The legal challenge of civil militia groups in Kenya

H Nanjala Nyabola

Introduction

In early 2008, Kenya faced its most dire social and political crisis in 45 years. As international organisations and governments scrambled to establish reasons for the apparently sudden descent into chaos, a disturbing pattern began to emerge. Across the country the sometimes spontaneous expressions of frustration at a clearly imperfect election process quickly degenerated into ethnically targeted attacks that were countered by reprisals by ethnic militia groups, eventually leading to the displacement of up to half a million people and the deaths of close to a thousand.1

The recurrence of political violence has become an unfortunate characteristic of the democratic experiment in Kenya, as civil militia groups who are typically composed of
young males and are directly responsible for much of the carnage, increase in number. Yet debates on prosecution and accountability for the election violence continue to focus on the political leaders who are believed to have financed and overseen the violence. Certainly, it would be an enormous failure on the part of the judicial system if these individuals were not held accountable for their part in bringing the nation close to collapse. However, it is also an opportunity to address the threat of the civil militia that attack citizens not just during elections but also in ‘peace time’. The crimes committed by these gangs are grave enough that if they had occurred during a war, they would constitute war crimes, as per the definitions of the International Criminal Court (ICC). However, because Kenya is technically at peace, the possibility of initiating such a prosecution is not particularly clear.

**Understanding civil militia groups**

In part, the difficulty of developing an efficient prosecution against the gangs of young men terrorising civilians in Kenya is in categorising them in a way that adequately accounts for their origins, actions and effects. Existing definitions limit the ability to address the diversified nature of their activities. Whereas the groups in eastern Congo are labelled as ‘rebel groups’, legitimising, at least in part, their agendas and recognising them as a tangible threat to long-term peace and security, their counterparts in Nairobi are labelled ‘gangs’, implying a lack of a systematic core to their actions. The reality is that while their goals and agendas may differ, fundamentally these are groups of (typically) young people who have been locked out of the mainstream political process and are united by a common, if not always clearly articulated, social or political agenda that is expressed by violent means. It is this agenda that distinguishes them from criminal gangs. These groups are, at least in their own opinion, pursuing a valid goal; violence is not an end in itself but a means towards this end. Thus the term that best defines these groups is ‘civil militia’.

The term ‘militia’ comes from the Latin word *miles*, meaning soldier. A civil militia group may be defined as a ‘citizen army made up of free men between the ages of sixteen and sixty who [perform] occasional mandatory military service to protect their country, colony or state’. Over time the conceptual scope has broadened to include militarised groups operating in the private domain, or ‘a citizen self help force to provide security and defence and to be called up in case of emergencies’. More often than not, these groups position themselves to provide security and defend their perceived allies or fellow community members against threats from the state itself.

In Kenya, this has led to the emergence of community or interest-based groups, organised by a variety of stakeholders, including the regime in power. Community-based militia groups frequently emerge in response to a perceived threat against the
integrity – territorial, social or otherwise – of the community. The Sabaot Defence Force in western Kenya, for example, exists nominally to protect and defend land held by the Sabaot community while the Mungiki developed at first as defenders of the cultural heritage of the Kikuyu – the largest ethnic group in the country – in central Kenya. Interest-based groups also develop to protect specific political or economic interests and may include in their ranks individuals from a variety of social backgrounds. These groups in particular may have a defensive element in their origin and expansion, such as the Jeshi ya Mzee that ‘defended’ the political agenda of the Kenya African National Union (KANU) in 1992.

It is important to clarify what does not constitute a militia group. Spontaneous acts of vigilantism by communities out the legislative reach of government agencies, while they may have a criminal dimension, do not necessarily give rise to the emergence of a civil militia. The temporal dimension – that is, a sustained level of violence over time by the particular group – is a critical factor, particularly for the purposes of this article. It is the unchecked, repetitive expression of such spontaneous acts of violence that indicates the potential for the development of militia groups in these areas. The reaction of the state to these acts of vigilantism determines whether they remain spontaneous or signify the beginnings of a new civil militia. Militia groups emerge where state control is at its weakest, such as in failed states or failing states with a stunted ability to exercise power in its entire territory. Government responses that may lead to the development of militias include no response at all or an overzealous response. An excellent example of this over-reaction was the recent military action by the Kenyan government against the Somali (as an ethnic community of Kenya) community of Mandera following an incursion by the Somali (nationality) during which two Italian nuns working in the region were kidnapped. Such actions only served to legitimise the widely held belief that the government of Kenya cares little for the needs of the people of the region.

