INTERNATIONAL LAW AND JUSTICE: LONG-TERM EFFECTS OF THE ICC CASES AGAINST SIX KENYANS IN PROMOTING JUSTICE IN KENYA

BY

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DECLARATION

I certify that this is my original work and has not been presented to any other university or learning institution for academic purposes. To the best of my knowledge, the thesis contains no material previously published or written by another person, except where due reference has been made therein.

Signed ..... Date 24th Nov 2015

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This Research thesis has been submitted for examination with my approval as the University Supervisor

Signed ..... Date 24/11/2015

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DEDICATION

I dedicate this work to my dad Daniel, my Mum Josphine, my two brothers Edwin and Dennis and my niece Winnie for their relentless support, prayers and encouragement.

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LIST OF ABBREVIATIONS

ADRMs...Alternative Dispute Resolution Mechanisms

ECK...Electoral Commission of Kenya

ICC...International Criminal Court

ICTR...International Criminal Tribunal for Rwanda

ICTY...International Criminal Tribunal for Yugoslavia (former)

KRB...Kenya Roads Board

KTCs...Kenyan Traditional Communities

LRA...Lord's Resistance Army

MP...Member of Parliament

PEV...Post Election Violence

RPE...Rules of Procedure and Evidence

SPLA...Sudan People's Liberation Army

TJS...Traditional Justice Systems

UNSC...United Nations Security Council

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ABSTRACT

This research project was aimed at examining the long-term effects that the two cases against six Kenyans at the ICC have had in promoting justice in Kenya. After the indictment of six Kenyans by the ICC and eventual confirmation of four Kenyans for trial, political leaders turned the ICC case into a political mimic accusing the ICC of bias, prejudice against Africans and as a tool of neo-colonialism. The voice of the victims and ordinary Kenyans was drowned in these shouts by political leaders and the question of whether ICC as a complement of the local courts was overlooked. This research was therefore aimed at getting views of Kenyans, former displaced persons, legal respondents and international relations respondents in a bid to know if the ICC had helped promote justice so far.

Through an analysis and study of various relevant documents, the research found out that the Kenyan judicial system had performed far below the expectation. This was due to various factors established mainly shortcoming of the old Kenyan constitution like the lack of independence among judicial officers, and the fact that the Chief Justice and judges of the high court were presidential appointees hence prone to manipulation by the executive. However, the research established that Alternative Dispute Resolution Mechanisms like the Councils of Elders had performed well and won the confidence of many Kenyan.

The study confirmed the fact that the ICC had followed due process in indicting the six Kenyans who were accused of bearing the greatest responsibility for the 2007 PEV chaos as enshrined in various articles of the Rome Statute and as reported in views of respondents. The research also established that the ICC judicial process on Kenya has had far-reaching effects on promotion of justice in Kenya and established other areas where the process has had shortcomings like failing to protect victims properly and witnesses and poor legal representation of victims' interests. At the end, the researcher offered some recommendations to various concern parties like the government of Kenya, the judiciary, the civil societies and the ICC itself which are aimed at ensuring both the accused and the victims receive justice and address the various shortcomings established during the study

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

The International Criminal Court (ICC) came into force on July 1st 2002 as an intergovernmental organization that is headquartered in The Hague, Netherlands[1]. The need to create a permanent international court arose from the establishment of military tribunals of Nuremberg and Tokyo to prosecute some of the generals who caused World War II. After these tribunals, the General Assembly in 1948 in appreciation of the realist theory's assertion that politics is a struggle for power and in the struggle men will always wage war, called for the establishment of a permanent tribunal to try masterminds of wars and mass killings[2]. These trials also pointed to the appreciation by the General Assembly of the liberal assertion that international organizations have the ability to minimize the threats of war as they increase the interaction between member states.

To this end, the Rome Statute was enacted to create the ICC in the year 2000 and came into force in 2002. Appreciating the realist assertion that states are the sovereign entities in the international system, and therefore no power can be above the state, the founders of the Rome Statute established The ICC to complement the existing national judiciaries. This means the ICC's jurisdiction only applies when the national courts have proved unable and or unwilling to prosecute crimes so as to respect the sovereignty of states. This gives power to realist assertions that the state cannot subject its sovereignty to any other body or entity. The ICC can also initiate investigations when individual states refer cases to it (further recognizing the sovereignty of the state) or when the Security Council of the UN refers cases to it.

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[1] United Nations Department of Public Information, December 2002. *The International Criminal Court.* Retrieved 5 December 2006.

[2] Dempsey, T. (1998), *Reasonable Doubt: The Case against the Proposed International Criminal Court.* Cato Institute. Retrieved 31 December 2006.

The Rome Statute gives The ICC mandate to prosecute war crimes, genocide crimes, and crimes against humanity[3]. There have also been efforts to give The ICC mandate to try the crimes of aggression, but the legal authority has not yet been granted by member states.

The Republic of Kenya ratified the Rome Statute on March 15th 2005 and consequently, the Statute came into force on 1st June 2005 in Kenya, 3 months after ratification. In 2008, the Parliament of Kenya enacted into law, the International Crimes Act. The purpose of the International Crimes Act of 2008, as it states in its preamble is;

> "...to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions"... (*International Crimes Act, 2008*)

The International Crimes Act therefore in effect domesticated the Rome Statute and hence the Statute became part of the Kenyan laws. Article 3 of the International Crimes Act states that "this Act shall be binding on the Government" while Article 4 sub-article 1 states that the provisions of the Rome Statute will henceforth have the force of law in Kenya. Subsequently, Kenya became a party to the Rome Statute and fell under The ICC's jurisdiction.

Under the old constitution of Kenya, Article 136 sub-article 2(a), general elections are held after every five years (specifically on the second Tuesday of August). In 2007, 27th December Kenya went to the polls (under the old constitution) to elect the president, members of parliament and councilors as these were the elective seats under that constitution. After counting of the presidential votes, the defunct Electoral Commission of Kenya (ECK) announced incumbent

[3] Amnesty International (11 April 2002). *The International Criminal Court – A Historic Development in the Fight for Justice.* Retrieved 20 March 2008.

President Kibaki as the winner of the presidential seat. Following the announcement, supporters of the announced first runner's up-Raila Odinga-alleged electoral manipulation in favor of the pronounced winner and this was supported by electoral observers who alleged both parties had participated in electoral malpractices[4]. What followed was ethnic based violence partly attributed to supporters of Raila heeding to his call for mass protests. Ethnic attacks were directed at the Kikuyu, who were from President Kibaki's tribe[5]. The violence led to deaths of 1,133 people according to police estimates.

After about a month of turmoil, former UN Secretary General Kofi Annan arrived in Nairobi under the UN and African Union mandate the to bring both parties to a negotiating table. After fruitful mediation the two parties agreed to a coalition power sharing government (National Accord and Reconciliation Act) with President Kibaki as president and Raila Odinga as prime minister.

One of the agreements of the power-sharing deal was to set up a commission of inquiry to investigate the post-election violence in Kenya. The Commission of Inquiry into the Post Election Violence (CIPEV) chaired by appellate Judge Philip Waki was set up. The Waki Commission came up with a list of individuals it felt bore the greatest responsibility and handed it over to chief mediator Kofi Annan who in turn handed it to ICC prosecutor Louis Moreno Ocampo who opened investigations after the Kenyan Legislature failed to create a local tribunal to prosecute the perpetrators. Ocampo finally named six suspects whom he said bore the greatest responsibility and four of them (William Ruto, Uhuru Kenyatta, Francis Muthaura and Joshua Sang) were indicted by the pre-Trial chamber of the ICC on 8th March 2011. With time, the case

[4] *"Kenya rivals agree to share power"*. BBC News. February 28, 2008. Archived from the original on February 29, 2008. Retrieved March 1, 2008

[5] Nikita, B. (2011). *Kenya's Coalitions of Convenience and Ethnic Politicking*. Think Africa Press. Retrieved 11 December 2012.

against Francis Muthaura and Uhuru Kenyatta was dropped due to lack of enough evidence and the case against the remaining two is still continuing.

Following the indictment, reactions came in swift. The government appealed to both The ICC and the UN Security Council to stop the cases to no avail. The Kenyan Legislature approved a motion to remove Kenya from the ICC state party's list[6]. Reactions came from outside Kenya as well. After Uhuru Kenyatta was elected Kenya's president in 2013with William Ruto as his deputy, African leaders called for postponing of the cases as according to them, a sitting head of state should not be subjected to a criminal judicial process. Other scholars argue the ICC has become a tool for trying Africans.

However in all these reactions, the main point was lost. The ICC was formed to compliment local judicial mechanisms. As a complimenting actor therefore, the ICC should improve the access of Kenyans towards achieving justice. While most of the reactions to the Kenyan cases at the ICC were politically motivated, the legal aspect of whether the ICC had contributed in complimenting access of Kenyans to justice had not been looked into. This created the need therefore to conduct a research to find out how Kenyans felt the ICC process-in reference to the Kenyan cases-had impacted on their access to justice.

1.2 Statement of the Problem

Since independence, the Kenyan judiciary has been undergoing transformation that has seen it become a unified justice system that applies both Kenyan Customary law and the English law.[7] However the Kenyan judicial and justice system has had a bad history that has seen many (especially the poor) lose hope of ever finding justice in Kenya as the Integrity and Anti-

[6] *Parliament pulls Kenya from ICC treaty*, Daily Nation, 22 December 2010, retrieved 2011-04-30
[7] Abdullahi, A. (2002), *The Judiciary in Kenya: Who Should Reform It?* The Advocate, 2nd Quarter.

Corruption Committee which the government established in 2003 to probe the rot in the judiciary found out (Ringera Committee)[8].

To strengthen the pursuit of Kenyans for justice and compliment its weak judicial systems, Kenya signed the Rome Statute in 2005 bringing it under the ICC's jurisdiction. In December 2007, violence erupted after the due to disputed presidential elections. Due to lack of trust in prosecuting the cases, the hope of victims of the Post Election Violence (PEV) ever finding justice was raised when the ICC took up the matter and indicted four Kenyans as masterminds of the 2007 election violence[9].

Following the indictments, however, politicians turned the ICC cases into a political issue. The Kenyan parliament even passed a motion to delink Kenya from ICC. However, while so much attention had been given to the political rhetoric coming out of politicians about the ICC process, the legal question of whether the ICC had helped Kenyans achieve justice through this cases had been overlooked by many scholars. This research was therefore aimed at studying the Kenyan judicial system through existing relevant documents/information to find out its flaws and weakness as these flaws lay the basis for the ICC coming in to compliment it. The research sought to determine how the respondents felt the ICC had performed in helping achieve justice in Kenya.

1.3 Research Objectives

The general objective of this study was to examine the long-term effects the Kenyan cases at the ICC against six Kenyans have had as far as promoting justice in Kenya was concern.

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[8] Republic of Kenya, *Report of the Integrity and Anti Corruption Committee*, Government Printer (July 2003)
[9] Ojewska, N. (2014), *Uhuru Kenyatta's trial: A case study in what's wrong with the ICC*, Amsterdam. Netherlands

1.3.1 Specific objectives

(i) To examine relevant documents/information on the Kenyan judicial system in order to evaluate its performance since independence.

(ii) To study the procedures used by the ICC in indicting suspects and to find out if due process was followed in the indictment of the four Kenyans.

(iii)To find out the effects created by the ICC cases against six Kenyans in promoting justice in Kenya.

1.3.2 Research Questions

i. Has the post-independence Kenyan judicial system performed efficiently, competently and fairly?

ii. Was due process adhered to in indicting the six Kenyans?

iii. What effects have the cases at the ICC against six Kenyans had in promoting justice in Kenya?

1.4 Justification of the Study

Research on the effects the ongoing Kenyan case at the ICC has had is sparse and very limited. This is partly because the politicians blew the ICC cases out of proportion misleading masses about the ICC. They influenced their followers to have negative thoughts about the ICC and made it a purely political matter yet the ICC is a purely judicial issue. Since the judicial impact of ICC has been under-researched, there is little knowledge about the impact the ongoing cases are making in promoting justice in Kenya. This research will, therefore, provide a clear picture into the real impact the ICC cases are making in addressing the question of dispensing justice to Kenyans.

This research will also be of immense importance to the Kenyan judicial system. As a complementing judicial mechanism to the local courts, this research is aimed at bringing out the fact that Kenyans have more faith in the ICC than the local courts. This will inspire the local courts to work on their shortcomings so as to raise the trust of Kenyans in their own courts. The local courts can in turn learn from the professionalism of the ICC after going through the findings of this research as the ICC has acted as a benchmark to them in dispensing justice.

Several studies have been undertaken on the ICC. Much has however been to find out if the ICC is fair or biased (as some scholars and politicians have claimed) focusing little attention on the dispensation of justice part. This existing literature has therefore been largely knowledge obtained from legal respondents, politicians, opinion shapers and legal think-tanks. Research is sparsely available about the views of the citizens at the ground who are the primary targets the ICC aims at dispensing justice to. This research will, therefore, provide a rear glimpse into what the ordinary citizen thinks about the ICC.

The findings of this research will also be important to future researchers who may want to carry out further research to follow up on the recommendations therein.

1.5 Literature Review

This section examined relevant existing literature on the topic of study. It looked at the relationship between the ICC and Africa, looked at the ICC indictments by virtue of office one holds and finally examined the issue of immunity of high-ranking government officials before domestic foreign courts. Works by other scholars relevant to the topic of study were keenly examined and analyzed, and knowledge gaps in the existing literature were established.

1.5.1 The cooperative-conflictual relationship between the ICC and Africa

The ICC is a permanent criminal court whose statute was backed by a membership of 120 states in 1998 in Rome[10]. Hailed as a landmark of justice and a beacon of hope to oppressed people across the globe[11], the ICC has been pushed into conflict situations in a bid to dispense justice and promote the peace process as it wins both praise and condemnation[12].

Defenders of the ICC argue that the ICC has been an important factor in restoring peace and promoting democracy in the African continent. They argue that for many years, most ruthless and autocratic African leaders have threatened, compromised local judges or even corrupted them in order to avoid prosecution, but this is the ICC's strongpoint as the ICC judges and prosecutors are beyond reach and threats[13]. The ICC has therefore been a last resort at restoring justice for the survivors and victims of autocratic rule and abuse who due to political influence cannot access justice in their home states. The Court has acted as a deterrent to bad leaders who have always found their way around local judiciaries.

They praise the ICC's footsteps on the African continent that have seen it confirm, charge and imprison (attaining its first conviction) Thomas Lubanga of the Congo while arresting Germain Katanga and Mathieu Ngudjolo[14]. The ICC has also opened investigations in Northern Uganda, Darfur, and the Central African Republic. They mostly attribute the progress on the Juba talks

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[10] Ku, J. & Nzelibe, J. (2007) *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*? Washington University Law Quarterly, vol. 84, 2007.

[11] Waddell, N. & Clark, P. (2007) *Peace, Justice and the ICC in Africa*, London: Royal African Society, Available at: www.royalafricansociety.org/documents/Peace,JusticeandtheICC-seriesreport.pdf.

[12] Cobban, H. (2007), *Amnesty After Atrocity?: Healing Nations After Genocide and War Crimes*, Colorado: Paradigm Publishers

[13] Boell, C. (2012). *Perspectives: Political Analysis and Commentary from Africa*," p. 21, available at http://www.boell.de/downloads/2012-08-Perspectives_Africa_1_12.pdf.

[14] ICC. (2011). *The ICC and Community-Level Reconciliation: In-Country Perspectives—Regional Consultation Report*," p. 11, http://www.iccnow.org/documents/IJR_ICC_Regional_Consultation_Report_Final_2011.pdf.

between the government of Uganda and the leadership of Lord's Resistance Army (LRA) to the issuance of arrest warrants against the LRA leadership[15].

Critics of the ICC, on the other hand, argue that crimes committed during conflict are not continental-specific in nature (to Africa)[16]. There has been remarked absence of direct involvement and interest from great powers in Africa's conflicts and this may have contributed to the susceptibility of the continent to ICC's investigative work but this does not justify the ICC's over concentration in the continent[17]. Some African countries have raised questions about their sovereignty as they accuse the ICC of trampling over their national judicial mechanism.

1.5.1.1 The ambivalent relationship between the ICC and Uganda

The last two decades have seen Ugandans suffer at the hands of the Lord's Resistance Army (LRA) led by Joseph Kony, who initially claimed to be on a spiritual mission of cleansing the land. Lately, however[18], the LRA has tried to recast itself as a freedom fighting force of the economically and politically oppressed[19]. They have unleashed a reign of terror killing, raping, maiming and mutilating in advancing their campaign[20].

The government has provided a weak solution driving many of the oppressed into insecure camps where they are constantly attacked and distanced from their fertile lands hence subjected to hunger and poverty. In 2004, the Ugandan government sought the help of the ICC in bringing

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[15] ICC. (2012). *Understanding the International Criminal Court*, p. 12, available at http://www.iccint/iccdocs/PIDS/publications/UICCEng.pdf.
[16] Ibid 11
[17] Lomo, Z. (2006), *Why the International Criminal Court Must Withdraw Indictments against the Top LRA Leaders: A Legal Perspective.* Refugee Law Project, August 2006
[18] United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *A Ugandan Tragedy*, 10 November 2004.
[19] Ibid 14
[20] Office of the Prosecutor, *Background note on the opening by the Prosecutor of an investigation in Uganda*, Media Release by the Office of the Prosecutor, The Hague: ICC, 22 May 2007.

the LRA to justice[21]. The outcome was the issuance of arrest warrants against LRA leaders that jolted them into negotiations for fear of being arrested. The Ugandan government initially praised the ICC and attributed peace progress in the North to the arrest warrants. The government argued Uganda was on the path to promising lasting peace due to the ICC's efforts. An agreement to end hostilities between the LRA and the government has seen many survivors of the war return to their homes to re-start their lives.

However, the decision to issue arrest warrants has also drawn extensive criticism to the ICC. Mediators, academicians, and NGOs have all accused the ICC of undermining the fragile peace process by dangling the threat of international prosecutions. This has threatened the peace process ongoing in Juba. Scholars argue that besides the ICC offering retributive justice, it hinders traditional reconciliation efforts, and they say the ICC's efforts will perpetuate rather than prevent the conflict in Northern Uganda. This has also seen the Ugandan government withdraw its support for the ICC. The Kampala government has been especially critical of the ICC after the ICC indicted President Uhuru Kenyatta of Kenya[22].

1.5.1.2 The conflictual relationship between ICC and the Sudan

The UNSC referred the Darfur situation to the ICC for investigation and possible prosecution[23]. The Darfur region gained prominence in 2003 when the rebel group Sudan People's Liberation Army (SPLA) launched attached backed by the Justice and Equality Movement, against residents of garrisons in Darfur. The government of Khartoum responded with military might with a

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[21] Allen, T. (2005) *War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention.* London: Crisis States Research Centre, London School of Economics

[22] Voice of America. (2013). *Uganda, African Union condemn International Criminal Court Warrants* http://www.voanews.com/content/uganda -african-union-condemn-international-criminal-court-warrants-125451843/158470.html.

[23] "Accountability for Human Rights Abuses" in Abdelsalam H & de Waal A (eds.), *The Phoenix State: Civil Society and the Future of Sudan,* Trenton, New Jersey: Red Sea Press, 2000

counter-insurgency that was aimed at breaking the support base of the rebels[24]. The insurgency was finally crushed in 2004 leaving in its wake, widespread killings, rape, diseases, looting and razing villages, displacement and poisoning of water wells committed by both rebels and the military.

