

# Final

*by* Harriet Owalla

---

FILE	23NOV.DOCX (205.24K)	WORD COUNT	19373
TIME SUBMITTED	23-NOV-2016 01:01PM	CHARACTER COUNT	120705
SUBMISSION ID	741972351		



**CONSTITUTIONALISM AND TRANSNATIONAL JUSTICE IN**

**KENYA FROM 2002-2012**

**OWALLA HARRIET AKINYI**

**R50/75065/2014**

**23**

**A PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS OF THE BACHELOR OF ARTS IN INTERNATIONAL  
STUDIES, INSTITUTE OF DIPLOMACY AND INTERNATIONAL  
STUDIES (IDIS),**

**UNIVERSITY OF NAIROBI**

**AUGUST 2016**

**DECLARATION AND COPYRIGHT**

This dissertation is my original work and has not been subjected for examination to any institution of higher learning.

.....

OWALLA HARRIET AKINYI

.....

DATE

The research <sup>62</sup> project has been submitted for examination with my approval as the university's supervisor

.....

MISS PRISCA KAMUNGI

.....

DATE

### ACKNOWLEDGEMENT

I would like to thank my lecturer Miss Prisca Kamungi, for her <sup>12</sup>patience and insight. Her comments helped me focus on improving the quality of this project.

To my classmates, I would like to thank them for giving me the support, encouragement and guidance. It really meant a lot.

Most notably, <sup>12</sup>I would like to express my love and debt to my parents for raising me, and sacrificing a lot to give me the opportunity to live and learn; I owe them a lot. To my brothers and sisters, this is to inspire you to reach greater heights, further than I have set. And above all, to God for giving me provision, strength and focus required to study and finish this project.

### **DEDICATION**

This research is dedicated to my family. To my late grandfather, MR ABISHAI ORINA, thank you for your advice and for believing in me. You would have wished to see this, but God knows best. To my dad, MR JAMES OWALLA, thank you for building a strong foundation in my life and make me aspire to be better. To my mum, MRS. FLORENCE OWALLA, thank you for being an incredible mum; I would have not been who I am without your guidance and advice.

To my sisters and brothers, thank you for believing in me. You inspire me to greater heights; your friendship and love make each living day a gift. I love you all.

### **ABSTRACT**

The aim of this research was to look into constitutionalism and transnational justice from 2002-2012. The question examined here is whether the introduction of a new constitutional era was able to address the injustices that have been culminating for years and have not yet been addressed. Under the new constitution, the TJRC was set up to examine the violations of human rights that had taken place since the time Kenya was freed from colonial domination to the end of February 2008. Other institutions were also set up to address historical grievances over land and marginalization.

The findings indicate that before independence, many injustices were committed to Kenyans which even during independence, the preceding regimes promised to address. However, what has befallen the gullible citizens is a series of injustices and the quest by the ruling class to safeguard their interests and using the constitution changing the constitution to work in their favor. The previous regimes that failed to regard the constitution, and this in turn resulted in all-powerful executive president who did not regard the rule of law and the essential privileges and freedom of the citizens. Further, efforts by the international community to come and assist through the ICC has proved to be futile as the state of anarchy which exists, through which countries fail to observe the international law, has made them toothless to execute justice.

The research concludes despite various efforts during this period 2002-2012 to address the issues, the lack of constitutionalism has resulted in domestic politics still having the upper hand instead of the adherence to the law and bringing justice to the affected victims.

### List of Abbreviations and Acronyms

ICC	International Criminal Court
IPPG	Inter-Party Parliamentary Group
KANU	Kenya African National Union
NCEC	National Convention Executive Council
ODM	Orange Democratic Movement
PNU	Party of National Unity
PRT	People's Revolutionary Tribunal
TJ	Transnational Justice
TJRC	<sup>68</sup> Truth and Justice Reconciliation Commission
TRC	Truth and Reconciliation Commission
UN	United Nations

## Table of Contents

<b>DECLARATION AND COPYRIGHT .....</b>	<b>2</b>
<b>ACKNOWLEDGEMENT.....</b>	<b>3</b>
<b>DEDICATION.....</b>	<b>4</b>
<b>ABSTRACT.....</b>	<b>5</b>
<b>List of Abbreviations and Acronyms .....</b>	<b>6</b>
<b>CHAPTER ONE: .....</b>	<b>9</b>
<b>INTRODUCTION .....</b>	<b>9</b>
<b>1.1 BACKGROUND OF THE STUDY .....</b>	<b>9</b>
<b>1.2 PROBLEM STATEMENT .....</b>	<b>12</b>
<b>1.3 RESEARCH QUESTIONS.....</b>	<b>13</b>
<b>1.4 OBJECTIVES OF THE RESEARCH.....</b>	<b>13</b>
1.4.1 MAIN OBJECTIVES.....	13
1.4.2 Specific objectives.....	13
<b>1.5 LITERATURE REVIEW .....</b>	<b>13</b>
<b>1.5.1 CONSTITUTIONALISM IN THE WORLD .....</b>	<b>14</b>
<b>1.5.2 HISTORY OF TRANSNATIONAL JUSTICE .....</b>	<b>16</b>
<b>1.5.3 TRANSNATIONAL MECHANISMS .....</b>	<b>19</b>
<b>1.5.4 Merits and Demerits of Hybrid courts and tribunals .....</b>	<b>25</b>
<b>1.6 LITERATURE GAP .....</b>	<b>28</b>
<b>1.7 JUSTIFICATION OF THE STUDY .....</b>	<b>29</b>
1.6.1 Academic justification.....	Error! Bookmark not defined.
1.6.2 Policy justification .....	Error! Bookmark not defined.
1.6.3 Public justification.....	Error! Bookmark not defined.
<b>1.8 CONCEPTUAL FRAMEWORK.....</b>	<b>30</b>
<b>1.9 METHODOLOGY.....</b>	<b>33</b>
1.10.1 DATA COLLECTION .....	33
<b>1.11 OPERANALIZATION OF KEY WORDS.....</b>	<b>33</b>
<b>1.12 OVERVIEW OF CHAPTER .....</b>	<b>33</b>
<b>CHAPTER TWO .....</b>	<b>35</b>
<b>HISTORICAL DEVELOPMENT OF THE CONSTITUTION IN KENYA.....</b>	<b>35</b>
<b>2.1 Introduction.....</b>	<b>35</b>
<b>2.2 HISTORY AND DEVELOPMENT OF THE CONSTITUTION IN KENYA .....</b>	<b>35</b>
<b>2.3 DRAFTING THE NEW CONSTITUTION .....</b>	<b>40</b>
<b>2.4 CRITICISMS OF THE IPPG REFORMS.....</b>	<b>43</b>
<b>CONCLUSION .....</b>	<b>45</b>
<b>CHAPTER THREE .....</b>	<b>46</b>



<b>CONSTITUTIONALISM AND TRANSITIONAL JUSTICE BETWEEN 2002-2012 .....</b>	<b>46</b>
<b>3.1 Introduction.....</b>	<b>46</b>
<b>3.2 CONSTITUTIONALISM AND TRANSNATIONAL JUSTICE 2002-2012.....</b>	<b>46</b>
<b>3.3 2005: CONSTITUTIONAL REFERENDUM .....</b>	<b>47</b>
<b>3.4 2007 ELECTIONS AND POST ELECTION VIOLENCE.....</b>	<b>50</b>
<b>3.5 THE NATIONAL ACCORD AND RECONCILIATION ACT .....</b>	<b>50</b>
<b>3.6 2010 PROMULGATION OF THE NEW CONSTITUTION .....</b>	<b>53</b>
<b>CHAPTER FOUR.....</b>	<b>55</b>
<b>TRANSNATIONAL JUSTICE IN KENYA .....</b>	<b>55</b>
<b>4.1 Introduction.....</b>	<b>55</b>
<b>4.2 BACKGROUND OF TRANSNATIONAL JUSTICE IN KENYA.....</b>	<b>55</b>
2007 Post-election violence .....	56
<b>4.2 THE WAKI COMMISSION .....</b>	<b>57</b>
<b>4.3 THE KRIEGLER COMMISSION .....</b>	<b>58</b>
<b>4.4 TRUTH JUSTICE AND RECONCILIATION COMMISSION .....</b>	<b>59</b>
<b>CHAPTER FIVE .....</b>	<b>63</b>
<b>ICC AND IT'S INVOLVEMENT IN KENYA'S POST ELECTION VIOLENCE CASE .....</b>	<b>63</b>
<b>5.1 Introduction.....</b>	<b>63</b>
<b>5.2 THE ICC BACKGROUND.....</b>	<b>63</b>
<b>5.3 THE ICC INVESTIGATIONS AND KENYA .....</b>	<b>65</b>
<b>5.4 THE KENYAN GOVERNMENT'S RESPONSE TO THE ICC .....</b>	<b>67</b>
<b>5.5 PARTICIPATION OF VICTIMS OF IN ICC TRIALS .....</b>	<b>69</b>
<b>5.6 ICC IMPACT IN KENYA'S JUSTICE .....</b>	<b>70</b>
<b>CHAPTER 6.....</b>	<b>72</b>
<b>SUMMARY, CONCLUSION AND RECOMMENDATIONS.....</b>	<b>72</b>
<b>6.1 Summary of Chapters One to Five .....</b>	<b>72</b>
<b>6.2 Key Findings.....</b>	<b>73</b>
<b>6.3 Recommendations .....</b>	<b>75</b>
<b>Appendix 1: .....</b>	<b>77</b>
<b>REFERENCES.....</b>	<b>83</b>

## CHAPTER ONE: INTRODUCTION

### 1.1 BACKGROUND OF THE STUDY

According to Sajo (1999), constitutionalism is an ongoing democratic process, which transcends various regimes and generations, which seeks to curtail an authoritarian president by sharing the powers amongst various branches of government<sup>1</sup>. Hence, the term constitutionalism implies the doctrine whereby these branches of government act upon the checks and balances within any feature of a democratic system. These limits can be in form of either a group's right or individuals who are against the government like the freedom of association, or equality as well as the due law process. On the other hand, transnational justice implies a means through which justice is attained in periods where a nation has undergone state repression or conflict. In the process of achieving accountability and redressing the persons affected by the injustice, transnational justice offers a platform where the victim's rights can be recognized and this consequently reinforces the democratic rule of law. Globally, many states are still struggling to cultivate a culture of constitutionalism because of being severely attached to a past of undemocratic practices. The current processes of constitution- making emerged from crises in authoritarian governments and illiberal regimes that were responsible for gross violations of fundamental rights. In Asia, Latin America, Eastern Europe and Africa, many states began the challenging path of democratization but constitutionalism remains a challenge<sup>2</sup>. Hence, various forms of transitional justice have emerged: the desire to safeguard the successful transfer of political power from a former authoritarian regime to a new one that is democratic. This means

<sup>1</sup> A. Sajo. 1999. *Limiting Government: An Introduction to Constitutionalism*. Central European University Press

<sup>2</sup> Huntington, S. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. University of Oklahoma Press

that the penal action will be abandoned against the politicians who committed crimes under the old constitutional system. This is mostly against the opposing need of easing the already built up tension brought about by the oppressed victims and not abstaining from the use of the law as a way in which the old oppressors can be delegitimized. Huntington (1991) notes that in Africa, many countries have beautiful constitutions, which have often raised the hopes of their citizens when promulgated but bring disappointment each time they fail to result in the expected reforms.

Constitutionalism derives from the notion that there should be a restriction in the powers of the government and that their authority should be based on their observance of the law. In most instances, the attempt to restrict the arbitrary nature of the government, which is in the constitution, has been unsuccessful<sup>3</sup>. Sometimes, the emphasis of transitional justice is mainly on how human right abuses have been treated especially in times when the nation is transitioning politically: criminal as well as legal prosecution. Various concepts of the word justice led to the emergence of the concept transitional justice. However, in the late 1980s and early 1990s, the definition of transitional justice in changed. This is because all over the world, many countries were considering to develop democratic institutions that were stable and renewing civil society. During this transitional period, the challenges of democratization were many. For instance, governments were faced with the challenge of settling past accounts without derailing the democratic progress in their nation states. They were also forced to develop judicial or a third party institution that had the capacity to handle reparations, resolve the conflict, assist in the creation of memorials as well as ensuring that an educational curriculum that can redress the unhealed trauma amongst the people affected by the conflict are established.

---

<sup>3</sup> Arjomand, S.(2007). *Constitutionalism and political reconstruction*. Brill publishers

Historically, there has been a trend of violations of citizen's privileges as well as injustices. During the late Jomo Kenyatta regime's, which took power soon after independence, Kenya was an authoritarian government that was increasingly corrupt. By the time of his death, the state was characterized by nepotism, personal rule, gross human right violations as well as public theft. In his book, <sup>45</sup> *Challenging the rulers: A leadership model for good governance*, Okoth-Okombo (2011) examines the nature of leadership that existed in Kenya in the past where the president was the constitution and changed it at will to suit his personal agenda and not what was good for the nation. Under President Daniel Moi's regime, which succeeded Kenyatta, under the ruling party KANU and the government, President Moi exercised extensive control over the media, judiciary, civic groups, trade unions, as well as the legislature<sup>4</sup>. The state's objectives under this rule was mainly detention without trial to those who opposed the government, political assassinations and murder, ethnic clashes and tensions that were politically-instigated, arbitrary arrests, torture, opponents were also accused and arrested falsely to make to intimidate them. In the year 2002, there was a change of regime and President Mwai Kibaki came in power. Under his regime, the Justice and Constitutional Affairs Minister in 2003 were charged with appointing a Task Force that would deal with the misgivings of the past regimes. The 2007 elections were followed by an era of political unrest as well as intense violence<sup>5</sup>. The allegations by the opposition led by Honorable Raila that the elections were manipulated to favor president Kibaki intersected with ethnic tension, which boiled over into bloodshed, acts of rape as well as well as

<sup>4</sup> Murunga, G & Nasong'o, S. (2007). *Kenya: The struggle for democracy*. Zed Books publishers

<sup>5</sup> Teitel, R. 2000. *Transitional Justice*. Oxford University Press.

displacement of persons. A peace agreement was signed and it required the coalition government to undertake many transnational justice actions like constitutional and legal reforms.

### **1.2 PROBLEM STATEMENT**

This research seeks look into transnational justice and constitutionalism in Kenya between the years 2002-2012. The period began a new dispensation in Kenya as the 2010 constitution was promulgated. It was designed to address the gross human violations that were carried out during the two decades of authoritarian rule as well as curtail the unbridled power of the imperial presidency. This imperial president meant that there was a lack of constitutionalism in the country as power was mainly concentrated in the presidency and other arms of government and civil society were toothless. This new Constitution therefore became a vital pillar of the process of transitional justice in Kenya. It provided measures through which accountability and protection of human rights could be attained. This study seeks to examine the extent to which this new constitution has been able to curtail the powers of the president and provide mechanisms through which the privileges of individuals have been violated could be tackled in Kenya. This is the essence of constitutionalism and transnational justice. Since independence, Kenya has experienced gross violations of human rights such as massacres, land clashes, grand coalition, extrajudicial executions, arbitrary arrest and torture, detention without trial, electoral violence, and in addition economic crimes. All these were a consequence of having an authoritarian regime that was above the law, which could not be brought under trial despite the fact that some of its officials were implicated in crime. Whereas the new constitution was created to minimize the nature of the presidency and ensure good governance this research seeks to answer the following question: Did the 2002-2012 period of constitutional reforms address the issues of constitutionalism and transnational justice that have been carried forward from the previous regimes?