For the purposes of this analysis, therefore, a civil militia is a group that has either gone beyond its initial defensive function, taking on an offensive character, or one that did not have a defensive one to begin with. Understanding the impact of these groups with regard to the Kenyan situation is pertinent for two reasons. First, it will be impossible to achieve peace in Kenya without understanding the role that these groups have played and continue to play in obstructing any attempts at peace making. Second, the current situation in Kenya represents a critical juncture in the historical trajectory of the country, that will either see it emerge stronger or fatally weaker as a nation, and civil militias form a crucial element of this situation. In short, it is inconceivable that a true and lasting peace can be achieved in Kenya without understanding the potential for prosecution, and therefore, justice and reconciliation as part of a positive peace-building process. It is from this perspective that it is important that the civil militia groups that hold the greatest threat, particularly in terms of exporting their brand of violence across the region, must be addressed.
Civil militia groups and the state in Kenya

The emergence of civil militia groups can usually be traced back to the failure of the state to provide security, particularly in marginal areas of their territories. In some cases, this is a direct result of the collapse of the central state itself, but in the case of countries like Kenya the state apparatus does exist, but the state is unwilling or unable to extend its reach beyond large towns, major border points, etc. In Kenya, government authority is regularly challenged by militia groups in informal settlements, comprising the largest part of the urban population. Critics have often accused successive governments of pursuing economic growth without addressing the inefficiency of the distribution mechanisms of the Kenyan economy, because it provides for the wealthy few at the expense of the poverty-stricken majority. Furthermore, wealthier residents opt for private security arrangements while the residents of slum areas choose or are forced to rely on militia groups for their security.

With its limited capacity, coupled with a crumbling police force – corrupt, lacking in morale, understaffed and poorly equipped – the government of Kenya has often tacitly accepted the existence and growth of such informal security arrangements by reducing their workload and restricting their operations in the less affluent areas of the cities. In the face of this situation, it is not surprising that the groups have become stronger and have broadened their activities beyond simply filling the security vacuum. For example, both the Mungiki and Taliban militia groups have been accused of running extortion and protection rackets in the slums in which they operate. The reaction from the authorities in both cases has oscillated between the two extremes of apathy to heavy-handed attempts to stop the groups. The government seems only to challenge the militia groups when the interests of the ruling elite conflict with those of the militia groups, as in the build-up to and aftermath of the 2007 elections.

The situation is exacerbated by the fact that the government occasionally uses these militia groups to provide extra-judicial services, particularly during election periods. Because these groups have no legal standing, the state can attribute their violence to the democratisation process, or to criminal activities. Thus when the Mungiki allied themselves with the KANU/NDP alliance during the 2002 elections, its violent actions were to some extent tolerated because of its relationship with the government. The government used the militia movements as tools to maintain control in potential opposition strongholds or to ensure the survival of the current regime. The KANU regime relied heavily on particularly the Mungiki to undermine opposition support in urban areas by creating the impression that the opposition could not be trusted to maintain security even in their own strongholds.

This complex relationship obviously presents numerous legal problems for analysts and legal practitioners alike. On the one hand, if a civil militia group like the Mungiki is simply...
a criminal gang, then the responsibility for apprehending and prosecuting members rests solely with the national legal system. On the other hand, if they are violent groups with ‘legitimate’ status, their actions constitute a violation of international criminal law: ‘… aimed at any civilian population … regardless whether they are committed in an armed conflict, international or internal in character’.\(^{19}\) Part of the distinction between such crime against humanity and a simple crime is that whereas simple crimes can be spontaneous expressions of the darker side of human nature, crimes against humanity are widespread and systematic.\(^{20}\) In fact, in terms of the Statute of Rome that led to the creation of the International Criminal Court, for a crime to qualify as a crime against humanity, it has to be either widespread or systematic, but not necessarily both.\(^{21}\)