However, since given the mandate, the ICC has received much backlash and failed to obtain cooperation from the Sudanese government. Of the two indicted- Ahmed Mohamed Haroun[25] former Interior Minister and Ali Mohamed Rahman a militia leader who worked with him[26], none has surrendered to the ICC.

The prosecutor has been criticized for the two names he proposed for prosecution. Human rights activists accused the prosecutor of naming only two individuals saying he should have named more and arrested individuals placed around the president. South Sudan has also accused the ICC of ignoring comparable violations of law meted upon them by Khartoum as the Comprehensive Peace Agreement is silent on accountability of these crimes.

1.5.1.3 The criticism leveled against ICC in pursuing the Congo case

Of all the ICC's ventures into Africa, the Democratic Republic of Congo's (DRC) gives it a morale booster as it provided the court with its first ever conviction-Thomas Lubanga who was convicted of war crimes that were committed by rebels under his authority. This rebel committed deaths of many civilians though shootings, executions and starvation due to burning down of food fields and slashing food crops.

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[24] Toga, D. "The African Union Mediation and the Darfur Peace Talks" in Alex, de Waal (ed.) (2007), *War in Darfur and the Search for Peace*, Cambridge, MA: Harvard University Press.

[25] Ahmed Haroun had earlier served as the organizer of the Popular Defense Forces militia in South Kordofan during the 1990s, when there were intense attacks on the civilian population of the Nuba Mountains.

[26] Office of the Prosecutor, *Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593*, The Hague: ICC, 7 June 2007.

He was arrested alongside Germain Katanga and Mathieu Ngudjolo[27]. This was after DRC's President Kabila invited the ICC prosecutor to investigate war crimes in Congo in 2004.

The choice of the three was widely criticized by some quarters[28]. It was no doubt that the gravest crimes had been in Ituri province where the prosecutor had chosen to focus his investigations. However, the prosecutor seemed to exercise political caution to shield any connection falling back to President Kabila during the investigations. The prosecutor was accused of ignoring provinces like South, and North Kivu, where government forces had been backing rebels hence, would directly implicate Kinshasa[29].

The prosecutor has also been criticized about the narrow approach he took in the case against Lubanga. He showed an unwillingness to investigate crimes against Lubanga relating to training and financing of his rebels that would have implicated the Kigali and Kampala governments[30]. The prosecutor hence chose to ignore the role played by these two foreign governments in the Ituri conflict

1.5.2 Prosecution under ICC by virtue of the office held by suspects.

The prosecutor of the ICC targets individuals-not states-believed to bear the greatest responsibility for crimes under the Rome Statute committed under the jurisdiction of the court or referred to the court by the UNSC[31]. The ICC does not in such cases, take into account positions

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[27] Brubacher, M. (2007) "The ICC, National Governments and Judiciaries" in Waddell N and Clark P (eds.), *Peace, Justice and the ICC in Africa*, Meeting Series Report, London: Royal African Society, pp.22-23.

[28] Arsanjani, M. and Reisman, M. (2005) *Developments at the International Criminal Court: The Law-in-Action of the International Criminal Court.* American Journal of International Law, 99, pp.387-388.

[29] Black Star News, *ICC Probe for Nkunda,Lubanga DRC Militia Leaders*" by Allimadi M , 20 December 2007, www.blackstarnews.com/?c=122&a=4008

[30] P. Apps, *ICC Hopes for Uganda Trial in 6 Months, Then Congo*, Reuters, 26 January 2005, available at: www.globalpolicy.org/intljustice/icc/2005/0126ugandatrial.htm.

[31] *Report on the Immunity of Foreign State Officials* (No. 20, The Hague, May 2011) The Advisory Committee on Issues of Public International Law

held by the accused be they official or otherwise. Likewise, the court does not exempt anyone from prosecution due to the nature of his/her duties that he or she holds or had held during the time the crime was committed. Heads of State and Government, ministers or even MPs are thus liable to prosecution.

In exceptional circumstances, a person can be held liable for crimes committed by those under him who act on his orders or execute his commands. Therefore militia leaders, warlords, and even presidents can be tried under this clause.

1.5.2.1 The Prosecutor vs. Mohammed Ali and Francis Muthaura

In the charges before the ICC, the prosecutor alleged that Muthaura and Ali by virtue of their offices[32] with the help of the outlawed Mungiki sect, "agreed to pursue an organizational policy to keep the PNU in power through every means necessary, including by orchestrating a police failure to prevent the commission of crimes"[33]. In this period, Muthaura was the chairman of the National Security Committee while Ali was the police commissioner[34]. While Muthaura was accused of funding and organizing a series of meeting between other government officials and Mungiki leaders, Ali was accused of instructing the police not to intervene in the retaliatory attacks carried out by the Mungiki and for the police to provide a safe passage for Mungiki men travelling to Nakuru and Naivasha[35].

The Prosecutor also accused Ali of authorizing police to use excessive force especially against supporters of the opposition party. The prosecution alleged that at some point, Ali gave a 'shoot

[32] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya. International Criminal Court. pp. 79–83. Retrieved 27 January 2012
[33] Ocampo three" responsible for attacks in Nakuru and Naivasha, The Standard, retrieved 27 January 2012
[34] Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. International Criminal Court. 15 December 2010. p. 6. Retrieved 2011-07-12
[35] Ali: a very effective police boss. Nairobi Chronicle. 9 September 2009. Retrieved 4 November 2014.

to kill' order and the PEV report showed that gunshots caused the most fatalities among the dead[36].

While the Pre-Trial Chamber ruled that there was enough evidence that Muthaura acted as an indirect co-perpetrator with Kenyatta, they ruled that there was little evidence to link Ali or his actions to the PEV. However, these two were tried by virtue of the offices they held.

1.5.3 Immunity of selected state officials before foreign domestic courts

The idea that individuals can commit certain criminal acts that are considered international crimes[37], as outlined in international law regardless of their municipal law, has become well recognized. In the last decade, many serving as well as former leaders have been prosecuted, and some convicted for international crimes in international courts. This has seen convictions of Charles Taylor under the Special Court for Sierra Leone (SCSL), Jean Kambanda under the International Criminal Tribunal for Rwanda (ICTR), Slobodan Milosevic under the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Thomas Lubanga under the ICC.

In international courts, immunities entitled to some state officials mostly under municipal law has been waived in so as to prosecute these leaders unhindered[38]. However as far as domestic courts are concerned, it has been a controversial matter especially under crimes committed by foreign leaders. Several domestic courts have issued contradictory orders with some recognizing the immunity of such foreign leaders while others chose to shelve the immunity.

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[36] Kelley, K. (19 March 2011). Why Kenya failed to defer ICC cases at Security Council. Daily Nation. Retrieved 2011-04-30

[37] The term 'international crimes' is used here to refer to crimes recognized by international law itself, which impose criminal responsibility directly on individuals.

[38] *Advisory Report on the Immunity of Foreign State Officials* (No. 20) The Hague, May 2011 by The Advisory Committee on Issues of Public International Law.

In 2011, human rights activists in Switzerland submitted a complaint against U.S President George Bush for torturing of terror suspects in U.S custody on the eve of his planned visit to that country leading Bush to drop the visit. In March 2011, an *ex parte* was made for the arrest of former Soviet President Mikhail in London for torture claims[39]. However, it was dismissed by the court on ground that Mikhail enjoyed immunity as a member of a special mission in London at the time. In 2009, U.S station chief of the Central Intelligence Agency was convicted by an Italian court for the rendition of a terror suspect to Egypt. In Spain, the courts have issued arrest warrants for some South African leaders of government for torture claims. There is also an ongoing debate on the possible prosecution of former Chadian President Hissene Habre[40].

These cases have led to more questions arising on the immunity of foreign leaders as well as high-ranking officials due to developments in universal jurisdiction concerning international crimes. The truth is that prosecution against high ranking officials of another state will depend on various political and legal factors as well as laws of the prosecuting state[41]. It is evident from the above-mentioned cases that immunity against defendants was in some rulings considered and upheld and in others shelved. In the case of Djibouti v France concerning "Certain Questions of Mutual Judicial Assistance in Criminal Matters"[42] the ICJ ruled that it is up to the official's state to inform the suing state that the latter will not be obliged to consider or raise the matter of its own accord[43].

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[39] Kolodkin, R. (June 2010) *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc A/CN.4/631*, para 94(i).

[40] Arimatsu, L. (2010), *Universal Jurisdiction for International Crimes: Africa's Hope for Justice*, Chatham House Briefing Paper, IL BP2010/01,

[41] Franey, E (2010) *Immunity, Individuals and International Law,* Lambert Academic Publishing, pp. 146–47.

[42] *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)*, Judgment, ICJ Reports 2008, p. 177.

[43] This ruling contrast the position in the United Kingdom under the State Immunity Act 1978: where a foreign state itself is being sued, this requires the courts to respect any immunity it may have of their own motion

1.5.3.1 Officials entitled to immunity under majority foreign domestic jurisdictions

Heads of State; personal immunity has always been accorded to sitting (and at times former) heads of state. They have absolute immunity and inviolability against criminal jurisdiction in foreign states as reflected in many earlier civic and national criminal proceedings[44]

Heads of government/foreign ministers; these two positions have traditionally been linked with the head of state. Existing state practice among majority domestic jurisdictions, support the view that these two enjoy immunity equivalent to heads of state[45].

By state practice, other high ranking state officials like cabinet ministers, deputy presidents, military officials and other officials that states see fit to deserve immunity[46].

1.6 Theoretical Framework

This research study utilized two theories in explaining the topic of study and the relationship between the variables. These are realism and liberalism. Though the two theories were propagated by two schools of opposite views, tentacles of the two are spread throughout the topic of study hence none could be examined or used in isolation to explain the topic under study. Realism was mainly used to explain the events leading to the 2007/2008 PEV and the taking up of the case and functioning of the ICC while liberalism was sued to understand the creation of the ICC.

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[44] Sir Watts, A. (1994) *The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers', Recueil des Cours,* Vol. 247 .

[45] Article 21(2) of the 1969 Convention on Special Missions refers to both heads of government and foreign ministers and suggests that both, like heads of state, are entitled to privileges and immunities under international law in addition to those conferred by the convention itself

[46] In the Case Concerning *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda),* ICJ Reports 2006, p. 6, the court noted that in modern international relations ministers, other than the head of state, head of government and foreign minister, may represent their state internationally in specific fields and may bind it by their statements on those matters.

1.6.1 Realism Theory

Realism as a theory has been attributed to early works of Niccolo Machiavelli and Thomas Hobbes. It rose to prominence in the World War years of the early and mid 20th century[47]. Realism has been described as a 'spectrum of ideas' revolving from four key propositions, Egoism, Political Groupism, Power Politics and International Anarchy[48].

Realism argues that human nature has never been inherently compassionate but is competitive and self centered[49]. This can be used to explain the activities in Kenya in the run up to the 2007 elections. Politicians were tearing into each other and each trying to blackmail the other in order to win the presidential seat. According to Thomas Hobbes, humans are not necessarily selfish but are egocentric and conflictual[50]. In the run up to the elections, political party candidates tore into each other's reputations each trying to prove himself better to the electorate and this spread hatred and intolerance among their supporters. Hobbes argues the human mind's intuitive nature is an anarchic one. He argues this selfish nature makes them to seek more power (just like the presidential candidates did).

Realism argues that just like states, groups within a state always strive to attain as much resources and power as they can[51]. This was true of the political parties in Kenya in the 2007 elections. Each party wanted to get into power where they would have as much control of power and state resources as possible.

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[47] Carr, E. H. & Cox, M. (1939) eds 2001. *The twenty years' crisis, 1919-1939: An introduction to the study of international relations*. Houndmills ; New York: Palgrave.
[48] Goodin, R. (2010). *The Oxford Handbook of International Relations*. Oxford: Oxford University Press. p. 132
[49] Ibid
[50] Ashworth, L. 2006. Where are the idealists in interwar International Relations? *Review of International Studies* 32, pp. 291-308
[51] Schweller, R. (2003) "The Progressiveness of Neoclassical Realism", pp. 311–347 in Colin Elman and Miriam Fendius Elman eds., *Progress in International Relations Theory*, (Cambridge, Mass.: MIT Press)

On the international scene, realism is of the view that the international system is dominated by anarchy and that no power exists above the state nor is there one able to regulate state behavior. The formulators of the Rome statute understood this well. That is why the ICC was formed as a court of the last resort and only as a secondary complement to the local judicial mechanisms. To this end, the ICC will take up cases when states refer cases to The ICC[52]. In 2008, the Kenyan legislators did just that when they shot down a motion to set up a local tribunal to try the masterminds of the PEV and said they did not have faith in a local mechanism hence the ICC should take over the cases.

1.6.2 Liberalism Theory

Liberalism theory is the opposite of realism in terms of ideals it advocates for. Based on tenets of social liberalism, it came up in the Age of Enlightenment amongst western philosophers and is widely accredited to John Locke[53]. The theory supports ideas such as press freedom, civil and human rights, democracy, and ownership of private property. When it emerged, it opposed the prevailing system that advocated for the hereditary transfer of rulership, an imposition of a state religion, and divine rights that were apportioned to kings[54].

It was used by revolutionists in America and France to spearhead the American and French revolutions in a bid to overthrow tyrannical governments.

Liberalism acknowledges that war and conflict is a global issue of concern that requires a multilateral and collective approach rather than a national one. In this respect, states realized that they needed to come together (as they would not address it individually) and deal with the issues

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[52] Baylis, J., Smith, S & Ownes, P, *The Globalization of World Politics*, Oxford university press, USA, p. 95

[53] Locke believed in a liberal society that provides a constitutional government (rule by laws not by men) and freedom of religion, though, expression and economic interaction.

[54] Donohue, K. (2003), *Freedom from Want: American Liberalism and the Idea of the consumer.* Johns Hopkins University Press, USA.

surrounding war and in particular addressing the issue of the victims of war since war cannot be prevented. Thus in 2002, they drafted the Rome Statute to create a court that would try perpetrators of violence and enable victims seek reparations and justice.

Liberalism further argues that although anarchy and war within the state and the international system are inevitable, there is need to create and strengthen institutions that will act as deterrence to war[55]. This necessitated them to realize that local judicial mechanisms needed more strength to act as an able deterrence. They then created the ICC to act as a complement to the local judiciaries and as deterrence to violence and wars.

According to liberalism, a war within states is not as a result of human behavior but due to weak institutions that encourage humans to harm others[56]. After the disputed elections results of 2007, opposition candidate Raila Odinga said he would not go to court because the ICCs were corrupt and flawed. Had the Kenyan courts been efficient and trustable, he would have gone to court and most probably the ensuing violence would not have occurred.

Liberalist advice the international system to eliminate institutions that promote war and encourage states to carry out reforms so that democracy can help pacify relations[57]. Had elections in Kenya be truly democratic, the presidential candidates would have accepted the results as fairly won. But this did not happen, as even the commission set up to investigate the electoral commission concluded that it was not possible to say who won as both parties rigged

[55] Markwell, D. & Keynes, J. (2006). *International Relations: Economic Paths to War and Peace*. Oxford University Press. Chapter 1.
[56] Devetak, R. (2001). Postmodernism. In: Burchill, S. *Theories of international relations*. Basingstoke ; New York: Palgrave. pp.181-208
[57] Samir, A. (2004) *The Liberal Virus: Permanent war and the Americanization of the World*. New York: Monthly Review Press

the polls. The international community has created the ICC as one of the institutions to strengthen democracy by deterring wars.

1.7 Methodology

This section deals with the research methods that were used in carrying out the research study. These included the design, research site, population sampling, data collections, analysis and presentation.

1.7.1 Research Design

A research design is an outline guide of how the research findings are presented. A good research design enables the researcher to address the research question as unambiguously as possible[58].

This study used descriptive design. This was because the study was aimed at presenting the views, opinions, and attitudes of respondents as they described them in the questionnaires hence descriptive design was sufficient in reporting the findings that helped formulate recommendations.

1.7.2 Study site

Owing to the type of data that was collected, there was more than one study site. Information from ordinary Kenyans was collected from the villages around the Kakuma Refugee Camp. Information from legal respondents was collected from two legal firms within the Nairobi central business district. Data from international relations respondents was collected from the School of

[58] Law, J & Lodge, T. (1984). *Science for social scientists*. London: Macmillan.pp.22-43.

Development Studies at Maseno University and Moi University while information from Internally Displaced Persons (IDPs) was collected from the Kakuma Refugee Camp.

1.7.3 Target Population

The study aimed at collecting data from four categories of respondents: legal respondents, international relations respondents, IDPs/ former IDPs and ordinary Kenyans. The target population for the research was 100 respondents who were divided as follows;

There were 20 questionnaires issued to legal respondents, 10 interview requests sent to international relations respondents, 10 questionnaires issued to IDPs and 60 questionnaires issued to ordinary Kenyans. This was because the ordinary Kenyans and IDPs were the primary focus of study as the ICC is aimed at providing justice to Kenyans. Gender issues were adhered to in this issuance of questionnaires and interview requests in a ratio of 50:50 in each of the four categories.

1.7.4 Sampling

The study aimed at getting views of various respondents about the contributions of the ICC to the promotion of justice in Kenya. Since this target population (Kenyans) was too big, it was practically impossible and cumbersome. Therefore, a sample was selected from this entire 'population'.

The study used two sampling techniques. For legal respondents and international relations respondents, non-probability sampling (purposive sampling method) was used. This is because this group of individuals is rich in the information required on the ICC process.

For the ordinary Kenyans and IDPs, probability sampling (simple random sampling method) was used to select respondents from among the formally educated adults (18 years and above). The target population and sample size are summarized in Table 1 below;

Table 1.0 Target Populations and Sample Size

Target Group	Male	Female	Total Number
Legal Respondents	10	10	20
International Relations Respondents	5	5	10
IDPs	5	5	10
Ordinary Citizens	30	30	60

1.7.5 Data Collection

The data utilized in the research was collected from both primary and secondary sources.

1.7.5.1 Primary Data

In collecting primary data, administering of questionnaires and interviews was used. All the target groups were important to the study, so the data collected from each was given equal consideration. Legal respondents understood the legal process better and provided expert opinion on the ICC process while international relations respondents understood how international organizations and states relate. Ordinary Kenyans and IDPs were also able to give views on whether the ICC promoted access to justice, especially for PEV.

1.7.5.2 Secondary Data

The research utilized secondary sources of data which will included various publications such as Donohue (2003), Abdullahi (2002), Ojewska (2014), Wolfrum R. & Weissbrodt (1998) and Bottigliero (2003) that touch on the Kenyan judicial mechanism as well as the functioning of the ICC. Various books too, as well as the ICC website, were extensively used as were various ICC bulletins and press releases. ICC court proceedings were also used.

1.7.6 Data Collection Instruments

The study utilized the following instruments;

Questionnaires; They were aimed at aiding the respondents in freely expressing themselves especially about those views they could feel uncomfortable giving in an interview but can note down. Questionnaires are effective in collecting clear cut information, examining basic attitudes and measure the satisfaction level of individuals with a service or product[59]. Enough writing space was provided for the respondents to express themselves.

Interviews; They were aimed at collecting credible data as the researcher engaged them one on one. One on one interviews help respondents express themselves freely unlike interviews that maybe conducted in groups. Interviews also aid in making the respondents give detailed opinion that they may not give in questionnaires due to lack of enough writing space[60].

