criminal justice. The Milosevic trial was also imperative for it revealed significant dynamics in relation to prosecution of senior level accused especially is seeking to balance the often competing principles of fairness and expedition. These include a finding that such trials are inherently more complex and less expeditious especially given the broad geographic and temporal parameters within which the suspect's criminal responsibility must be determined. The fact that such leaders rarely physically perpetrate the alleged crimes themselves presents another challenge since the prosecution must not only prove the crimes themselves but also the suspect's responsibility for those crimes. The propensity of such senior accused to manipulate, disrupt and derail proceedings given the political capital and widespread publicity the proceedings attract is another test.

Minimal victim participation and representation in the tribunal proceedings (only witnesses considered useful are invited by the parties), weak rehabilitative or reconciliatory frameworks, ad hoc nature and costly outlay of operational resources are further challenges that have informed the consideration by international community of other options to address legacies of mass atrocities.

4. Internationalized Domestic or Mixed or Hybrid Tribunals

The above are nomenclatures one would normally encounter in any depiction of this new species of supranational tribunals often grafted onto the judicial structure of a host nation recovering from mass atrocities or created as a treaty based organ, separate from that structure. The Special Court of Sierra Leone, Extra- Ordinary Chambers in Cambodia, Regulation 64 Panels of Kosovo, Serious Crimes Panels in East Timor and War Crimes Chamber in Bosnia and Herzegovina are examples of these enterprises. Because they fall at dissimilar points in the continuum of 'internationality' while serving the same end of international criminal justice, it has been suggested that these tribunals be described as 'international'. Significantly, these tribunals comprise mixed panels of international and local judges with jurisdiction to try cases prosecuted by agencies that are also mixed in composition. Their constituting instruments make them a half-way house, a hybrid embodying domestic legitimacy and international expertise. The main advantages of these tribunals have been cited to include the fact that their mandates are narrow and flexible enough to be moulded to suit the local circumstances. Coupled with the fact that they are not subsidiary organizations of the UN, their decision making processes are less encumbered and therefore efficient. However, this fluid relationship with the UN is a double edged sword in that member states have no obligation to cooperate with the tribunals or obey their orders. In situ public proceedings coupled with adequate dissemination of information ensure full victim participation thus enhancing chances of reconciliation. Integrating international and national processes guarantees application of international standards including due process circumstances be taken to restate, and respect for the rights of accused, while preserving the sovereignty of states in their judicial systems, a useful bulwark against nationalistic back clash. A level of impartiality and independence is achieved by the involvement of international judges and prosecutors thus engendering the confidence of the local population. Finally, the concept allows for skills and technology transfer thus bestowing on the host jurisdiction a cadre of trained investigators, prosecutors, case managers and judges. Despite these positives, challenges remain. Particularly critical will be ability of the international community to design a scheme fully acceptable to the host nation while maintaining international standards of due process. Importantly, all the potential benefits will only be sustained if these experiments are well resourced.

5. The International Criminal Court

The ICC is a permanent framework through which the international community proposes to supplant the existing ad hoc approaches to international criminal justice. Its creation was motivated in large measure by the relative successes of the ad hoc tribunals and signifies the commitment of the international community to a sustainable infrastructure for addressing mass atrocities. Citing its innovativeness, complex round of international negotiations preceding the adoption of its Statute, its ability to marry comparative criminal provisions with political propositions, parallels have been drawn between ICC legislative framework and the UN system. Significantly, the ICTY has in one of its decisions, underscored the legal significance of ICC by observing that its overwhelming adoption by states and endorsement by the General Assembly is indicative of an authoritative expression of the legal views (opinio juris) of many states and may, depending on particular

reflect, crystallize or clarify customary law and even create new or modify existing law. In yet another decision the ICTY described draft elements of crimes over which the ICC has primacy as useful in ascertaining the state of customary international law. It is important to record that the inherent jurisdiction of the ICC is restricted to the 'most serious crimes of concern to the international community'. The said core crimes into which the concept of individual criminal responsibility is also built include the crime of genocide, crimes against humanity, war crimes and possibly crime of aggression. Fundamentally, the jurisdiction of the ICC is complementary to national criminal jurisdictions of member states. This has been widely interpreted to mean that the ICC may only exercise its jurisdiction where state party is unable or unwilling to prosecute commission of the listed crimes. The principles of complementarity, nullum criminen sine lege, nulla coena sine lege (conviction and punishment under the statute), non-retroactivity ratione personae, jurisdiction rationae temporis(exclusion of ex post factoism), and the provisions relating to the supervisory role exercised by the Pre-trial Chamber over prosecution are some of the protective mechanisms built into the ICC framework. Given the wealth of jurisprudence and experiences developed by the ad hoc tribunals over the years, the ICC will not lack in legal and associated resources. But the main challenge is the aggressive opposition directed at it by the US and the ambivalence by other world and regional powers. While it may have weathered the initial storm in this regard thereby inspiring optimism in some observers, other commentators are still sceptical whether the ICC can survive without US input the given the considerable support the latter accorded both ICTY and ICTR. What in our view is interesting in this debate is that irrespective of the ICC and its mandate, the customary principle of universal jurisdiction subjects any US citizen suspected of mass atrocities to potential prosecution by any UN member state.