Mungiki and other civil militias pose a direct threat to the justice system because their crimes are acknowledged as widespread but there is debate about the extent to which they are systematic. Moreover, the idea of systematic crimes is still contested in international criminal law, as the International Criminal Tribunal for the former Yugoslavia suggested that a ‘pattern or a methodical plan’\(^ {22}\) is enough while the International Criminal Tribunal for Rwanda argued that where such crimes are ‘thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources’\(^ {23}\) they can be regarded as being systematic. The former definition suggests that if enough evidence exists to prove that even one of the attacks orchestrated by Mungiki had been planned with the intent of inflicting grievous harm against a specific segment of the civilian population, its leaders may be held to be culpable for crimes against humanity. The latter suggests that where crimes form part of a broader and perhaps discriminatory policy advanced by the government or other interest groups, they are systematic. In terms of this definition, evidence would have to be found to corroborate speculation that the government or politicians directly bankrolled and supported the Mungiki group, or have been complicit in furthering their cause either by engendering police or judicial apathy.

In any case, the challenge to the national and international justice systems is how to deal with such a group in the context of a crumbling national judicial system, potential complicity by the political elite, difficult economic conditions and escalating levels of violence within the country. While the Kenyan legal system is theoretically attempting to prosecute militias, public confidence in the system is non-existent in the face of its near collapse.\(^ {24}\) It calls into question the fundamental purpose of a prosecution in such a case as this: if the goal of the prosecution is to simply get bodies behind bars, the degree of confidence in the judicial system is no problem. If, however, the goal of justice is to actually get to the root of the phenomenon, then a prosecution must be perceived by those affected the most as being truly free, fair and efficient. Ultimately, for the purposes of building a true and lasting peace, justice must not only be done but should also be seen to be done.\(^ {25}\)

The challenge to the international justice system is how to encourage, or even take on, a prosecution of civil militias without a misstep in the diplomatic minefield that is state
sovereignty. Currently, there is palpable tension between the position that any violations against international conventions are subject to universal jurisdiction, and that national jurisdictions must be given ‘rights to first refusal’ on any crimes against humanity occurring on their territory. The Treaty of Rome supports the latter interpretation, and the question in the case of Mungiki and other civil militia groups is whether the government of Kenya would under normal circumstances transfer jurisdiction over these crimes to the ICC. Apart from the logistical and financial difficulties that such a transfer would necessitate, it would also be an implicit acknowledgement of the failure and weakness of the judicial system in Kenya, something that a state would be loath to do. The ICC is, of course, free to pursue any prosecution brought to its attention by the Security Council or by a citizen of a state party. Given that a prosecution demands an investigation, however, such a move would be far easier if the ICC were guaranteed state cooperation.

In the case of Kenya the matter is further complicated by the ambiguous relationship between civil militias and the state. The militia groups fill a vacuum in state governance and as such any investigation and prosecution process will not only have to deal with the perpetrators of the crimes but also suggest pragmatic ways of filling this vacuum. The aim of prosecution must be to introduce accountability and transparency in the country, as well as to strengthen the position of the judicial system in dealing with similar groups in future. The aim should further be to highlight the international implications of the continued existence of militia groups in general, and particularly their influence on regional stability and their potential to develop into full-blown terrorist organisations. Undoubtedly, this would be a complex undertaking in the case of Kenya, particularly given the relationship between the state and the civil militia groups. Therefore, the next goal of this article is to suggest a method by which this can be accomplished using existing instruments.

Efficient prosecution

At this point, it is important to understand why prosecution against civil militias is such an important idea, particularly in Kenya. First, the prosecution of civil militias in Kenya has significant implications for the development of a strong judicial system and, in turn, strengthening of the general state apparatus. Particularly community militia groups – citizen based, located within communities and bound to them as part of their mandate – introduce a potential fracture line in an already weakened state. A state is by definition entitled to some degree of monopoly on the use of force, and any entity that challenges this by extension undermines its legitimacy, for it creates the impression that the state no longer has the support of the majority of its citizens for its goals and no longer has their confidence, or it can no longer assure their security in the face of the rising strength of the militia groups. This lack of support in turn results in an inability to control – whether it is the movement of people and goods across borders, including
illegal arms, or exploitation of resources. This further undermines the strength of the state, as neighbouring states then also lose confidence in that state’s ability to manage activities within its territory. The end result is that more and more militia groups appear to fill the growing state vacuum, which attracts criminal elements and could make the country a destination for terrorist groups and international criminals.