[59] Oppenheim, A. (1992) *Questionnaire design, interviewing and attitude measurement* (2nd edition). London: St Martins Press
[60] Ibid 68

1.7.7 Data Analysis and Presentation

The data collected from the study was first transcribed. It was then broken down and processed simultaneously. The research heavily relied on thematic and content analysis as one of the chief techniques. The transcribed data was studied and used to come up with themes which were then merged to create wider themes, and these were used to answer the research questions.

The information was presented in charts, tables and bar graphs for easy interpretation.

1.7.8 Ethical Issues

The researcher was guided by globally accepted ethics of research. The respondents were assured of the confidentiality and assurance that the data they provided would only be utilized for academic purposes i.e. answering the research questions. Research considered as ethical ensures no harm comes to the respondents be it political, legal or psychological to the respondent[61]. The researcher hence upheld ethical requirements even to respondents who were not aware of them. The respondents' privacy, confidentiality, and integrity were well observed throughout the exercise.

1.8 Definition of Key Terms

I.C.C: The initials ICC have been used as acronyms of various institutions. However for this study, ICC will be used to mean the International Criminal Court.

M.P: The initials that are widely used to stand for Member of Parliament will be used to mean Member of Parliament of Kenya in this study.

P.R.E: These initials will be used to mean the Rules of Procedure and Evidence of the ICC.

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[61] Booth, C., Colomb, G. & Williams, M. (1995). *The craft of research.* Chicago: The University of Chicago Press. p.258.

The Prosecutor: This term will be used to refer to the prosecutor of the International Criminal Court.

1.9 Chapter Breakdown

This research paper was divided into five chapters. The first chapter dealt with the research proposal. It first mapped out the background information on the topic under study. It then stated the problem of the statement and outlined the objectives and research questions. Then relevant literature was studied in details under the literature review. The methodology outlining how the research was conducted concluded the chapter.

Chapter two tackled the first objective. It aimed at answering the research question 'Has the post-independence Kenyan judicial system performed efficiently and competently'? The chapter began by examining the measures of 'efficiency and competency' in the judicial system, then analyzed past researches, publications, documents, reviews as well as journals to answer the research question.

Chapter three handled the second objective that sought to address the research question 'Was due process adhered to in indicting the six Kenyans'? The chapter begun by analyzing the ICC due process in indicting a suspect before the court and then analyzed data collected from law respondents and international relations respondents in addressing the research question.

Chapter four answered the third research question 'What effects have the cases at the ICC against six Kenyans had in promoting justice in Kenya'. It analyzed the data collected from former IDPs and ordinary Kenyans to answer the research question.

The last chapter dealt with recommendations and conclusion of the research. After studying the findings, the researcher gave a summary of the whole research, a conclusion as well as recommendations to the shortcomings established during the study.

CHAPTER TWO: PERFOMANCE OF THE POST-INDEPENDENCE KENYAN JUSTICE SYSTEM

2.1 Introduction

This chapter is aimed at addressing the research question 'Has the post-independence Kenyan judicial system performed efficiently, competently and fairly'? It is important to first understand the history of the Kenyan Judiciary as most ills in the judiciary today were inherited from the colonial Kenyan Judiciary. Thus the chapter first traces the history of the Kenyan Judiciary under the colonialist and how it worked.

The chapter then defines and discusses the measures of 'efficiency, competency and fairness' in the performance of the judicial system. It then discusses and assesses the performance of the Kenyan Judiciary

2.2 History of the Kenyan Judiciary under the colonial government

Like many other African countries, dispensation of justice in Kenya has been in existence long before colonialism. Many communities in pre-colonial Kenya used various forums to dispense justice like family gatherings, at the shrines and early churches. Kenyan Traditional Communities (KTCs) also used other mechanisms of conflict management and resolution such as mediation (mainly by respected community elders), arbitration and reconciliation.[62]

Until 1895, Kenya had no formal structured legal system and most early tribes used the informal avenues to solve disputes. The country was also administered through the Imperial British East Africa Company (IBEA) which carried out the wishes of the British government throughout East

[62]Tudor, J. (1982) *The Law of Kenya*. 3rd Ed. Kenya Literature Bureau Publishers, Nairobi Kenya.

Africa[63]. IBEA had earlier established the first formal court in the year 1890 and appointed Judge A. W Jenner as its first judge. The court was established to protect the interests of the IBEA Company which carried out the wishes of the British Kingdom and expanded its interests into Africa. In 1896 IBEA changed its name to East African Protectorate and consequently was renamed Kenya Colony and British Protectorate in 1920[64].

The settlement of more British personnel in the Kenya saw the rise of a need to provide an administrative and legislative system to use in ruling the inhabitants of the land. To make their administration easier, the British colonial masters imported British systems of governance and British laws that had been codified in India. The imported laws were meant to protect the interests of the colonial masters and had nothing to do with justice to the Kenyan people. The British thus completely disregarded the already existing conflict mechanisms in among the Kenyan people and imposed a biased foreign system that the local did not even understand how it worked[65].

The early Kenyan legal system under the colonial masters was thus shaped in the image of the English legal system and lasted over six decades. In this legal structure, all judges were exclusively European who had little or no disregard for African interests. The rulings given by these judges always favored the whites, and whenever two whites wronged each other, the courts encouraged them to solve their matter out of court.

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[63] Wangũhũ, N. (2006) *Kenya's Colonial Administration and Justice- Foundation of the Nation.* Gatundu Publishers.

[64] Todd, S. & Griebel, M (2006): *Building The Judiciary in East Africa.* John Wiley & Sons, Inc July 2003

4 Denyer, S. (1998) *African Traditional and Colonial Justice.* Nairobi, Heinemann Educational Books Ltd.

After much resistance to these biased system of justice from natives over years, the colonial masters allowed the Kenyan citizens to practice African Customary law, the Hindus to practice Hindu Customary Law and the Muslims and Arabs practice Muslim law, as long as these did not conflict with the English law. Where these practices contravened English law, the Native practices were overruled and English law was subordinate in all aspects[66]. The judiciary thus became a tripartite agreement of subordinate courts i.e. Muslim Courts, Native Courts, and British formal courts. The system was later modified into a dual system of superior courts for the colonialists and inferior courts for natives[67]

Over time, further protests were witnessed from the Natives and resistance grew to white colonial rule. To calm the situation, the colonialists gave power to native local village elders, chiefs and headmen to handle and hear disputes among natives as happened before the coming of the colonialists. However, these Native leaders were handpicked by District Commissioners who were white officers. They were threatened and coerced by the colonial masters and hence in the end, ended up serving the interests of the former[68].

The colonialists developed these traditional organs of settling disputes into tribunals which were formally recognized in 1907 under the Native Courts Ordinance promulgation[69]. It saw establishment of tribunals for each ethnic community in Kenya[70].

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[66] Hardenberg, T (2004). *The Courthouse: Justice and the Rule of Law in East Africa.* New York, New York Publishers
[67] Jiwaji, D. (1981) Law Courts in *Kenya: Investigative Report.* University of Nairobi
[68] Gichangi, T. (2002) *Courts in Kenya: The steps and missed steps*. Nairobi, Longhorn Publishers
[69] Ibid
[70] Ibid

2.2.1 How the Native Court Tribunals worked

The dual tribunals were set up, controlled and administered by the Chief Native Commissioner appointed by the colonial masters. The tribunals were established at the division and district level[71]

At the Coast, however, the governor appointed a *Liwali* to adjudicate conflicts between members of the Muslim community. Appeals from the tribunals were filed to District Officers (DOs), District Commissioners (DCs) and to Provincial Commissioners (PCs) who were all white officers. Those satisfied with the decisions of PCs would file appeals at the Supreme Court for cases where those involved were natives. Where whites were involved, the cases were entrusted to white magistrates and judges who always ruled in favor of the whites.

The Supreme Court was led by the Chief Justice and all administrative duties were carried out by the registrar of the Supreme Court. This system of segregated Provincial Administration continued until 1962 when the judicial functions were transferred to the judiciary.

2.3 Measures of efficiency, competency and fairness in the Kenyan judicial system today

In judicial circles, the term efficiency refers to the economical application of available resources in accomplishing set goals and improving public safety. Competency refers to the ability of judicial stakeholders to dispense their duties while fairness deals with ensuring equal treatment is given to like offenders and that sentencing reflects the fairness of the judicial system[72].

Article 159 of the Constitution of Kenya sets the benchmark for efficiency competency and fairness in the judicial system. It states that in the exercise of dispensing justice tribunals and

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[71] Brooks, J. (1999) *Colonial Courts in Kenya*, Princeton, Princeton University

[72] Reaves, B. (1999) *Law Enforcement Management and Administrative Statistics, 1999.* Washington, D.C.: Bureau of Justice Statistics.

courts of law are to be guided by the following principles of law[73]: that justice shall be done and be seen to be done to all people regardless of their status, justice shall not under any circumstances be delayed, and all alternative dispute resolution mechanisms like arbitration and mediation shall be promoted at all times as long as it shall not contravene the constitution, the bill of rights or be repugnant to morality and justice. To further ensure nothing hinders the process of justice, Article 161 of the constitution dictates that the judiciary is only subject to the law and the Constitution itself and not to control of any other authority or person[74].

The United States Department of Justice in collaboration with Princeton University came up with a benchmark document 'Performance Measures for the Justice System' commonly referred to as the Princeton Project in 1993. This document is widely used to measure efficiency competency and fairness of judicial systems across the world[75]. According to the Princeton Project, to measure efficiency, competency and fairness in the judicial system, one cannot examine the courts in isolation but also consider relevant stakeholders i.e. other dispute resolution mechanisms, prisons and correctional facilities, and the police. Of all these though, the courts[76] carry the most weight.

The Princeton Project agreed that for there to be effectiveness, competency and fairness in the courts, courts must be accessible and open not in terms of the buildings but the procedures and response of judicial officers to the public. To achieve this, the conference agreed that courts should conduct their proceedings in public, facilities at the court should be accessible, safe and easy to use and all appearing in court ought to be given opportunity to participate efficiently.

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[73]Constitution of Kenya (eds2010), National Council for Law Reporting, Nairobi, Kenya.
[74]Ibid 2
[75]During the conference rigorous discussion and debate with stakeholders of the criminal justice system took place to come up with the document
[76]The term court here refers to all stakeholders in trials including the courts, prosecution and defense

Time is also a critical factor. The court should act in an expeditious and timely manner as unnecessary delay means lack of competency and defeats fairness[77]. The court should also provide equal protection, application and consideration of the law to all those who have business before it.

The effectiveness, competency and fairness of the prisons also contribute to the performance of the judicial system according to the Princeton Project. To achieve these measures, prisons should be impervious in both directions (inward and outward) hence it should keep prisoners in. The prison should be safe to all prisoners, and staff and order should be kept throughout in the facility (i.e. rules adhered to). Prison administrators should be able to administer compliance to prison rules. Rehabilitation programs should be provided to the prisoners as well as proper healthcare[78].

The police too play a significant role in promoting impartial justice and fairness. According to the Princeton Project, police handle criminals since the time they are apprehended until the time they are produced in court for trial and also act as a link between justice and crime prevention. The project urges police to treat members of the public in an appropriate manner at all times. They should ensure safe communities so that criminals do not terrorize law abiding peaceful citizens. They must also assist crime victims to get back to their normal lives and establish strong links between them and the society so as to develop and cultivate non-criminal behavior[79].

[77]The appendix of the commission's report contains a listing of each performance measure, the data collection methods, and the personnel to be included in the evaluation

[78]*Performance measures for the justice system*, Discussion Papers from the Princeton Project, U.S Department of Justice 1993

[79] Ibid 9

2.4 The performance of the post-independence Kenyan judicial/justice system

Even after the colonial masters established the courts of law, KTCs widely used the local mechanism to sort out grievances with their neighbors only resorting to the courts of law as the last option. This was because they knew the courts of law's proceedings were always adversarial unlike them who wanted to strike a reconciliatory approach. The Kenyan law system has however grown since independence and applies a dualist approach of incorporating customary law alongside English law. To address the research question, the judicial system will be analyzed under different sub-topics.

2.4.1 Independence and performance of the judiciary/judicial officers in Kenya

In a research study done by AfriMAP and the Open Society Initiative for Eastern Africa (OSIEA)2011[80], found out that Kenyan judiciary has largely lacked independence for a longer period of its existence and this has been one of the foremost threats to observance of the rule of law in the country. The old constitution enacted in 1963, gave the president sole discretion in appointing and dismissing the Chief Justice as well as judges of the high court and court of appeal. This greatly worked to undermine the dispensation of justice and thus compromised the fairness of judges in applying the law as appointed judges worked to serve the interests of the appointing authority as well as the Executive at large. In this respect, many citizens who brought cases to courts against the state or high ranking officials lost the cases as judges feared for their jobs making many Kenyans lose trust in the courts.

[80]Mbote, P. &Akech, M. (2011) *Kenya: Justice Sector and the Rule of Law*, A Research study for AfriMAP and Open Society Initiative for Eastern Africa (OSIEA): Johannesburg: Open Society Initiative for Eastern Africa.

The old constitution did not also have a clearly laid out process of how judges would be removed from office according to Nowark (2003)[81]. This finding was supported by similar findings by the Integrity and Anti-Corruption Committee that was set up in 2003 to investigate allegations of corruption in the judiciary (Ringera Committee)[82]. The committee noted in its findings that it did not have a well defined basic due process to guide it in the dismissal of judges and hence admitted that some of the dismissed judges might not have been in fact guilty. The competency of the commission's findings was therefore attributed to a weak constitution that did not grant fairness in dismissal of judges.

These problems that undermined the competency of the judiciary were further identified and highlighted in the Report of the Task Force on Judicial Reforms sitting in 2010[83]. The report noted that the judiciary was very inefficient and incompetent as constituted under the old constitution due to several shortcomings related to its lack of independence among them lack of an independent judicial service, lack of merit based appointment criteria for judges, corruption and unethical behavior among judicial officers due to political intimidation, and poor terms of service for judicial officers.

According to the AfriMAP study many judicial officers work under poor terms and in poor facilities making their competency an issue. A local newspaper-The Nairobi Star on 23rd September 2013 reported of a magistrate in northern part of Kenya who has to work under a tree due to lack of office space and a courtroom[84]. Insufficient funding due to dependency on the

[81]Nowak, M., (2003) *Introduction to the Human Rights Regime in Kenya.* Princeton University

[82]Republic of Kenya, Final Report of the Integrity and Anti-Corruption Committee, Government Printer (July 2004).

[83]Republic of Kenya, Final Report of the Task Force on Judicial Reforms, Government Printer (July 2010).

[84]Mati, M., 'Justice under the Tree as Garissa magistrate has no courtroom', *Nairobi Star*, 23 September 2013.

Executive for budgetary allocations under the old constitution has seen poor quality decision making in the courts

Under the new constitution, however, the study by AfriMAP found out that several shortcomings related to judicial independence are being addressed. The study cited the giving of autonomy to the judiciary and de-linking it from the executive. The newly created Judicial Service Commission (JSC) is now mandated to 'promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice' and recommends judges to be appointed by the president. The JSC also lays out elaborate mechanisms for the dismissal of judges.

The AfriMAP report found out that after the new constitution was enacted, the judiciary has made significant progress and changes. Today, the wheels of justice roll faster for much litigation and there is robust enjoyment of human rights due to impartial and fair judgments. Several bodies working in collaboration with the judiciary have been formed to enhance delivery of justice like the Kenya National Human Rights and Equality Commission, the National Cohesion and Integration Commission, as well was remodeling of the Law Reform Commission.

The country has made progress, and the courts are on their way to becoming the true custodians of the rule of law. Hence the efficiency, competency and fairness of the judiciary have greatly improved.

2.4.2 Performance of the criminal justice system in Kenya

In their special Report of 2004, Ngugi et al found out that the Kenyan criminal justice system has wide and unregulated discretionary powers[85]. In the report the authors found that exercising these

[85]Ngugi, R., et al, *Security Risk and Private Sector Growth in Kenya*,' Kenya Institute For Public Policy Research (KIPPRA) Special Report No. 6, 2004.

powers has led to the persecution of the citizen. They continue to say that the existing legal and policy framework cannot pass the test of efficiency and competency as it only serves the interests of the ruling class leading to abuse of rule of law in criminal justice.

The authors found that the two key institutions of the criminal justice system-the prisons and the police-work under appalling conditions that often make then turn against the public they should be serving. The authors conclude their report by saying, "it can hardly be said that the rule of law prevails in the Kenyan criminal justice system.[86]" This report has been supported by various findings in different criminal justice fields as follows:

2.4.2.1 Crime Rates

According to the UN Habitat statistics, Kenya has witnessed a rapid rise in the level of crime in the last two decades[87]. The statistics show there is also a rise in white-collar crimes across Kenya due to various factors like rapid urban population growth and rising urban unemployment. This is collaborated by the Kenya Police Force which points out that the problem of insecurity heightens during the election and post-election period especially the 2007/2008 post election period.

The CIPEV report on aftermath of the post-election period also attributed this high crime to police activity[88]. The CIPEV found that the police used excessive force at most times as most victims died of bullet wounds. The Commission in its report also indicated that there was prove that police murdered, gang-raped and looted civilian property[89].

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[86]Ibid 14
[87]UN Habitat, *Crime in Nairobi: Results of a City-Wide Victim Survey*, Safer Cities Series (2002).
[88]Republic of Kenya, Report of the Commission of Inquiry into Post Election Violence 346 (October 2008).
[89] Ibid pp386-395

Other reports have also similarly accused police of committing crimes instead of preventing them raising the doubt about the efficiency and competency of the police to combat crime that they take part in. Police have been even accused of misusing firearms to commit crime going against Section 28 of the Police Act. According to Prof. Alston (a UN special Rapporteur), extrajudicial executions are widespread in Kenya with some killings appearing opportunistic and personal[90]. In a similar finding, Amnesty International through a study found out that torture and unlawful state killings have persisted in the last decade[91].

2.4.2.2 Poor Data Collection

There is scanty information in existence in the public domain on crime prevention in Kenya. Most Kenyans in fact perceive the criminal justice system as one which only responds to crime once it has happened and not one that prevents crime from being committed. This therefore is an indication that information on crime is either lacking or inaccessible by the public. Whenever such information exists, there is always much reluctance to publicize it according to the UN-Habitat[92]. This failure in collection and publication of crime data has been occasioned by many factors:

The manner in which police handle some cases has made some members of the public get discouraged to ever report crimes. The police label some cases as 'unfounded' claims even before they have conducted investigations. Good examples of these are domestic cases which the police are at most times unwilling to investigate telling the complainants to go solve their

[90] United Nations Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Kenya*, 26 May 2009

[91] Amnesty International, *The State of the World's Human Rights.* Amnesty International Report 2009.

[92] UN Habitat, *Crime in Nairobi: Results of a City-Wide Victim Survey*, Safer Cities Series (2002).

differences at home. This has made most poor Kenyans to resort to formal mechanisms of resolving conflicts according to the UN-Habitat report.

The police also lack adequate resources to collect data and carry out investigations. A good example is sexual crimes which require immediate laboratory examination and evidence collection. This calls for speedy reporting, medical examination and collection of evidence to be able to obtain a conviction. However many victims have no access to police stations or hospitals.

This leads to low convictions discouraging other victims from reporting the crimes.

Another reason is that the Kenyan criminal justice system does not award compensation to complainants. Unlike in civil cases where compensation is normally awarded, the criminal system appears punitive. This forces complainants to initiate civil proceedings which are lengthy and expensive that the poor cannot afford. This puts a strain on complainants who cannot afford legal services.

