
Getting Away with Murder
When Electoral Violence Becomes a Crime against Humanity
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Problem Statement

Recent research into the levels of violence in elections has revealed that, on an annual basis, an average of one in five elections experiences some form of violence.¹ And, in rare instances, the violence experienced is orchestrated scale that it is considered a crime against humanity, as determined by the International Criminal Court (ICC), or that required the establishment of transitional justice mechanisms. There have been two cases of crimes against humanity in an electoral context brought before the ICC - Kenya in 2007 and Cote D'Ivoire in 2010. However, because of its relevance, one additional case is also examined here - East Timor in 1999. The orchestration and scale of the violence in East Timor would have placed it within the jurisdiction of the ICC; however, that institution had not yet been established and cannot retrospectively prosecute such cases. For example, during the conduct of the United Nations (UN) supervised status referendum vote in East Timor, Indonesian-backed militia inflicted widespread deaths, assaults, and displacements, particularly in the post-election phase. The author of this paper was the Chief Electoral Officer for the United Nations Assistance Mission in East Timor (UNAMET) which was responsible for overseeing that voting.

The common denominator that these cases present is that of impunity for these crimes. While justice in cases of electoral violence can be elusive, these three cases reveal situations where charges have been withdrawn, lesser charges have been filed, or the perpetrators were not extradited. As a result, penalties for orchestrating such violence are absent or minimized. Without effective mechanisms to punish the leadership of the violence, the incentives to commit such crimes on such scales are not diminished. However, forecasting the potential for such atrocities to occur should not be overlooked. Improved approaches and tools for such forecasting can serve to prevent such violence from occurring.

¹ This notional figure is drawn from studies of electoral violence by United Nations Special Rapporteur for Extrajudicial Violence, Philip Alto,; Professors Scott Straus and Charlie Taylor of the University of Wisconsin, and Jeff Fischer, formerly with the International Foundation for Electoral Systems.

Structure of Paper

This paper will examine the institutions and processes associated with bringing justice to cases of crimes against humanity committed in an electoral context. The cases of Kenya and Cote D'Ivoire will be examined through the institution of the ICC and the processes which it employed (and is employing) to prosecute the leaders of those atrocities. East Timor will be examined as model involving multiple transitional justice mechanisms through both the international community and those of the governments of Indonesia and Timor-Leste.

However, while justice is important, prevention must be addressed as well. This paper will examine the Early Warning Project, a collaborative initiative by the U.S. Holocaust Memorial Museum's Center for the Prevention of Genocide and the John Sloan Dickey Center for International Understanding at Dartmouth College. In this project, annual statistical surveys and opinion pooling are employed to forecast the prospect of mass killings in specific locations and during specific periods of time. This tool will be examined in the context of employing forecasting as a preventative measure for crimes against humanity in an electoral context.

What is Electoral Violence?

A discussion of electoral violence and conflict can be introduced with a conceptual approach to conflict in a democratic context and then refining the electoral violence context from the broader concept. The United States Agency for International Development's (USAID's) *Conducting a Conflict Assessment - A Framework for Strategy and Program Development* points out that "Democratic institutions, for example, are not meant to eliminate conflict; they are designed to manage it and channel it in productive directions."² Underlying the Framework is the premise that no single definition of conflict can give full expression to the variety of manifestations that conflict can take. And, further more, conflict is constantly evolving.

The United Nations Development Program (UNDP) further distinguishes between constructive conflict and destructive conflict in a democratic context with constructive conflict employing persuasion and promising techniques that will encourage political support; where destructive conflict is 'imposed unilaterally' with little regard for the victim.³ UNDP cites examples of elections engendering destructive conflict in countries such as Burundi, Cambodia, Ethiopia, Guyana, Haiti, Kenya, Sri Lanka, and Zimbabwe. As elections are arenas for political competition to occur, the objective of election security programming is to ensure that elections remain vehicles for participation and constructive conflict and that they do not devolve into a destructive form of conflict.

² USAID, *Conflict Management and Mitigation (CMM), Conducting a Conflict Assessment – A Framework for Strategy and Program Development* (2005), page 11.

³ UNDP, *Elections and Conflict Prevention – A Guide to Analysis, Planning and Programming* (2009), page 3.

With these concepts concerning conflict in a democratic context noted, several definitions of electoral violence can be cited. One states that electoral violence is “any random or organized act or threat to intimidate, physically harm, blackmail, or abuse an electoral stakeholder in seeking to determine, delay, or to otherwise influence the electoral process.”⁴ UNDP defines it as follows: “Electoral violence is a sub-type of political violence in which actors employ coercion in an instrumental way to advance their interests or achieve specific political ends (Colombia, India, Indonesia, Kosovo and Sri Lanka).”⁵ And “Electoral violence includes acts such as assassination of opponents or spontaneous fistcuffs between rival groups of supporters – and threats, coercion and intimidation of opponents, voters, and election officials.”⁶

Another definition concludes the following:

“At the broadest level, by violence or political violence we mean the deliberate use of physical harm or the threat of physical harm for a political purpose. Overt physical violence can take the form of beatings, torture, and murder, but violence is also evident by its threat – by coercive intimidation. ‘Electoral violence’ refers to physical violence and coercive intimidation directly tied to an impending electoral contest or to an announced electoral result.”⁷

These definitions have at least three features in common. First, electoral violence has a broad range of manifestations. On one end of the spectrum, the scale of electoral violence was experienced in the three cases examined here. But, electoral conflict can also manifest itself in personal intimidation, such as the so-called “night letters” delivered by the Taliban, warning Afghan voters not to cast ballots in the 2009 presidential election or threatening personal consequences if they did participate.