It may seem extreme, but this is the cycle that continues to play out throughout the Great Lakes region. Civil militias have been recurring features in the political history of for example the Democratic Republic of Congo (DRC) since independence, and in this country usually take the form of ethnic groups that try to undermine the successive authoritative regimes there. In the period preceding and following the coup that removed Mobutu from power, community militias protected the interests of particular ethnic groups in remote regions beyond the control of Kinshasa. It was one of these groups, the Mayi Mayi, that took the opportunity of growing Rwandese frustration about Interhamwe militias based in the eastern DRC to join a movement that eventually resulted in the toppling of Mobutu’s government. Kabila may have succeeded in deposing Mobutu, but failed to unite the groups that had briefly come together to support his agenda, a failure that quickly threatened his tenuous hold on the DRC. As minor insurgencies flourished, particularly along the eastern border, neighbouring nations grew increasingly frustrated and launched a series of cross-border military raids that have resulted in what is frequently dubbed ‘Africa’s World War’.

The situation in the DRC points to the need for a strong central state to prevent the proliferation of civil militia groups. Kabila actively encouraged the growth in militia groups because they served his interests in portraying himself as independent of the influence of Rwanda, Uganda and to some extent, the United States. Recognising that he did not have control over the entire territory of the DRC, he capitalised on the antagonism between various militia groups to fight proxy battles against his supposed enemies (Rwanda and Uganda) and give the illusion of strength. In the long run, the eastern border of the DRC became a virtual political free-for-all area, with powerful military groups violently competing to protect material and territorial interests. The DRC continues to exist as a sovereign state, but the reality is that most of its security interests are debated by the UN Security Council and the UN Mission to the DRC, while its internal security interests, particularly in the east, are secured predominantly by community militia groups.

Prosecution of the case of the DRC implies restoring order to the fractured eastern region by removing violent elements and enabling the state to restore its reach in the area. It is a call that has already been taken up by the international criminal law fraternity. The International Criminal Court has made significant headway towards this end, issuing warrants and initiating prosecutions against the leaders of various militia groups. While recognising the significance of this step, one wonders whether a prosecution at an earlier
juncture could have prevented the descent into chaos, and whether such a prosecution elsewhere could avert state disintegration.

The case of Kenya, in particular, which was once touted as an island of stability in a sea of chaos, raises pertinent questions with regard to the effect of prosecution on the development of civil militias. There is no question that civil militia groups operating in Kenya are responsible for perpetrating crimes against humanity, with a crime against humanity being defined as:

Murder, extermination … and other inhumane acts committed against any civilian population … or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.36

The Mungiki militia group is considered to be one of the greatest security threats in present-day Kenya. According to various news reports the group has been responsible for crimes ranging from murder and extortion in the city to undressing women wearing trousers as part of their campaign against indecent dress.37 The group is attempting to gain control of entire neighbourhoods where the central government has little or no impact. Further complicating the issue is the fact that clashes between the Mungiki and other groups are increasingly common, because individuals outside Mungiki’s ethnic base are trying to organise themselves into militia groups, too. On 3 March 2002 a violent clash between the Mungiki and the Taliban groups in Nairobi’s Kariobangi North estate left 20 local residents dead and 31 in hospital, highlighting the increasing gravity of the situation.38

The government approach to the militias has historically been inconsistent. After the 2002 violence in Kariobangi, for example, the government officially proscribed the Mungiki and other groups but they were allowed to resurface during the 2007 elections.39 The government, unable to deal with the threat through conventional channels, resorted to extrajudicial killings and disappearances.40 These actions reinforced the perception that the state is unable to control its territory and is forced to turn to violence to apprehend criminals. It implies that with enough force any objectives can be met, and in this way does not deter civil militias from forming but rather encourages them to choose even more violent methods to overpower the police.