Poor schemes of witness protection also discourage many witnesses and victims from coming forward. The criminal justice system lacks a proper equipped witness protection unit which can offer protection to witnesses and victims of grave and sensitive cases.

2.4.2.3 Arrest and Prosecution

According to the AfriMAP study, the legal framework governing the Kenyan criminal justice system has several flaws. The study found out that many cases had been thrown out of the courts due to a low threshold of evidence. The study found out that two factors contribute to this; a prosecution being conducted by police officers who are not trained legal personnel and hence the difficulty these police officer prosecutors encounter in challenging advocates conducting the defense, and the inability of these policemen to ensure all legal loopholes are filled.

The Kenya Police Force agrees to these findings adding their standing orders[93] allows them to use policemen above the rank of inspector as prosecutors though the police prosecutors are being phased out.

In an interview with KTN TV, then police commissioner pointed out that the other factor affecting the competency of prosecutions in Kenya is the practice of giving transfers to investigating officers[94]. The Commissioner said once they have been transferred, it becomes hard to attend court proceedings despite being important witnesses in the cases. This leads the cases to drag for a long time compromising efficiency and fairness.

A report by an experienced lawyer Imanyara found out that implementation of the law is also problematic is the Kenyan criminal justice system. In his report, he says that justice is an elusive concept for the vulnerable and the poor in Kenya[95]. He argues the Kenya Anti-Corruption police under the old constitution would only prosecute small fish while the rich are let free. In this report, he alleges that the Attorney General, who under the old law had powers to determine who was to be prosecuted, did do selectively and for those who decided to prosecute private suits, the attorney general would use his power to terminate the suit.

With the advent of the new constitution however, public prosecutions have been put under an independent Office of the Director of Public Prosecutions (ODPP). The ODPP is currently in the process of replacing police prosecutors with legally trained civilian prosecutors. However much of the criminal justice system has not experienced any significant changes.

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[93]Kenya Police, Force Standing Orders, chapter 48, section 7 (i).

[94]Commissioner of Police, KTN interviews, 26 June 2009

[95]Imanyara, G. (2004), 'Systems and Structures Set up by the Government to Fight Corruption: How Effective and What More Can Be Done?' in *Strengthening Judicial Reforms in Kenya* Volume IX: The Anti-Corruption Court in Kenya 49

2.4.3 Performance of Prisons and Rehabilitation centers in Kenya

Chapter 90 of the Laws of Kenya empowers the Prison Service to contain offenders and keep them in safe custody so as to rehabilitate reform and aid in administering justice for the protection of the community, its stability and integration. According to the Prison Service website, there are 89 penal institutions in Kenya, two borstal institutions and a single youth corrective centre[96]. A review by Musembi in 2003 stated that imprisonment is the most common form of punishment in Kenya and that 40% of inmates are remandees[97].

Most remandees according to the report have spent a lot of time behind bars due to unnecessary delays in the hearing of their cases with some running up to two years yet they are charged with petty offences. The report noted that most of the delays are caused by transfer of magistrates in the midst of ongoing hearings.

According to statistics obtained available at the Nairobi's Industrial Remand home, most prisons are overcrowded in Kenya. The Remand had a population of 4,805 inmates in July 2006 against its official capacity of 1000 inmates[98].Lang'ata women's prison had 353 against its official capacity of 200[99].

The OSIEA study found out that of the 34,500 offenders behind bars in 2006, 18000 were convicted of small offences of less than three years in prison. The study report then felt these petty offenders should have been given non-custodial sentences to decongest the prisons.

The Standard Newspaper of 17th June 2009 reported that the overcrowding problem in Kenyan prisons has been worsened by inadequate and old infrastructure putting lives of warders and prisoners at risk. The newspaper noted that the inability of prisoners to get conjugal rights has

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[96]Sourced from the Prisons Service website, www.prisons.go.ke

[97]Musembi, C. (2003) *Review of Experience in Engaging with justice systems in Africa.* Institute of African Studies

[98] Statistics obtained from Nairobi Industrial Area Remand Home.

[99]Statistics obtained from Lang'ata Women's Prison

led to unprotected sexual intercourse between male prisoners. The standard found out that there are inadequate medical facilities to cater for the prisoners making them a hotbed of diseases. Competency of the security personnel at the prison was also compromised as some prisoner would use mobile phones from inside the prison to commit crimes[100].

In its 1996 report, the Kenya Human Rights Commission reported that Kenyan prisons are chambers of death that are unhygienic and overcrowded. The report found that prisoners slept on cold floors, and communal cells were poorly lit and ventilated. There was also poor sanitation due to acute water shortages[101].

The Kenya National Commission on Human Rights (KNCHR) in its 2004 report stated that some reforms had been initiated in the prisons. The department has started an open door policy enabling NGOs and researchers to visit and highlight the plight of prisoners. The policy also allowed paralegal persons to access prisoners and provide legal assistance. The Governance Justice Law and Order Sector (GJLOS) also initiated reforms in 2003 that seen the putting up of HIV/Aids units in various prisons and offer academic lessons or vocational training[102].

2.4.4 Performance of the Traditional Justice Systems in Kenya

According to a research carried out by the Federation of Women Lawyers in Kenya (FIDA) in 2008, complicated court process and delay in judicial processes have pushed many to seek alternative forms of justice in Kenya[103]. The most common of this are the Traditional Justice Systems (TJS). Majority of those seeking justice from the TJS are women who have no means of affording the high cost of litigation in formal courts.

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[100] *Prisoners Spread Terror from Jail*, Standard, 17 June 2009.

[101] Kenya Human Rights Commission, *A Death Sentence: Prison Conditions in Kenya* (1996).

[102] Kenya National Commission on Human Rights, *Beyond the Open Door Policy : A Status Report on Prison Reforms in Kenya* Jan 2003–Dec 2004 (2004).

[103] FIDA-KENYA. *Traditional Justice Systems in Kenya: A Study of Communities in Coast Province. Kenya*, (2008), A Research Report

In a paper presented at the Codesria 11th General Assembly in Mozambique, Kimathi indicated that many Kenyans have since independence relied on TJS to solve their disputes and even if the colonial government discouraged them terming them as retrogressive, they have continued to flourish[104]. The Penal Reform International in its report of the year 2010 supported these findings and said that TJS are more prevalent in Africa Today than before[105].

According to the FIDA study, men generally supported TJS. They say the TJS are fair, accessible, affordable and efficient as compared to formal courts. The male respondents also recognized the competence of TJS in providing amicable solutions. The respondents reported that even in serious crimes such as homicide, TJS always tries to reconcile families and thus restore cohesion. Some male respondents also said TJS are a source of cultural and ethnic identity[106]. On their part, the female respondents felt TJS were accessible, affordable and delivered justice promptly. However, some female respondents felt TJS composed of men only are at times biased to women due to cultural attachments.

These findings were similar to those of a study done by Muli in 2003 in finding out the experience of women who were victims of domestic violence and sought informal dispute resolution mechanisms. She discovered that most women preferred TJS as they would freely express private matters without much humiliation and intimidation[107].

A report by the Coalition of Violence against Women (CEDAW) found out that there is also active cooperation between the TJS and the formal system of justice. They found out that in cases where a litigant of TJS is not satisfied with their decision, the issue is appealable to the

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[104]Kimathi, L. (2005) *Non state Institutions As a Basis of State Reconstruction: The Case of Justice Systems in Kenya.* Paper presented at the Codesria 11th General Assembly, Maputo, Mozambique.

[105]Penal Reform International (PRI) (Report: 2000). *Access to justice in Sub Saharan Africa. The Role of Traditional and Informal Justice Systems*

[106]Ibid 24

[107]Muli, E. (2003), *Kiamas: Rethinking Access to Justice in Domestic Violence Cases in Kenya,* JSD Dissertation, Stanford University.

area chief and the chief will have a sitting with one of the elders who had heard the matter previously to determine the appeal. Also, the TJS can at times refer a case to the police especially where the crime is a serious one foe example murder. CEDAW found that when a party to the dispute fails to adhere to the ruling, the TJS can also report him or her to the chief[108].

2.5 Chapter Summary and Conclusion

The preceding examination of the Kenyan judicial system above paints a clear picture of a weak judicial system that cannot meet the threshold of efficiency, competency and fairness. Using the Princeton Project and the Kenyan Judiciary Mandate as stated on the judiciary website as yardsticks to measure the performance of the Post-Independent Kenyan judiciary, shows the judicial system that falls below par.

The judicial officers have operated without independence for a long time. They have been subject to control and manipulation of the Executive and those in the ruling class. For a long time, the powers to appoint the Chief Justice and judges of the superior courts lay with the President subjecting the judiciary to the wishes of the Presidency. Judicial officers have also operated under poor conditions as evidenced by the report of a magistrate operating under a tree for lack of office space and a courtroom. Following the enactment of the new constitution, however, the judiciary has breathed a new sigh of relief. Several changes including an independent judicial service commission that recruits and dismisses judges as well as making the judiciary budget have seen improved services in the judicial corridors.

The criminal system has also fallen below par in its performance. The police officers have been accused of turning against the citizen they should be protecting and even misusing their firearms. Police have also been misused by the Executive to commit extra-judicial killings. The prison

[108] Coalition of Violence against Women (2002). *In Pursuit of Justice: A Research Report on Service Providers' Response to Cases of Violence against Women in Nairobi Province*

service has been another poor performer. Prisons are overcrowded, poorly ventilated with poor sanitation conditions. Security and discipline inside prisons have also been wanting with prisoners reportedly smuggling mobile phones into the prisons and using them to commit crime. On a positive note however, the Alternative Dispute Resolution Mechanisms specifically the TJS have performed fairly well and earned trust from many citizens. They have been praised as being efficient, trustworthy, timely and agents of social integration. However some especially women have also accused some male dominated TJS of being biased against women but overall they have performed well.

In conclusion therefore in answering the research question, it can be concluded from the above study that the post-independence Kenyan Judicial System has not performed effectively, competently and fairly. However it is important to note that there is hope that with time, the judicial system will perform to expectation as the passage of the new constitution has herald a new dawn and several changes are taking place in the judiciary as highlighted in the foregoing study.

CHAPTER THREE: EVALUATION OF THE PROCEDURE USED BY THE ICC TO INDICT THE SIX KENYANS

3.1 Introduction

This chapter is aimed at addressing the research question 'Was due process adhered to in indicting the six Kenyans'? It analyzes primary data collected from two groups of respondents i.e. Legal respondents and International Relations respondents. To begin with, it is important to appreciate the ICC due indictment process as contained in various articles used by the ICC and then gauge views of these two groups of respondents in answering the research question.

3.2 The ICC indictment process

In every step of the ICC indictment process, The ICC is governed by the universal principle of fair trial. To ensure a fair trial, the ICC always struggles to ensure the accused person(s) is a subject of the trial process and not its object[109]. The accused must thus have procedural rights as well as remedies that will enable him/her influence the trial in terms of the content of law and the evidence adduced[110] The principle of fair trial includes the right of the accused to an impartial hearing, representation by qualified advocate(s), adequate facilities provided to his/her defense team to prepare for defense, permission to cross-examine the witnesses brought by the prosecution as well as examine his own[111].

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[109] Owen, T. (2012) *The International Criminal Court in Kenya: Three defining Features of a Contested Accountability Process and their Implications for the future of International Justice*, Australian Journal of Human Rights, Vol. 18, No. 2, 2012

[110] Wolfrum, R. & Weissbrodt, B. (1998) (eds), *The Right to a Fair Trial*, New York: New York Publishers.

[111] International Center for Transitional Justice, *ICTJ In Focus*, Issue 27 February 2013

The procedure to be followed by The ICC in indictments is contained in the Rules of Procedure and Evidence (RPE)[112]. The RPE applies across all crimes under The ICC's jurisdiction. The RPE are complemented by Part 5 that deals with Investigation and Prosecution and Part 6 dealing with the Trial[113]. Throughout the process from Pre-Trial up to the end of trial, general principles of law play an important part in the practice and exercise of justice of the ICC.

3.2.1 General principles of law applied by the ICC in determination of its matters

In considering issues before it, the ICC is governed by and considers several principles of law that are widely based on natural justice and international law. They include;

3.2.1.1 Nullum crimen sine lege

Article 22 of the Rome Statute states categorically that a person shall only be held criminally responsible if the crimes s/he is alleged to commit and at the time s/he allegedly committed them constitute a crime that falls under the ICC's jurisdiction. The Article further clarifies that the crime s/he is alleged to commit must be clearly interpreted and not extended by any means and, in case of any ambiguity; the interpretation shall be defined to favor the suspect[114].

To ensure justice all through the process, Article 23 of the Rome Statute states that a person who has been determined guilty by the court shall only be punished as per the Rome Statute[115]. This basically means the sentencing the ICC hands down to a convicted person, must be within the accepted provisions of the law and should not be waivered due to any other factor like the weight of the case or personal emotion of the side of any of the parties concern in the trial.

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[112] Rules of Procedure and Evidence, Doc. A/CONF.183/13 Vol. II
[113] Rome Statute of the International Criminal Court, Doc. A/CONF.183/13 Vol.I.
[114] Rome Statute of the International Criminal Court, Article 22
[115] Rome Statute of the International Criminal Court, Article 23

3.2.1.2 Non-retroactivity ratione personae

Article 24 forbids the ICC from charging any individual for crimes committed before the Rome Statute entered into force. The article also observes that if the law applicable to a case before the ICC changes before the end of the case, the version of the law that favors the person under trial shall apply[116].

3.2.1.3 Individual Criminal Responsibility

Article 25 of the Rome Statute outlines who is to be charged before the ICC for crimes which have been reported falling under the Statute establishing the ICC. The Articles states that the ICC only has jurisdiction over natural persons as stated by the Statute. According to the Article, any person who commits a crime that falls under the jurisdiction of the ICC shall be held individually responsible before the court.

Those to be held criminally responsible for crimes committed within the ICC's jurisdiction are those who: commit the crime either individually; commit the crime with another person or through another person; those who order commission of a crime; induce or solicit the commission of the said crime (whether the crime occurred or was tempted); those who assist, aid, abet including providing the means for the crime to be committed; those who attempt to commit the crime through actions that initiate the execution of the crime whether it occurs or not; and, those who incite others to commit genocide.

However, the Article provides that any person who participates in a crime through the ways outlined above, but abandons it midway or prevents it from completion is not liable for the prosecution of the crime. Article 25 also categorically states that the individual criminal

[116] Rome Statute of the International Criminal Court, Article 24

responsibility of an individual does not in any way affect the responsibility of his State under international law[117]. This means the State from which the individual who committed the crimes comes from, shall not be held responsible for his/her crimes.

3.2.1.4 Exclusion of Criminal Responsibility

Article 31 of the Rome Statute outlines the grounds under which a person accused of criminal responsibility may be excluded from prosecution of the charge. These apply if during the conduct of the crime the person: suffered from a mental illness affecting his/her capacity to appreciate the capacity of his/her actions; if the accused was in a state of intoxication that deterred his ability to appreciate the unlawful nature of his actions (unless the person become intoxicated voluntarily); if the accused acted in the manner he did to defend himself or others from harm, protect property that is essential for their survival, or property that is essential to complete a military mission during war; or if the accused committed the crime under duress from a threat of pending death or bodily harm against him or other persons.

The article gives the ICC powers to determine how the exclusion of criminal responsibility shall be applied during hearing of cases before it[118].

3.2.1.5 Following orders and prescriptions of law

Article 33 of the Rome Statute concerns those who commit crimes while following orders from their superiors. According to the article, the fact that one commits a crime while following orders from his government or superiors does not relieve him of criminal responsibility unless;

[117] Rome Statute of the International Criminal Court, Article 25
[118] Rome Statute of the International Criminal Court, Article 31

The accused was required by law to obey orders from the government or his superiors; s/he did not know the order s/he followed was unlawful; the order was not unlawful at the time it was followed. However orders to commit crimes against humanity, war crimes, and genocide are unlawful at any time[119]

3.2.2 Jurisdiction and admissibility

For a case to be proper before The ICC, the Rome Statute requires fulfillment of three basic pre-conditions that are jurisdical in nature[120].

The first is the subject-matter. The ICC only tries crimes listed in the Rome Statute that established it. These crimes are contained in Article V of the Rome Statute and expounded in Articles 6(Genocide), 7(Crimes against Humanity) and 8(War Crimes)[121]. These crimes involve the following acts:

Article 6 of the Rome Statute defines Genocide as acts that are committed with the intention of destroying wholly or in part, a nation, ethnic group, a race or a religious group and these involves the following acts: killing the members of the target group; causing the group members serious bodily or mental harm; inflicting conditions of life that are deliberately aimed at causing physical destruction of the group; enforcing measures that prevent further births within the group; and, the transfer of the children belonging to the group to a different group by force[122].

In regard to Crimes against Humanity, Article 7 of the Rome Statute defines them as acts that are committed as parts of systematic or widespread attacks that are directed against a civilian populace with full knowledge of the attack. These acts include: Murder of population;

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[119] Rome Statute of the International Criminal Court, Article 33
[120] Klaus B, Sparrow T & Lambertz T (2013) *When Justice Meets Politics,* International Academic Publishers
[121] Rome Statute, Article 5.
[122] Rome Statute of the International Criminal Court, Article 6

Extermination; imprisonment that includes deprivation of the population's civil liberties; Enslavement; Torture; Sexual slavery, rape, forced pregnancy, forced prostitution and forced sterilization; Persecution; Crime of Apartheid; Enforced disappearance of a population; and, other inhumane acts of similar magnitude and character meant to cause suffering or injury to mental or physical health of the population concern[123].

Article 8 of the Rome Statute defines War Crimes under 4 broad areas[124]: Article 8 sub-article 2 (a) defines war crimes as grave breaches of the Geneva Conventions of 1949 which are acts against persons and property that is under the protection of relevant provisions of the Geneva Convention and include acts such as: Killing willfully; Inhuman treatment and torture that include conducting biological experiments; cause of suffering or bodily harm; Wanton and unlawful destruction of property not justified by military necessity; compelling of war prisoners to serve in the forces of a hostile power; depriving war prisoners a fair trial; Deporting, transferring or unlawfully confining people; and, taking of hostages[125].

Sub-article 2 (b), includes all other serious violations of customs and laws that are applied in international armed conflict under international law as making up war crimes[126].

Sub-article 2 (c), includes serious violations of the Geneva Conventions of 1949 that are directed against persons taking an in-active role in the conflict inclusive of armed forces who have laid

[123] Rome Statute of the International Criminal Court, Article 7
[124] Rome Statute of the International Criminal Court, Article 8 (1)
[125] Rome Statute of the International Criminal Court, Article 8, Sub-article 2 (a)
[126] Rome Statute of the International Criminal Court, Article 8, Sub-article 2 (b)

down their weapons and those who are in-active due to sickness, wounds or in detention during armed conflict not international in nature as composing war crimes[127]

Sub-article 2 (e) includes all other grave violations of customs and laws that are applied in armed conflicts that lack an international nature, that lie within the established framework of international law as composing of war crimes[128]. Article 70 of the Statute establishing the ICC explains that offenses against the administration of justice are also punishable under The ICC. These offences include: Presenting false testimony before the court when under oath; presenting forged or false evidence; influencing witnesses, interfering with their attendance to give testimony, tampering with or destroying their evidence; intimidating, impeding or corruptly influencing a court official in a bid to influence him to do or not do his duties; retaliation against a court official for performing his duties; and, receiving or asking for a bribe by a court official in fulfillment of his duties.