### 1.3 RESEARCH QUESTIONS

- What are the effects of the constitution reform period in addressing constitutionalism and transitional justice in Kenya?
- How do constitutional provisions ensure that the issue of injustice is addressed?
- What is the job of the international institutions in ensuring that transnational justice and constitutionalism are achieved in Kenya?

32

### 1.4 OBJECTIVES OF THE RESEARCH

#### 1.4.1 MAIN OBJECTIVES

- To examine the development of constitutionalism and transnational justice in Kenya from 2002-2012.

#### 1.4.2 Specific objectives

- To investigate the effects of constitution reforms on transnational justice in Kenya from 2002-2012.
- To look into the effects of the various mechanisms of transnational justice from 2002-2012.
- To examine the responsibility of international institutions in addressing the issues of transnational justice and constitutionalism in Kenya from 2002-2012.

### 1.5 LITERATURE REVIEW

#### INTRODUCTION

This chapter seeks to look into the various literatures on the themes of transnational justice and constitutionalism around the world.

The general notions of "justice" eventually became the basis upon which transitional justice was built upon. According to Halmai, the early epistemology linked transnational justice to human

rights. In the past, legal rights and lawyers who defined the laws wrote literature on transitional justice and processes on how the violations of individual advantages could be dealt with and how those accused of wrong could be held answerable. Thus, transitional justice has its origins in both the movements that arose to fight for the privileges of individuals and in international <sup>5</sup> human rights and humanitarian law<sup>6</sup>. On the other hand, constitutionalism comprises of a lot of historical and philosophical discourse. But despite of this, constitutionalism relies on the citizens' actions as well as the regime in power to be executed. Once, Ruth Gordon stated: "Constitutionalism is the end product of social, economic, cultural and political progress; it can become a tradition only if it forms part of the shared history of a people<sup>7</sup>". From that statement, constitutionalism can be said to be a culture that develops over a long period of time. It binds the people together with their government, advances the rule of law, democracy, reverence for the privileges of human beings and in addition good governance. Gordon (1999) notes that the rule of law or in other words constitutionalism denotes the restriction of the power of state leaders and other bodies in the government, and that through established processes these parameters can be imposed. As legal or political principle, constitutionalism connotes government that means, it is first dedicated entirely for the community's advancement as well as to safeguard the privileges of its people.

### 1.5.1 CONSTITUTIONALISM IN THE WORLD <sup>8</sup>

In his work dubbed, *The role of constitutionalism in Transitional justice processed in Central Europe*, Halmai categorizes constitutionalism in the world into different patterns. First, <sup>8</sup>

<sup>6</sup> Halmai, G. The Role of Constitutionalism in Transitional Justice Processes in Central Europe. Retrieved from <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmai/Constitutions-and-TJ.pdf>

<sup>7</sup> Gordon, R. Growing Constitutions. *Journal of constitutional law*. Retrieved from [https://www.law.upenn.edu/journals/conlaw/articles/volume1/issue3/Gordon1U.Pa.J.Const.L.528\(1999\).pdf](https://www.law.upenn.edu/journals/conlaw/articles/volume1/issue3/Gordon1U.Pa.J.Const.L.528(1999).pdf)

there is the veteran constitutional state whose constitutional tradition has been stable and continuous over the years like the United States. Other nation states like Germany and France represent have has a break in their developmental history of their constitution<sup>8</sup>. As the representatives of states that had a communist past, Eastern and Central Europe also have had a break coming constitutionalism. For instance, in both Hungary and Poland, a fresh order in the constitution has been birthed by parliaments, which are perceived to be illegitimate. He further notes that having peaceful negotiations between the democratic opposition and the authoritarian regime representatives, a comprehensive modification of the old constitutions was done. Similar 'post-sovereign process of making the constitutional also took place at the conclusion of the 70's as well as in South Africa from independence through the middle of the 90s. In Poland, the process of creating the constitution was shut in 1997 by the making of the last constitution, but in Hungary this second level making the constitution in the era, after the post-sovereign period, was unsuccessful in 1996, when part of the new constitution was rejected<sup>9</sup>. In most instances, constitutions are in most instances are made in transition days after coming through a season of being repressed politically. Transitional justice is a process through which societies that have gone through major abuses of their privileges opt to move forward by addressing the needs for justice to the victims.

Tordoff (1997) observes that the colonial period in Africa and thereafter independence resulted in modern types of governments that led to the creation of a written form of constitution

39

<sup>8</sup> A. Sajó. 1999. *Limiting Government: An Introduction to Constitutionalism*. Central European University Press

8

<sup>9</sup> Halmai, G. The Role of Constitutionalism in Transitional Justice Processes in Central Europe. Retrieved from <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmai/Constitutions-and-TJ.pdf>



that was documented. This constitution was introduced into the colonies as an imposed constitutionalism<sup>10</sup>. He notes that none of the local population in most of the African countries had the chance to participate the process of making the constitution. Instead, all they have experienced is intervention and pressure from external process to birth constitutional reforms that served the colonial masters. He further argues that the post-colonial Africa leaders were notoriously known to be dictatorial. They possessed total authority, which ensured that people with great morals attuned to the system of abuse as well as oppression, which they received from their colonial masters<sup>11</sup>. This situation continues to grow worse in most African states that have made many local people lose confidence in the process of democracy. The rule of law or constitutionalism connotes that the authority of the leaders and the government institutions of leaders and government bodies is controlled, and it is only through established processes can they be set in place.

### 1.5.2 HISTORY OF TRANSNATIONAL JUSTICE

Transnational justice traces its origin back in Europe in the epoch after Second World War where the victors of the war carried out trials as well as punishments for people who were living in the defeated nations for what they termed as wrongs against peace as well as civilians. The methods employed to attain transitional justice differ immensely, and in most instances rely on innumerable factors such as culture, a conflict's past, as well as the balance of forces.

#### TRANSNATIONAL JUSTICE IN EUROPE: NUREMBERG TRIALS

---

<sup>10</sup> Alex T,(2002). An Introduction to African Politics, second edition. London and New York: Routledge

<sup>11</sup> Tordoff, W. 1997. *Government and Politics in Africa* (Bloomington, Indiana: Indiana University Press).

The trials in Nuremberg were a string of 13 military trials that were steered by the allies after World War 2 in Germany<sup>12</sup>. Heller (2011) notes that during these trials the elites in politics, judiciary, military as well as business in Nazi Germany who had taken part in the Holocaust as well as other war crimes were prosecuted. He further notes that despite the fact that the trial's legal justification as well as the procedure was controversial during that period, in this present time, the Nuremberg trials are deemed to be significant as they provided a basis for the formation of the permanent international court, a vital precedent that was established to deal with later incidences of genocide and other offences against of civilians. In addition, the trials have been applauded for the formation of the criminal international law. Eventually, fifty years later, the Rome statute was adopted and the International Criminal Court was established. This crusade arose as a result of a clash between how the US and Germany conducted their courts system. In his book, *The Nuremberg legacy: How the Nazi crimes trials changed the course of history*, Ehrenfreund discusses in detail the effects of the Nuremberg trials. The continent of Europe had not yet heard of the crime of conspiracy in its system of civil law. Consequently, the German justification deemed it one-sided to charge the culprits with the crime of conspiracy while the judges from common-law nation states were employed to do.

The trials also served as a model for the following:

- The Universal Declaration of Human Rights in 1948
- The genocide convention in 1948
- The Nuremberg principles in 1950

<sup>1212</sup> Heller, Kevin Jon (2011). *The Nuremberg Military Tribunals and the Origins of International Criminal Law*. Oxford: Oxford University Press

- The Convention dealing with the <sup>31</sup>abolition of the Statute of Limitation on War Crimes and Crimes against humanity in 1968.
- The Geneva Convention on the War Laws and Customs formed in 1949 and its supplementary protocols that were formulated in 1977.

In addition, these trials aided as the replica for the Eichmann and for the current Hague courts, for prosecuting crimes that were carried out in the early 1990s during the Balkan and one at Arusha, which was responsible for prosecuting people guilty for the genocide in Rwanda<sup>13</sup>.

### THE TOKYO TRIALS

Totani (2009) notes that the Nuremberg trials aided <sup>1</sup>as the replica for the East Asia International Military Tribunal, which charged the government officials in Japan for crimes against humanity and peace.

He further observes that the Tribunal was created as an implementation of the declaration of Potsdam, Cairo Declaration, the Moscow Conference as well as the Instrument of surrender. The declaration of Potsdam had called for trials as well as a purge of the Japanese who deceived and misled the people into war<sup>14</sup>. Nevertheless, a great disagreement arose between the Allies and the administrations about who to accuse and who not to. General Douglas MacArthur, the Supreme, settled to commenced arrests despite the fact that there was no consensus.

<sup>27</sup>

<sup>13</sup> Ehrenfreund, N. (2007). *The Nuremberg legacy: How the Nazi crimes trials changed the course of history*. St Martin's press publishers

<sup>14</sup> Totani, Y (2009). *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*. Cambridge: Harvard University Asia Center

### 1.5.3 TRANSNATIONAL MECHANISMS

#### Truth and reconciliation Commissions

<sup>21</sup> A truth and reconciliation commission can be said to be a commission charged with digging up and revealing what a former government had done in the past. Since truth is the basis of central concern of transitional justice, the government owes the people <sup>83</sup> to know the truth about gross human rights violations during war or repression<sup>15</sup>. This is in most instances done to assist in resolving past conflicts. They are occasionally set up by states that have come from an epoch of civil war, or even authoritarian governments. Rotberg & Thompson (2000) note that truth commissions have political implications as they always define objectives like justice, memory, reconciliation, truth as well as memory and make decisions on how these objectives can be settled and the people that these decisions will affect. In most instances, it focuses on the past, rather than the current events going on in a nation state. It also assesses a series of occurrences that ensued over a period engaging directly with the victims ensuring that their information is gathered. Globally, most lists of truth commissions comprise of findings that were either established before or in the midst of conflict. For instance, according to Etcheson (2005) in Cambodia, The Courts of Cambodia's Extraordinary Chambers (ECCC) has been said to be the second court that has ever been internationalized to try its senior leaders for violating the privileges of its citizens in Khmer Rouge's regime. Summoned in 1979, this first court, which was also dubbed, ' the People's Revolutionary Tribunal, or the PRT<sup>16</sup>. It was portrayed as a domestic judicial proceeding, but behind the scenes, the PRT owed much to support from countries like East Germany as well as Vietnam. In addition, it can be said to be as much as a

<sup>8</sup>  
<sup>1515</sup> Halmi, G. The role of constitutionalism in transitional justice processes in Central Europe

<sup>30</sup>  
<sup>16</sup> Etcheson, C. *After the Killing Fields: Lessons from the Cambodian Genocide* (Westport, CT: Greenwood Publishing, 2005).

premeditated political scheme as it was an exercise in justice. Many people working for the government after the <sup>71</sup> Khmer Rouge had previously been participants of the Khmer Rouge, and as a result this new leadership felt that they had to portray an image to the Cambodian people as well as the international community at large that they were different from its predecessor<sup>17</sup>. In this regard, the PRT's main objective was to ensure that local as well as global legitimacy is conferred upon the new regime. Further, the new regime desired to motivate the rest of the members to defect from the party by having two of its senior leaders prosecuted.

The commission of truth and reconciliation in South African was formed in 1994 by the members of parliament to examine the gross violations of human rights like killings, cruelty, torture, as well as abductions, which were carried out by the state, and the South African movements of liberation from 1960 to 1994. According to Fombad (2008), this truth commission was known as one of the most well publicized truth and reconciliation commission and they are mostly preferred as a second option to prosecution. The Act empowered the commission to give pardon to persons, seize evidence, search premises, subpoena witnesses as well as manage run a witness protection program. He notes that the commission had three committees: the amnesty committee; it was charged with processing amnesty applied by affected South Africans. Second was the committee in charge of the various violations of human rights, which gathered statements of each victim and documented evidence. Lastly was the committee that was in charge of compensations and recovery not only designed but also submitted suggestions for the plan of compensating the affected. In 2006, a TRC unit was created to supervise how the commission's suggestions will be implemented comprising the issues surrounding reparations as

---

<sup>17</sup> Ibid pg. 6

well as exhumations<sup>18</sup>. A task team called, a missing person's task, was established for reburials, exhumations, as well as to further investigate the disappearance of the affected persons. However, the South Africa's commission was inevitably compromised, as majority of the political crimes have not yet been reported. In addition, Okello (2012) argues that majority of the black population have not been able to reap the economic benefits of transition. Politicians, the military as well as powerful officials also managed to get away with their wrong doings. The only thing that the commission managed to do was to inject a moral resource where victims could talk about the past while safeguarding the political transition.

Liberia's truth commission on the continent was inaugurated in 2006. It was Part VI, article XIII of the Treaty of Peace that was signed in Accra which was advocated for in the year 2003. He further observes that argues the commission commenced public hearing early in 2008. This was as a result of many delays, which were a by-product of logistics and lack of money. The hearings will be categorized into three areas: The first one is individual hearings, which is in most instances created as a result of interviews and statements made by witnesses. Thematic hearings are the second set and seek to search for the various tendencies and reasons why conflicts arise. The last one is institutional hearings, which looks into how national institutions like the education as well as have been moved by the conflict, with the aim of making sure that reforms are introduced.

This system has been critiqued by the domestic civil society factions who argue that the established commission was doing things against the memorandum of understanding, which

14

---

<sup>18</sup> Fombad. C.M. 2008. *Transitional Justice in Africa: The Experience with Truth Commissions* Retrieved from [http://www.nyulawglobal.org/globalex/Africa\\_Truth\\_Commissions.html](http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions.html)

placed the civil society as the chief executors of the programs that were community based <sup>19</sup>. Secondly, through his advocates, Charles Taylor, the former president of Liberia, got a directive from the Supreme to stop his testimonies from being heard by the established commission. The court stated that such testimonies may become a hindrance to his hearing with Sierra Leone's Special Court.

### Sudan

To address the numerous political issues that have plagued Sudan since its independence, three transitional justice processes have been created. For example, such special courts include the Special Criminal Court on the Darfur incidents, a specialized attorney office established to take care of the wrongs against individuals <sup>82</sup> as well as the International criminal court (ICC).

The specialized attorney office for wrong doings against civilians is based in Khartoum and it began its operations in 2005 with jurisdictions linked to crimes against its citizens that have been committed in any place in the country<sup>20</sup>. Nevertheless, there has been less information on this office as well as the various cases that have been resolved.

In addition, there was a creation of the Court for Special Criminals based on what took place in Darfur. The authorities in Sudan formed distinct courts that dealt with criminals in Darfur. It was endorsed and distributed immediately after inquires into Sudan had began by the ICC. The court's responsibility was to look into the crimes as written in the Sudan constitution as well as other penal codes. In 2005, The UN decided to send a referral to the ICC Prosecutor to inspect and accuse persons with the most responsibilities for wrong doings carried out in Sudan

38

<sup>19</sup> Okello, M. (2012). *Where Law meets reality: forging African transitional justice*. Fahamu/pambazuka publishers

21

<sup>20</sup> Sriram, C & Pilla, S. (2010). *Peace versus justice?: The dilemma of transitional justice in Africa*. Literary collections publishers

since 1 July the year 2002 (Sriram & Pilla, 2010). Authorization to apprehend was issued by the ICC in April 2007, for a previous Sudanese Interiors State Minister and the head of an armed group dubbed, 'the Janjaweed'. They were charged on 55 accusations of war wrongdoings and offenses against civilians comprising torture, killings as well as rape. However, the regime in Sudan rejected to fulfill the arrest permits of the government officials' care on the actions of the ICC.