Second, violence is employed to achieve a political objective. In an electoral context, this objective would be a capture of the electoral process through the elimination of political rivals, suppression of voter turnout, coercion of voters, or intimidation of election officials.

And, third, electoral violence can occur during any phase of the election, from voter registration, political campaigning, and Election Day to the announcement and implementation of outcomes. As a result, policy and programming options must be process-oriented and not electoral event-oriented with a singular focus on Election Day security.

International Criminal Court (ICC)

ICC may exercise jurisdictions over genocide, crimes against humanity and war crimes. Its mandate was codified in the Rome Statute, a document signed by 123 countries. It is

⁴ Fischer, Jeff, *Electoral Conflict and Violence – A Strategy for Study and Prevention*, IFES (2002) page 8.

⁵ UNDP, page 4.

⁶ UNDP, page 4.

⁷ Straus, Scott and Charlie Taylor, *Democratization and Electoral Violence in Sub-Saharan Africa – 1990 – 2007*, University of Wisconsin (2009), page 9.

the first permanent, treaty-based, international criminal court established to prosecute such crimes. This point is worth noting because previous courts prosecuting such crimes were time and location specific, such as the International Criminal Tribunal for the former Yugoslavia. Under the Rome Statute, persons are criminally responsible if the material elements of the crime are committed with “intent and knowledge”. However, persons may be indirectly responsible or liable by aiding, abetting or otherwise assisting with the crime. The ICC is a court of last resort and will not take a case if a national justice system is capable of prosecuting it. ICC’s jurisdiction is limited to events taking place since July 1, 2002.⁸

The electoral violence experienced in Kenya and Cote D’Ivoire has been prosecuted as crimes against humanity. Such crimes involve participation in “widespread or systematic attack on a civilian population...”⁹ Proving intent alone may be sufficient for conviction. The ICC defines categories of crimes against humanity as listed below.

- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer of population;
- Imprisonment;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- Persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds;
- Enforced disappearance of persons;
- Crime of apartheid;
- Other inhumane actions of a similar character intentionally causing great suffering or serious bodily or mental injury.¹⁰

Kenya 2007

The ICC Case Information Sheet describes the initial eruption of violence in Kenya as follows:

Immediately after the announcements of the results of the presidential election and specifically from 30 December 2007 until 16 January 2008, an attack was carried out – following a unified, concerted and pre-determined strategy – by different groups of Kalenjin people, in locations including Turbo town, the greater Eldoret area (encompassing Huruna, Kiambaa, Kimumu, Langas, and Yamunbi), Kapsabet town and Nandi Hills, in the town, in the Uasin Gishu and Nandi Districts, the Republic of

⁸ <http://www.icc-cpi.int/en>, accessed April 16, 2015.

⁹ Ibid.

¹⁰ Ibid.

Kenya. The attack allegedly targeted the civilian population, namely the Kikuyu, Kamba and Kisii ethnic groups, which were perceived as Party of National Unity (PNU) supporters.¹¹

Three distinct waves of post-election violence occurred following the 2007 elections. “First, there was spontaneous looting by youths in the slums of Nairobi and Kisumu of government buildings and of the shops and houses of Kikuyu families and PNU supporters after the announcement of the election results. Second, violence organized in part before the election by opposition and tribal leaders as a response in the event of Kibaki’s winning the election. Third, reprisal attacks were organized by government supporters and Kikuyu militias that mainly targeted migrant workers thought to be opposition supporters in parts of the Rift Valley Province, Central Province, and Nairobi slums. The police also were responsible for much of the violence, either by using excessive force to deal with protesters or choosing not to prevent violence.”¹²

The violence continued until the power sharing agreement was signed between the President Mwai Kibaki and Prime Minister Raila Odinga. The African Union sponsored the Panel of Eminent African Personalities, led by former UN Secretary General Kofi Annan, which negotiated the Kenya National Dialogue and Reconciliation Accord on February 28, 2008. This accord led to the establishment of two commissions concerning elections.

One commission, the Commission of Inquiry into Post-Election Violence (CIPEV), was established to investigate the violence. The commission was led by Kenyan Judge Philip Waki and was also called the “Waki Commission”, after its chair. CIPEV was mandated to investigate the violence and make recommendations, including those to bring justice to perpetrators. In its October 28, 2008 report, CIPEV identified 1,133 deaths, 3,561 injuries, and 117,216 instances of property destruction. CIPEV identified land grievances and centralized power in the presidency as the “root causes” of the violence. CIPEV made a number of recommendations concerning crime legislation and police reform, such as the integration of the politicized Administrative Police into the more independent Kenyan National Police. However, its principal recommendation was that a special Kenyan tribunal be established to prosecute the perpetrators of violence. The special tribunal was rejected by the National Assembly, and, as a result, CIPEV forwarded the names of the suspects to the ICC.¹³

The second commission, the Independent Review Commission (IREC) was established to more generally examine the issue of electoral violence. This commission was also called the “Kriegler Commission”, after its chair, Judge Johann Kriegler of South Africa. The IREC submitted its report to the President of Kenya on September 28, 2008 and put

¹¹ ICC-PIDS-CIS-KEN-01-012/13_Eng Updated 18 September 2013, Case Information Sheet, page 2.