The second pre-condition is the personal or territorial jurisdiction. Cases brought before the ICC can only be those of individuals who have committed the alleged crime within a territory that falls under the jurisdiction of The ICC or, he or she has committed the said crime while being a member of a state that is within ICC's jurisdiction[129]. The final pre-condition is the issue of temporal jurisdiction. This refers to the period under which The ICC can exercise judicial authority. The Rome Statute only allows the ICC to try crimes committed after the Statute came into force that is on 1st July 2002[130].

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[127] Rome Statute of the International Criminal Court, Article 8, Sub-article 2 (c)
[128] Rome Statute of the International Criminal Court, Article 8, Sub-article 2 (e)
[129] Rome Statute, Article 13(b).
[130] Unpublished Draft Paper, *A Fatal Attraction? The UN Security Council and the Relationship between R2P and the International Criminal Court*, by Mark Kersten, February 2013

3.2.3 Procedure followed by the ICC in indictments

For the Office of The Prosecutor to commence investigations; he or she must be convinced that a crime has occurred or is still under occurrence, in an area falling under the jurisdiction of The ICC, that investigating the case would be consistent with the complementality principle (as the ICC only serves to compliment national courts) and that the investigation will serve the interest of justice. The Prosecutor can only open investigation if, a situation has been referred to him by a state party to the Rome Statute, the UN Nations Security Council or if the pre-trial chamber authorizes him to do so based on information it has received.

Once The Prosecutor has been given the green light to proceed[131], he then must carry out detailed investigations. In so doing, he must take into account the weight of the crime committed and the victims' interests. The investigation must be thorough so as to guarantee a watertight case.

After the prosecution has finished its investigation, it submits it to the Pre-Trial Chamber that considers the evidence produced. Upon the request of the Prosecutor and satisfaction of that the evidence provided is admissible and meets threshold, Article 58 of the Statute then gives the Pre-Trial Chamber authority to issue a warrant of arrest or summonses to appear if: the Chamber is convinced that the evidence shows the accused committed the alleged crime that falls under the ICC's jurisdiction; issue an arrest warrant if it feels it is necessary to ensure the accused appears at trial, he does not obstruct or endanger investigations, or prevent him from continuing with the commission of the alleged crime[132]

Then, the first contact between judges and the accused occurs in the pre-trial chamber. During this first contact between the accused and the judges, the accused can raise a challenge on the

[131] The Statute does not say explicitly that The Prosecutor's decision to commence investigation pursuant to article 18(3) needs authorization by the pre-trial Chamber

[132] Rome Statute, Article 58

grounds of the admissibility of the case before the ICC or the grounds of the jurisdiction under which the ICC will hear the case[133]. The state in which the accused belongs can also challenge the admissibility of the case on grounds of it investigating or prosecuting the same case. The ICC must then hear the petition, determine and satisfy itself that the case is rightly before the Court.

Article 55 of the Rome Statute also outlines the rights of the accused before, during and after the entire judicial process. The accused shall not be compelled by the Prosecution or the chamber to give incriminating evidence against him or confess guilt. The accused shall not also be placed under duress or threatened, shall not be coerced or tortures. During the trial, the accused has a right to be spoken to in a language he fully understands and if not, at the expense of the ICC have a competent interpreter. He shall also not be subjected to arbitrary arrest and detention[134]. During questioning, the accused has the right to be informed before he is questioned that there are sufficient reasons to believe he has committed a crime falling under the jurisdiction of the ICC. He also has a right to remain silent during questioning, and such silence can be used to determine his innocence or guilt and also, he has a right to have adequate legal representation[135].

In the pre-trial, The ICC seeks to confirm the identity of the accused and inquire if she or he has been made aware what crimes she or he is accused of and he has been informed of his rights[136]. The Chamber also seeks to know if any of the accused's rights have been violated since his surrender to ICC's jurisdiction.

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[133] Rome Statute of the International Criminal Court, Article 19 Sub-article 2 (b)
[134] Rome Statute of the International Criminal Court, Article 55, Sub-article 1
[135] Rome Statute of the International Criminal Court, Article 55 Sub-article 2
[136] Although the relevant rights are those outlined in Article 55 of the Statute, in Mr. Lubanga's Initial Appearance, Judge Jorda emphasized the rights to apply at the confirmation hearing and during trial and can be found in Article 67 ICC Statute. Ibid. supra n.1, p. 4-5.

If during the confirmation hearings the accused has waived his right to appear or is not present in the court, the accused shall be represented by his counsel and has a right within reasonable time to be provided with a copy of the charges facing him and be informed of the evidence the prosecution will bring against him at the trial.

If the pre-trial chamber confirms the charges, then the case proceeds to full trial. Trials are conducted under a hybrid of civil and common law[137]. Decisions are made by a majority of the three-judge bench. During Trial, the accused has several rights as outlined in Articles 66 and 67 of the Statute. These among others include: the accused's right to be presumed innocent until proven guilty; he will be entitled to a public hearing; the right to a fair hearing; right to be informed in detail the content and cause of the charge; and, to have access to adequate facilities to prepare his defense and communicate freely with his legal team[138].

The accused also has a right to be tried without undue delay; be present during his trial; examine and cross-examine witnesses against and for his defense; have a competent interpreter if any of the proceedings or documents are in a language he doesn't fully understand; and not to be compelled to confess guilt.

RPE also gives room for victims to present their views before The ICC during the trial[139]. This can occur at various stages of the case and can be in different forms mostly presentation on their behalf by a legal representative. The RPE thus give an opportunity for victims to seek reparations from the Chamber and this provides a balance between restorative and retributive justice[140].

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[137] Schabas, A. (2011). *An Introduction to the International Criminal Court*. Cambridge University Press. p. 302.
[138] Rome Statute of the International Criminal court, Article 67
[139] Bottigliero, A. (2003). *The International Criminal Court – Hope for the Victims*. 32 *SGI Quarterly*. pp. 13–15
[140] Open Society Justice Initiative, *Briefing: Survivors of Sexual Attacks in Kenya Seek Justice for Post-Election Violence*, February 2008

3.3 Procedure followed by the ICC in indicting the six Kenyans

Kenyans went to the general elections on 27th of December 2007 to choose leaders for three government levels; the president, members of parliament and county council members under Article 136 Sub-article 2 (a) of the old constitution. After days of counting the votes, the defunct Electoral Commission of Kenya (ECK) announced incumbent President Mwai Kibaki to be the winner of the presidential seat on 30th December 2007. This was contested by the first runner's up and opposition leader designate Raila Odinga who called his supporters to mass action.

For more than two months that followed, the country was engulfed in ethnic attacks targeting the winner's tribe-the Kikuyu-on one hand and the loser's ethnic tribes of Luo, Kalenjin and Luhya that saw approximately 1,133 people dead according to police estimates[141].

A peace deal was brokered by former UN Secretary General Kofi Annan backed by a panel of other eminent persons that saw the creation of a grand coalition government with Mwai Kibaki as the president and Raila Odinga as the Prime Minister under the National Accord and Reconciliation Act of 2008[142].

A commission of inquiry into the post-election violence (CIPEV) was formed under the leadership of appellate Judge Philip Waki to probe the violence and came up with a report containing 20 names of those the Waki Commission found to bear the greatest responsibility for the crimes and presented it to the Kenyan government on 15th October 2008. The envelope and the report were handed over to chief mediator Kofi Annan while Kenya was given the opportunity to establish a local mechanism to try the post-election masterminds[143]. However all attempts to form a local mechanism were thwarted by the Kenyan Parliament which made it

[141] Gettleman, J. (31 December 2007). *Disputed Vote Plunges Kenya into Bloodshed.* The New York Times.
[142] Barasa, L (10 July 2009). *Parties ask ICC to disclose violence suspects.* Daily Nation.
[143] Nganga, T. (2010). *Electoral Trends in Kenya: From 1992 to 2007.* Nairobi, Longhorn Publishers

clear that it had no faith in the Kenyan judiciary to handle the matter of trying the suspects locally when it voted down a motion to form a local tribunal on 12th February 2009[144].

With this development, Kofi Annan handed over the envelope to ICC Prosecutor Moreno Ocampo on July 16th 2009. The Prosecutor then invoked Article 53 Sub-Article 1 of the Rome Statute that authorizes him to evaluate the information provided to him and upon determination that it warrants a case launched further investigation into the Kenyan post-election violence cases.

On November 26th 2009, the Prosecutor presented the evidence he had in his possession before the Pre-Trial chamber seeking authority to open investigations into crimes committed in Kenya in 2007/2008 post-election period. Invoking Article 57 sub-article 3(d), the Chamber granted the prosecutor's prayers to open formal investigations and present a case on the Kenyan post-election chaos on March 31, 2010[145]. The Pre-Trial Chamber by a 2-1 majority decision ruled that there was sufficient basis to proceed with an investigation in Kenya on crimes against humanity committed between 2005 and 2009.

After carrying out his investigation through a wide range of powers invested in his office by Article 54 of the Rome Statute, The Prosecutor identified six suspects whom he felt bore the greatest culpability for crimes against humanity committed in Kenya. On 15th December 2010, the Prosecutor submitted an application to the chamber for an issuance of summonses for the six to appear as enshrined in Article 58 of the Statute. The Pre-Trial chamber felt there were reasonable grounds to believe the accused committed the crimes and issued summonses to them to appear on March 8th 2011.

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[144] *Parliament pulls Kenya from ICC treaty*, Daily Nation, 22 December 2010

[145] *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (PDF). International Criminal Court. pp. 79–83. Retrieved 27 January 2012

On March 31st 2011, the government of Kenya filed an admissibility challenge case against the cases being before the ICC[146].

On June 2011, the Pre-Trial Chamber raised the possibility of holding confirmation hearings in Kenya and asked the prosecution, defendants, and the victims to comment. While the move was supported by Amnesty International (which felt the move would bring justice closer to the victims), Francis Muthaura, and Henry Kosgei, it was opposed by the prosecution which cited security concerns and Ruto, Sang and Kenyatta who felt that the change would result in delay of the hearings hence the chamber decided to hold them at the Hague[147].

The six appeared before the Pre-Trial Chamber and the prosecution divided them into two cases. In the first case, the Prosecutor accused William Ruto and Joshua Sang of four counts of crimes against humanity listed under Article 7 of the Rome Statute. The accused were mentioned as indirect co-perpetrators at various locations in Eldoret, Turbo, Nandi Hills and Kapsabet. Their acts as outlined by the Prosecution were: Murder as under Article 7 sub-article 1 (a) of the Statute; forcible transfer of populations as under Article 7 sub-article 1 (d); torture under Article 7 sub-article 1 (f); and, persecution as under Article 7 sub-article 1 (h).

In the second case, Uhuru Kenyatta and Francis Muthaura were accused of five counts of crimes against humanity that they allegedly committed as indirect co-perpetrators at various locations in Kibera, Kisumu, Naivasha and Nakuru[148]. Their acts included: Murder as under article 7 sub article 1 (a) of the Statute; forcible transfer of populations as under Article 7 sub-article 1 (d);

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[146] *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute* (PDF). International Criminal Court. 30 May 2011. Retrieved 2011-07-12

[147] Mathenge, O '*Hague Six differ over proposal to relocate hearings*'. Daily Nation 18 June 2011.

[148] *"Ocampo three" responsible for attacks in Nakuru and Naivasha*, The Standard, retrieved 27 January 2012

Rape and sexual violence under Article 7 sub-article 1 (g); persecution as under Article 7 sub-article 1 (h); and, inhuman acts under Article 7 sub-article 1 (k).

After their appearance before the Pre-Trial chamber and both the prosecution and the defense given a chance to produce their evidence, the Pre-Trial chamber confirmed charges against William Ruto, Joshua Sang, Francis Muthaura and Uhuru Kenyatta letting off the hook Mohammed Ali and Henry Kosgey for lack of evidence[149].

Victims were also allowed to participate as guaranteed by Article 68 the Rome Statute. In the first case of Ruto et al. 394 victims applied to be participants and 327 were admitted while in the Kenyatta et al. case, 249 applied and 233 were admitted[150].

In March 2013, the prosecution dropped charges against Muthaura citing insufficient evidence after a recanting by a key witness who had linked Muthaura to the planning of the violence. The prosecutor also cited death and disappearance of other key witnesses and lack of cooperation by the Kenyan government[151]. On 18th June 2013, the Trial Chamber granted Deputy President William Ruto excusal from continuous attendance at the court due to his position as a deputy president. The case against Ruto and Sang finally commenced on 10th September 2013 after an earlier postponement requested by the defense.

On December 2014, the prosecution dropped its case against Kenyatta after the Trial Chamber turned down a request for an indefinite postponement after it found its evidence too low to convict Uhuru Kenyatta. On March 13th 2015, Trial Chamber unanimously terminated the

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[149] *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* (PDF). ICC. p. 138

[150] *Participation of victims in proceedings*. International Criminal Court. Retrieved 2011-07-28

[151] Kelley, K. '*Why the Prosecution let Muthaura off the hook*'. Daily Nation 19 March 2011. Retrieved 2011-04-30.

proceeding against Uhuru Kenyatta. They, however, made it clear that the prosecution was at liberty to bring new evidence and hence still charge him.

3.4 Opinion of Respondents on the ICC Kenyan judicial process

Various respondents from the legal and international relations field were asked by the researcher their opinion about the ICC process and whether due process was followed.

3.4.1 Characteristics of the research Respondents

This section of the chapter deals with the presentation and discussion of the research findings collected from the field. The study used non-probability sampling (purposive sampling method) to obtain the data from the two groups of respondents. This is because these groups of individuals were rich sources of the information required on the ICC process. They were hence best suited to give meaningful academic information for the study

The section starts by analyzing the characteristics that define the respondents i.e. their gender, age, level of education and profession. (The data from the two groups is analyzed together because they were administered with the same sets of questions that Legal respondents answered through a questionnaire while International Relations Respondents were interviewed).

3.4.1.1 Gender composition of the respondents

In the study, the researcher issued 20 questionnaires to legal respondents (10 to male and 10 to female) and got 12 of them back, 7 of which were male representing a 58% and 5 female representing a 42% while I sent requests for interviews to 10 international relations respondents (6 female and four male), but managed to interview 7 of which, 4 were male representing 57% and 3 female representing 43% as analyzed in Table 2 below.

It was significant for the researcher to as much as possible balance the genders of the respondents. This was crucial in enabling collection of unbiased data in the study as involvement of both genders would bring out balanced views.

Table 2.0 Gender composition of respondents

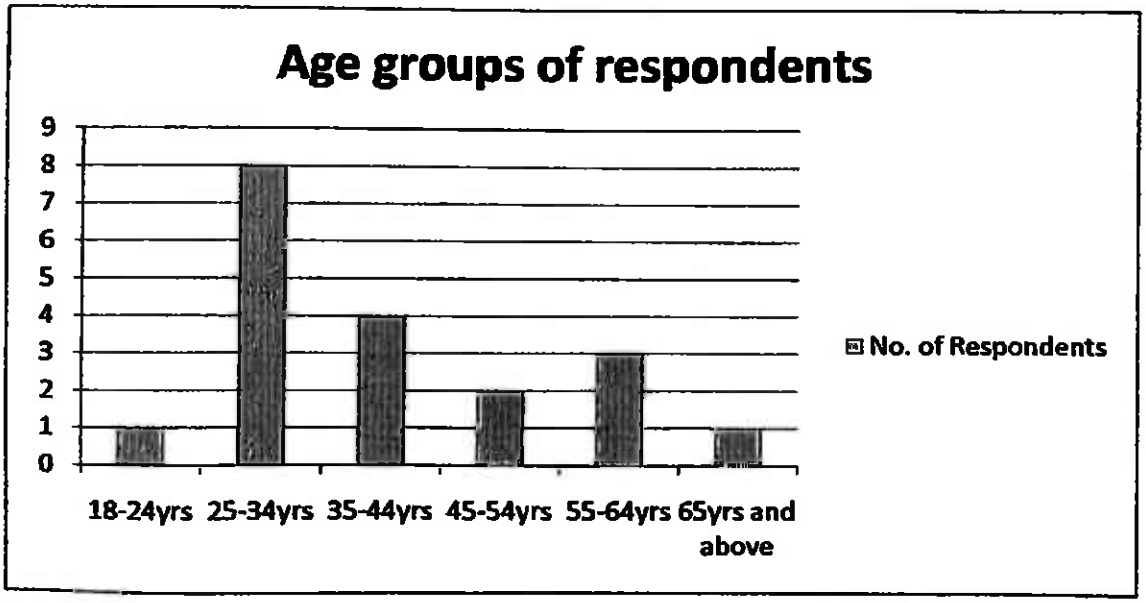
Target Group	Male	%	Female	%	Total Number
Legal Respondents	7	58%	5	42%	12
International Rlns. Respondents.	4	57%	3	43%	7

Source: Study Data

3.4.1.2 Age composition of the respondents

It was important to include all adult respondents of above 18years to enable the researcher get all-inclusive views from all age groups. While older respondents tend to have more experience, know more about their profession and are hence rich sources of knowledge, the young also present the views of a vibrant generation and are more informed especially on current affairs.
In this study, the age composition was as follows; 18-24 yrs, 1 respondent (representing 5.3% of the total), 25-34yrs, 8 respondents (representing 42.1%), 35-44yrs, 4 respondents (representing 21.1%), 45-54yrs, 2 respondents (which translates to 10.5%), 55-64 yrs, 3 respondents (accounting for 15.8%) and 65yrs and above, 1 respondent (equaling 5.3%). These figures are represented in the chart below.

Fig 1.0: Age composition of Respondents



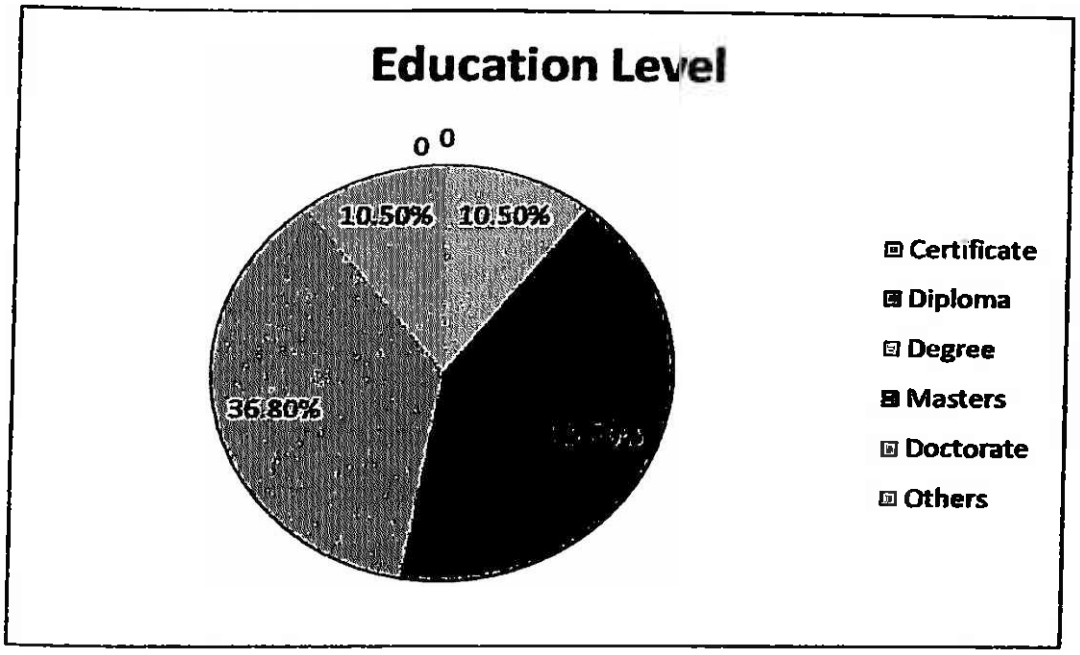
Source: Study data

3.4.1.3 Level of Education of Respondents

Level of education was an important consideration for the respondents. Generally to be well informed in fields such as law and international relations, one must have more than secondary education. They must have adequate education, high levels of understanding about the issues in their discipline and in this case, show enough understanding of the issues under study, i.e. International as well as constitutional law and issues surrounding the ICC cases against the six Kenyans.