### Uganda

Since independence, Uganda has had a turbulent history, which has been tested in its four transitional processes.

President Museveni requested the ICC to investigate the evils that have been carried out <sup>67</sup> by the Lord's Resistance Army (LRA). Even though the Uganda regime initiated the ICC process, they have now changed their mind because the rebels have declined to sign the peace deal whilst the warrants to capture them is still on<sup>21</sup>. The Amnesty Act was established in 2000 by the Commission that deals with amnesty in Uganda with the aim of promoting peace, reconciliation, as well as security. The amnesty was applicable to evils that dated from January 1986.

Soon after Museveni became president in 1986, he started an inquiry commission to look into the various abuses of human rights and giving it authority to investigate torture and killings, arbitrary arrests as well as imprisonment that had occurred between December in the year 1962 and January in the year 1986. Sriram & Pilla (2010) indicate that the commission was requested to make suggestions to avert the repetition of such gross mistreatments. In its account, the commission recorded proof of extensive indiscriminate detention, as well as imprisonments and recommended that the laws on imprisonment without prosecution be repealed. The first commission of inquiry was established in 1974, after the transition period and looked into the

<sup>21</sup>

<sup>21</sup> Sriram, C & Pilla, S. (2010). *Peace versus justice?: The dilemma of transitional justice in Africa*. Literary collections publishers



disappearance of individuals, which was linked to President Amin<sup>22</sup>. The final recommendations for this inquiry advocated for reforms in the police and security sector and in addition the civilian rights were to be instructed on law enforcement as they had been previously ignored.

### Burundi

An International Commission of Inquiry was created <sup>81</sup> by the United Nations Security Council in 1993 <sup>81</sup> to examine the murder of the President Mechior Ndadaye, and in addition look into other massacres and serious offences that were carried out from 1993 to 1995<sup>23</sup>. It was anticipated that the commission offer suggestions that will in the end deliver justice to the convicted persons. Consequently, this would finish impunity and advance reconciliation in Burundi.

Comprising of 5 foreign commissioners, the commission in the end was able to hear approximately 667 witnesses and its final report was handed over in the year 2002 to the Secretary General of the UN. This was not able to deliver much of what was attained in the Arusha Accords of 2000. Sriram (2013) argues that the parties settled to inquire whether the UN would set up an international commission that would look into grave wrongdoings that were carried out in Burundi since 1962. Sriram (2013) further reveals that the UN sent a crew Burundi in 2004. Its purpose was to examine the practicability of such a system and it suggested that a truth commission be created to dig into the historical details of the conflict. Additionally, the commission was to determine the source of the conflict, and categorize the crimes that were committed as well as look for the individuals who were responsible. Furthermore, it was a requirement that a Special Chamber that was in Burundi's court system to be created in order to

<sup>38</sup>

<sup>22</sup> Okello, M. (2012). *Where Law meets reality: forging African transitional justice*. Fahamu/pambazuka publishers

<sup>21</sup>

<sup>23</sup> Sriram, C & Pilla, S. (2010). *Peace versus justice?: The dilemma of transitional justice in Africa*. Literary collections publishers

prosecute the people who were charged with the greatest charge for war crimes as well as crimes against humanity<sup>24</sup>. The Security Council approved the recommendations in 2000 but as Sriram (2013) purports, they have continued to drag on resulting to no progress. The Security Council together with the Burundi government agreed to set up a truth commission and a special tribunal that will in the end replace the special chamber that were projected at first. It is noted that the connection between the two bodies has been the basis of difference. Whilst the United Nation desired that the special prosecutor be granted the authority to choose whom to examine, the regime in Burundi wanted the prosecutor to only look into the cases that were directed to him from the commission.

#### 1.5.4 Merits and Demerits of Hybrid courts and tribunals

Tribunals or Hybrid courts were created to examine as well as prosecute offenses that were carried out against human rights<sup>25</sup>. They have emerged as the “third generation” courts as they follow the “first generation” tribunals, which were the Nuremberg, and Tokyo tribunals while the “second generation tribunals” mainly comprised of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These courts entailed actors from both international and domestic justice. Teitel (2000) notes that because of absence of political will as well as capacity, the domestic systems of justice failed. He further notes that the hybrid courts struggled to fortify its domestic capacities so that it could prosecute the various abuses of its citizen’s rights by transferring international legal skills and know-how. For instance, the Sierra Leone Special Court as well as the extraordinary chambers, which are situated in the courts of

<sup>24</sup> Alex T,(2002). *An Introduction to African Politics, second edition*. London and New York: Routledge

<sup>25</sup> Teitel, R. 2000. *Transitional Justice*. Oxford University Press.

Cambodia, is examples of such hybrid courts. Also dubbed “Special Tribunal,” The Special Court for Sierra Leone denotes a judicial body that was started by the Sierra Leone regime in corporation with the UN to accuse individuals who bear the greatest responsibility for gross humanitarian as well as Sierra Leonean Law after 1996 as well as during the Sierra Leone Civil War<sup>26</sup>.

The first demerit of these courts is capacity building. In most instances, these societies that have been affected by conflicts often have a destroyed legal landscape. Conflicts leave the human capacity as well as the physical infrastructure destroyed. In contrast, the international courts the international courts have strong capacity and these expenses conflicts with the budget of these courts. This has resulted in criticisms, which argue that international courts only build international capacities instead of also building the domestic capacity of these societies to handle their own cases.

The Court staff lacked basic apparatus vital for their work like interpreters and other staff. Moreover, they may have an issue enticing and maintaining competent international staff to aid such as prosecutors, judges, as well as defense counsel. Consequently, according to Fitchelberg (2015), this led to the hybrid courts are seen as a way of cheaply carrying out justice. In most instances, they are not given the most basic resources; consequently they end up not doing their job.

Fitchtelberg (2015) notes that some hybrid courts may have greater legality in the settlement of serious crimes that were carried out against individuals’ rights than either purely international trials or one that is domestic. The legitimacy of the domestic institutions in most post-conflict

---

<sup>26</sup> Fitchtelberg, A.(2015).*Hybrid Tribunals: A comparative Examination*. Springer publishers

circumstances may sometimes be in question<sup>27</sup>. He further adds that most of the times, the judiciary in these nations is often corrupted and crippled with injustice. Moreover, the remaining available personnel may be severely compromised either because they are linked to the prior regime or they lack the skills required to judge the case. Prosecutors and judges from the previous regimes—who may have a record of failing to prosecute or convict ethnic cleansers, murderers, or even torturers- may be in the new government or even still be in their position. For instance as DeLaet (2014) notes, in Burundi, there was conflict of interest between the government and the hybrid the international court. The Security Council had accepted some proposals that were forwarded in the year 2000. However, these negotiation discussions between the government and the UN, have delayed bringing no progress<sup>28</sup>. Besides the fact that these two have agreed on setting up the special tribunal as well as the truth commission to replace the special chamber, the partnership has been known to be the main cause of conflict. He further purports that though the UN wanted a special prosecutor to be given the authority to choose whom to probe, the regime in Burundi desired that the prosecutor only looks into the cases that have been forwarded to him the truth commission.

DeLaet (2014) notes that the fact that they are a hybrid of both national and international components, they can bring a good deal and offer a platform where such issues of transnational justice can be addressed in a nation. He further adds that judicial institutions are not impartial and independent as the individuals affected by the crime lack ownership of the trials. These prosecutions occur in courtrooms that are far away and the lawyers and judges may not be

---

<sup>27</sup> Fichtelberg, A.(2015).*Hybrid Tribunals: A comparative Examination*. Springer publishers

<sup>28</sup> De Laet,D. (2014). *The global struggle for human rights*. Cengage Learning publishers

familiar with the culture of even the nature of conflict. As a result, the positive effects of these trials do not affect the victims from the conflict.

He observes that the sharing of responsibilities among domestic and international officials cannot be said to be the solution for legitimacy issues. New issues may arise as to whom is controlling the entire process especially in instances where the international actors wield more power than domestic officials. For instance, in cases where majority of the judges are international and the domestic ones are given charge a deputies. On the other hand, when there is less control internationally, there may arise concerns on whether the process, which is overly controlled locally, is free and impartial. The shared arrangement fails to assure that these challenges will be addressed on a purely domesticated process.

Arato (1994) argues that the hybrid courts are a means through which nations can use the international law to be able to resolve the issues of transnational justice. They can be effective as they assist governments to be accountable to the international community for the mass atrocities that they have committed. He further notes that hybrid courts are have institutions together with the applicable law and is a blend of the local and international, used in nations where justice is unattainable. Despite the growing literature of transnational justice, these courts have received little attention as they are seen as second best alternative courts compared to the international courts.

### **1.6 LITERATURE GAP**

Kenya has experienced gross human rights violations from the colonial period. Up to this present time, these violations are still at the point of discussion with little implementation. The constitution during the pre-colonial Kenya lacked the administrative machinery as well as

judicial institution that could implement it. The Westminster constitutions that were imported into Africa during colonialism were mainly concerned with power distribution; limitation and state institutions and none of the constitutions gave instructions on the role of the government<sup>29</sup>. Kenya remained loyal to this pattern of constitution during the Kenyatta and Moi regime, a constitution which failed to represent the interests of the citizens only of the state.

The gap of study lies in the period of study and especially during the 2002-2012, the era where the change of regime brought an end to an autocratic rule and brought in place a regime that promised to ensure that a new constitution will be in place. Most studies look only at transnational justice without including the role of the constitution and more so constitutionalism in ensuring that victims get justice. This study seeks to examine this how the two concepts go hand in hand and whether the new constitution brought about constitutionalism and transitional justice during the period.

## **1.6 JUSTIFICATION OF THE STUDY**

For long, the subject transnational justice and constitutionalism has been researched on and discussed. In most instances, injustices carried out by previous regimes globally have not been dealt with leaving the affected victims crying out to be compensated. In other nations, regimes, which have promised to uphold constitutionalism and democracy, have ended up not executing what they promised the public to do so. The adherence to the constitution by the government is what will ensure that justice is given to the affected victims consequently resulting to healing. This research will add to the existing body of knowledge on constitutionalism and transnational justice in Kenya. For instance, it will contribute in the debate of how to deal with transnational

3

---

<sup>29</sup> Murunga, G & Nasong'o, S. (2007). Kenya: The struggle for democracy. Zed Books publishers

justice where the privileges of the civilians have been breached and the role of the constitution in this entire process. This will add on to the knowledge for academicians as well as students.

To the government, this research will assist in setting up structures that will ensure that the leaders uphold the constitution more than their wishes.

Subsequently, this research will inform the Kenyan populace on constitutionalism and transnational justice and how they can participate in the process. This in turn will assist in building an informed population that makes informative decisions as far as politics is concerned.

### 1.7 CONCEPTUAL FRAMEWORK

Constitutionalism comes from the word constitution, which refers to a set of fundamental principles or precedents that have been established for people to abide by<sup>30</sup>. During transition, the constitution is mostly the boundary through which legal action is measured by<sup>31</sup>. However, constitutions are meaningless in most cases where the principle of constitutionalism is not adhered. In this case, the government must get its authority from a body of fundamental law.

Social contract theory will be employed to describe this paper. The rule of law as described by John Locke is a social pact between the régime and those who are ruled that restricts the extent to which the power of the government is exerted<sup>32</sup>. The lives of persons living in this state of nature was short, brutish and nasty. It was a situation where the government advocated having their selfish ambitions and their absence of privileges and agreements blocked the society or social

24

<sup>30</sup> Arato, A. 1994. 'Dilemmas Arising Out of the Power to Create Constitutions in Eastern Europe' in M. Rosenfel(Ed.), *Constitutionalism, Identity and Difference*. Duke University Press

57

<sup>31</sup> Mc Ilwain, C.H. 1948. *Constitutionalism: ancient and modern*. Cornell University Press  
<http://www.constitution.org/cmt/mcilw/mcilw.htm>

20

<sup>32</sup> Harrison, R.(2003). *Hobbes, Locke, and Confusion's Empire: an Examination of Seventeenth-Century Political Philosophy*. Cambridge University Press

life. In this case, life was 'anarchic' meaning; it lacked leadership or a sovereign power that could guarantee the protection of the people. Consequently, this situation resulted in the signing of a social contract<sup>33</sup>.

The second theorist who was able to dissect this theory was Jean-Jacques Rousseau (1712-1778). He purports that the law has to be passed premised on the wishes of the people so that every person obeys the constitution. Ross (2003) notes that in the social contract theory, the unwritten constitution is what will make it simpler for the citizens to implement the constitution's essence without the abusing it.

The social contract occurs when people come together to give up a portion of their rights to make the other party relinquish theirs. Consequently, this has led to the creation of the government, a sovereign entity that has laws to control social interactions. However, the state, which became anarchic, grew out of the social contract and respect to each other. States began to advance their wishes while contesting against each other.

In this case, it is the government, which enforces its own limitations through the constitution. According to Narverson & Trenchard (2008) states with democracies that are established constitutionalism in most instances comprises of the doctrine of an independent judiciary, separation of powers as well as the supremacy of the constitution. In states, which have just emerged from repression or war, the conventional definition of constitutionalism is in most

---

<sup>33</sup> Narverson, J & Trenchard, D. (2008). "Contractarianism/Social Contract". In Hamowy, Ronald. *The Encyclopedia of Libertarianism*. Thousand Oaks, CA: SAGE; Cato Institute.



instances substituted by transitional constitutionalism<sup>34</sup>. In this regard, the idea constitutionalism is defined as a social deal between transitional regimes and their citizens, and whose goal was to restrict the extent of to which the authority of the state is extended in the period of transition. In addition, constitutionalism can be referred to as the process through which democratic culture is inculcated into a constitutional order. Therefore, transitional constitutionalism commences when states settle to have a new dispensation in the constitution by creating, transitional legislatures as well as the commission charged with drafting the constitution, which are either elected via democratic means or formed when various political forces negotiate to make the government. As such, constitutionalism can be said to be a major characteristic of the shift to democracy, and is comprehended not just as a permissible issue but also as a complex political procedure.

The second important theory that will be used in this paper is transitional justice theory. Additionally, transitional justice encompasses the full scope of procedures as well as means that are connected with the society's attempts to resolve a legacy of gross abuses in the past. Teitel (2002) this is done to bring about accountability to the government, serve justice and achieve reconciliation to the affected victims. The two key notions that act as the main reference for this paper are transitional justice as well as constitutionalism. As a notion portraying provisional constitutional arrangements like transitional parliament, judiciary, constitution, as well as other transitional state organs. This means that it can be seen as a key aspect of transitional justice.

---

<sup>34</sup> Harrison, R. (2003). *Hobbes, Locke, and Confusion's Empire: an Examination of Seventeenth-Century Political Philosophy*. Cambridge University Press

## **1.10 METHODOLOGY**

### **1.10.1 DATA COLLECTION**

This research will adopt a qualitative research methodology and content analysis; therefore analytical methods will be employed in the entire research. They will be employed to analyze published and unpublished secondary data will be employed to put the relevant issues into proper context and justify this research. Information from books, reports, journals as well as other published materials will be employed to build on the literature and put issues on transnational justice and constitutionalism into perspective.

On the other hand, content analysis will be employed to analyze qualitative data.