Crimes have been and are acknowledged to have been committed by the civil militia. For the victims of these crimes, the need for justice raises the question of where and with whom the buck stops. Primarily, prosecution is about making individuals that perpetrate crimes accountable for their actions and making these accountability measures a lasting feature of the judicial system. Bassiouni suggests that accountability brings with it
three associated concepts, namely truth, justice and redress.\textsuperscript{41} It affords the nation an opportunity to construct a shared narrative on the crimes that have been committed, to prevent ambiguity and restore a sense of shared experience and therefore a national identity. In this way it also serves to prevent the perpetuation of those negative and destructive narratives which have characterised many post-conflict states. It gives the victims of the crimes an opportunity to gain closure regarding their suffering and finally offers them a basis on which to seek further redress, whether in the form of a prison sentence or reparations for survivors. Granted, as Bassiouni suggests, prosecution is not the only means of achieving these ends, but in the broader context of the Kenyan legal and political system, prosecution is perhaps the best way.

As has already been stated, the Kenyan judicial system is known the world over to have a high level of corruption and inefficiency. According to the 2008 Transparency International Survey, while interaction with the judiciary was limited, the likelihood of encountering a bribe when dealing with the judiciary is 62 per cent.\textsuperscript{42} Confidence in the judiciary is low and a culture of impunity, particularly among the political elite, is entrenched. There are accusations that civil militia groups are financed and supported by politicians, particularly during political transition periods (election years) when instability can be manipulated into political capital by politicians.\textsuperscript{43} (These politicians at the same time enjoy the protection of the police.) As Bassiouni notes, where the state fails to implement legal standards, amongst others by quashing prosecutions, impunity becomes the norm.\textsuperscript{44} A prosecution would thus serve the dual purpose of countering the perception of inefficiency and partiality by dealing with the culture of impunity and strengthening the position of the central state.

Ethnic tensions could also be eased by prosecution. It should be noted that most community militia in Kenya are organised along ethnic lines, as in the case of the Mungiki, which is associated with the Kikuyu. Although analysts of the 2007 post-election violence in Kenya went out of their way to portray the violence as ethnic, it should be noted that ethnic groups do not exist in a vacuum.\textsuperscript{45} Relationships between communities have been shaped and moulded by decades of systematic manipulation by ruling government elites and other leaders. In particular, while corruption has been a negative feature of the country throughout most of its history, the perception by citizens is that it favours the community that holds the presidency, which has been a Kikuyu two out of three times. It is beyond the scope of this article to evaluate relationships between ethnic groups, but it should be noted that an effective prosecution of a civil militia group in Kenya, particularly the Mungiki, would go a long way towards challenging the notion that one or more ethnic groups are favoured over others.

This article is not arguing for prosecution for the sake of prosecution. Reconciliation, particularly in the aftermath of events as cataclysmic as the post-election violence in Kenya, cannot occur without some form of accountability on the part of those who orchestrated
and executed the violence. Modern Hobbesian societies are founded on the premise that individuals partially give up their freedom in favour of security offered by the state.46 Thus where a state is unable or unwilling to provide security for its citizens, it is an indicator of not only social failure, but also moral failure on the part of the state to uphold its part of the bargain. As with any other breach of contract, such a failure cannot be allowed to go unpunished, for the very basic reason that it undermines any aspirations to modern statehood. By not prosecuting the militias consistently and objectively, the state is guilty of such failure. Furthermore, the perceived mishandling of the civil militias that led to the post-election violence meant that Kenya lost significant international legitimacy that once saw it regarded as one of the most stable and rapidly developing nations in Africa.

This article argues for an efficient prosecution, and it is in bridging this efficiency gap between a nominal and an efficient prosecution that international criminal law and its attendant institutions can play a role. The judiciary in Kenya requires a strong system of checks and balances and international criminal law institutions can bolster the Kenyan judiciary’s prosecution of civil militias by filling in technical gaps. The ICC enshrines this principle under its complementarity regime that recognises the primacy of national jurisdictions over international prosecutions but allows room for cooperation between the two.47 Bassiouni notes that international prosecutions as a matter of policy focus on the prosecution of decision-making officials, and if this were done in Kenya it would reduce the social tension such a prosecution can place on the already fragmented state.48 In the case of Kenya, speculation about the role that ethnic considerations play in the prosecution of civil militias could be reduced by an international prosecution of the ringleaders and/or financiers of the movements. This would also diffuse the potential for violence.