The levels of education of the respondents of the two groups analyzed together break down as follows: Certificate (0), Diploma (0), Degree (2 translating to 10.5% of the total), Masters (8 representing 42.1% of the total), Doctorate (7 equaling to 36.8%), and Others (2 totaling to 10.5%), as represented in the pie chart below;

Figure 2.0: Education Levels of Respondents



Source: Study Data

3.4.1.4 Specialization of respondents

For the legal respondents, 3 were respondents in International Law (accounting for 25%), 6 in criminal law (representing 50%) and 3 in both constitutional and criminal law (representing 25%). Of the International Relations respondents, 2 were respondents in international law (equaling to 28.6 %), 4 in international politics (accounting for 57.1%) and 1 foreign policy (representing 14.3%)

Figure 3.0: Specialization of Legal Respondents

Specialization	No of Respondents	Percentage
International law	3	25%
Criminal Law	6	50%
Constitutional & Criminal law	3	25%

Source: Study Data

Figure 4.0: Specialization of International Relations Respondents

Specialization	No of Respondents	Percentage
International law	2	28.6%
International Politics	4	57.1%
Foreign Policy	1	14.3%

Source: Study Data

3.5 Respondents' opinions

In this section of the chapter, respondent opinions are discussed and analyzed. Views of respondents on matters relating to the Kenyan cases at the ICC are hereby discussed.

3.4.1 Due legal process in the ICC Kenyan cases

This was the main research question for this chapter. The two groups of respondents were asked if in their opinion; the ICC fully followed due process (including adhering to Rules and Procedures of Evidence as contained in Doc. A/CONF. 183/13 Vol. II of the Rome Statute) in indicting the six Kenyans.

10 out of 12 (translating to 83%) of the legal respondents said they were of the opinion that the ICC had followed due processing in indicting the six Kenyans. 50% of these 10 respondents, said all the steps from naming the suspects, issuing summonses to appear, the pre-trial hearings, confirmation and trials had followed the due process of the law. The other 50% said there were a few legal hitches here and there but added that those are normal in any case, so they were satisfied the court followed due process.

2 legal respondents said they were not satisfied at all with the process. Both had issues with the conduct of the prosecution. One noted that the Rome Statute requires the Office of the Prosecutor to carry out independent investigations into cases. However, he said The Prosecutor of the ICC relied so much on the evidence of the Kenya Human Rights Commission Report and the Waki Commission Report without carrying out independent investigations hence he did not follow due process. The other respondent who dissented noted that throughout the cases, issues of the prosecution having bribed and coached witnesses to appear have come up hence the prosecution did not follow due process in acquiring witnesses.

6 out of the 7 international relations respondents also said they were of the opinion that due process had been followed by the ICC in the Kenyan cases. The one who dissented also took issue with the ICC witness protection procedures. She noted that the ICC did not protect some major witnesses who had asked for protection as required by the Rome Statute and hence some were exposed and killed by unknown people rendering the cases against Uhuru Kenyatta and Francis Muthaura weak leading to their dismissal.

To answer the research question therefore 'Was due process adhered to in indicting the six Kenyans', 16 out of 19 of the respondents (which translates to 84%) felt that yes the ICC had followed due process in indicting the six Kenyans.

3.4.2 Fairness to all parties in the ICC cases

Respondents were also asked if, in their opinion, the ICC had accorded a fair hearing to both the accused and the victims. All of the 7 international respondents felt the ICC had accorded hearing to all parties. 71% of this said the parties have been represented well at the cases as each has enough lawyers and witnesses who have been given audience by the court. The other 2 added that Trial Chamber V on 3rd October 2014 even revised the procedure to be followed so as to

accommodate more victims who wished to participate in the cases. They also cited the fact that all legal representatives have been given enough time to present their arguments. 3 of the respondents said the court has declared the suspects innocent until proven guilty to ensure they get a fair hearing.

9 legal respondents also agreed that the ICC had given fair hearing to both parties while 25% (3 respondents) of them felt the court had given more time to the accused than the victims and witnesses.

In total, 16 out of 19 respondents (translating to 84%) were satisfied that both parties had been accorded a fair hearing while 3 respondents (equaling to 16%) were not satisfied.

3.4.3 Admissibility of the Kenyan cases at the ICC

11 out of 12 legal respondents (which is 92%), who responded to the admissibility challenge case, said they were satisfied that the ICC had jurisdiction and mandate to try the Kenyan cases. 9 of these said that Kenya being a signatory of the Rome Statute, the ICC was mandated to hear the Kenyan cases while 2 said the ICC had jurisdiction as Kenya itself referred the cases to the ICC when it wouldn't form a local tribunal. The only respondent, who objected, noted that ICC mostly tries cases of states with failed judiciaries, and the Kenyan Judiciary was functional hence it was not necessary for the ICC to take over the case.

5 out of the 7 international relations respondents interviewed were satisfied that the case was properly before the ICC stating similar reasons as argued by legal respondents. 2 international relations respondents however did not feel satisfied that the case was properly before the ICC. They said the case did not meet the threshold of the ICC hence should have been referred to the Kenyan courts. In total, therefore, 84% of the respondents agreed that the ICC had admissibility of the cases while 16% did not agree.

3.4.4 Adequate Legal Representation of the victims at the ICC Kenyan cases

This was a simply 'yes' or 'no' question that did not require the respondents to elaborate their answer. 71% of the international relations respondents interviewed (translating to 5 out of 7) felt there wasn't adequate legal representation of the victims of the 2007 PEV at the ICC Kenyan cases. Only two felt the 2007 PEV victims were adequately represented in the ICC cases.

On the other hand, 9 respondents (translating to 75%) of the legal respondents who responded to the questionnaire felt that there was no adequate legal representation of the victims. Only 3 out of the 12 felt the legal representation of victims was adequate. Therefore, 14 out of the 19 respondents who responded to this question (which is 74%) felt the legal representation of victims was inadequate while only 26% felt the representation was adequate.

3.4.5 Victim Reparations from the ICC

The study sought to find out from the respondents if they felt the victims of the 2007 PEV should initiate reparation proceedings at the ICC to compensate their losses during the skirmishes. 86% of international relations respondents interviewed felt the victims should seek for reparations as most suffered so many losses during the skirmishes. Only 1 objected. The respondent felt the victims have the right to seek reparations but not from the ICC. He felt the ICC was more focused on the main case (i.e. the criminal responsibility of the suspects) and hence had done enough for the Kenyan PEV victims. He hence suggested the victims should instead seek reparations from through the Kenyan Judiciary, not the ICC.

10 out of the 12 legal respondents (which is 83%) agreed that the victims of the 2007 PEV can seek reparations by initiating reparation proceedings through their legal representatives in the case or even appoint new legal teams to pursue the reparation proceedings. Asked when the proceedings can be initiated, 5 of the 10 felt the reparations proceedings can be initiated

alongside the ongoing case while the other five felt it should happen after the conclusion of the ongoing case so as not to distract the attention of the judges from the main case. However, the other 17% of legal respondents felt the PEV victims should not seek reparations at all. They said it would be hard to identify the genuine PEV victims, and it may not serve justice as some PEV victims have died since the cases started.

Therefore 16 out of 19 respondents (translating to 84%) feel the PEV victims can seek reparations from the ICC while 3 other (equaling to 16%) object.

3.4.6 Fulfillment of all legal obligations of the Kenyan government to the ICC

Out of the 12 legal respondents who gave their views, 8 of them stated that they were not satisfied that the Kenyan government fulfilled all its legal obligations to the ICC as far as the two Kenyan cases were concern while 4 said they were fully satisfied. 3 of the 8 noted that the Kenyan government being a signatory of the Rome Statute, has shown much reluctance in aiding the ICC legally in prosecuting the cases. 67% of the legal respondents explained that the Kenyan government had not provided all the documents requested by the ICC prosecution to help them try the masterminds like the bank and phone records of the suspects.

71% of the International Relations Respondents (5 out of the 7) interviewed also stated they were not satisfied. 63% of those who were not satisfied said the Kenyan Government politicized the ICC cases leading to non-cooperation while the rest said the Kenyan Attorney General defended the masterminds in his appearance at the ICC. In total, 13 out of 19 (representing 68%) of the respondents said they were not satisfied that the Kenyan government had fulfilled its legal obligation to the ICC.

3.4.7 Improvement of the performance of the Kenyan judiciary

The research sought to find out from the respondents if the confidence level in the Kenyan judiciary has changed since the onset of the ICC judicial process. 58% of the legal respondents felt the confidence levels in the local judiciary have gone up. 22% of these attributed the increase in confidence levels to several changes in the judiciary that have been catapulted by the ICC judicial process. 5 of the respondents said the judiciary is now transparent while 2 noted that there are more judges and that hate speech offenders are now being pursued. 42% of the legal respondents felt the confidence has either dropped or not improved due to various reasons. 2 legal respondents said corruption still bedevils the judiciary making justice elusive for the poor. The remaining three said the judiciary is still under-staffed delaying justice.

4 out of the 7 international relations respondents interviewed (translating to 57%) agreed that the confidence levels have gone up while. Two attributed this to many steps taken by the judiciary like setting up the Witness protection unit while the rest saw reduced corruption levels within the court processes as the reason. The other 3 international respondents disagreed that the confidence levels had gone up due to the ICC judicial process. They attributed the rise of the confidence levels to ongoing reforms in the judiciary brought about by the new constitution and not necessarily due to the ICC cases.

Overall, 58% of respondents from both groups of respondents said the confidence levels in the judiciary have risen as an effect of the ICC judicial process while the remaining 42% could not attribute any changes in the confidence level of the local judicial mechanism to the ICC Kenyan cases.

3.5 Chapter Summary and Conclusion

Following a failed effort by Kenyan legislators to establish a local tribunal to prosecute the alleged masterminds of the 2007 PEV chaos, the ICC took over the cases. This was mainly because, like a majority of Kenyans, many legislators in Kenya had no confidence in the Kenyan judicial system exposing its weaknesses and shortcoming.

However, since the cases commenced at the ICC, the court has come under a lot of scrutiny with some critics saying the ICC did not follow due process in indicting the six Kenyans before the court. However, through this study, the facts have been brought out through the opinions of the respondents. 84% of the respondents, who are legal and international law respondents concur that the cases are legally and legitimately before the jurisdiction of ICC. The government of Kenya had at one time lodged an admissibility claim that the cases were not rightly before the ICC.

Data collected from the respondents also show that 68% of the respondents felt the government had not fulfilled its legal obligations as far as the cases were concern. 21% felt the claims by The Prosecutor that the Kenyan government was not totally cooperating with the court by providing the ICC with all the needed information was just an attempt by the prosecution to save face from an already collapsed case. The collapse of the case (against Uhuru Kenyatta and Francis Muthaura) can be attributed to the death and disappearance of many key witnesses as noted by 23% of the respondents who attributed it to the fact that the ICC could not protect them.

The respondents also largely feel (by 71% of international relations respondents and 75% of legal respondents) that the victims of the 2007 PEV have been adequately represented in the ICC cases and that the ICC has accorded a fair hearing to both the accused and the victims with some

respondents even noting that Trial Chamber V amended the procedure to allow more victims to participate.

Majority of the respondents agree that the confidence level in the judiciary has gone up since 2011 when the cases were initiated at the ICC. While the respondents differ as to the reasons for the increase in the confidence level, they all agree that the judiciary has shown remarked improvement since the Kenyan cases begun. 58% of the legal respondents feel the judiciary has improved and cited some developments like the prosecution of hate speech cases and increase in the number of judges thus speeding up the wheels of justice. However, other legal respondents felt the confidence levels haven't improved so much as to get noticed. Majority of the international relations respondents also felt the confidence levels had improved and attributed his change to various improvements made by the judiciary like the setting up of the witness protection unit.

However other respondents from the international relations field felt that the improvement in the confidence levels had nothing to do with the ICC Kenyan cases but attributed it to the changes brought about by the new constitution. In finally answering the research question, a majority 84% of the respondents felt the ICC followed due process in indicting the six Kenyans and the trials that followed.

CHAPTER FOUR: THE ICC KENYAN CASES AND PROMOTION OF JUSTICE IN KENYA

4.1 Introduction

> *"The ICC is the last remaining hope for the victims of the 2007 Post Election Violence victims in Kenya to have justice. There will be no more impunity for the crimes that have been committed" Former ICC Prosecutor Luis Ocampo after announcing names of the six Kenyan bearing the greatest responsibility for 2007 Post Election Violence Crimes in 2010*

This chapter is the main focus of the study. It sets out to investigate the main component of the research i.e. to study the effects the ICC Kenyan cases have had in the promotion of justice in Kenya. It is meant to answer the research question, 'What effects have the cases at the ICC against six Kenyans had in promoting justice in Kenya?' The researcher sought to have general views of the respondents about the whole case and if it has promoted justice especially to the 2007 PEV victims.

To answer the research question, two groups of respondents were issued with questionnaires containing questions that provided the relevant information required. These were the; PEV Internally Displaced Persons (IDPs)/ former IDPs (as most have been resettled and are no longer IDPs) and Ordinary Kenyans.

The chapter started by first analyzing the different character variation of the two groups of respondents (the data from the two groups was analyzed together because they were administered the same questionnaire). Character variations are the features that differentiate the respondents from one another like age, level of education, etc.

4.2 Characteristics of the Respondents

The respondents in this chapter of the research were defined by seven distinct variations. These were gender, age, level of education, category, profession, nationality and lastly the religion of the respondent. These variations are important in research in ensuring people from different ages, experience and religion give out their views to enable a cross-cutting outcome.

4.2.1 Gender of Respondents

In this study, it was important to get gender-sensitive data so that views of both sexes would be heard. For this reason, the researcher tried as much as possible to balance the genders of the respondents. To achieve this, an equal number of questionnaires were allocated to both men and women in both groups of respondents.

In getting the data required for this chapter, the researcher issued 60 questionnaires to ordinary Kenyans (30 male and 30 female) and got 42 of them back, 15 of which were male representing a 36% and 27 female representing a 64%. 10 former IDPs were also given questionnaires, (5 male and 5 female) but managed to get 6 questionnaires back 4 of which were male representing 67% and 2 female representing 33%. These figures are summarized in Table 3 below

Table 3.0: Gender composition of respondents

Target Group	Male	%	Female	%	Total Number
Ordinary Kenyans	15	36%	27	64%	42
IDPs	4	67%	2	33%	6

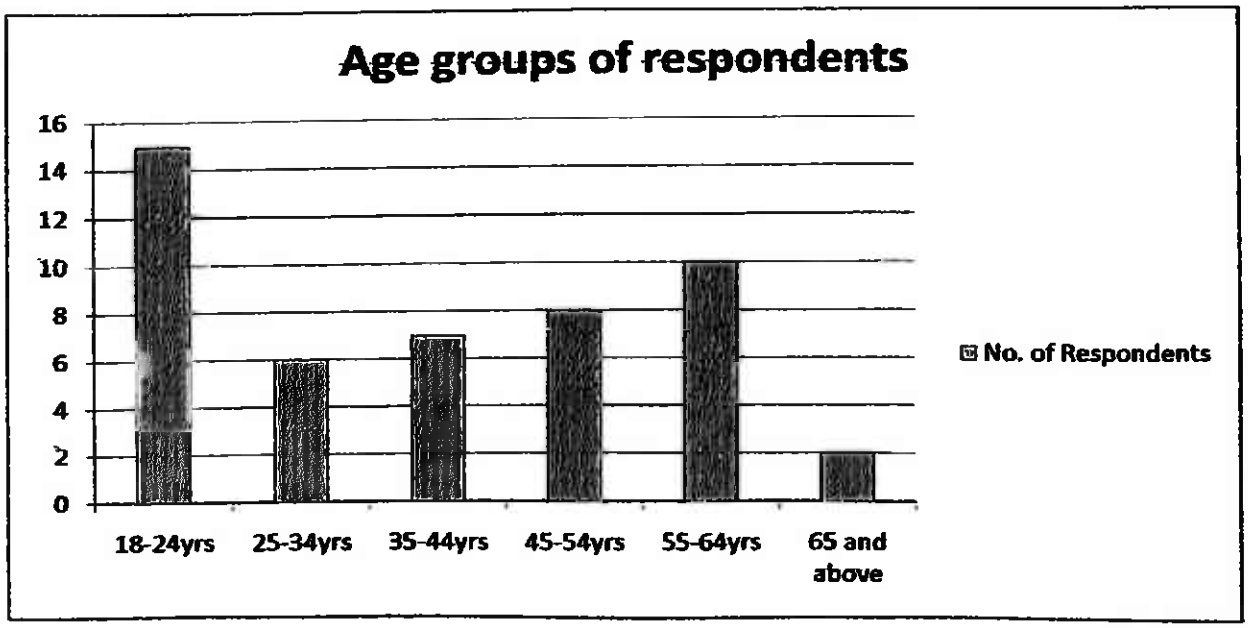
Source: Study Data

4.2.2 Age composition of the respondents

Age was another important consideration. It was of importance that the researcher gets data from both the young and the old generation so as to have a mixture of experience, the wisdom of the old and ambition and hopes of the young.

In terms of the distribution of respondents' ages (from both groups analyzed together), majority were aged between 18-24 accounting for 15 respondents (representing 31.3% of the total), followed by those aged 55-64 years who were 10 (representing 20.8% of the total), and then 45-54 years were 8 (representing 16.7% of the total). Respondents aged between 35-44 years were 7 (representing 14.6% of the total), those aged 25-34 years were 6 (which is 12.5% of the total) and 2 were aged above 65 years representing a 4.2% of the total. These figures are captured in the chart below.

Fig 5.0: Age composition of Respondents



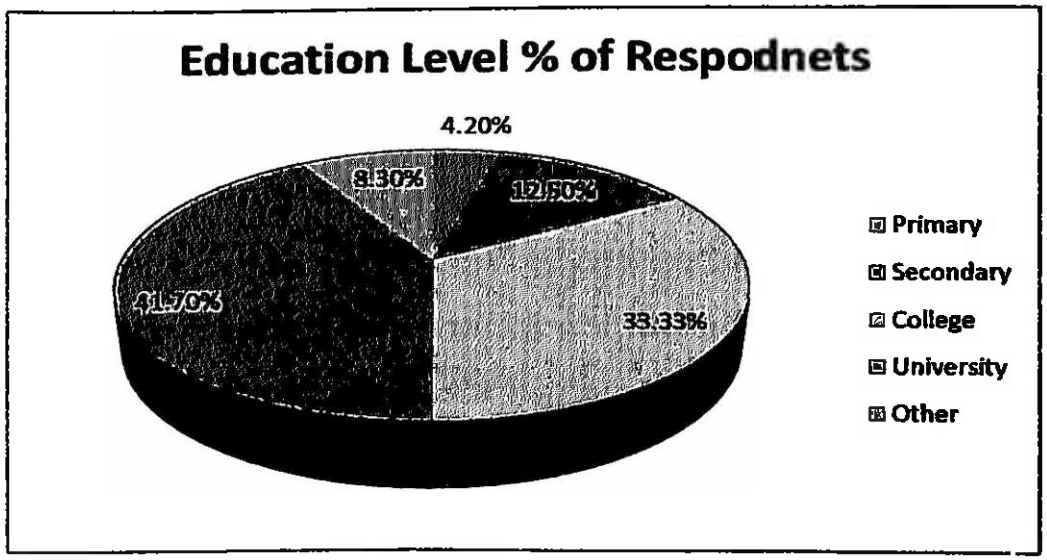
Source: Study Data

4.2.3 Level of education of the Respondents

The level of education was another important consideration in this research. Educated people respond from a well-understood point of view and can communicate more effectively since they can read and write well. However, respondents of all levels of education were given a chance to participate with more questionnaires supplied to those who have attained tertiary education.