¹² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67654/elections-ke-2007.pdf.

¹³ International Center for Transitional Justice, *The Kenya Commission of Inquiry into Post-Election Violence*, Fact Sheet.

http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf

forward recommendations on the management capacity of electoral authorities, voter registration, delimitation, and overall electoral integrity.¹⁴ However, their main recommendations centered on “radically” changing the structure, independence, capacity, and management of the Electoral Commission of Kenya (ECK).

The ICC’s Office of the Prosecutor received information from sources within the Waki Commission that crimes against humanity had occurred in the 2007-2008 post-election violence. On November 5, 2009, the Prosecutor notified the President of the Court of its intention to investigate the situation in Kenya. The period being investigated was from June 1, 2005 (the date of Kenya’s signature on the Rome Statute) and November 26, 2009 (the date of the filing of the Prosecutor’s request).

On October 5, 2011, charges were confirmed against the “Ocampo Six”, named after ICC Prosecutor Luis Moreno Ocampo. However, on January 23, 2013, charges were dropped against Henry Kiprono Kosget and Mohammed Hussein Ali, two of the Ocampo Six. But, the charges remained against the other four - William Samoei Ruto, Joshua Arap Sang, Francis Kirikmo Muthaura, and Uhuru Muigai Kenyatta. In March 2013, the charges against Muthaura were dismissed before a trial was initiated. He had been accused of authorizing the police to use excessive force against protesters seen as supporting Prime Minister Odinga.

Deputy President of the Republic of Kenya, Ruto, was accused by the prosecutor of being criminally responsible as a co-conspirator for the crimes against humanity of murder, deportation or forcible transfer of population, and persecution. Sang, Head of Operations at the KASS FM radio station in Nairobi was accused of having otherwise contributed to the crimes of murder, deportation or forcible transfer of population, and persecution. Kenyatta, current President of the Republic of Kenya, was accused of the crimes against humanity of murder, deportation or forcible transfer of population, rape, persecution, and other inhumane acts.

Additionally, Walter Osapiri Barasa was accused of “corruptly or attempting to corruptly influencing three ICC witnesses”,¹⁵ a case of witness tampering in addition to the four charged with crimes against humanity. However, Barasa has remained in Kenya and in May 2014, the Kenyan Court of Appeals suspended the ICC arrest warrant to allow Barasa’s appeal to be heard. This case is one of two in Kenyan courts concerning Barasa and his role in the violence. The first, as stated above, concerns Barasa’s appeal of the arrest warrant. The second is an application by the Director of Public Prosecution asking the High Court to issue an arrest warrant for Barasa based upon an ICC request. Both cases are pending at this writing.¹⁶

¹⁴ *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (September 27, 2008), pages ix and x.

¹⁵ <http://www.icc-cpi.int/en>, accessed April 16, 2015.

¹⁶ Maliti, Tom, *Kenyan Court of Appeal Suspends Arrest Warrant against Barasa*, International Justice Monitor, May 29, 2014, <http://www.ijmonitor.org>.

In the Ruto and Sang cases, the Prosecutor accused the defendants of forming an organization with the stated purpose of removing members of the Kikuyu, Kambia, and Kisii ethnic groups from the Rift Valley in order to establish an Orange Democratic Movement (ODM) power base there. At an April 15, 2007 meeting at Ruto's house, an oath of allegiance was taken among the conspirators. At a subsequent December 22, 2007 meeting at Ruto's house, guns and money were distributed. Sang allegedly used KASS FM to aid the plan by placing his radio talk show at the disposal of Ruto's organization, advertising the organization's meetings, hate speech against the Kikuyu tribe, and broadcasting false news stories about Kalenjin tribe murders. The murders took place from December 20, 2007 to January 16, 2008. There are 628 victims participating in the proceedings. At this writing, the Ruto and Sang trials continue in closed session with issues over witnesses' refusals to testify for fear of their personal safety.¹⁷

In the Kenyatta case, the Prosecutor alleged a conspiracy to keep the PNU in power at any cost. A partnership was formed with an outlawed Mungiki sect, a Kikuyu "terrorist" organization. The allegation included the orchestration of police failure to prevent commissions of crimes and the provision of funding, uniforms, and weapons to Mungiki and pro-PNU youth to carry out attacks. The ICC alleged that Kenyatta's participation in this plan was "essential" for it to happen. His participation included bringing the institutional support of the PNU Coalition, the agreement with the Mungiki to commit the crimes, and the execution of the plan. There were at least 112 people killed in Nakuru and Naivasha. ODM supporters were forced to leave homes in Nakuru and Naivasha, the tribes of the Luo, Luhya and Kalenjin. There were 725 victims participating in the proceedings. However, because of a diminishing number of witnesses available or willing to testify, on December 3, 2014, the prosecution withdrew its charges against Kenyatta.