B. Truth Commissions

A common feature of transitional milieu is that traditional avenues of justice such as courts are often too incapacitated or compromised to administer justice thereby necessitating recourse to other strategies to ensure accountability for criminal conduct. It is in this context that Truth Commissions (TCs) have in the recent past emerged to dominate the international legal and political arena as the preferred modes through which states in political and post conflict transitions seek to enforce justice. Not everyone has been uncritical though. While some commentators have equated this apparent fixation with TCs to uncritical 'besottement', others deride their creation as some mark of democratic bona fides. But TCs have a chequered history and are touted in many quarters as alternatives to criminal prosecutions. In most instances, TCs have been complementary or precursors to judicial action either by establishing a more complete historical record or operating as an interim measure prior to full-scale prosecutions. And, by collecting and preserving evidence and testimony, TCs ensure that justice is merely postponed, not sacrificed altogether particularly in transitions where pragmatism dictates that prosecutions be deferred to promote cessation of hostilities.

Because they are restorative in orientation, TCs may obtain satisfactory justice for victims since issues such as reparation, rehabilitation and compensation may be sufficiently addressed in such fora. Further, since the design and operations of TCs revolve around the victims ensuring their active participation, national reconciliation may be facilitated especially given that TCs enquiries are always conducted in situ. Allowing victims to tell their own stories not only acknowledges their suffering and therefore fundamental to their recovery, storytelling has also been determined to be therapeutic besides expressing other ways by which 'humans assert their humanity. Further, specific recommendations by TCs may operate as pressure points around which future systemic reforms may be initiated. Finally TCs reports may operate as the basic constitutive document in the founding of a renewed country.

Despite their popularity in transitions, there are inherent weaknesses that predispose TCs to myriad challenges. First, the lack of powers to prosecute and impose sanctions for egregious conduct is a major handicap. Second, TCs may be susceptible to politically imposed limitations and manipulation: their structure, mandate and resources are largely determined by the political forces at play in their creation. Third, TCs may encourage impunity especially where blanket pardons and amnesties are granted. Fourth, political exigencies may undermine their ability to access relevant information and determine what matters are to be investigated thus influencing the accuracy of their final findings and recommendations. Fifth, TCs are often ad hoc and have only limited mandate in the implementation of their recommendations. This means the appointing authority may implement the recommendations selectively or simply shelve them altogether. Finally, TCs may lose support and confidence of stakeholders where its work is not realistically time–bound.

IV. CONCLUSION

We set out to explore the goals of international criminal justice and to evaluate the approaches pursued in their attainment within the global context. We determined that it is a framework within which the international community responds to legacies of mass atrocities especially in post conflict and political transitions, with a view to establishing penal responsibility. We demonstrated that the concept is fairly dynamic and that the uniqueness of individual transitional milieu has been instrumental in dictating adoption of diverse options ranging from judicial prosecutions to truth seeking alternatives. Review of key aspects of each initiative adopted revealed their relative viabilities but we submit that balancing the two UN goals in these enterprises– sustainable peace and justice should be the fundamental consideration. In this regard, we are persuaded that in order to secure peace and justice in transitions, pragmatism on the issue of prosecutions, amnesty and pardons is inevitable. Whether the legal framework of the ICC can be interpreted so as to deal with this matter conclusively is still debatable. But the approach fusing conditional amnesties and pardons accompanied by alternative forms of justice is persuasive. Equally, whether we contest the motivations or manner of execution, it is impossible in our view, to

dissociate politics from the realm of international criminal justice. This observation is pegged on the considerations that: mass atrocities are functions of political ideologies or conflicts; the international community responds to these atrocities through political compromises, in particular through the UN system; enforcement of these compromises, including modifications of domestic legislation and judicial or administrative structures to facilitate the same require cooperation which is dependent on political processes and entities; and significantly, the operations of any international criminal justice framework are resourced by states especially the powerful and therefore entirely dependent on latter's political goodwill meaning that political philosophies and orientations and other values including conceptions of governance will always come into play.

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The quote:

'If we desire respect for the law,
we must first make the law respectable'.

Louis D. Brandeis

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