Among the respondents, majority had university education accounting for 20 respondents, (representing 41.7% of the total), followed by those with education from other tertiary levels who were 16 (which is 33.3% of the total). Those who had secondary school education were 6 (representing 12.2% of the total), those with 'other' levels of education were 4 (which is 8.3% of the total) while 2 had primary education (representing 4.2% of the total) as represented below.

Fig 6.0: Education Level of Respondents



Source: Study Data

4.2.4 Category of Respondents

There were two groups of respondents involved; ordinary Kenyans and IDPs/former IDPs. Of those who were able to return the questionnaires, 42 were ordinary Kenyans while 6 were former IDPs as analyzed in Table 4.

Table 4.0: Category of Respondents

Group of Respondent	No. of Respondents	Percentage (%)
Ordinary Kenyans	42	87.5%
Former IDPs	6	12.5%
Total	48	100.0%

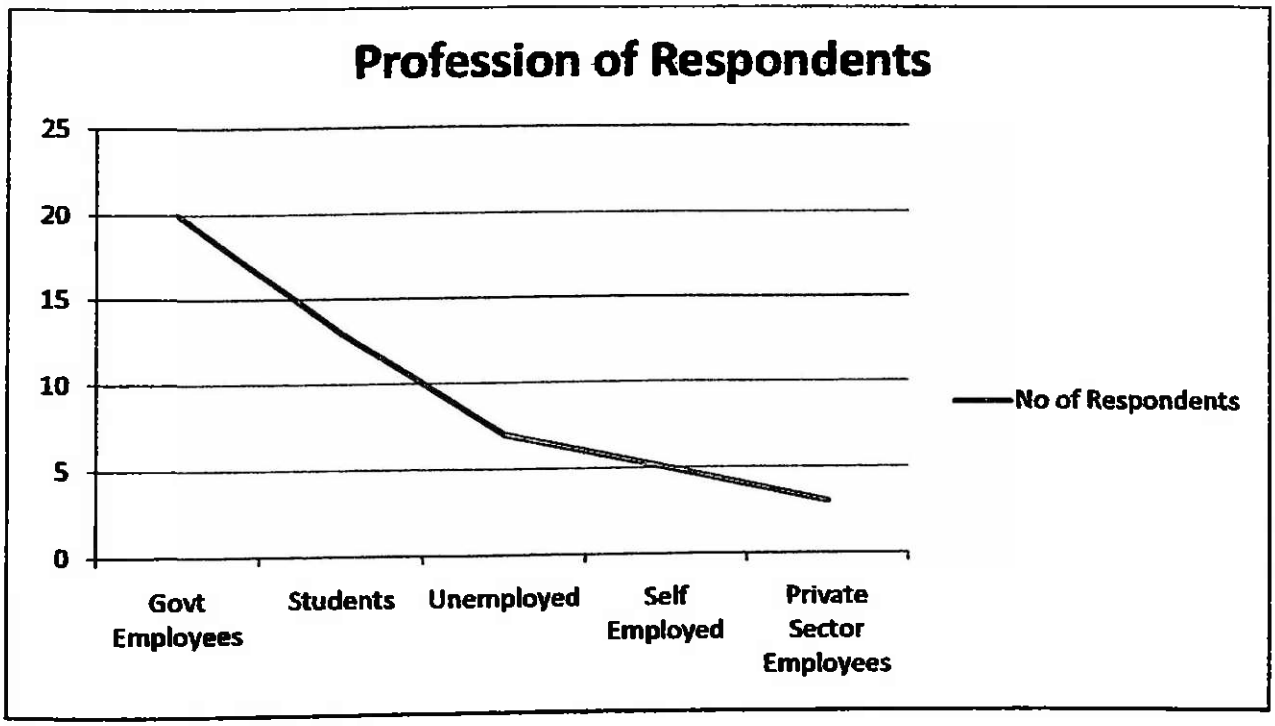
Source: Study Data

4.2.5 Profession of Respondents

Respondents were required to mention their professions. The researcher made an effort to ensure that respondents from all sectors were given a chance to give their views right from students, the unemployed up to the self-employed.

The majority of the respondents were government employees who were 20 respondents, 13 were students, 7 were unemployed, 5 self-employed and 3 worked in the private sector. This translated to 41.7% government employees 27.1% students, 14.5% unemployed, 10.4% self-employed and 6.3% private sector employees. These figures are represented in figure 7 below

Figure 7.0: Professions of Respondents



Source: Study Data

4.2.6 Religion of Respondents

In term or religion, majority were Christians accounting for 72.9%, 16.7% were Muslims, 8.3% Hindu and 2.1% Traditional African Worshipper as presented in the following table

Table 5.0: Religion of Respondents

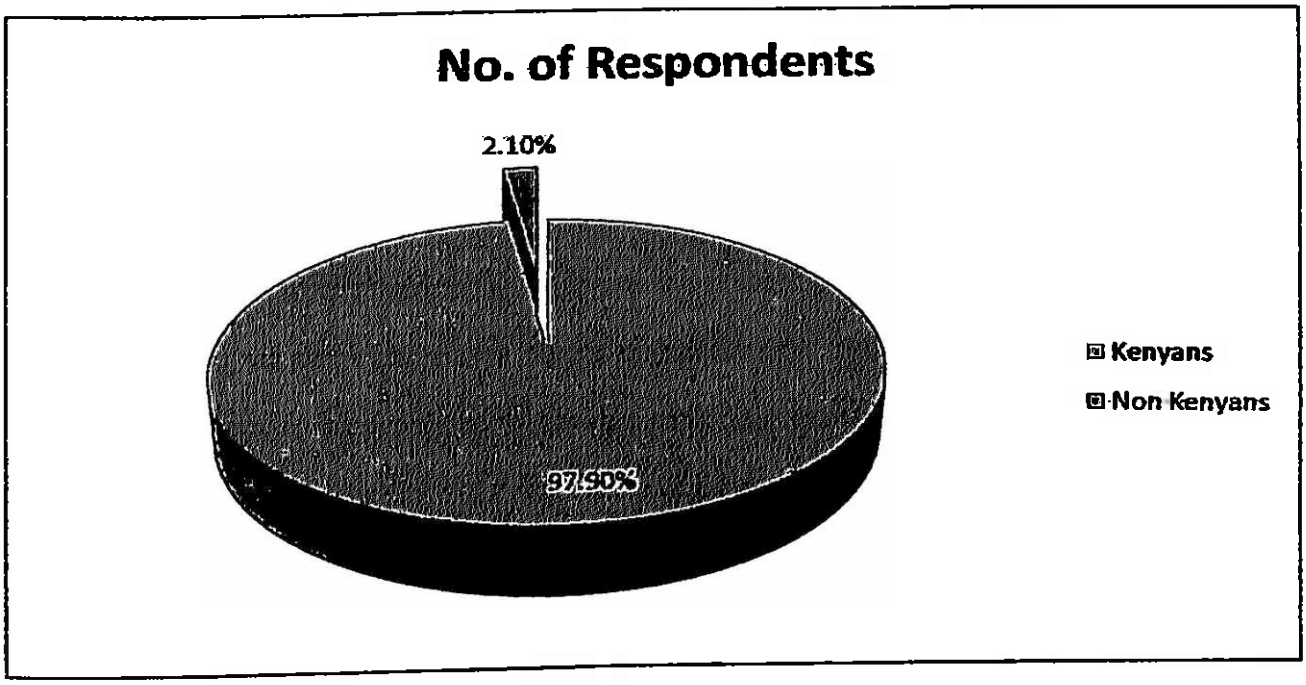
Religion	No. of Respondents	Percentage (%)
Christians	35	72.9
Muslims	8	16.7
Hindus	4	8.3
Traditional African Worshipper	1	2.1
Totals	48	100.0

Source: Study Data

4.2.7 Nationality of the Respondents

Of the respondents of the study, 47 of them were Kenyans representing a 97.9% while one was a Non-Kenyan representing a 2.1%. Figure 8 below captures these data

Figure 8.0: Nationality of Respondents



Source: Study Data

4.3 Research Findings

This part of the chapter discusses the research findings as collected from the field of study. This analysis contains percentages, figures and views of respondents.

4.3.1 Local Tribunal vs. the ICC

The study sought to find out from the respondents if they felt the ICC had done a good job in handling the cases or if they felt a local tribunal would have done better in serving justice to more 2007 PEV. This could entail serving justice to all the parties (masterminds, perpetrators, the police, victims, etc.) Through this enquiry, the research aimed at finding out if the

respondents were satisfied that the ICC had done enough through the two Kenyan cases to serve justice and if not, if a local tribunal would do better. The response from those who gave their views was divided in the two options.

23 of the ordinary Kenyans who responded (representing a 53% of the respondents in this group) preferred a local tribunal. Of these, 10 said a local tribunal would include more suspects than the six the ICC went after and probably would have tried all the twenty in the CIPEV list. The other 5 were concerned with the limited investigative capability of the ICC. They said a local tribunal would have seen more investigations done, and more evidence adduced since it would be near the scenes of the crimes committed.

However, the other 47% (representing 19 respondents) of the ordinary Kenyans felt the ICC would be better in serving justice. They cited the corruption in the local judicial system as the major reason the local tribunal would not be ideal in providing justice.

Among the former IDPs, 5 of them supported the local tribunal option. They said the people who did the actual killing, maiming, and looting are still in the country, and only a local tribunal would reach these people as the ICC only tried those with the greatest responsibility. The 1 who chose the ICC said the powerful like the masterminds would easily manipulate a local tribunal hence go scot free. In total, therefore, 28 out of 48 respondents representing a 58% felt a local tribunal would be ideal while 42% felt the ICC was best placed to serve justice to all parties.

4.3.2 Representation of Victims' Interests

The study also sought to know from the respondents if they felt the interests of the 2007 PEV victims were well captured in their legal representation in the cases. This was aimed at assessing if the victims felt they had accessed justice through the representation of their interests.

71% of the ordinary Kenyans who responded to this question said no. They felt the interests of the victims had not been well represented. 50% of these who said no said the legal representatives of the victims were more concern with the legal proceedings between the prosecution and the defense and less concern with defending the interests of the victims. The other 50% said the legal representatives of the victims have been rarely seen making submissions before the chamber and appeared to have taken a backseat in the proceedings.

Out of the 6 former IDPs, only 4 responded to this question, and they all said no. They said the legal team for the victims was not in touch with the victims at the ground and, therefore, wondered whose interests they were claiming to purport since they had very minimal contact with their clients. 2 of these said they had never met any legal representatives of the victims since the cases started while the other 2 said they had met them once at the start of the cases but haven't seen or heard from them since.

Therefore in both groups, 71% of the respondents said they were not satisfied that the legal representatives of the victims were representing the interests of the victims, 25% said yes they were satisfied while 4% did not respond to the question.

4.3.3 Victims' Reparations from the ICC

Just like the first group of respondents (the legal and international relations experts) had been asked this question, ordinary Kenyans and former IDPs were also asked if they felt the 2007 PEV victims should seek reparations from the ICC for their losses group though it was a simple 'yes' or 'no' question that did not require them to elaborate or explain their answer.

64% of the ordinary Kenyans said 'yes' the victims should seek reparations from the ICC and these translates to 27 respondents. However, 24% said 'no' (representing 10 respondents) while 12% (representing 5 respondents) did not respond to the question.

Among former IDPs 67% (representing 4 respondents) said 'yes' they should seek reparations while 33% (2 respondents) said 'no.' Therefore accumulatively, 66% said 'yes', 25% said 'no' while 9% did not respond to the question.

4.3.4 Observation of the rights of all parties at the ICC cases

Respondents were asked if, in their opinion, the ICC had observed the rights of the accused, the victims, and the witnesses. A majority of ordinary Kenyans felt the ICC had observed the rights of the three parties. 31 respondents out of the 42 agreed that the ICC had observed the rights of all. 5 of these said the legal process had been fully followed ensuring all the parties in the case have had their rights provided for them. 10 said the accused have been treated well as no one has been manhandled or coerced to incriminate themselves. They also pointed out that the victims were given a chance to give their side of the story during investigations.

However, 9 ordinary Kenyans did not agree while 2 did not respond to the question. Of the 9, three pointed out the fact that the ICC has not been able to protect the victims, and most have been killed or maimed. Also, 2 of them mentioned the fact that the identity of some of the witnesses had been unmasked hence the ICC had abused their rights to protection of their identities.

All the 6 former IDPs said the ICC had failed in observing the rights of the parties. They cited the fact that most victims and witnesses have been murdered as the ICC has been unable to protect them. Therefore 31 respondents felt the ICC had observed the rights of the three parties, 15 respondents said they felt the rights of the parties had not been observed while 2 did not respond to the question.

4.3.5 Effect of the ICC Kenyan cases on the 2013 Kenyan General Elections

The research also sought to engage the opinion of the respondents if they felt the ICC Kenyan cases deterred the re-occurrence of post-election violence during and after the 2013 general elections.

50% of the ordinary Kenyan felt the cases were a deterrent measure against post-election related violence. 75% of these 50% felt many political contenders feared to engage in any violence as the fate of their six colleagues at the ICC was still fresh in their minds. However another 26 respondents (representing 50%) said the ICC had nothing to do with the peaceful election period. 10 of them attributed the lack of violence to the readiness of most contenders to agree with the election results while another 8 attributed it to the increase in confidence level in the local judiciary hence those not satisfied were able to get redress in court. Most gave the example of the presidential petition at the Supreme Court pitting the first runner's up Raila Odinga versus presidential winner Uhuru Kenyatta.

4 former IDPS concurred with this, saying the ICC had nothing to do with the peaceful elections. They attributed the peaceful elections to proper civic education before the elections, reconciliation and cohesion efforts before the election and the strict monitoring of hate speech. 1 former IDP attributed the peace to the ICC cases while the remaining one did not respond to the question.

This therefore means, 52% of the respondents felt the ICC cases did not deter or re-occurrence of post-election violence in Kenya in 2013 or it was not the reason for the peaceful elections, while another 44% felt it did deter the re-occurrence.

4.3.6 The ICC cases' effect on Kenya's socio-political and economic landscape

The study sought to find out from the respondents if the Kenyan cases at the ICC have brought any significant socio-political or economic changes in the Kenyan landscape. 32 ordinary Kenyan (translating to 81%) the ICC judicial process has brought significant changes in the political, social and economic landscape. Socially, 5 respondents felt the ICC process has increased awareness to the Kenyan people on their rights and the checks and balances in the international scene. Some also felt it has made Kenyans to be more responsible as they know they will always be held responsible for their actions. Politically, 65% of those who said yes feel political leaders have learnt lessons they won't forget quickly and that impunity among politicians is now under check. 5 respondents also cited the formation of the ruling coalition, The Jubilee Coalition as it was formed by suspects before the ICC. Economically, 45% of those who said yes feel the cases have contributed to bad relations between Kenya and the West.

However, 7 ordinary Kenyans feel no major changes have been brought by the Kenyan cases and hence its business as usual for the political and economic elites. These were supported by 5 former IDPs who say nothing has changed as the culture of impunity still exists, and Kenyans still hate each other, practice nepotism and tribalism as before. Only one former IDP felt there is more tolerance between communities of different tribes today, and political leaders have become more responsible.

69% of all respondents, therefore, felt the ICC process has brought some significant change while 25% felt no major changes had been witnessed.

4.3.7 Effect of ICC cases on national reconciliation, integration, and cohesion

The research enquired from the respondents what effect the ICC judicial process has had on national cohesion, integration and reconciliation efforts especially among the warring communities in the 2007 PEV violence.

67% of ordinary Kenyans said the ICC judicial process has had a positive effect. 14 respondents among this group said that reconciliation occurred between the Kikuyu and Kalenjin communities who were bitter rivals in the 2007 elections when the two suspects-Uhuru Kenyatta and William Ruto-united into a coalition to form a government. This united their followers from the two communities. Other respondents cited the various efforts made by the government to convince the international community that Kenya is one united nation like creation of the National Cohesion and Integration Commission that guards against hate speech and the formation of the Truth Justice and Reconciliation Commission to unearth past injustices including the 2007 post-election ones. However, another 30% of ordinary Kenyans said the effect was negative. Most cited the continued practice of tribalism and lack of structured reconciliation as worsening relations between communities. 4 respondents said the ICC judicial process created an impasse in reconciliation efforts as on one hand, as while the political backgrounds of the leaders see it as a loss, victims of the 2007 chaos see it as win hence it has become harder to reconcile the two groups. The remaining 3% of ordinary Kenyans said the ICC judicial process has had no effect on the reconciliation and cohesion efforts.

Among the former IDPs, 69% felt the ICC judicial process has had no effect on the reconciliation and integration efforts. They cite the fact that electoral related violence in Kenya is a political issue, and only change of the way politics is done will promote reconciliation and not

any judicial process. Another 11% feel it has had a positive effect as the trial of masterminds has brought a sense of justice to the victims. The other 20% did not respond to the question.

4.3.8 Effect of ICC Kenyan cases in bringing justice to 2007 PEV victims

The study sought to find out from the respondents if the ICC judicial process has solidified the course of justice for the 2007 PEV victims.

37 respondents among the ordinary Kenyans (translating to 87% of the respondents) felt the ICC judicial process has helped solidify the course of justice for the victims. 13 respondents among these said that since the Kenyan legislator failed to form a local tribunal, the ICC was the best chance of the victims ever attaining justice. 50% of those who said yes felt since the ICC system cannot be corrupted by the politicians who could have easily bribed judges at home had a local tribunal been formed, the ICC will deliver justice at the end of the cases.

Another 10% of the ordinary Kenyans, however, disagreed. They said the ICC judicial process has not solidified the course of justice for the 2007 PEV victims. 2 of these attributed the fact that out of the six perpetrators mentioned by the prosecutor, today only two are standing trial. The other two felt the victims had not been properly involved in the case as very few were witnesses, and most victims were not represented in the proceedings.

Among former IDPs, 5 out of 6 (representing 83%) felt the ICC judicial process has not solidified the cause of justice for the 2007 PEV victims. 2 of these felt the prosecutor should have gone for more names from the Waki envelope than to pursue just six of them. 1 felt the death of many victims due to killings and disappearance of others had tainted whatever justice they can get from the ICC since the court failed to protect the victims and witnesses. The other two felt more victims should have appeared before the court as witnesses so as to solidify their quest for justice. The remaining 1 responded felt the ICC has solidified justice for the victims as

many of the post-election related cases taken to the local courts had been thrown off or dismissed hence the ICC was the last remaining ray of hope for the victims.