As a result, of the original Ocampo Six only two remain at trial and the certainty that these trials can continue to be conducted may be in question because of witness intimidation and tampering. And, the individual accused of the witness tampering remains at large in Kenya.

Cote D'Ivoire 2010

The UN-certified election results of the 2010 Cote D'Ivoire presidential election showed former Prime Minister Alassane Ouattara had won the run-off with 50.1 percent of the vote. His support was centered in the predominantly Muslim north, but he also garnered votes from the supporters of third place finisher in the first round, Henri Konan Bedie, and some of Bedie's Akan tribal base. President Laurent Gbagbo received 49.9 percent of the vote predominantly from the Krou tribal group in the south-center, some Akan areas in the south-center and the southeastern Lagoon tribal areas. Gbagbo appealed the results to the Constitutional Council, the members of which were appointed by Gbagbo and his ally, Mamadou Koulibay, President of the National Assembly. Citing such irregularities as reports of fraud, violence, and the failure to announce the final results within three

¹⁷ ICC-PIDS-CIS-KEN-01-012/13_Eng Updated 18 September 2013, Case Information Sheet, page 2.

days of the close of polls, the Council nullified the results in seven northern departments, giving Gbagbo a 51.5 percent victory.

However, this decision was widely disputed by the international community. The UN Special Representative of the Secretary-General, Choi Yung-Jin, “certified the outcome of the second round of the presidential election, as announced by the IEC [electoral commission], confirming Mr. Ouattara as the winner”.¹⁸ In Cote D’Ivoire, the UN Security Council Resolution (SCR) 1603 established the High Representative for Elections (HRE), an unprecedented post in UN electoral interventions. This position was established to fulfill terms of the April 2005 Pretoria Agreement which included the establishment of a mechanism to “verify, on behalf of the international community, all the stages of the electoral process.” In the 2006 SCR 1721, the mandate was amended to read “shall certify that all stages of the electoral process, including the process of identification of the population, the establishment of a register of voters and the issuance of voters’ cards, and provide all necessary guarantees for the holding of open, free, fair and transparent presidential and legislative elections in accordance with international standards.” However, differences regarding the HRE’s role continued and, in the subsequent Ouagadougou Peace Agreement of March 2007, it was decided that the Special Representative of the Secretary-General (SRSG) would certify the election and the HRE’s mandate would be terminated.¹⁹

Resisting the international recognition of his opponent’s victory, the Gbagbo government took such actions as controlling income payments for civil servants and the military to “buy” their loyalty, attempting to eject the UN Mission from the country, and conducting an international public relations campaign to make its case. Gbagbo also proposed to consider establishing a Government of National Unity (GNU); however, the proposal was rejected by the Economic Community of West African States (ECOWAS), other international stakeholders such as the United States, and Ouattara as well. He then proposed an international assessment of the election results led by the African Union (AU) and including the European Union (EU), ECOWAS, Arab League, United States, Russia, and China as the international component. This proposal was also rejected.

The ICC case involves targeted acts by security forces, under the command of Gbagbo against electoral opponents, including the abduction of opposition neighborhood leaders, the murders of opposition supporters, and gang-rapes of women opposition vote mobilizers. These acts are alleged to have resulted in 3,000 fatalities and 150 rapes. Furthermore, an example of the use of state proxies can be found in post-election violence in Cote D’Ivoire, as militias loyal to Gbagbo inflicted violence which included “killings by militiamen with bricks and clubs, and sexual assaults in front of family members.”²⁰

¹⁸ Cook, Nicholas, *Code D’Ivoire’s Post-Election Crisis*, Congressional Research Service (January 28, 2011), page 3.

¹⁹Electoral Assistance Division (EAD) *Workshop on Monitoring and Certification of Elections*, unpublished paper, page 5.

²⁰ Human Rights Watch, *Cote D’Ivoire: Violence Campaign by Security Forces, Militias* (January 28, 2011).

The ICC examined the period of criminality between December 16, 2010 and April 12, 2011. However, in pre-trial papers, the ICC notes that this kind of violence has been employed by government and rebel forces since a failed *coup d'état* in September 2002. The ICC stated that government and rebel forces were allegedly responsible for “child recruitment, enforced displacement and unlawful attacks” through 2002 and leading up to the 2010 electoral violence.²¹ Examples of the violence included one incident in 2002 in Bouake where rebel forces executed 131 individuals, including gendarmes and members of their families. Also in 2002, in the village of Mono-Zohi, government forces shot and killed as many as 120 civilians, mostly immigrant plantation workers. In March 2003, mercenaries reportedly working for the government killed 200 members of the Dioula community in an attack in Bangolo. And, the ICC cites the violence in a March 2004 opposition demonstration in Abidjan perpetrated by pro-government militias that left 105 dead, 290 injured, and 20 “disappeared”. In November 2004, the military attacked rebels in the northern cities of Bouake and Korhogo, killing 55 civilians and nine French soldiers. Government militia attacks were reported in February 2005 in the rebel-held town of Logouale. Other government attacks occurred in January 2006.