### **1.11 OPERANALIZATION OF KEY WORDS**

1. **Transnational justice:** a set of processes through which a society tries to attain reconciliation and serve justice after a period of conflict.
2. **Constitutionalism:** The process whereby the law and not their interests bind the government's actions.
3. **Constitution:** A set of laws governing a nation state
4. **Proprio motu:** an individual's own initiative to begin a case.

### **1.12 OVERVIEW OF CHAPTER**

This research unfolds into five parts. Chapter one is the proposal; It introduces the subject of study and lays the foundation of the research. This chapter captures the problem statement, objectives of the study, literature review, as well as the research methodology. In addition, the chapter will comprise of problems of the study as well as the limitations. Chapter two will look into the historical development of the constitution and transnational justice in Kenya. The aim of this chapter is to look into the various injustices that have been carried forward as well as

unconstitutionality in Kenya. Chapter three will look at constitutionalism and transnational justice during the Kibaki era. Chapter four discusses the various processes and mechanisms of transnational justice between the years 2002- 2012 and whether or not they have been able to address the issues of injustice and constitutionalism. Chapter five will look into the ICC and its investigations and its impacts on justice in Kenya. This is to <sup>79</sup>analyze the role of the global society in addressing the issues of constitutionalism and transnational justice. Chapter six offers conclusion, recommendations and areas for further research.

## **CHAPTER TWO**

### **HISTORICAL DEVELOPMENT OF THE CONSTITUTION IN KENYA**

#### **2.1 Introduction**

This chapter seeks to look into the history and development of the constitution, the injustices in the past and how the new constitution came into existence in Kenya. It will look into the history of the development of the constitution in Kenya, and the process of drafting the new constitution to give us a background of the injustice issues that were carried forward from the year 2002-2012.

#### **2.2 HISTORY AND DEVELOPMENT OF THE CONSTITUTION IN KENYA**

Before Kenya's independence in 1963, the British government waged war against the Mau Mau and other freedom fighters. In this period, many Mau Mau suspects were detained without trial by the British government subjecting where gross violations of human rights was carried out against them. In his journal transnational justice: How far should we go in defining the past? Kariuki shades light on how the grievances that the Mau Mau had after independence. They felt that they fought and lost everything that belonged to them. Those who were loyalists retained their land and were rewarded with government posts during the colonial period. Consequently, when independence came, their status quo was maintained: the loyalists were given their land back and had resources that they could employ to educate their children who in future were given public offices. In this case, the historical injustices were maintained.

The constitution during the pre-colonial Kenya lacked the administrative machinery as well as judicial institution that could implement it. The West minister constitutions that were imported into Africa during colonialism were mainly concerned with power distribution; limitation and

state institutions and none of the constitutions gave instructions on the role of the government<sup>35</sup>. Kenya remained loyal to this pattern of constitution, which failed to represent the interests of the citizens only of the state.

Since gaining independence, Kenya has been through two major constitutional reforms: in 1969 and in 2010. The 1969 constitutional change replaced the 1963 independence constitution, which gave rise to the government that was in place<sup>36</sup>. Queen Elizabeth, Britain's ruler, was represented by the governor –general who acted as the head of state in Kenya. In addition, the Constitution provided for a two-house parliament, which included **of the House of Representatives and the Senate.**

**The** Constitution was amended in 1964 to make Kenya a republic with the President acting as the head of government as well as the state. Later on in 1966, the Senate and the House of Representatives was combined to create a unicameral National Assembly. Nevertheless, the political elite began a course that would in the end mutilate the supreme law. According to Throup and Hornsby, between 1964 when Kenya became a republic and 1978 when he passed on, Charles Njonjo, the then Attorney General, the Cabinet and the Legislature led the modification of the Constitution to an extent where the office of the president would become a

3

<sup>35</sup> Murunga, G & Nasong'o, S. (2007). Kenya: The struggle for democracy. Zed Books publishers

22

<sup>36</sup> Throup, D & Hornsby, C. (1998). *Multiparty politics: the Kenyatta & Moi states & The triumph of the system in the 1992 election*. James Currey Publishers

dominant institution at the expense of other institutions of the state<sup>37</sup>. Gradually, after the first revision, the constitution became a monster that birthed a presidency that was authoritative; an institution that troubled the nation until in 2010 when the new constitution was promulgated. This amendment led to the creation of the Vice President office, which gave the president the power to appoint him. Crucial powers were also given to the regional assemblies, but the executive authorities were withdrawn after the Independence Constitution's first schedule.

The constitution in this era failed to look into the grievances of the people but only catered for the government's interest, increasing the presidency's powers. Hence, according to Masime (2001), the constitution in place during independence was designed for the power hungry elite who totally changed it to equip the presidency with much power. During this period, the president was never elected by anyone.

In bid to destroy the opposition, Act No 2 of 1966, stipulated that a member of legislature who resigns from the ruling party that supported him in election phase. This would later on be employed to specifically victimize KPU members. During these years, the ugly hand of detention without trial resulted in a number of Kenyans being tortured to death, mutilated and incarcerated for a long time without even getting a fair trial. Consequently, this amendment stretched the president's emergency powers to independently act when he thought that the

security of the country was at stake<sup>38</sup>. The amendment advocated for the Preservation of Public Security Act as well as the introduction of the sedition laws in the penal code. In 1966, Act No 19 eliminated bicameral parliament as well as the diluted regional assemblies. It merged the lower house and the Senate into the National Assembly and in this case abolished the Senate<sup>39</sup>. The ten amendments that have so far been made have managed to increase the presidential powers. The liberty of Constitution was completely distorted to fit the elites who were yearning for power in the president's office.

The revisions in the constitution transformed the arrangement of the state from a centralized to a unitary system. The unicameral parliament was also transformed to a bicameral legislature and there was also a reduction of the protections of the bill of rights. Furthermore, the amendments that were enacted in the 1969 constitution were later attained, in 1982, where the country was transformed to a de jure single party government.

The conclusion of the Cold War in the early 1990s resulted in a shift to democracy<sup>40</sup>. In Kenya, there was a plea for a new constitution that could substitute the 1969 one that concentrated more on the state instead of the people. Consequently, system of one party ended in 1991, leading to a presidential election in the year 1992. The Saba Saba Riots political pressure groups led by

6

<sup>38</sup> Okoth-Okombo, D. (2011). *Challenging the rulers: A leadership model for good governance*. African Books

collective publishers

9

<sup>39</sup> Okoth-Ogendo H.W.O "The Politics of Constitutional Change in Kenya Since Independence 1963-1969" *African Affairs* Vol.71 No. 282.

44

<sup>40</sup> Throup, D& Hornsby, C. (1998). *Multiparty politics: the Kenyatta & Moi states & The triumph of the system in the 1992 election*. James Currey Publishers

Matiba, Raila and Rubia held a Saba Saba meeting on July 7 1990. The meeting was as a result of the political murders of Bishop Alexander and Robert Ouko. It was alleged that Bishop Muge was murdered because of his incessant demand for constitutional reforms and multi-partyism<sup>41</sup>. Consequently, the arrests of the leaders, deaths as well as the riots led to the demand for reforms in the constitution as well as multi-partyism.

This era was characterized by numerous agitations for change. There was both international and local pressure that resulted in the introduction of multiparty democracy and other reforms in the electoral process. In addition, the period saw the rise of civil societies as well as opposition political parties that pushed for a new Constitution and specific changes which led to devolving the president's power.

During this period, there were three processes that were taken to carry out the reforms. First, a mutual agreement was forged as part of the Ufungamano Initiative. Second, the initiative ordered and pushed for a parliamentary structure that would control the entire process. Third, there was a push for further amendments in the constitution under the Inter-Party Parliamentary Group (IPPG). Hornsby (2012) purports that there were demands from the public to review and reform the Constitution of Kenya because of several factors. One was that the people of Kenya had a vision to have a better and prosperous country. They desired a state that is governed by the rule of law as well as democratic principles of social justice and good governance. Moreover, there was clamor in the public to tackle the negative effects of the amendments that were made to the 1963 independence constitution<sup>42</sup>. This amendment had resulted in the concentration of power in

3

<sup>41</sup> Murunga, G & Nasong'o, S. (2007). Kenya: The struggle for democracy. Zed Books publishers

53

<sup>42</sup> Hornsby, C. (2012). Kenya: A History since independence. IB Taurius publishers



the Presidency, which created an executive that was powerful, which weakened democratic and accountability mechanisms. In 1991, there were tribal clashes, which heightened pressure for democratic reforms increasing the number of players. These tribal clashes were politically motivated and drew condemnation heightening the demand for constitutional reform. Violence was seen as government's attempt to forestall clamor for multi-partyism and constitutional change. Kenyans had experienced a continued decay in their political, social and economic governance. As a result, Kenya experienced deepening poverty, poor growth in its economy as well as collapse of its infrastructure.

### 2.3 DRAFTING THE NEW CONSTITUTION

In 1995, the ruling party during this period, KANU, made drastic decisions on the various constitutional reforms to take place. In addition, the party in power specified that it would not be open-minded in the registration of new parties that opted to be in opposition and to the NGOs as well as diplomats who engaged in politics. As a result, the opposition and the civic bodies had to look through their significance in the process of reforming the constitution. A lot of in house consultations were held by the opposition and the civic bodies on the way forward to review the constitution. Burja & Adejumbi (2003) argue that there were various disagreements on who should commence the talks. Consequently, three groups emerged from the process: The National Opposition Alliance was established in 1995 and was initiated by Mwai Kibaki (DP), Martin Shikuku (Ford-A) and Kijana Wamalwa (Ford-K). The Opposition Solidarity was the second group, which was led by Raila Odinga (Ford-K, now in NDP) and Kenneth Matiba (Ford-A). The Civic groups and the church made up the last group who prepared a set of changes that they sought to be effected before the elections began in 1997. The following were some of the demands that the church put in place:

1. To have an independent electoral commission, the church and the civic society proposed that a non –partisan, independent, as well as an electoral commission that represented both the ruling regime, civil society as well as opposition deal with inter-party elections to ensure that there is a fair representation from the opposition<sup>43</sup>. Consequently, they desired to have Constitution’s Section 41 to be changed.
2. The two groups sought to repeal the <sup>9</sup> preservation of Public Security Act (Cap 57), as well as Part III of Cap 57 which made the President have the authority to capture people without prosecution, control aliens, limit how people moved as well as censor the media during the election period (Burja & Adejumobi, 2003).
3. The two bodies recommended that caution be taken when applying the provisions of <sup>9</sup> Section 56 and 57 of the Penal Code Cap 63 which dealt with publications and intentions that may be seen as seditious subject and that 56 (1) (b) be repealed (Burja & Adejumobi, 2003).
4. In order to ensure that there was independence in the presidential appointments of the chief justice, Attorney general, commissioner of the police as well as the judges, the two bodies observed that the appointments and terminations be confirmed by 65% of the legislators<sup>44</sup>.
5. The church and civic society suggested that it was a requirement for the constitution to be changed and that a régime which made the nation one, and takes care of all groups in the society, be created.

---

<sup>16</sup>

<sup>43</sup> Burja, A & Adejumobi, S. (2003). *Breaking Barriers, Creating New Hopes: Democracy, Civil Society and Good Governance in Africa*. Development policy management forum

<sup>16</sup>

<sup>44</sup> Burja, A & Adejumobi, S. (2003). *Breaking Barriers, Creating New Hopes: Democracy, Civil Society and Good Governance in Africa*. Development policy management forum

The National Convention Planning Committee (NCPC), was created as an umbrella body to represent all the factional interests in the civil society as well as the opposition parties. It was created after a realization that the political class was derailing the constitutional reforms because of their factional interests (Burja & Adejumobi, 2003).

In 1997, the pressure to make the government effect reforms bore fruit as President Moi's began the process of discussions on how the constitution can be changed and he met a few Muslim and Christian leaders, legislators from both opposition and non-parliamentary members of NCEC<sup>45</sup>. During these meetings, it was agreed that the National Convention Executive Council (NCEC) was the umbrella body charged with the representation of the opposition interests making it the only body that could hold discussions on how there can be changes in the government.

However, KANU stayed away during the launch of the National Convention Executive Council arguing that they could only have dialogue with the chosen representatives of the citizens. Consequently, it led to Inter-Parties Parliamentary Group meeting (IPPG), which strategically made the NCEC irrelevant as it limited agenda for reforms to the parliamentarians<sup>46</sup>. Murunga & Nasong'o, (2007) indicates that some of the politicians from the opposition party left the NCEC and settled to take part in making changes in IPPG.

26

---

<sup>45</sup> Murunga, G & Nasong'o, S. (2007). Kenya: The struggle for democracy. Zed Books publishers

42

<sup>46</sup> Murunga, G & Nasong'o, S. (2007). Kenya: The struggle for democracy. Zed Books publishers

Further amendments were made after two weeks of deliberations and the IPPG made the following changes which have transformed into law: -

1. An added section was added in Section one that made Kenya a multi-party democracy.
2. The Electoral Commission was given the power to employ prosecutors to advance the procedure of election appeals.
3. Every clause in the Penal Code that touched on Sedition was repealed.
4. The protection of the act of Public Security Act amended to eliminate being imprisoned without a hearing.
5. Section 7 was amended to permit the <sup>9</sup> winning President to create a government of national unity.

Additionally, a bill that dealt with a commission that dealt with the review of the constitution discussed in parliament and a commission was to be established which was to begin the procedure of collecting the public's perspectives on what they wanted changed in the constitution.

#### **2.4 CRITICISMS OF THE IPPG REFORMS**

Both the Church as well as the NCEC have denounced the IPPG reforms package and the NCEC on its part saw the proposals as being greatly flawed and that they had no ability to address the basic issues that brought about the Constitutional Crisis. On the other hand, the Church observed that the bills for reforms were inadequate to ensure a free and fair General Election. They desired an extension of the parliament to enact the changes but their request was cut short when Moi the

then president disbanded the legislature gearing the state for the 1997 General Elections<sup>47</sup>. However there are various issues that have made the Kenyan parliament the only institution in charge of enacting Constitutional reforms. Historically, the parliament has been known to perform the function of utilizing the changes in the constitution to fortify the executive. Also, the structure of the dissolved parliament was manufactured in the ruling party KANU hence any amendment done could have zero impact on Kenyans.

The IPPG has been condemned for not integrating the suggestions made by the <sup>46</sup> National Council of 'churches' in Kenya (NCKK), the National Convention Executive Council (NCEC) as well as the Law Society of Kenya (LSK)<sup>48</sup>. Secondly, the IPPG package left the excessive powers of the president to dissolve parliament untouched.

Later on, the writing of a new constitution began which was a change from the first one drafted by the political elite. Representatives from all over the nation participated in the Bomas process to write a new supreme law. This resulted in the adoption of the "Bomas draft" constitution making the opposition National Rainbow Coalition (NARC) party win elections in the General Elections of 2002<sup>49</sup>. Finally, Moi lost power at the end of 2002 election placing Kibaki as the nation's president.

<sup>26</sup>

<sup>47</sup> Murunga,G & Nasong'o, S. (2007). Kenya: The struggle for democracy. Zed Books publishers

<sup>42</sup>

<sup>48</sup> Murunga,G & Nasong'o, S. (2007). Kenya: The struggle for democracy. Zed Books publishers

<sup>49</sup> Arjomand,S.(2007). *Constitutionalism and political reconstruction*. Brill publishers

## CONCLUSION

The chapter discussed the history of the constitution in Kenya and the regimes that ruled during those epoch. It is clear that during both regimes, there were clear injustices and grievances that have been carried forward. Both presidents have not been able to respect the constitution in achieving the rule of law and making sure that the issues of injustices are resolved.