International support of prosecutions carried out by (and preferably in) Kenya would increase confidence in that country’s judicial process and offer the public the assurance of an objective prosecution. International prosecution for the organisers of civil militia groups within Kenya would also serve as a deterrent to future potential militia organisations, addressing the impunity in Kenya that has made citizens are less willing to report crimes for fear of retribution or out of a sense of helplessness. As Bassiouni notes, impunity is counterproductive to peace.49 It is worth noting at this point that contrary to the favourable view given of Kenya in international reports and media as a haven of peace, ethnic and other widespread forms of violence have been a recurring phenomenon in the country, as the frequent cross-border raids by Somali, Ethiopian, Sudanese and Ugandan armed cattle rustlers attest.50 Instability has often lurked just under the surface, as the rise of the phenomenon of civil militias and the increasing freedom with which they are operating attest. For long-lasting peace to be constructed in the country, it is of the utmost importance that these groups be prosecuted efficiently.

The fact that the activities of the civil militia groups only attract international attention when the situation is out of control is worrying. If such a situation is allowed to continue,
it might result in the perception by the locals that while the militia at least care about their day-to-day needs, international concern only emerges when things reach a crisis point. As has happened in Kariobangi and other slums in Kenya, individuals may then be more inclined to place their trust in civil militias and their brand of justice than in any legal system. Cooperation with any national or even international prosecution thus already diminishes before it even begins.

Conclusions

The pursuit of an efficient prosecution of Kenya’s civil militias offers significant opportunities for enriching Kenyan national and international judicial traditions, while strengthening the rule of law, and by extension the Kenyan state. The apparent toleration of these groups tests the role of judicial systems in peace-building in the developing world, and brings into question whether the state is fully in control of its territory. Given the uncertain relationship between militia groups and the state in Kenya, it raises doubts about the willingness and ability of the national judicial system to address the immediate security concerns of the Kenyan people. In the process it poses a challenge to the international criminal law tradition to devise a method of cooperation and complementarity that will not undermine the sovereignty of the state and the primacy of national jurisdiction but will at the same time increase the confidence of the people in international justice. Unchecked speculation over who was behind the 2008 violence could lead to the creation of a skewed narrative, most likely along ethnic lines, which could significantly hamper any prospects for long-term peace in Kenya and reinforce ethnic prejudices that already threaten the integrity of the state. An efficient prosecution will initiate a sense of accountability, and eventually justice will give all victims (not only those who suffered political violence) closure.

Notes

5 Ibid, 2.
11 Agony and tears as families come to terms with tragedy, Daily Nation, 6 March 2002, 5.
13 Ibid, 533.
17 Francis, Introduction, 4.
19 Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.
21 Christopher K Hall and Rodney Dixon (eds), Crimes against humanity: paragraph 1, Chapeau and paragraph 1(a)–(f), in Otto Triffterer and Kai Ambos (eds), Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article, Oxford: Beck, 2008, 177.
22 Supra note 21, Tadić (Trial chamber judgment), paragraph 648.
23 Supra note 21, Akayesu (Trial Chamber judgment), paragraph 580.
27 The Rome Statute, articles 13 and 15.
31 Macharia Munene, Mayi Mayi and Interhamwe militias, in David J Francis (ed), Civil militias: Africa’s intractable security menace, 237.
32 Ibid, 244.
33 Ibid, 245.
34 Ibid.
36 International Military Tribunal for the Trial of Major War Criminals, Charter, article 6(c).
41 M Cherif Bassiouni, Post-conflict justice, International and Comparative Criminal Law Series, Ardsley,
43 Kagwanja, *Facing Mount Kenya or facing Mecca?*, 37.
45 IRIN, *It’s the economy, stupid*.
47 The Rome Statute, articles 1 and 17.
49 Ibid, 52.
50 See various UN reports by the Office for the Coordination of Humanitarian Affairs at www.ochaonline.un.org/kenya/.