The ICC concluded that “[w]hile the context of violence reached a critical point in late 2010, it appears that this was a continuation of the ongoing political crisis and the culmination of a long power struggle in Cote D’Ivoire”.²² In examining the pattern of violence described above and its relevance to the current cases, “The Chamber is of the view that the incidents analyzed above appear to have taken place in the context of, and were associated with, an armed conflict not of an international character and they may amount to murder and rape as war crimes...”.²³ As a result, “...the information sufficiently indicates that the attacks against the civilian population by the government forces were of a widespread and systematic nature, and they were committed pursuant to a State policy”.²⁴

This attention to the history of violence was not part of the consideration in the Kenyan case. While Kenyan elections and society in general experience different forms of violence, the ICC likely chose to highlight the history of violence in Cote D’Ivoire because of its systematic nature and the relevance of these tactics to crimes against humanity. Additionally, xenophobic rhetoric was a continuing theme in the campaign, with aspersions cast by supporters of Gbagbo on opponents’ “Ivorite”. As the International Crisis Group observed, “This language of exclusion reinforces fear between communities and is a powerful driver of violence”.²⁵

Mr. Gbagbo has been charged with murder, rape and other sexual violence, persecution and other inhumane acts. He is in custody at The Hague. His wife, Simone Gbagbo, has

²¹ International Criminal Court, Pre-Trial Chamber III, *Situation in Cote D’Ivoire* (February 22, 2012).

²² *Ibid*, page 14.

²³ *Ibid*, page 14.

²⁴ *Ibid*, page 17.

²⁵ International Crisis Group, *Cote D’Ivoire: Securing the Electoral Process*, Africa Report No. 158 (May 5, 2010), page 2.

been charged with murder, rape and other sexual violence, persecution and other inhumane acts. She is in custody in Cote d'Ivoire. And, Charles Ble Goude has been charged as an indirect co-perpetrator for four counts of crimes against humanity. He is in custody in The Hague. On March 11, 2015, the prosecution joined the two cases of Gbagbo and Goude "...in order to ensure the efficacy and expeditiousness of the proceedings".²⁶ The trials are proceeding at this writing.

Simone Gbagbo had been under house arrest since April 2011. ICC issued a sealed arrest warrant against her in February 2012. The government of Cote D'Ivoire has refused to hand her over due to concerns that such a move could jeopardize the country's efforts at reconciliation. However, Ivorian authorities did charge Simone Gbagbo with both human rights crimes, including genocide, and crimes against the state. Her trial for the latter charge in Cote D'Ivoire, together with more than 80 codefendants, was set to begin in October 2014, but was delayed. However, on March 10, 2015, the former first lady was convicted in an Ivorian court and sentenced to 20 years in jail for her role in the violence that followed the 2010 elections. In an unusual move, on March 16, both the defense and the prosecution lodged an appeal indicating dissatisfaction with the process from both sides. Pro-Gbagbo supporters decried it as a political trial and spoke of 'victor's justice'. Independent analysts and human rights activists have also condemned the judiciary and claim the trial was hasty and inconclusive. A pardon is still possible for Simone Gbagbo, with a source close to President Ouattara saying the president "will do it".²⁷

In this case, the prosecution mechanism was bifurcated between the ICC and the Ivorian judiciary. While a conviction was obtained on conspiracy against the state in the case of the former first lady, she avoided trial at The Hague and facing charges of crimes against humanity.

East Timor 1999

The Popular Consultation in East Timor was a non-binding referendum on Timorese independence. Under an agreement signed by the UN and the governments of Indonesia and Portugal, East Timorese would have the opportunity to cast a ballot accepting or rejecting a special autonomy arrangement but remaining under Indonesian national governance. A rejection of the autonomy proposal would be tantamount to a vote for independence which would then be granted by the Indonesian parliament. Throughout the campaign, independence supporters were subject to attack followed by a wave of post-election violence resulting in an estimated 900 deaths and 400,000 displacements.²⁸

As a former Portuguese colony, the East Timorese were largely Roman Catholic in religion, compared with the majority Muslim population of Indonesia. East Timorese speak either Tetun or Portuguese; Bahasa Indonesian is the majority the language of the

²⁶ ICC-02/11, Situation in the Republic of Cote D'Ivoire, page 2.

²⁷ Council on Foreign Relations, Africa in Transition (John Campbell blog), *Coming Clean: Was Justice Served in the Ivory Coast Trial of Simone Gbagbo?* (April 8, 2015).

²⁸ Robinson, Jeffrey, *East Timor 1999 Crimes against Humanity* (2003), page 46.

country. Despite threats of violence, the East Timorese people voted emphatically in favor of independence with 78.5 percent voting in favor of independence. .

Between the beginning of January and late October 1999, the people of East Timor were subjected to horrific systematic violence and intimidation which resulted in the killing of between 1,200 and 1,500 civilians. Citizens were killed and subject to torture and abuse. Women and girls were the victims of sexual assault and rape. The most deadly period came after the September 4 announcement of the outcome and continued until late September when an UN-sanctioned military force intervened to help restore order. During this period more than 250,000 of the estimated 400,000 displaced persons were forcibly transferred into Indonesian West Timor by pro-Indonesian forces including militias and soldiers from the Tentara Nasional Indonesia (TNI) or Indonesian Armed Forces.