## CHAPTER THREE

### CONSTITUTIONALISM AND TRANSITIONAL JUSTICE BETWEEN 2002-2012

#### 3.1 Introduction

This chapter seeks to look into constitutionalism and transnational justice between 2002-2012. The process of the constitutional referendum together with the 2007 elections which triggered the post election violence will be discussed too to give us a background of whether constitutionalism and transnational justice have been effective in Kenya.

#### 3.2 CONSTITUTIONALISM AND TRANSNATIONAL JUSTICE 2002-2012

Following the 2002 elections, Mwai Kibaki was chosen the third President of Kenya. Mr. Kibaki promised to commence an immediate Constitution review, which gave the president power, and to create a new constitution in six months<sup>50</sup>. In addition, he promised that he would combat corruption and create a similar panel like South Africa's Commission of Truth and Reconciliation to address economic and social justice wrongdoings that were carried out in the past. Top officials too had to declare their wealth publicly.

Mwai Kibaki founded the Democratic Party in December 1991. During those years, the party was linked with the Kikuyu power elite from the Kenyatta years. Consequently, this undermined the power that KANU possessed amongst the Kikuyu group as many of them defected to DP. The leaders in this party represented the interests of the indigenous Kenyan bourgeoisie. In his book, *Challenging the rulers: A leadership model for good governance* Okoth-Okombo describes Kibaki's style of leadership as low key publicity but highly intelligent coupled with a technocrat

<sup>50</sup> Okoth-Okombo, D. (2011). *Challenging the rulers: A leadership model for good governance*. African Books collective publishers

that is competent. This could be contrasted sharply with the autocratic rule that characterizes other African leaders<sup>51</sup>. Kibaki's leadership was different from his predecessors, as he never attempted to create a personality cult. For instance, he never consented to having his portrait on each unit of Kenya's money; there was no street, institution or even place that was named after him, no praise songs in his honor.

### 3.3 2005: CONSTITUTIONAL REFERENDUM

Significant changes were made to the draft before the 2005 referendum, which consequently led to a separation in the coalition in charge. Led by former Prime Minister Hon. Raila Odinga, the Liberal Democratic party faction in partnership with KANU steered a successful 'No' vote against the changed Wako Draft or the Bomas Draft. This stalled the review as well as negotiations of the Constitution over the adoption of a new text.

The referendum took place in November 2005 and the central main disagreement was how much authority should the president possess. Those who feared a powerful president from the previous drafts added provisions for sharing power between a president who is ceremonial elected President and a Prime Minister chosen by the Parliament. Amos Wako presented this European-style draft, the then Attorney General for the referendum that desired to retain powers for the

6

---

<sup>51</sup> Okoth-Okombo, D. (2011). *Challenging the rulers: A leadership model for good governance*. African Books collective publishers



Presidency. The proposed new constitution was rejected by 58% of the voters despite the fact that most of the regime's officials even President Kibaki had pushed for a "yes" vote<sup>52</sup>.

The effect of the referendum was that it split the ruling party National Rainbow Coalition into factions who were for and against it. Though the process was quiet, it prompted violence between Orange and Banana enthusiasts; nine persons died during the period of campaign that was spread over several months.

Disagreements arose on the amount of authority the president should be allowed to possess. Most of the people argued that Kibaki was trying to accumulate authoritarian powers. In the preceding drafts, those who feared that the president would have more power added more provisions. They advocated for a European-style pact that could split the power between the President and Prime Minister. Nevertheless, the final draft of the constitution still made the president have more powers.

In addition, land reform issues were rampant as a result of clashes between different tribes. The draft constitution was supposed to handle this issue and it comprised of various actions against foreigners owning land. In addition, the constitution was supposed to permit women to be able to possess land. The Land Commission would oversee the redistribution of land that would curtail government officials from giving away land in return for favors. In addition, the land commission also acted as an overseer of human rights especially over wrangles over land and

---

<sup>52</sup> **7** Morris Kiwinda, M & John Osogo, A. (2014). *The New constitution of Kenya: principles, Government and humanrights*. Law Africa Publishing Ltd

would then give land back to the tribal communities that lost land unfairly in the past<sup>53</sup>. The constitution classified land as either individual, community or government property. However, resistance from people whose land could be repossessed for instance nomadic groups like the Masaais and landowners met this decision.

Moreover, the religious courts became a major issue just before the period of voting before. The existence of Islamic courts resulted in a demand by other religions that offered a legal foundation for most of the religious judiciaries.

In 2005, the loss in the referendum resulted in the dismissal of the entire cabinet by the then president Kibaki because he desired to purge all ministers in his cabinet who were Raila's allies. Only Moody Awori, the former Vice President and Home Affairs Minister, as well as Amos Wako the Attorney General were left standing as their positions were safeguarded by the constitution. The Waki commission gave a report, which highlighted some issues. For instance, they stated that after approving the informal Memorandum of Understanding, President Kibaki defaulted on this pact as soon as he was elected.

The cabinet began fracturing as a result and the ruling party, which was the National Rainbow Coalition, was a combination of minor parties like National Party of Kenya, Democratic Party, FORD–Kenya, and the Liberal Democratic party members maintained conflicting loyalties as well as agendas and in most instances were more loyal to their parties than the coalition party<sup>54</sup>.

6

<sup>53</sup> Okoth-Okombo, D. (2011). *Challenging the rulers: A leadership model for good governance*. African Books collective publishers

<sup>54</sup> Hope, K. (2011). *The political Economy of Development*. A&C Black publishers

The president also failed to discipline charges on corruption against his officials and this resulted in a lot of criticisms from the public.

### **3.4 2007 ELECTIONS AND POST ELECTION VIOLENCE**

The 2007 presidential elections was a race between the incumbent Mwai Kibaki on a PNU ticket and the opposition leader Raila Odinga of Orange Democratic Party. The election was characterized by hostility amongst the tribes. Kibaki was gaining more popularity from the Kikuyu ethnic group, and other neighboring groups in central Kenya, such as the Meru and Embu<sup>55</sup>. Opposition leader, Raila Odinga, was a member of the Luo tribe and was successful in ensuring that a wider base amongst the regional leaders like from the Luhya, Muslim as well as Kalenjin as well as coast leaders. Mwai Kibaki won by 46%, and became the president. However, Raila Odinga the opposition leader claimed victory, and as a result there was civil unrest and many Kenyans lost their lives, and up to 600,000 people were displaced. This was settled by the creation of the act of National Accord and Reconciliation, which resulted in Raila Odinga becoming the Prime Minister.

### **3.5 THE NATIONAL ACCORD AND RECONCILIATION ACT**

The violence that broke out after the 2007 elections was characterized as the lowest point of President Kibaki's political legacy. As a result there was widespread vandalism, looting, theft,

---

<sup>55</sup> **7** Morris Kiwinda, M & John Osogo, A. (2014). *The New constitution of Kenya: principles, Government and humanrights*. Law Africa Publishing Ltd

as well as destruction of property. Additionally, there were a number of killings, atrocities, displacements as well as sexual violence<sup>56</sup>.

When the Independent Review Commission (IREC) investigates the elections, they found out that there had been a lot of misconducts from various areas that were committed by all the disputing parties. In this case, there is no conclusion as to who won the elections and the violence resulted in the establishment of the Grand Coalition government of Hon Kibaki and Hon Raila Odinga sharing power after signing a peace accord<sup>57</sup>. Kenya's peace accord was brokered by the former UN Secretary General, who was the former Secretary General of the UN, with a Panel of Eminent African Personalities, the African Union, the UK and the United States, brokered the peace accord. The general purpose of the KNDR procedure was to attain harmony, stability and fairness in Kenya through the rule of law and regard for the privileges of its citizens. The parties decided to commit themselves to end violence and were able to identify the issues that had caused the disaster. As a result, Raila Odinga was sworn in on April 2008, as Prime Minister, along with a power-sharing Cabinet, comprising of 42 ministers as well as 50 assistant ministers.

The parties agreed to a four-point agenda:

- They immediately desired to end the violence as well as reinstate fundamental rights and freedoms.

<sup>56</sup> Morris Kiwinda, M & John Osogo, A. (2014). *The New constitution of Kenya: principles, Government and humanrights*. Law Africa Publishing Ltd

<sup>57</sup> Okoth-Okombo, D. (2011). *Challenging the rulers: A leadership model for good governance*. African Books collective publishers

- They agreed to address the humanitarian catastrophe, and encourage restoration and understanding;
- They agreed to find solutions as to how they can overcome the political crisis.
- These were the long-term issues that they sought to address: land reforms, constitutional, legal and institutional changes, scarcity and inequity, imbalances in regional development, unemployment, particularly among the youth<sup>58</sup>. They also agreed to consolidate national cohesion and unity; transparency, impunity as well as accountability.

In November 2009, the committee of experts proposed the following highlights for the harmonized draft constitution:

- The executive authority to be transferred <sup>1</sup> from the President to the Prime Minister position who in this case will be the Head of Government.
- The president will in this kind of government be just a ceremonial figure.
- The head of the government as well as the party coalition will be the Prime Minister who will have a majority in Parliament. He will be given the power to nominate ministers to the Cabinet.
- The total number of the members of parliament was increased from 222 to 295.
- The senate, whose total number will be 113, will act as an upper house and will represent the territories.
- <sup>1</sup> Devolution to the provincial level – current 8 provinces will be now referred to as regions.

<sup>7</sup> \_\_\_\_\_  
<sup>58</sup> Morris Kiwinda, M & John Osogo, A. (2014). *The New constitution of Kenya: principles, Government and humanrights*. Law Africa Publishing Ltd

- The removal of the 8 provinces, which will be subdivided into a total of 70 counties. Executives or governors will head each of the counties.
- The Kadhi court system was retained as it was in the current constitution.

The purpose of devolution is to ensure that resources are equally distributed to resolve the issue of injustice and inequality.

### 3.6 2010 PROMULGATION OF THE NEW CONSTITUTION

On 6 May, the final text of the constitution was published and ready to be approved through a referendum. On August 2010, 67% of Kenyans approved and promulgated the constitution.

The most significant changes in the constitution in summary included:

- All presidential appointments as well as decision have to be checked by the parliament.
- The constitution also placed restrictions on the number of cabinet posts
- A senate was appointed to review all decisions that were made by the parliament.
- Powerful provincial governments replaced by a network of smaller counties
- A Judicial Service Commission was created under article 171 of the constitution whose role was to oversee the judiciary<sup>59</sup>.
- A Bill of Rights for the citizens was created.
- A land commission was established to ensure that stolen property was returned and past abuses reviewed.

<sup>59</sup> Morris Kiwinda, M & John Osogo, A. (2014). *The New constitution of Kenya: principles, Government and humanrights*. Law Africa Publishing Ltd

All of those changes, in their own way, add checks and balances to the centers of power, and undermine tribal politics. <sup>1</sup> On 5 October, the parliament created the Constitutional Implementation Oversight Committee (CIOC), which was given charge to ensure that the reforms required in the new constitution were executed.

### CONCLUSION

This chapter discussed the Kibaki era and the promises to establish a new constitution. From the literature, Kibaki was successful in ensuring that the new constitution was promulgated, one that would ensure that the bill of rights was respected as well as past injustices were addressed.

## CHAPTER FOUR

### TRANSNATIONAL JUSTICE IN KENYA

#### 4.1 Introduction

This chapter seeks to look into the various processes and mechanisms transnational justice in Kenya and whether or not they have been successful in addressing injustices in Kenya between 2002-2012. It will look into the Waki, Krieggler as well as the injustices committed during the conflict that happened after the elections and how the government of Kenya chose to deal with them.

#### 4.2 BACKGROUND OF TRANSNATIONAL JUSTICE IN KENYA

In many post conflict states, transnational Justice is significant in ensuring that stability, peace as well as the rule of law is established. It has been a major issue affecting Kenya particularly since the 2007 post-election violence. Lafargue,(2009) notes that the history of marginalization, human rights violations, as well as other forms of injustices has never been resolved as the perpetrators of these abuses have apparently been the state. Hence, measures of transnational justice can be said to be a bold move to ensure that the past wrongs are dealt with as well as the journey towards strengthening the nation is enhanced. Despite the fact that various mechanism of transitional justice have been activated, it is imperative to note that these measures are in most instances destroyed by unpredictable domestic politics which in turn result in lack of coordination as well as implementation of these measures<sup>60</sup>.

---

<sup>60</sup> Lafargue, J. (2009). *General Election in Kenya, 2007*. Dar es Salaam: Mkuki Na Nyota.



### 2007 Post-election violence

The 2007 elections were characterized by violence, as well as crimes against humanity. It was ruthless and it spread speedily to various parts of the country and this <sup>53</sup> not only shook the nation but the international community too. This occurred soon after the declaration of Mwai Kibaki as president in the contested results. Between 1992 and 2002, most election related violence normally took place during the phase of pre-election phase especially during party campaigns, voter registration, as well as nominations<sup>61</sup>. Raila Odinga's supporters alleged electoral manipulation and this fact were widely confirmed by international observers who alleged that both parties were victims.

The opposition supporters not only staged <sup>10</sup> several nonviolent protests, they also went on a violent rampage in several parts of the nation state. Most noticeably, in Nyanza Province where the opposition leader, Raila Odinga hails from and the slums of Nairobi, parts of his Langata constituency are areas where violence was experienced. In these areas, the <sup>17</sup> police shot a number of demonstrators, and a few in front of cameras and this resulted in more violence and protests directed toward the police. Violence that was targeted to specific ethnic communities spurred and at first, it was directed mainly directed towards the Kikuyu people living outside their ancestral settlement areas, particularly those that lived in Rift Valley Province. Kibaki, the sworn president, hails from the Kikuyu community and the violence peaked on New Year's Day <sup>17</sup> with the killing of over 30 civilians who were unarmed in a church near Eldoret. According to Lafargue (2009), the Nairobi slums experienced the worst violence, which were apparently attacks that were ethnically motivated. It is said that other attacks were as a result of a simple

---

<sup>51</sup> Lafargue, J. (2009). *General Election in Kenya, 2007*. Dar es Salaam: Mkuki Na Nyota.

outrage at the extreme poverty that they experienced, while others were the actions of criminal gangs. These attacks went on sporadically for several months, particularly in the Rift Valley province.

It took the intervention of Kofi Annan, the former UN Secretary General, who arrived in the nation a month after the elections. After negotiations, Mwai Kibaki and opposition leader, Raila Odinga signed an agreement to share power on 28 February 2008, dubbed, the National Accord and Reconciliation Act<sup>62</sup>. The act established the prime minister office as well as the creation of the coalition government. Raila Odinga headed the power-sharing cabinet, which was sworn in on 17 April.

#### 4.2 THE WAKI COMMISSION

Also called the mini truth commission, the Waki commission incorporated a means through which its findings would activate prosecution of the criminal cases externally in case the local political initiatives did not work out. Officially known as The Commission of Inquiry on Post Election Violence (CIPEV), it was an international commission of inquiry established in the year 2008 by the Kenyan government to examine the clashes that took place soon after the 2007 presidential elections. Justice Philip Waki, who was also an court of appeal judge, was the commission's chairman of the Commission with Gavin Alistair McFadyen, a New Zealand's former police Assistant Commissioner and Pascal K. Kambale, a Democratic Republic of Congo lawyer at that time was on a project together with the Open Society Institute's Africa Governance, Monitoring and Advocacy. George Mong'are Kegoro was the Commission's

---

<sup>62</sup> Arenhovel, M. (2012). Democratization and Transitional Justice, *Democratization*, 15:3,37-41

secretary who doubled up as <sup>1</sup> an advocate of the High Court of Kenya and the Director of the International Commission of Jurists, Kenyan section.

Waki's report <sup>25</sup> recommended that the Kenyan government set up a special tribunal to prosecute those responsible for the worst crimes. Despite the fact that both Kibaki and Raila Odinga agreed to have a local tribunal, the notion was not accepted by the Parliament. <sup>1</sup> Waki passed his report, and his list comprised of the names of the people that he deemed to be responsible for the post election violence. Arenhovel (2012) notes that Kofi Annan instructed the Commission to hand over the names of the criminals <sup>1</sup> to the International Criminal Court if the local tribunals did not make any progress in delivering the names.

<sup>1</sup> The Waki commission delivered a copy of the report together with other six boxes of documents and added supporting materials to the International Criminal Court. In addition, the commission delivered a sealed envelope, which comprised of a list of people who were allegedly accused for participating in the violence. The envelope was inspected and resealed back by <sup>1</sup> prosecutor, Luis Moreno Ocampo. So far, the "Waki List" has not been made public, and there is public speculation that list may comprise of more names, more than the six who were initially indicted by the ICC. This has led to calls by the Kenyan public <sup>1</sup> for either the ICC or Waki to release the list.

#### 4.3 THE KRIEGLER COMMISSION

The Kriegler Commission was created in the year 2008 by the government of Kenya and was charged with the powers to investigate the 2007 elections that were allegedly rigged. However, it failed to establish who the actual winner of the election was. The commission's mandate was:

- To examine the legal as well as the constitutional framework and in addition, look into the inconsistencies that exist in the electoral laws.
- To look into the participation of the public during the electoral process in 2007
- To look into how effective the electoral commission is in discharging its mandate.

The commission found out that there were a lot of malpractices during the elections from various regions in which both the contesting parties could not be able to establish clearly who the winner was<sup>63</sup>. They also found out that there were a lot of mal practices during the elections like intimidation, bribery, as well as vote buying.

#### 4.4 TRUTH JUSTICE AND RECONCILIATION COMMISSION

Discussion between the NARC government, the post-election victims as well as the civil society resulted in the formation of a task force in April 2003. Its mandate was to establish whether or not the truth commission in Kenya is viable or not. The task force mainly comprised of actors from the civil society who published a report in October 2003. They recommended that the Truth, Justice and Reconciliation Commission be started by June 2004 as an instrument to advance national healing and reconciliation as well as to address and redress historic breaches of the individual's privileges as well as past unfairness. In addition, the directive proposed that these violations be traced back to economic crimes that were carried out from 12<sup>th</sup> December 1963 till the period that NARC took the government.

As Fombad (2008) illustrates, the <sup>2</sup> Truth, Justice and Reconciliation Commission (TJRC) was started in 2008 by an act of Legislature. It was charged with the authority to examine, investigate

---

<sup>63</sup> Sharp, D. (2013). Justice and Economic violence in Transition. SpringerScience and Business media publishers

as well as report on what occurred in the country between 1963 and 2008 relating to economic crimes, gross human rights violations, marginalization, acquisition of public land illegally, as well as ethnic violence<sup>64</sup>. Economic crimes like illegal acquisition of land as well as corruption are seen as one of the pillars of conflicts in Kenya. The commission was not given the power to prosecute, but it had the ability to recommend trials as well as reparations for the affected victims.

In other parts of the world, commissions have had various titles with different objectives in their meaning. A truth commission's objective is to ensure is to accumulate records of all the **human rights abuses** that **have been** carried out **in** a country<sup>65</sup>. In Kenya however, this definition has broadened to capture three different aspects, which are truth, justice and reconciliation.

The Commission began with just nine members. However, in the year 2010, two of these commissioners, who were both international and national, resigned. Presently, the credibility of the appointed Chairman of the commission, Ambassador Bethuel Kiplagat, has been questioned. The ambassador has been charged with breaching the privileges of the individuals and despite international and domestic pressure; he has refused to step down.

14

<sup>64</sup> Charles Manga Fombad. 2008. *Transitional Justice in Africa: The Experience with Truth*

*Commissions* Retrieved from

[http://www.nyulawglobal.org/globalex/Africa\\_Truth\\_Commissions.html](http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions.html)

3

<sup>65</sup> Asaala, E.(2010). Exploring transnational justice as a vehicle for social and political transformation in

*Kenya, African Human Rights Journal, 377-406*

The following were the goals and objectives of the Commission:

- Truth: the commission establishes precise, comprehensive historical records of various <sup>76</sup> violations of human rights and injustices, as well as sensitizes the public.
- Justice: By providing recommendation for prosecutions for prosecutions, reparations and amnesty, they restore criminal as well as social justice.
- Peace and National Unity
- Provide both national as well as individual healing and reconciliation
- They seek to restore human dignity of both the victims as well as the perpetrators.

Initially, The TJRC was only given a two-year mandate, which was prolonged three times. It was only handed over to the president on May 2013 after collecting over <sup>29</sup> 42,465 statements and 1,828 memoranda from Kenyans and conducting public hearings all over Kenya. Asaala (2010), notes that the report was only 2,000 pages comprising of findings and recommendations. The period covered by the commission was split into four distinct eras. It was discovered that there were only four political administrations that governed the nation during that epoch: the first period was in the British colonial era (1895–1963), the second one was during Jomo Kenyatta presidency (1963–1978), the third one existed during Daniel Arap Moi’ presidency (1978–2002) and lastly Mwai Kibaki’s presidency which was between (2002–2008)<sup>66</sup>. During these four periods, the Commission discovered that the state was responsible for many human rights violations which comprised of detention, torture, political assassinations, arbitrary arrest and detention, grand corruption, enforced disappearance, acquisition of land illegally, extrajudicial execution, sexual violence, looting and burning of property.

The report names as well as recommends prosecutions to some senior military personnel who were reported to be involved in gross human rights violations. Further, it recommends reforms in the security services, establishment of memorials as well as a sincere apology from the State. It was also recommended that a reparation fund be created to compensate victims, and Reparation Framework be created too. A special committee was also to be established to enable and monitor the implementation of the recommendations of the committee as well as dispense a reparations fund.

### CONCLUSION

The chapter looks into President Kibaki's second term and the post election violence. It look at how domestic politics were placed above the justice of the Kenyan people especially those that were raped, killed, displaced and those who up to date are seeking for their rights to be addressed. Despite the promulgation of the new constitution, politicians are still above the established rules that have been created to govern the nation.

## CHAPTER FIVE

### ICC AND IT'S INVOLVEMENT IN KENYA'S POST ELECTION VIOLENCE CASE

#### 5.1 Introduction

This chapter will look into the ICC and its involvement in the Kenya's post election violence. It will begin with the ICC mandate and why it was established and go further to look into its success or failure in bringing justice to the victims.

#### 5.2 THE ICC BACKGROUND

The International Criminal Court ICC can be defined as an international tribunal that has its headquarters at The Hague. It is a form of justice that adapts to the conditions special conditions of societies that are undergoing transformation from governments that are repressive. Gegout (2013) In most instances, these regimes are involved in conflicts that have had gross human right abuses as a way of promoting justice, reconciliation and peace. It's jurisdiction entails prosecuting criminals for crimes against humanity, genocide as well as war crimes. Its intention was to compliment the judicial systems that exist in nation states, which are its signatories. Therefore, it may only have the right to exercise its jurisdiction in situations where specific conditions are met or in instances where the state is not able to prosecute the criminals. In addition, the court may also take up a case in instances where the UN Security council refers special investigations to the court<sup>67</sup>. The Court began its responsibilities in the year 2002, and its also the year when the Rome statute was enforced. In this case, nation states become parties to

<sup>67</sup> Schabas, William A. (2011). *An Introduction to the International Criminal Court*. Cambridge University Press.



the statute by ratifying it and presently, only <sup>1</sup> 124 states are party to the Rome Statute and this automatically makes them ICC members.

The main goal of this court is to end impunity for individuals who have committed the worst crimes that have had an impact in the international community. This would in turn bring justice to the perpetrators as well as the victims and in the end deter violent actions in future<sup>68</sup>. The Court has sought to prosecute cases in Uganda, Kenya, <sup>11</sup> the Democratic Republic of the Congo, Mali, the Central African Republic, Libya, Cote d'Ivoire, as well as in Sudan. In addition, the ICC Office of the Prosecutor is presently digging into situations in Colombia, Afghanistan, Nigeria, Guinea, Georgia, Honduras and Korea.

There are various ways through which cases can be brought into the ICC. First, any state that <sup>1</sup> is a State Party to the statute of Rome can present their case to The Hague. Gegout, (2013) notes that together with a special United Nations ceremony, a group of 10 states ratified the statute and therefore were all selected to the 60th State Party. Second, the UN Security Council as was done in the case of Libya can present a situation to the court<sup>69</sup>. The third way can be when the Office of the Prosecutor begins an investigation under *proprio motu* powers. In this case, *Proprio motu* can be defined as an individual's own initiative to begin a case.' In his independent judgment, a

<sup>35</sup> \_\_\_\_\_  
<sup>68</sup> Lynch, G& Zgoniec-Rozej, M. (2013). *The ICC Intervention in Kenya*. Retrieved from

[https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0213pp\\_icc\\_kenya.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0213pp_icc_kenya.pdf)

on 23rd August, 2016

<sup>34</sup> \_\_\_\_\_  
<sup>69</sup> Gegout, C. (2013) 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace', *Third World Quarterly*, 34/5: 800-818.

prosecutor can opt to decide which crimes to investigate<sup>70</sup>. Under Article 15 of the Rome Statute the Pre-Trial Chamber must endorse the investigation, before the Prosecutor begins investigations and he/she may have little oversight aside from this. The Kenyan case was the first time the prosecutor began its investigations.

### 5.3 THE ICC INVESTIGATIONS AND KENYA

The Kenyan government opted as the last resort to get justice for the post election violence victims. Under Article 17 (1), the ICC can step in if the regime does not want to carry out prosecution or investigations. The lack of institutional capacity may also imply the failure of non-prosecutorial processes like the Truth and Reconciliation Commissions<sup>71</sup>. The ICC investigation in Kenya or the situation in the Republic of Kenya can be said to be an ongoing examination into the responsibility for the events that took place during the post-election violence from 2007-2008. Akhavan (2009) observes that this crisis preceded the presidential elections that took place on 27 December 2007. After attempting and failing to conduct a criminal investigation of those who supposedly were guilty of propagating violence, the issue was taken to the International Criminal Court. The ICC Prosecutor, Luis Ocampo, announced in 2010 that he was seeking summonses for six people who were guilty of crimes against

<sup>70</sup> Akhavan, P. (2009). Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism. *Human Rights Quarterly*. 31, 624-654

<sup>71</sup> Gegout, C. (2013) 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace', *Third World Quarterly*, 34/5: 800-818.

humanity<sup>72</sup>: Henry Kosgei, **the** then Industrialization Minister, William Ruto, the then Education Minister, Mohammed Hussein, the former police commissioner, Francis Muthaura, the then **Secretary to the Cabinet, Uhuru Muigai Kenyatta, the then Deputy Prime Minister and Joshua Sang, radio executive.** These six suspects were referred to as "Ocampo six" and on 8th March 2011, they **were indicted by the ICC's Pre-Trial Chamber II** and summoned to appear before the Court.

Despite the fact that the cases were presented to the pretrial chambers, the three **judges issued a dissenting opinion** and they purported **that it was not clear whether the alleged crimes against humanity were carried out as part of the premeditated organizational policy just to attack the civilians as dictated by the Rome statute.** They therefore opted to reject it on the claims that the supposed wrong doings crimes do not qualify as misconducts against humanity<sup>73</sup>. The ICC confirmed its rejection of a Kenyan request to have the cases tried in a national court on August 2011. The ICC Appeals Court stated that **Kenya had failed to provide evidence that it was conducting its own investigations.**

**The ICC cases were split into two:**

---

<sup>72</sup> Institute for security studies. (2012). *The international Criminal court's cases in Kenya: origin and impact.*

Retrieved from <https://www.issafrica.org/uploads/Paper237.pdf> on 23rd August, 2016

<sup>73</sup> Akhavan, P. (2009). Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism. *Human Rights Quarterly.* 31, 624-654

The first case was Prosecutor v. William Ruto and Joshua Arap Sang. In this case, Ruto was allegedly charged as a secondary co-perpetrator. This means that he was accused of committing crimes by using another individual. He was charged for the crimes against humanity of persecution, murder, as well as forcible transfer. As a radio presenter affiliated to the ODM, Joshua Arap Sang, allegedly contributed to the committing these crimes via a group of individuals who were supposedly led by William Ruto. The crimes were supposedly committed against supporters of the PNU as part of a strategy to increase their dominance in the province of Rift Valley. This was to discipline and drive out PNU supporters from the region.

In the second case was the former head of the civil service as well as secretary to the cabinet, Francis Muthaura, together with Kenyatta, the then Deputy Prime Minister are alleged to be co-perpetrators indirectly of the wrongdoings against its citizens of rape, persecution, murder, aggressive resettlement, as well as other acts deemed to inhumane. These wrongdoings were apparently committed to make sure that PNU maintained its dominance as part of the schemed revenge attacks against supporters of ODM party Naivasha and Nakuru towns in central Rift Valley<sup>74</sup>. It was said that these two allegedly cooperated and mobilized the Mungiki, a gang made up of Kikuyus, to attack civilians who were perceived to support the ODM party.

#### 5.4 THE KENYAN GOVERNMENT'S RESPONSE TO THE ICC

The Kenyan government and the National Assembly tried to block the ICC process. They attempted to appeal to the UN Security Council, the AU together with the ICC with regards to

<sup>74</sup> Hansen, T.O.(2011). A Holistic look: How the ICC process shapes transnational justice in Kenya, *The international Criminal Court Kenya Monitor*. Retrieved from <http://www.ijmonitor.org/2011/09/a-holistic-look-how-the-icc-process-shapes-transitional-justice-in-kenya/> on 23<sup>rd</sup> August, 2016

the admissibility of the case. The Kenyan parliament voted for Kenya to be removed <sup>10</sup> as a party to the Rome statute, which was the international treaty that created the International Criminal Court. Despite this opposition by the government, the suspects still collaborated with the ICC proceedings and appeared before all the preliminary hearings in The Hague. All these took place in April 2011 and on September that year too the confirmation of charges hearings took place. The charges were confirmed by the <sup>1</sup> Pre-Trial Chamber II against Kenyatta, Sang and Ruto and failed to confirm the charges against Muthaura, Ali, and Kosgey. Sang and Ruto's trial commenced on 10 September 2013, while that of Kenyatta commenced on February 2014<sup>75</sup>. Nevertheless, Luis Ocampo, the Chief prosecutor requested <sup>1</sup> that the case be adjourned citing there was insufficient evidence needed for trial. The ICC Prosecutor concluded this by saying that the cases have been hindered by lack of cooperation by the government of Kenyan government as well as intimidation of the witness.