One of the core questions in the aftermath of the human rights violations of 1999 was the question of responsibility. Specifically, was the violence carried out by local militiamen who were acting independently or were the perpetrators of violence following a systematic plan devised by Indonesian officials? In his report commissioned by East Timor General Prosecutor Mohamed Othman, James Dunn detailed the development of the post-consultation violence. Dunn writes that

“The wave of so-called militia violence which swept over East Timor in 1999, culminating in massive deportations and destruction in September, was not the spontaneous response of those who favoured integration, but the outcome of a decision by TNI generals to counter the surge of popular support in East Timor for independence, by means of intimidation and violence, and to prevent the loss of the province to the Republic of Indonesia. The campaign of massive destruction, deportation and killings in September was essentially an operation planned and carried out by the TNI, with militia participation, to punish the people of East Timor for their vote against integration.”²⁹

The UN’s Commission of Inquiry on East Timor was established almost one month after the popular consultation to investigate human rights violations. The commission’s final report also finds that the Indonesian army was substantially involved in the human rights abuses that occurred in 1999. Specifically, it finds evidence that the Indonesian army supported the militia’s intimidation and attacks through an involvement with recruitment, funding, arming, and guidance to the militias. There is also evidence that personnel of the Indonesian army were directly involved with these abuses and were integral to their occurrence. The report finds that both before and after the popular consultation, “ultimately the Indonesian army was responsible for the intimidation, terror, killings and other acts of violence experienced by the people of East Timor.”³⁰

²⁹ Dunn, James, *Crimes Against Humanity in East Timor, January to October 1999-Their Nature and Causes* (2001), page 2.

³⁰ United Nations, General Assembly, *Report of the International Commission of Inquiry on East Timor*, (January 31, 2000).

The mechanisms for transitional justice for those victims involved international, Indonesian, and Timor-Leste initiatives. (Timor-Leste became the official name of the new country). As the discussion which follows will show despite a robust, complex, and internationally-driven pursuit of justice, penalties were ultimately minimal for the leadership.

In the first institutional response to the post-election violence, the UN Commission on Human Rights adopted a resolution to establish an International Committee of Inquiry on East Timor, which was done on October 15, 1999. A parallel commission of inquiry was established by the Indonesian Human Rights Commission. During this period, the UN also dispatched three Special Rapporteurs to explore the options for prosecution of those involved with the violence. On January 31, 2000, both commissions released reports which found the Indonesian military as culpable in the violence, with the Indonesian report naming 33 individuals responsible. However, the Indonesian report called for national prosecution of the perpetrators, whereas the UN report stated that there should be an international mechanism. The notion that the perpetrators would be properly tried within Indonesia was met with skepticism by the international community and within Timor-Leste.³¹ In fact, the three UN Special Rapporteurs concluded, “The record of impunity for human rights crimes committed by Indonesia’s armed forces in East Timor over almost a quarter of a century cannot instill confidence in their ability to ensure a proper accounting”.³² However, the Indonesian government made it clear that it would not support participation in an international-driven process and the trials were eventually conducted by the Indonesian Ad Hoc Human Rights Court.

Nevertheless, the UN maintained an active posture in the investigations. In its role as the transitional administration, the UN was tasked with establishing a domestic judicial system. A debate ensued about whether international East Timorese judges should be engaged. Initially, UN ultimately engaged East Timorese judges in less serious crimes than those of crimes against humanity. In 2000, the United Nations Transitional Administration in East Timor (UNTAET) established a Serious Crimes Unit (SCU). Through the SCU, the UN established Special Panels for Serious Crimes within the District Court of Dili. These Panels were mandate to investigate cases of genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture. The Panels consisted of one Timorese judge and two international judges. However, the Timorese judges were distressed about their relegation to an apparently subordinate role, and one human rights organization, Yayasan HAK, termed it a “back door” tribunal.³³ The issue of “consultation” between international and Timorese stakeholders continued to foster dysfunctionality in the relationship. At its closure in May 2005, the SCU had indicted 391 people in 95 different indictments. However, of those 391, 339 of them remained at large within Indonesia and outside of the District Court of Dili’s jurisdiction.³⁴ Many of those in custody were characterized as relatively low-level offenders.

³¹International Center for Transitional Justice, *The Serious Crimes Process in Timor-Leste: In Retrospect* (March 2006), page 9.

³² Ibid, page 9.

³³ Ibid, page 13.

³⁴ Ibid, page 18.

In 2001, UNTAET also established the East Timor Commission for Reception, Truth and Reconciliation, or CAVR in its Portuguese acronym, a co-existing transition mechanism with the SCU. CAVR's mandate was to identify the truth regarding human rights abuses between 1974 and 1999. The mandate also established the Community Reconciliation Procedures (CRP). Under CRP procedures, low-level offenders of less serious crimes such as theft or minor assault could petition to have a local hearing, called an *adat* to decide their cases. In CAVR's final report released in February 2006, they concluded that the international community took interest in the 1999 atrocities, but little interest in those over the 23 previous years. Despite this failing, CAVR supports a strong international dimension to justice in this case stating, "... [T]he Commission believes that the definitive approach to achieve justice for crimes committed in Timor-Leste should hinge critically on the commitment of the international community, in particular the United Nations."³⁵

Finally, in 2002, the Ad Hoc Human Rights Court in Indonesia was established by Indonesian authorities. There were 12 trials involving 18 defendants. Six of the defendants were convicted with sentences ranging from 3 to 10 years. Among those convicted were military officers, a militia leader, political leaders, and civilian officials, all regarded as leaders of the 1999 violence.