Under the Rome statute, the Kenyan government was obliged to collaborate fully with investigations carried out by the ICC as well as the <sup>4</sup> prosecutions of crimes under its jurisdiction. Moreover, the ICC does not have its own patrol force and that's why it is necessary that the country cooperate with the surrender as well as arrest of the suspects<sup>76</sup>. In instances where the state fails to cooperate as requested, the court may take the issue back to the <sup>4</sup> Assembly of States Parties for further action. The assembly comprises of state reps that are all members to the Rome Statute. The assembly acts as the ICC's monitoring body. Additionally, it may, through

---

<sup>11</sup>

<sup>75</sup> Jalloh, C. (2012). Kenya vs the ICC prosecutor. *Harvard International Law Journal*. 53, 269-285.

<sup>76</sup> Schabas, William A. (2011). *An introduction the International Criminal Court*. Cambridge University Press

diplomacy, may give solutions to issues of non-cooperation like through ‘good offices’ intervention by the assembly’s president.<sup>77</sup>

These cases have not only been highly controversial in Kenya but also within the African Union. The organization has called for the cases to be suspended. Kenyatta and his running mate Ruto were elected in the first round of presidential elections in 2013, despite ICC charges against them.

Kenya's case is represents the dilemma that most African nations face presently. Despite the fact that most regimes are acknowledging the presence of injustices as well as atrocities that need to be addressed the lack of constitutionalism has resulted in the cry for justice and the demands for peace. Consequently, this transitional justice dilemma, depicts that Kenya cannot be trusted in tackling injustices successfully.

#### 4 5.5 PARTICIPATION OF VICTIMS OF IN ICC TRIALS

Victims are permitted to contribute in the ICC proceedings trials in two different ways. First of all, they can either be required to appear before the court directly through video link or in person.

4  
In case they are absent, they can participate through a legal representative. In case the accused are convicted, the court may demand for reparations to the affected victims<sup>78</sup>. There are various types of reparations like rehabilitation, compensation, or other symbolic methods like outreach. These efforts can be directed towards the affected persons or the entire community. If the court

3  
<sup>77</sup> Asaala, E.(2010). Exploring transnational justice as a vehicle for social and political transformation in Kenya, *African Human Rights Journal*, 377-406

1  
<sup>78</sup> Schabas, William A. (2011). *An introduction the International Criminal Court*. Cambridge University Press

settles to command a collective reimbursement, <sup>4</sup> it may request for payment to be made through the trust fund that the ICC set aside for the casualties.

### 5.6 ICC IMPACT IN KENYA'S JUSTICE

One of the main impacts is that Uhuru Kenyatta and William Ruto, both accused individuals from the tribes that fought bitterly during the post-election, <sup>15</sup> forged a political alliance in 2012 ahead of the 2013 elections. Asaala, (2010) notes that the coming together of these tribes that were enemies in the past is an achievement.

The ICC has sparked debates on international justice, which have assisted in minimizing the culture of impunity. This has in turn challenged the idea that some people are more powerful than others and that they can't be held accountable for their actions.

In addition, there have been major changes in the judiciary <sup>15</sup> in Kenya, which have been quickened by the presence of the ICC in the country<sup>79</sup>. For instance, the creation of the International Crimes Division (ICD), to take care of genocide and wrong doings against civilians, is a development since in the past, the judiciary was deemed not to have the ability to prosecute crimes of such magnitude.

However, the ICC placed a lot of emphasis on the major leaders instead of also looking into the lower level perpetrators during the post election violence. Consequently, this has hindered true reconciliation as well as transnational justice in the country.

### CONCLUSION

As a permanent court, the ICC is the only permanent criminal court that can be able to address issues of transnational justice in states, which are not capable to handle injustice. ICC requires working with the state institutions when conducting its investigations as well as the cases so that

<sup>3</sup> <sup>79</sup> Asaala, E.(2010). Exploring transnational justice as a vehicle for social and political transformation in Kenya, *African Human Rights Journal*, 377-406

they can assist in rebuilding and strengthening the domestic judicial institutions. However, based on the research, the Kenyan government failed to cooperate with the ICC in order to ensure justice to the post election victims. Domestic politics came first instead of the constitution and this in this case the victims fails to get justice.



## SUMMARY, CONCLUSION AND RECOMMENDATIONS

**6.1 Summary of Chapters One to Five**

Many states in the world are still grappling with cultivating the culture of constitutionalism especially when dealing with issues of transnational justice.

The situation in Kenya is a typical representation of the dilemma that affects not just most African states but also other countries around the world today. Most of these nations have a historical past of having authoritarian regimes that have been accused of committing human rights abuses, atrocities, as well as other forms of injustices that may require to not only be addressed but also a constitution set in place that can be able to subject even the most powerful individuals to be held accountable for the actions.

This is the transitional justice dilemma, which the Kenyan state has thus far failed to show it can be trusted to successfully tackle. Hence, the civil society together with other non-state actors must ensure that justice is upheld in the nation and that those responsible should be brought to book. Since the colonial period, where the colonial government abused the rights of the African people, injustices were committed and the incumbent government promised to address the issues of which they didn't. The regime of late Jomo Kenyatta, which took power soon after independence, was an authoritarian government that was increasingly corrupt. Under President Daniel Moi's regime, which succeeded Kenyatta, under the ruling party KANU and the government, President Moi exercised extensive control over the media, judiciary, civic groups, trade unions, as well as the legislature<sup>80</sup>. The state's objectives under this rule was mainly detention without trial to those who opposed the government, political assassinations and

<sup>80</sup> Murunga, G & Nasong'o, S. (2007). Kenya: The struggle for democracy. Zed Books publishers

murder, ethnic clashes and tensions that were politically-instigated, arbitrary arrests, torture, opponents were also accused and arrested falsely to make to intimidate them. In the year 2002, there was a change of regime and President Mwai Kibaki came in power. Under his regime, the Justice and Constitutional Affairs Minister in 2003 were charged with appointing people to create a commission to deal with Truth, Justice and Reconciliation (Task Force). This was an opportunity to establish transitional justice as it was given the mandate <sup>50</sup> to consider the possibility of creating a Truth, Justice and Reconciliation Commission (TJRC) that would deal with the misgivings of previous governments. It would then make recommendations to the Justice Minister as to whether TJRC was good for the country or not. The 2007 elections were followed by an era of political unrest as well as intense violence<sup>81</sup>. Despite the fact that there was already a new constitution that tackles the issues of the rule of law, it is clear that domestic politics still rules and this in turn hinders transnational justice and constitutionalism.

## 6.2 Key Findings

From the research, five findings can be deduced. First, before Kenya's independence in 1963, there were various injustices that were committed against many Mau Mau suspects. They were detained without trial by the British government subjecting and gross violations of human rights were carried out against them. They felt that they fought and lost everything that belonged to them. Those who were loyalists retained their land and were rewarded with government posts during the colonial period. Consequently, when independence came, their status quo was maintained: the loyalists were given their land back and had resources that they could employ to

educate their children who in future were given public offices. In this case, the historical injustices were maintained.

The constitution during the pre-colonial Kenya lacked the administrative machinery as well as judicial institution that could implement it. The Westminster constitutions that were imported into Africa during colonialism were mainly concerned with power distribution; limitation and state institutions and none of the constitutions gave instructions on the role of the government<sup>82</sup>. Kenya remained loyal to this pattern of constitution, which failed to represent the interests of the citizens only of the state.

Secondly, these grievances were carried forward during all the preceding regimes and consequently they became magnified as the Moi regime was also authoritarian. When the Kibaki regime came into power after successfully toppling Uhuru, they only brought the new constitution which domestic politics has diluted its ability to prosecute and fight for fairness for the affected casualties.

Third, the conflict that took place after the elections was a test to find out whether constitutionalism exists in Kenya or it's just a notion. The period proved that constitutionalism still lacks and hence the issues of injustice and the rule of law still continue to plague the nation. It is important to note that it is these issues of injustice that bring disunity to the nation which in turn result in chaos and destruction.

Fourth, despite the use of international mechanism, in this case, the ICC to resolve our injustice issues, up to the year 2012, there was still no cooperation by the government in bringing justice to the nation. In fact, the Kenyan government together with the African Union strongly

<sup>82</sup> [3](#) \_\_\_\_\_  
Murunga, G & Nasong'o, S. (2007). Kenya: The struggle for democracy. Zed Books publishers

condemned the very institutions they set up and ratified to assist in resolving the issues of crimes against humanity. This further concludes that the lack of constitutionalism is still a malady not just in Kenya but in the entire continent of Africa and that it will take a long time before the citizens and the victims get the real justice that they deserve. The fact that there is a state of anarchy in the international community itself presents a loophole where adherence to the international law by the leaders is not looked into.

### **6.3 Recommendations**

Therefore, this research recommends: African people to take matters into their hands. Civil society and other non-state actors should engage the public in civic education to sensitize them on their rights and to empower them to understand that they <sup>74</sup> have the ability to hold their leaders accountable for their actions.

Secondly, the research found out that most of the times, leaders step into office with the promise of making this better. However, as time goes by, they become a representation of the vested interest of the ruling class. Hence, it is significant to ensure that civic education is done to the common *mwananchi*, because, an enlightened citizen will one day hold office and this maybe may bring the change that is required. The leadership in most instances reflects the values that the society has hence if Africa and in this case, 'Kenya desires to move on, there has to be a strong emphasis on civic education and political socialization.

Third, as much as it sounds like a broken record, the international institutions should be empowered to have authority of bringing nations to book incase they commit crimes against humanity. In most instances, as the research found out, these institutions rely on the good will of the government, which may be part of the crime, and hence they may fail to participate or even

cooperate to provide evidence or even during arrest. In extreme cases, they may threaten to walk out of these institutions that they themselves established.

The social contract theory dictates that individuals and government ought to sign a contract that ensures their rights are protected and that they are safe.

This study lays the foundation for future studies. There are various thematic areas that arose in the entire research that could be employed as the basis for future qualitative and quantitative research studies. From the research, it is clear that domestic politics in most instances dominates issues pertaining to transnational justice. Therefore, further research ought to be done on the role of domestic politics in constitutionalism. How vested interests affect constitutionalism not just in Africa but also around the world.

Further research can also be done on the role of the international community in ensuring that constitutionalism, in this case in the global community is adhered to. From the research it is clear that most states gravitate towards interest more than justice, the cry of the innocent victims during war or conflict.

**Appendix 1:**  
**TRUTH, JUSTICE AND RECONCILIATION COMMISSION RECOMMENDATIONS**

THEMES	RECOMMENDATIONS	RESPOSINBILITY FOR IMPLEMENTATION	TIMELINE
Atrocities committed during colonial era 12 months	Acknowledgment and confession by the government of Britain. Negotiation for reward from the government of Britain	Kenyan as well as the government of Britain	12 months
Shifita war	Acknowledgment and confession  Repeal of Indemnity Act 5 Publication and dissemination of the Arusha accord in 1967 between Somali and Kenyan state.  Creation of a public memorial	President and Chief of Defense Forces  Attorney General and Parliament 29 Foreign Affairs Ministry /Office of the President  Execution Mechanism/Ministry in charge of National Heritage/National Museum  5	5 months  9 months  9 months  24 months
Massacres	Acknowledgment and confession  Reparation for victims and survivors Release of all minutes of that are required by the District	5 President, Inspector General of Police and Chief of Defense Forces	6 months

	<p>Security Committees, Provincial Security Committee, Kenya</p> <p>2 Intelligence Committee and National Security Council</p> <p>Creation of monuments at the massacres sites</p> <p>Father Adrian Joseph Janito coming back to give evidence on Bubisa Massacre</p>	<p>Mechanisms of Execution</p> <p>President/Office of the President</p> <p>Execution mechanism/Ministry in charge of National Heritage/National Museum</p> <p>Catholic church</p>	<p>36 months</p> <p>6 months</p> <p>24 months</p>
<p>Political murders for national heritage/National Museum</p>	<p>Acknowledgment and confession</p> <p>Discharge of all materials from past inquiries of political assassinations</p> <p>Further inquiries connecting to the killing of JM Kariuki, Robert Ouko, Crispin Odhiambo-Mbai and Father Antony Kaiser</p> <p>Creation of public monuments</p>	<p>President</p> <p>2 President/Office of the President</p> <p>Director of Public Prosecutions</p> <p>Execution Mechanisms/ministry responsible</p>	<p>6 months</p> <p>6 months</p> <p>18 months</p>

			24 months
2 Access to justice	<p>Acceleration of the establishment of the International Crimes Division of the High Court.</p> <p>2 Fast-tracking of establishment of a nationwide legal aid system</p> <p>5 Declaration under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights</p> <p>2 Issuance of a public report on the progress of investigations and prosecution of 2007/2008 post-election related violence</p> <p>2 Fast-tracking of enactment of human rights related laws as envisaged by the Constitution of Kenya: § Legislation on freedom of the media (section 34) § Legislation on fair hearing (section 50) § Legislation on the rights of persons detained, held in custody or detained (section 51)</p>	<p>Chief Justice</p> <p>Ministry of Justice/National Legal Aid (And Awareness) Programme in Kenya (NALEAP)</p> <p>Ministry of Foreign Affairs</p> <p>Director of Public Prosecutions</p>	<p>12 months</p> <p>18 months</p> <p>12 months</p> <p>3 months (and in 3 months intervals thereafter)</p>



<p>2 Extra-judicial killings</p>	<p>Acknowledgment and confession</p> <p>Endorsement of International Convention for the Protection of All Persons from Enforced Disappearance</p> <p>Acceleration of changes in the police, comprising starting of new standard functioning processes on the employment of force.</p> <p>Creation of a modern national forensic laboratory that was fully stocked.</p> <p>Creation of a modern national forensic laboratory that was fully stocked in every county.</p> <p>Elimination of death penalty and transforming all death penalties to life imprisonment</p> <p>2 Reparation for victims and survivors</p>	<p>President, Inspector General of Police and Chief of Defence Forces</p> <p>Foreign Affairs Ministry</p> <p>Inspector General of Police and Police Service Commission.</p> <p>2 Ministry responsible for internal security and other relevant ministries/institutions</p> <p>Ministry in charge of the internal security and other</p> <p>Relevant ministries/institutions</p> <p>Attorney General and Parliament</p> <p>Mechanisms of execution</p>	<p>6 months</p> <p>24 months</p> <p>36 months</p> <p>36 months</p>
--------------------------------------	---	---	--

			24 months
			36 months
Entry to justice	<p>Acceleration of the creation of the High Court's International Crimes Division</p> <p>Acceleration of creation of a national legal aid system</p> <p>Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the creation of the African Court on rights of people.</p> <p>Giving out public report on the advancement of inquiries and trial of conflicts that took place in 2007/2008</p> <p>Fast-tracking of enactment of laws relating to the privileges of individuals related laws as envisaged by the Constitution</p>	<p>Chief Justice</p> <p>Ministry of Justice/National Legal Aid (And Awareness) Programme in Kenya (NALEAP)</p> <p>Ministry of Foreign Affairs</p> <p>Director of Public Prosecutions</p>	<p>12 months</p> <p>18 months</p> <p>12 months</p> <p>5 3 months (and in 3</p>

	<p>of Kenya:</p> <ul style="list-style-type: none"> <li>▪ Statute on media freedom (section 34) <sup>5</sup></li> <li>▪ Bill on fair hearing (section 50)</li> <li>▪ Bill on on the privileges of individuals confined, held in custody (section 51)</li> </ul>		<p>months intervals</p> <p>Thereafter)</p>
--	---	--	--

56

Source : TJRC Kenya. (2013). Report of the truth, justice and reconciliation commission. Retrieved from <http://www.redress.org/downloads/tjrc-supplementary-report.pdf> on 2 September, 2016

## REFERENCES

- A. Sajó. 1999. *Limiting Government: An Introduction to Constitutionalism*. Central European University Press
- Akhavan, P. (2009). Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism. *Human Rights Quarterly*. 31, 624-654.
- Alex T,(2002). *An Introduction to African Politics, second edition*. London and New York: Routledge
- Annan, K., UN Secretary-General (2004). *The Rule of Law in Conflict and Post-Conflict Societies*. NY: United Nations.
- Arato, A. 1994. 'Dilemmas Arising Out of the Power to Create Constitutions in Eastern Europe' in M. Rosenfel(Ed.), *Constitutionalism, Identity and Difference*. Duke University Press
- Arenhovel,M. (2012). Democratization and Transitional Justice, *Democratization*, 15:3,37-41
- Arjomand, S.(2007). *Constitutionalism and political reconstruction*. Brill publishers
- Arthur, P. (2009). How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice". *Human Rights Quarterly*, 31(2): 321-367.
- Arthur, P. (2011). Fear of the future, lived through the past: Pursuing transitional justice in the wake of ethnic conflict. *Identities in transition: Challenges for transitional justice in divided societies*, 271-302.
- Asaala, E.(2010). Exploring transnational justice as a vehicle for social and political

transformation in Kenya, *African Human Rights Journal*, 377-406

Burja, A & Adejumobi, S. (2003). *Breaking Barriers, Creating New Hopes: Democracy, Civil Society and Good Governance in Africa*. Development policy management forum publishers

Charles Manga Fombad. 2008. *Transitional Justice in Africa: The Experience with Truth Commissions* Retrieved from

[http://www.nvulawglobal.org/globalex/Africa\\_Truth\\_Commissions.html](http://www.nvulawglobal.org/globalex/Africa_Truth_Commissions.html)

Constitutionalism” *Constitutional Commentary* (2000) 17: 237. Teitel’s comment on transitional constitutionalism is based on her acclaimed work *Transitional Justice* (2002).