The Ad Hoc Human Rights Court received the evidence for the trials from the International Commission of Inquiry on East Timor. The Commission put forward the following major cases of violence.

- Liquisa Church Massacre, April 6, 1999
- Arbitrary assaults and torture in Kailako, April 12, 1999
- Ambush of Manuel Gamma groups, April 12, 1999
- Summary executions in Bobonaro, April 13, 1999
- Attack on Manuel Carrascalao's house, April 17, 1999
- Riots in Dili, August 26, 1999
- Burning down houses in Maliana, September 4, 1999
- Attack on Dili Diocese, September 5, 1999
- Attack on Bishop Belo's house, September 6, 1999
- Attack on Suai Church Complex, September 6, 1999
- Murder of Sander Thoenes, September 21, 1999
- Massacre in Los Palos, September 25, 1999
- Acts of gender-based violence including rape³⁶

However, as the International Center for Transitional Justice points out, "The problem with the Jakarta trials is that the process has been fundamentally flawed from the moment the attorney general's office took over the investigation..."³⁷ As the Center views it,

³⁵ Ibid, pages 39 and 40.

³⁶ Ibid, pages 16 and 17.

³⁷ International Center for Transitional Justice, *Intended to Fail – The Trials Before the Ad Hoc Human Rights Court in Jakarta* (August 2003), page v.

these flaws resulted in failures in providing justice. First, there was a general failure of the prosecution to “press” their cases as professionally and thoroughly as the evidence would have permitted it. Second, this same prosecution failed to present the case that these acts were indeed crimes against humanity warranting a special tribunal such as for Yugoslavia and Rwanda.

An objective of the trials was to reveal the command structure in place and, thus, the orchestration. The highest profile case was that of Major General Adam Damiri, who was the regional military commander in East Timor at the time of the 1999 voting. Although he was convicted and sentenced to three years, the prosecutor reopened the case and argued for his acquittal on the grounds that it had not proven its case. This illustrates there was a failure of political will on the part of the Attorney General’s office to prosecute these cases. This kind of obfuscation diminished the trials’ “truth function” which was to provide an historical record of the atrocities that took place.³⁸

As with the case in Kenya, witness intimidation was an issue with the court failing to establish electronic means of testifying to protect victim-witnesses; and its failure to call international witnesses, who would be less subject to intimidation, for their testimony.³⁹

In April 2008, the Indonesia Supreme Court reversed the convictions of all the defendants in the East Timor electoral violence cases.

Forecasting for Electoral Crimes Against Humanity

While the cases above speak to the issue of impunity for such crimes against humanity, the question can be posed that if the forecasting of such mass atrocities can be more effective, could the occurrence or intensity of these crimes be abated? Researcher Jay Ulfelder at the U.S. Holocaust Memorial Museum’s Center for the Prevention of Genocide has devised a three-channeled forecasting approach to the prediction of mass killings – the Early Warning Project. Mass killings are defined as “the deliberate killing of at least 1,000 noncombatant civilians and unfold over weeks, months, or years across multiple locales”, whereas a massacre is defined as a “discrete event that occurs in a particular locale on a particular date and kills as few as 10 noncombatant civilians”.⁴⁰

There are two principal forecasting tools in the Early Warning Project: “1) the statistical risk assessment...; and, 2) a “wisdom of crowds” system that mathematically aggregates experts’ judgments about the probability of atrocities in a situation of particular concern”.⁴¹

³⁸ Ibid, pages vi and vii.

³⁹ Ibid, page 14.

⁴⁰ Ulfelder, Jay, *Using the Wisdom of (Expert) Crowds to Forecast Mass Atrocities*, Annual Conference of the International Studies Association, Toronto, Canada (March 2014), page 5.

⁴¹ Ulfelder, Jay, *A Multimodel Ensemble to Forecast Onset of State-Sponsored Mass Killing*, U.S. Holocaust Museum’s Center for the Prevention of Genocide(August 1, 2013), page 1.