De Laet, D. (2014). *The global struggle for human rights*. Cengage Learning publishers

Ehrenfreund, N. (2007). *The Nuremberg legacy: How the Nazi crimes trials changed the course of history*. St Martin’s press publishers

Gegout, C. (2013). ‘The International Criminal Court: limits, potential and conditions for the promotion of justice and peace’, *Third World Quarterly*, 34/5: 800-818.

Halmai, G. *The Role of Constitutionalism in Transitional Justice Processes in Central Europe*. Retrieved from

<http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmai/Constitutions-and-TJ.pdf>

Hansen, T.O.(2011). A Holistic look: How the ICC process shapes transnational justice in Kenya, *The international Criminal Court Kenya Monitor*. Retrieved from

<http://www.ijmonitor.org/2011/09/a-holistic-look-how-the-icc-process-shapes-transitional-justice-in-kenya/> on 23<sup>rd</sup> August, 2016

- Hansen, T. (2011). Transitional Justice in Kenya: An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns. *California Western International Law Journal*. 42, 1-35.
- Harrison, R. (2003). *Hobbes, Locke, and Confusion's Empire: an Examination of Seventeenth-Century Political Philosophy*. Cambridge University Press
- Heller, Kevin Jon (2011). *The Nuremberg Military Tribunals and the Origins of International Criminal Law*. Oxford: Oxford University Press
- Hope, K. (2011). *The political Economy of Development*. A&C Black publishers
- Hornsby, C. (2012). Kenya: A History since independence. IB Taurius publishers
- Huntington, S. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. University of Oklahoma Press
- Institute for security studies. (2012). *The international Criminal court's cases in Kenya: origin and impact*. Retrieved from <https://www.issafrika.org/uploads/Paper237.pdf> on 23rd August, 2016
- Jalloh, C. (2012). Kenya vs the ICC prosecutor. *Harvard International Law Journal*. 53, 269-285.
- Kagwanja, P& Sothall, R. (2013). Kenya's Uncertain Democracy: The Electoral Crisis of 2008. Routledge publishers
- Kariuki, N. (2015). *Transnational Justice: How far should we go in defining the past?* Retrieved from [http://www.npi-africa.org/pages/admin/publications/upload/TRANSITIONAL\\_JUSTICE\\_IN\\_KENYA\\_1439835768.pdf](http://www.npi-africa.org/pages/admin/publications/upload/TRANSITIONAL_JUSTICE_IN_KENYA_1439835768.pdf) on 10th August, 2016

Kivutha, K & Wachira, M. (1996). *State and Citizen: issues Constitutional and Legal Reforms in Kenya's Emergent Multi-party Democracy: in Oloka-Onyango, Kibwana and Maina Peter (ed) Law and the Struggle for Democracy in East Africa.*

Lafargue, J. (2009). *General Election in Kenya, 2007.* Dar es Salaam: Mkuki Na Nyota.

Lavinia Stan, ed., *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*, London: Routledge, 2009.

Lynch, G& Zgonec-Rozej, M. (2013). *The ICC Intervention in Kenya.* Retrieved from [https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0213pp\\_icc\\_kenya.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0213pp_icc_kenya.pdf) on 23rd august, 2016

Masime, K. (2001). *A Historical Review of Kenya's Constitutional Evolution (1895-present).*  
Center for government

Mc Ilwain, C.H. 1948. *Constitutionalism: ancient and modern.* Cornell University Press

Morris Kiwinda, M & John Osogo, A. (2014). *The New constitution of Kenya: principles, Government and human rights.* Law Africa Publishing Ltd

Murunga, G & Nasong'o, S. (2007). *Kenya: The struggle for democracy.* Zed Books publishers

Narverson, J & Trenchard, D. (2008). "Contractarianism/Social Contract". In Hamowy, Ronald. *The Encyclopedia of Libertarianism.* Thousand Oaks, CA: SAGE; Cato Institute

Okello, M. (2012). *Where Law meets reality: forging African transitional justice.*  
Fahamu/pambazuka publishers

Okoth-Ogendo H.W.O “The Politics of Constitutional Change in Kenya Since Independence 1963-1969” *African Affairs* Vol.71 No. 282.

Okoth-Okombo,D. (2011). *Challenging the rulers: A leadership model for good governance*. African Books collective publishers

Priemel, Kim C.; Stiller. (2012). *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*. Berghahn Books.

Rotberg, R & Thompson, D. 2000. *Truth versus Justice: The Morality of Truth Commissions*. Princeton University Press

Ruti Teitel “The Constitutional Canon: The Challenge Posed by a Transitional

Schabas, W.(2011). *Transitional Justice and the Norms of International Law*. Japanese Society of International law Retrieved from [http://www.jsil.jp/annual\\_documents/2011/fall/schabas\\_trans\\_just911.pdf](http://www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf) on 12

Schabas, William A. (2011). *An Introduction to the International Criminal Court*. Cambridge University Press.

Sharp, D. (2013). *Justice and Economic violence in Transition*. Springer Science and Business media publishers

Sharp, D.(2013). *Justice and economic violence in transition*. Springer Science& Business Media

Sherman, C. (2001). *War Crimes: International Military Tribunal*. Paducah, Kentucky: Turner Publishing Company.



Sriram, C.(2013). *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-combatants*. Routledge publishers

Teitel, R. 2000. *Transitional Justice*. Oxford University Press.

Throup, D& Hornsby, C. (1998). *Multiparty politics: the Kenyatta & Moi states& The triumph of the system in the 1992 election*. James Currey Publishers

Tordoff, W.( 1997). *Government and Politics in Africa* (Bloomington, Indiana: Indiana University Press).

Totani, Y. (2009). *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*. Cambridge: Harvard University Asia Center

TJRC Kenya. (2013). *Report of the truth, justice and reconciliation commission*. Retrieved from <http://www.redress.org/downloads/tjrc-supplementary-report.pdf> on 2 September, 2016

# Final

---

## ORIGINALITY REPORT

---

% **15**  
SIMILARITY INDEX

% **11**  
INTERNET SOURCES

% **5**  
PUBLICATIONS

% **8**  
STUDENT PAPERS

---

## PRIMARY SOURCES

---

**1** [en.wikipedia.org](https://en.wikipedia.org) Internet Source % **2**

---

**2** [digitalcommons.law.seattleu.edu](https://digitalcommons.law.seattleu.edu) Internet Source % **1**

---

**3** Submitted to University of Leeds Student Paper % **1**

---

**4** [www.chathamhouse.org](https://www.chathamhouse.org) Internet Source % **1**

---

**5** [nisiskenya.com](https://nisiskenya.com) Internet Source % **1**

---

**6** Submitted to National University of Singapore Student Paper <% **1**

---

**7** Submitted to Strathmore University Student Paper <% **1**

---

**8** Submitted to Bocconi University Student Paper <% **1**

---

**9** [www.dpmf.org](https://www.dpmf.org) Internet Source <% **1**

---

10

Submitted to Coventry University

Student Paper

<% 1

---

11

[www.e-ir.info](http://www.e-ir.info)

Internet Source

<% 1

---

12

[www.dtic.mil](http://www.dtic.mil)

Internet Source

<% 1

---

13

Submitted to University of New South Wales

Student Paper

<% 1

---

14

Submitted to American University in Cairo

Student Paper

<% 1

---

15

[postconflictjustice.com](http://postconflictjustice.com)

Internet Source

<% 1

---

16

Submitted to La Trobe University

Student Paper

<% 1

---

17

Submitted to University of the Western Cape

Student Paper

<% 1

---

18

[m.allafrica.com](http://m.allafrica.com)

Internet Source

<% 1

---

19

[www.knchr.org](http://www.knchr.org)

Internet Source

<% 1

---

20

Submitted to Royal Melbourne Institute of  
Technology

Student Paper

<% 1

---

21

Internet Source

<% 1

---

22

Submitted to Kenyatta University

Student Paper

<% 1

---

23

Submitted to International School of Kenya

Student Paper

<% 1

---

24

[www.eui.eu](http://www.eui.eu)

Internet Source

<% 1

---

25

Submitted to Ashridge Business School

Student Paper

<% 1

---

26

Submitted to University of Birmingham

Student Paper

<% 1

---

27

Submitted to Deakin University

Student Paper

<% 1

---

28

Submitted to University of Kent at Canterbury

Student Paper

<% 1

---

29

[www.acordinternational.org](http://www.acordinternational.org)

Internet Source

<% 1

---

30

Submitted to Nottingham Trent University

Student Paper

<% 1

---

31

Submitted to University of Michigan, Dearborn

Student Paper

<% 1

---

32

Submitted to Central Queensland University

Student Paper

<% 1

---

33 [onlineresearchjournals.com](http://onlineresearchjournals.com) <% 1  
Internet Source

---

34 [transmit-ionosphere.net](http://transmit-ionosphere.net) <% 1  
Internet Source

---

35 Submitted to University of Durham <% 1  
Student Paper

---

36 Submitted to Midlands State University <% 1  
Student Paper

---

37 Submitted to University of Ghana <% 1  
Student Paper

---

38 Submitted to School of Oriental & African  
Studies <% 1  
Student Paper

---

39 Submitted to Kozep-europai Egyetem <% 1  
Student Paper

---

40 [www.ancl-radc.org.za](http://www.ancl-radc.org.za) <% 1  
Internet Source

---

41 Submitted to University of Toronto <% 1  
Student Paper

---

42 Submitted to Graduate Institute of International  
and Development Studies <% 1  
Student Paper

---

43 [www.africaresearchcentre.org](http://www.africaresearchcentre.org) <% 1  
Internet Source

---

44	Submitted to Anglia Ruskin University Student Paper	<% 1
45	chss.uonbi.ac.ke Internet Source	<% 1
46	allafrica.com Internet Source	<% 1
47	Submitted to Institute of Graduate Studies, UiTM Student Paper	<% 1
48	koreanlii.or.kr Internet Source	<% 1
49	businesscustomwriting.com Internet Source	<% 1
50	Submitted to University of Pretoria Student Paper	<% 1
51	www.scribd.com Internet Source	<% 1
52	Submitted to Old Saybrook High School Student Paper	<% 1
53	Harrington, John, and Alasdair O'Hare. "Framing the National Interest: Debating Intellectual Property and Access to Essential Medicines in Kenya : Framing the National Interest", The Journal of World Intellectual	<% 1

## Property, 2014.

Publication

---

54 [bosnianbonesspanishghosts.com](http://bosnianbonesspanishghosts.com) <% 1  
Internet Source

---

55 [pastebin.com](http://pastebin.com) <% 1  
Internet Source

---

56 Submitted to University of Keele <% 1  
Student Paper

---

57 [www.dominiopublico.gov.br](http://www.dominiopublico.gov.br) <% 1  
Internet Source

---

58 The International Criminal Court and the End of Impunity in Kenya, 2015. <% 1  
Publication

---

59 Submitted to Kingston University <% 1  
Student Paper

---

60 Submitted to University of St Andrews <% 1  
Student Paper

---

61 Submitted to Sheffield Hallam University <% 1  
Student Paper

---

62 Submitted to Africa Nazarene University <% 1  
Student Paper

---

63 [arizona.openrepository.com](http://arizona.openrepository.com) <% 1  
Internet Source

---

64 [www.fidh.org](http://www.fidh.org)

---

Internet Source

<% 1

---

65

[www.osf.org.za](http://www.osf.org.za)

Internet Source

<% 1

---

66

[updatesonkenya.blogspot.com](http://updatesonkenya.blogspot.com)

Internet Source

<% 1

---

67

[iccforum.com](http://iccforum.com)

Internet Source

<% 1

---

68

[uir.unisa.ac.za](http://uir.unisa.ac.za)

Internet Source

<% 1

---

69

[www.eurojournals.com](http://www.eurojournals.com)

Internet Source

<% 1

---

70

Hansen, Thomas Obel, and Chandra Lekha Sriram. "Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies", *International Journal of Transitional Justice*, 2015.

Publication

<% 1

---

71

[www.mei.edu](http://www.mei.edu)

Internet Source

<% 1

---

72

"Register of Commission documents: Assessing the need and possibilities for the establishment of an E", *European Union News*, Nov 12 2016  
Issue

Publication

<% 1

---



73	<a href="http://www.flownex.com">www.flownex.com</a> Internet Source	<% 1
74	<a href="http://hrbrief.org">hrbrief.org</a> Internet Source	<% 1
75	<a href="http://www.usip.org">www.usip.org</a> Internet Source	<% 1
76	<a href="http://human-rights.unglobalcompact.org">human-rights.unglobalcompact.org</a> Internet Source	<% 1
77	"Your Role is Vital And We Can't Afford to Fail, Annan Tells MPs.", Africa News Service, Feb 13 2008 Issue Publication	<% 1
78	<a href="http://chatafrik.com">chatafrik.com</a> Internet Source	<% 1
79	<a href="http://ke.boell.org">ke.boell.org</a> Internet Source	<% 1
80	<a href="http://www.mideasti.org">www.mideasti.org</a> Internet Source	<% 1
81	<a href="http://ir.lib.uwo.ca">ir.lib.uwo.ca</a> Internet Source	<% 1
82	Transitional Justice in Unified Korea, 2015. Publication	<% 1
83	<a href="http://boa.unimib.it">boa.unimib.it</a> Internet Source	<% 1

84

maseno.ac.ke

Internet Source

<% 1

85

Justice and Economic Violence in Transition,  
2014.

Publication

<% 1

86

The Post-Election Violence in Kenya, 2015.

Publication

<% 1

EXCLUDE QUOTES ON

EXCLUDE MATCHES < 5 WORDS

EXCLUDE  
BIBLIOGRAPHY ON