The statistical risk assessment employs a multimodel ensemble to statistical collection and analysis. An annual survey of countries over 500,000 in population that is conducted to ascertain the risk for mass killings to occur. According to the survey, since World War II there have been no more than two onsets of mass killings per year. During the Cold War, around 15 percent of countries experienced such onsets. These onsets peaked in the period following the Cold War to 25 percent, but declined starting in 2010, the year of the Cote D'Ivoire mass killing. These killings most often occurred in the context of some form of political crisis.⁴²

The second tool of the Early Warning Project is the opinion pool. Here, registered forecasters give their opinions about specific events during a certain time period. A "crowd" forecast is then aggregated. This approach is a version of a "prediction market" applied to mass killings. The author points out that prediction markets are utilized for a variety of topics such as the Hollywood Stock Market for entertainment industry futures, United States election and policy outcomes through the Iowa Electronic Markets and the American Civics Exchange and Intrade and Inkling Public Markets for global affairs.⁴³

For the Early Warning Project opinion pool, questions are posted which are specific to locations and time periods such as: "Before 1 January 2015, will an episode of state-led mass killing occur in Russia's North Caucasus region?" and provide registered forecasters with coding rules and procedures to express their views. The responses are mathematically combined to achieve a single best "crowd" forecast. If a forecaster changes an option, that update can be entered and automatically registered to derive a new "crowd" forecast result.⁴⁴

The registered forecasters are faculty and staff from the U.S. Holocaust Museum and Dartmouth College and numbered 139 persons in early 2015. The goal is to engage over 1,000 forecasters. The profile of the forecaster is largely American or European in nationality although all regions are represented. Most of the forecasters are from academia, but others are from government and intergovernmental organizations and some journalists. Most of the forecasters are generalists with only a few who are experts in genocide and mass killings. As it is a voluntary program, the frequency of responses is a factor to consider. Around three-quarters of the registered forecasters have made 10 or fewer comments. Most of the rest have made fewer than 50 forecasts, but a small set have made hundreds of forecasts each. However, as seen in the findings, the most frequent responders were generally the most accurate.⁴⁵

In its first year of operation, the opinion pool proved to be "quite accurate". In the first, 16 month period of operation, 83 questions were posted with yes/no answers with forecasters asked to estimate the probability of a "yes" outcome. In this regard, "The average Brier score across all 83 of the binary probability questions we asked before

⁴² Ibid, page 3.

⁴³ Ulfelder, Jay, *Using the Wisdom of (Expert) Crowds to Forecast Mass Atrocities*, Annual Conference of the International Studies Association, Toronto, Canada (March 2014), page 2.

⁴⁴ Ibid, page 3.

⁴⁵ Ibid, page 4.

2015 was an impressive 0.122.” The statistical survey methodology produced a result which exceeded those of the opinion pool, but these surveys are less frequent and event specific.⁴⁶

Conclusion

While the frequency of electoral violence classified as crimes against humanity is rare, the tolls in death, injuries, and destruction are obviously significant. However, while the infrequency is noted, this research reveals that the risks of prosecution for such crimes have been low. As a result, although such events are uncommon, preventative and punitive measures need to be engaged to create disincentives and raise the costs to the perpetrators.

In terms of commonalities, each case involved violence occurring in the post-election phase, triggered, in part, by the election outcomes. However, in the Kenya and Cote D’Ivoire cases, the violence was among political rivals in an attempt to change the vote outcomes and attack opponents. In East Timor, the violence was retaliatory for a vote overwhelmingly in favor of independence from Indonesia. In each case the conflict also possessed an identity politics dimension, playing out as inter-tribal violence in Kenya and Cote D’Ivoire and inter-religious undertones in East Timor and Cote D’Ivoire. In all three cases, security forces were complicit in the violence. However, in the case of East Timor the violence was perpetrated by Indonesia-backed militia with reported connections to security forces. Although the Indonesian police and military were mandated to provide electoral security, they were actually organizers of the insecurity. In all three cases the tactics involved targeted attacks – homicides, sexual assaults, physical assaults, mass displacement, and property destruction. And, at this juncture, justice has been incomplete. The two ICC cases represent crimes committed in 2007 and 2010. To date, the only successful prosecution was that of Simone Gbagbo, who was convicted by an Ivorian court and not the ICC. However, was the decision to block her extradition to The Hague in the interest of national reconciliation a mitigating factor? In the Kenya case, only two of the original “Ocampo Six” are still on trial, with the charges dismissed against the others. The arrest warrant from the ICC on the Barasa case remains under appeal, and Barasa remains in Kenya. For East Timor, in 2008 the Indonesian Supreme Court overturned the conviction of the violence’s leadership while some of the lower level perpetrators were prosecuted.

In order to reduce impunity for electoral crimes against humanity, the ICC and other international-driven or nationally-mandated transitional justice mechanisms could benefit from a standardized framework to conduct their investigations. The objective of the framework would be to provide prosecutors with stronger instruments to build their cases and reduce impunity for these crimes. The investigation and case-building framework would include best practices for witness protection; evidence protection; weight of evidence among documents, media, and testimony; profiling patterns of victimization and perpetration; and, legal precedents among others. Such a framework could be employed

⁴⁶ Ulfelder, Jay, *Promising Initial Results from a New Mass-Atrocities Early Warning System* (January 26, 2015), page 10.

by the ICC, UN, and regional Inter-Governmental Organizations (IGOs) for more effective prosecution of perpetrators and justice to victims.

However, coupled with this framework, the international community should also seek to strengthen its forecasting capacity in order to identify where such mass electoral killings could occur. The Explaining and Mitigating Electoral Violence Project of the University of Glasgow is contributing to the development of such forecasting capacity. This capacity development includes the global electoral violence incidents database, opinion pool, and social media components of the project which, when completed, can be employed as forecasting tools for electoral violence.

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