In summary therefore 79% of the respondents (37 out of 42) felt the ICC judicial process has solidified the course of justice for the 2007 PEV victims, 19% (10 respondents) disagreed while 2% (one respondent) did not answer the question.

4.4 Chapter Summary and Conclusion

It has been slightly above 5yrs since the ICC judicial process was initiated against perpetrators of the 2007 PEV in Kenya. Though he was handed a list of 20 names that bore the greatest responsibility for the post-election chaos, The Prosecutor of the ICC chose to pursue only six names. Today of the six, only two are still undergoing trial, Deputy President William Ruto and former broadcaster Joshua Sang. Two suspects were dropped by the pre-Trial Chamber for lack of sufficient evidence to proceed to trial while two others whose cases proceeded to trial (President Uhuru Kenyatta and Ambassador Francis Muthaura) were eventually dropped due to lack of enough evidence, disappearance and death of witnesses and lack of cooperation from the Kenyan government (according to The Prosecutor's claims).

From the data analyzed above, seems many Kenyans have had a change of heart and are now seeing how a local tribunal would have been ideal. 58% of the respondents today feel a local tribunal would have been ideal and inclusive in trying the majority of those who were concerned with the chaos. However, 48% still feel the local judicial mechanisms are not strong enough to try the cases as some feel corruption is still rampant and most of the suspects would corrupt their way out of the cases.

52% of the respondents feel the ICC judicial process against the six Kenyans was not the reason Kenyans voted peacefully in the 2013 General Elections. Some attribute the peace to a reformed

judiciary where the politicians would resolve electoral disputes legally while others feel monitoring of hate speech and reconciliation efforts before elections were the cause. Another 44%, however, feel the ICC was a deterrence factor to the re-occurrence of the chaos.

On the effect the ICC process has had in promoting justice in Kenya, 79% of respondents feel the ICC process has solidified the course of justice especially for the 2007 post-election victims. This is attributed to less being done locally about the perpetrators of the violence so far and hence the ICC remains the major hope of victims attaining justice, and partly to the fact that the ICC process is out of the reach of the influence of local leaders hence it cannot be corrupted thus a good player in providing justice.

However some 19% do not agree with this views and according to them, the ICC went for far few too names to be able to solidify justice for the victims while others feel only prosecution of those who committed actual criminal activities (as opposed to the current case against those who bore responsibility for organizing and financing) will bring justice.

To answer the research question, the ICC process has had numerous effects in the promotion of justice in Kenya. The Judiciary has seen a rapid improvement in its service delivery. The confidence level in the judiciary has increased, attributed partly to the benchmarking efforts the judiciary has made on the ICC. And this improvement has consequently led to more Kenyans accessing justice at the local courts hence the ICC judicial process has helped to promote justice among Kenyans at home courts.

The ICC process has also helped promote justice by encouraging reconciliation efforts especially among warring communities in the 2007 chaos. After the 2013 general elections when President Uhuru Kenyatta and his deputy came together in a coalition government, the Kikuyu and Kalenjin communities that were antagonists in the 2007 PEV have been reconciled and this has

been attributed by respondents to the ICC process as the two candidates were united by the ICC bond. Hence, the ICC process had an effect on the political affiliations of the two whose government in turn encouraged reconciliation among their communities.

The process has also helped promote justice for the 2007 PEV victims. Since nothing much has been done locally in prosecuting 2007 PEV suspects, the ICC process has become the source of hope for the victims ever attaining justice. Through prosecution of four Kenyans, victims feel that at the end of the case, a sense of justice will have been achieved to them by the ICC.

The ICC process also helped some of the suspects access justice by going through the process and clearing their names in the process or getting their cases dropped by the ICC. The first to smile were Mohammed Ali and Henry Kosgei whose cases were dropped by the Pre-Trial Chamber for lack of evidence and then Muthaura and Kenyatta's cases were dropped due recantation of witness statements and death of major witnesses. Hence in answering the research question, the ICC process has had numerous effects in promoting justice in Kenya.

CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Being the final chapter of the research, the chapter gives an overview of the findings obtained. It first gives a general summary of the study and then draws conclusions based on the results of the research study. The chapter then concludes by giving actionable recommendations to the problems observed during the study

5.2 Summary of the study

Following the failure of the Kenyan parliament to form a local tribunal to try the post-election masterminds, the ICC took over the Kenyan cases. Since then, it has been a slow, gradual judicial process that started with The Prosecutor of the ICC naming six Kenyans whom his office felt bore the greatest responsibility for the 2007 PEV chaos that rocked the country. Today, only two Kenyans from the initial six are still under trial at the ICC.

The takeover of the cases by the ICC exposed the weaknesses of the Kenyan judicial system. This was because many Kenyan legislators rejected the idea of forming a local tribunal because they felt the Kenyan judicial system to be weak and open to manipulation hence since the accused were rich individuals, would easily corrupt the courts at home. This necessitated a research study. The study began by studying the performance of the local judicial mechanisms to understand their inherent shortcomings.

The study showed that the Kenyan judiciary has a weak system of checks and balances that has a dented history as far as meting out justice is concerned. The study established that most of the shortcomings bedeviling the local court systems were inherited from the colonial master's model

courts. The study found out that the colonialists in Kenya created partial courts that were dominated by white magistrates and judges and served the interests of the crown of England.

After independence in 1963, Kenya adopted a weak judicial system with a weak constitution that granted the president powers to appoint the chief justice and judges of the higher courts making the judges questionable and serving the whims of the executive. This led to a corrupt, inept judiciary that was characterized by a backlog of cases, lengthy court sessions making the wheels of justice roll too slowly for the poor, rulings that favored the rich and a complete mistrust in the local courts.

When Kenya adopted a new constitution, several changes were made to the judiciary including the creation of an independent judicial service commission that vets and recommends judges for appointment, disciplines and monitors performance of the judges and magistrates. There has also been an appointment of more than 40 new high court judges and hiring of more magistrates for the lower courts. A supreme court was created as the highest court in the land. Today, the wheels of justice roll faster and respect for human rights has been widely advocated for by the judiciary. Several bodies have also been formed to work with the judiciary in promoting justice like the Kenya National Human Rights and Equality Commission and the National Cohesion and Integration Commission. The Law Reform Commission has been remodeled too. Use of other judicial mechanisms has also been suggested especially in relation to the trial of 2007 PEV Kenyan cases. The International Criminal Tribunal for Rwanda (ICTR) was suggested while others suggested the ICC moves its sittings to Arusha while other stakeholders suggested creation of a special division of the high court to try the cases.

ADRMs have also been supported and encouraged by the new constitution and the judiciary. The Chief Justice has been in the forefront in advocating for the use of Traditional Justice Systems like the councils of elders so as to reduce the number of cases before the courts. These changes have led to massive improvement of the judiciary and has seen the confidence level of Kenyans in the judiciary improve. The capacity of the judiciary has also greatly improved.

The Kenyan cases are however still before the ICC, and the researcher sought to find out the process used by the ICC in indicting suspects and see if this was followed in indicting the six Kenyans at the ICC. The ICC indictment process is a step by step legal process which the study found out. The process starts with a state, The Prosecutor or the UN Security Council presenting a case before the ICC for consideration. The prosecutor then takes up the case and does independent investigations and once he or she is satisfied there is sufficient reason to believe a crime has been committed, presents the evidence before a Pre-Trial Chamber who decide by majority if the case should proceed.

From the Pre-Trial Chamber ruling, the suspects are called to appear before the ICC, and a Pre-Trial process takes place. After confirmation of the charges, the cases proceed to trial. In seeking out the views of respondents, 86% of them agreed that the ICC had followed due process in indicting the six Kenyans. Another 84% felt the ICC had been fair to all parties in the case while 76% felt the victims were not adequately represented in the ongoing cases. Another 16 respondents out of 19 felt the victims are entitled to seek reparations from the ICC. A majority of the respondents were however not satisfied that the Kenyan government had fulfilled all its legal obligations to the ICC.

The ICC process has had long-term impacts on the attainment of justice in Kenya too. The study found out that a good number of Kenyans feel the ICC judicial process was deterrence to re-occurrence of post-election violence in Kenya in the 2013 general elections. They feel the prosecutions created fear among many politicians and hence put a stop to the culture of impunity. 69% of the respondents also felt the ICC has had positive impacts on national reconciliation and cohesion. They feel since the start of the cases, reconciliation efforts have been fostered especially among warring communities in the 2007 PEV chaos, the prosecution of hate speech has gone a notch higher and the government has stepped up cohesion efforts by among other measures creating a cohesion commission.

However, a majority of Kenyans (58%) still feel a local tribunal would have dispensed justice to many victims as opposed to the ICC that went only after those who bore the greatest responsibility. 71% of the respondents also feel that the legal representatives of the victims are not actually representing the interests of the victims at the ICC cases, but agree that the ICC has respected the rights of all parties and accorded a fair hearing to all the concern parties. A majority of the Kenyans (64%) feel the victims should seek reparations for their losses from the ICC.

Majority, however, agrees that at the end of the day, the ICC has solidified the course of justice on the 2007 PEV victims and so far remains the biggest chance of the victims attaining justice.

5.3 Conclusions of the study

The inheritance of a corrupt and biased judicial system from the colonial masters no doubt set Kenya on a dangerous path as far as the performance of the judiciary was concerned. The decline over the years of the judiciary and the loss of trust by Kenyans in the local courts was worsened

by the first government that carried out inadequate reforms to the weak constitution it inherited. This constitution allowed the president to appoint and dismiss the chief justice at whim, which put the judiciary in his pocket. This no doubt is responsible for the corruption that followed later in the judiciary as it sought to make pro-government rulings. This was due to consideration that the president appointed judges who once in office, owed loyalty to him and the executive than the citizens.

The research concluded from the foregoing study that successive governments since then rode on the failures of the first government, and this saw the continued misdemeanor and corruption at the courts. The fact that the constitution did not even outline an elaborate process of how judges could be removed from office no doubt led to miscarriage of justice as the executive did whatever it felt was necessary to discipline 'errant' judges like the appointment of the Ringera Commission that carried out a radical surgery of the judiciary, sacking judges without even an elaborate process to follow. This was also the conclusion arrived at by the Report of the Task Force on Judicial Reforms sitting in 2010 which concluded that the weaknesses of the judiciary then which was very inefficient and incompetent were due to the loopholes in the old constitution resulting to lack of independence among judicial officers, lack of an independent judicial service commission , lack of merit based appointment criteria for judges, corruption and unethical behavior among judicial officers due to political intimidation, and poor terms of service for judicial officers.

Neglect of the correctional and rehabilitation institutions by the government has also been attributed to the overcrowding currently experienced in the centers. The facilities are doing with poor health services, lack of clean water and food leading to diseases. The government is to be blamed for this neglect. Failure of the government to also reform the police service for a long

time is to be blamed for the worsening rates of corruption among police officers who have for long remained on top of anti-corruption watchdog lists of the most corrupt institutions.

The progress and changes in the judiciary today are in no doubt attributed to the new constitution. The constitution has given the much-needed independence that the judiciary lacked all these years and today, the researcher can confidently reach the conclusion that the performance of the judiciary has greatly improved. However, the will of the judicial officers to change the judiciary's tarnished name has also been of immense importance to the improvement of the judiciary. After the vetting exercise that got rid of the corrupt and inept judges, the judicial service commission has recommitted judges by signing performance contracts, and this has helped judges remain focused in their duties.

The support being drummed up by the chief justice for alternative dispute resolution mechanisms has also seen some Kenyans turn to TJSs like the councils of elders who are in most cases more trusted and readily available to settle dispute. While it is true that this TJS solve disputes majorly at the grassroots level, it can be concluded that they have proved very effective and this has contributed to the positive image of the Kenyan judicial systems as they are part of justice systems in Kenya. The role they play cannot therefore be ignored.

The research concludes that Kenyans are generally satisfied with the ICC legal process as 84% of the respondents felt due process had been followed by the court in the Kenyan indictments and trials. There is general satisfaction that the ICC has accorded fairness to all the parties concern in the Kenyan cases supported yet with 84% of respondents who were satisfied that the cases are properly before the ICC as it had jurisdiction over the cases and 58% of Kenyans feel the judiciary has greatly improved thanks to the ICC Kenyan process

However, a majority of Kenyans are not contended with the legal representation of the victims at the ICC as the research has shown and many feel the victims should seek reparations form the court. Kenyans also largely feel the government has failed to fulfill all its legal obligations to the ICC as required of it being a member state of the Rome Statute.

When it comes to the impacts the ICC process has had in promoting justice in Kenya, the ICC factor contributed to the peaceful 2013 general elections. This conclusion is supported by many Kenyans who feel the ICC has contributed immensely to national reconciliation and cohesion and had an impact on the socio-economic and political scene in Kenya.

However, the research reached the conclusion that some Kenyans still prefer a local tribunal as opposed to the ICC process as they feel the former would have been more inclusive and brought justice to many victims as opposed to the ICC. There is also a general feeling that the victims are not getting justice as their legal representatives are not representing their interests. At the end of it all, there is consensus that the ICC presents the best chance of providing justice for the victims.

5.4 Recommendations

After carrying out the study, analyzing the results and presenting them in the preceding chapters, the researcher gives the following recommendations.

5.4.1 Recommendations to the judiciary/judicial system in Kenya

- Efforts to fight corruption and inefficiency in the judiciary should be extended to cover all units of the judicial process. There should be efforts, therefore, to clean up the police force and the entire criminal system and carry out extensive reform in the prisons and rehabilitation centers. Then lawyers, as well as paralegal staff, should also be vetted

- Alternative Dispute Resolution Mechanisms (ADRMs) should be supported. The courts are backlogged because even simple disputes head to the courts. There is the need to encourage the use of ADRM's like the TJS supported by the chief justice. Minor disputes can be solved by councils of elders at home
- The Judicial Code of Conduct must be regularly revised to ensure new and best practices are adopted. The Judiciary should adopt international best practices like those of the ICC and ICJ to ensure its activities, and performance is beyond reproach.
- The judiciary should incorporate and accept the help of other actors in Kenya especially legislature and the civil society as long as these do not interfere with the independence of the judiciary. The legislature should in this regard create laws that will address the weak points in the judiciary especially in guarding the independence of the judiciary and carrying changes to the criminal justice system and the civil society should monitor the implementation of reforms yet to be accomplished in the judiciary that are provided for by the constitution.

5.4.2 Recommendations to the Government of Kenya

- As a state party of the Rome Statute, the government of Kenya should endeavor to fulfill all its legal obligations to the ICC. The government should give all the assistance it can to help prosecute the cases especially when such help has been sought by the ICC. This is so that the government cannot be seen to be a stumbling block to the course of justice.
- The legislative arm of the government should come up with a local tribunal to try the other perpetrators of the 2007 PEV chaos who could not be tried by the ICC. Kenyans will only live in peace when they see the neighbor who killed or raped tried so that

justice can prevail. There is still need for a local tribunal as many still prefer the local tribunal and feel it will deliver justice more effectively compared to the ICC process

- The government should carry out comprehensive reconciliation and cohesion exercises in the country. Though the main warring parties in the 2007 PEV chaos (Kikuyu and Kalenjin) have united, it is not lost to respondents that the two came together because their kingpins vied for political office on a joint ticket. Should this coalition break there is high likelihood of the two communities being enemies again. Therefore comprehensive reconciliation should be spearheaded by the government among all communities of Kenya

5.4.3 Recommendations to various parties of the ICC judicial process

- All parties concern in the ICC Kenyan cases should expedite the cases before the court in the interest of justice. The ICC judicial process is a time consuming slow process, and since the process started, several witnesses have died as well as other victims who have been waiting for justice. Since justice delayed is justice denied, many victims feel they may never get justice from the ICC hence the concern parties should expedite and bring the cases to a conclusion.
- The trial chamber should ensure that there is sufficient legal representation of the victims in cases. There is a general feeling (as seen in the analysis of the research data) that the legal representation of the victims is inadequate. Since justice is supposed to be done to the victims, it will be hard to achieve this if the victims feel they are under-represented.
- The civil society, the government of Kenya and the human rights movements representing the victims should ensure that the legal representatives of the victims

represent the interests of their clients in the case. There has been widespread content from the victims that the victim's legal representatives are not representing their interests. The civil society and the various human rights organizations involved should, therefore, ensure the legal representatives stay in touch with the victims, and the government should provide a good environment to ensure this happens.

- Since most victims feel they should seek reparations through the ICC for their losses, the legal representatives of the victims should meet their clients and come up with a way forward on the matter. So far the victims' legal representatives have not raised this matter in the trial or any avenue yet the victims feel they should seek reparations.
- The Office of the Prosecutor of the ICC needs to do more about the 2007 PEV cases to enable victims feel justice has been served. From six suspects initially, the ICC is now trying only two suspects. Many have been let off the hook due to shoddy investigations and inability to get witnesses to testify in some cases. The Prosecution should consider carrying out more investigations to continue with the dropped cases or go for new names in the Waki envelope.

5.4.4 Recommendation to future researchers

- This research aimed at studying the long term effects the ICC Kenyan cases have had in promoting justice in Kenya. However, the ICC judicial process has had impacts in several entities of our country. There is need to carry out more research into how the ICC process has affected other entities of our country for example:
  - ✓ How it has shaped the Kenyan political scene
  - ✓ How it has shaped the Kenyan Judiciary

- ✓ Its effect on the sovereignty principle, etc

so as to get a full and clear picture of the impact of the ICC judicial process in Kenya.

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APPENDIX ONE : QUESTIONNAIRE 1

Dear Respondent,

My name is Laban Machogu a Master of Arts in International Relations student at the Institute of Diplomacy and International Studies, University of Nairobi. I am doing a research thesis titled, **"INTERNATIONAL LAW AND JUSTICE: LONG TERM EFFECTS OF THE ICC CASES AGAINST SIX KENYANS IN PROMOTING JUSTICE IN KENYA"** and hence collecting data for the same. This questionnaire focuses on issues around the ICC cases and particularly on due process of the court.

The information you will provide in this questionnaire will be treated with extreme confidentiality and it will be strictly utilized only for academic purposes of this research. For any clarification needed, reach me through no. **0711577695** or email **labanamenya@gmail.com.**

Thanks in advance for your participation.

PART I: BIO DATA.

Please tick the most suitable response.

1. Sex: [ ] Male [ ] Female
2. Age: [ ] 18-24 [ ] 25-34 [ ] 35- 44 [ ] 44-54 [ ] 55-64
   [ ] 65 and above
3. Highest level of education attained:
   [ ] Certificate [ ] Diploma [ ] Degree [ ] Masters
   [ ] Doctorate [ ] Other (specify) _____
4. **Profession:**
   i) [ ] Legal Expert.
   Specialization:
   [ ] International law [ ] Criminal law [ ] Constitutional Law [ ] Family Law
   [ ] Other (specify) _____

ii) [ ] International Relations Expert.

Specialization:

[ ] International law [ ] Human Rights [ ] Foreign Policy [ ] International Politics

[ ] Other (specify) _____

PART II: RESEARCH QUESTIONS.

SECTION A: PROCEDURE

1. In your opinion, did the ICC **FULLY** follow the Rules of Procedure and Evidence as contained in Doc. A/CONF.183/13 Vol. II of the Rome Statute in indicting the six Kenyans? [ ] Yes [ ] No If 'no' elaborate_____

_____

_____

2. In your opinion have both the accused and the victims been accorded a fair hearing in the ICC Kenyan cases? [ ] Yes [ ] No

Explain_____

_____

_____

SECTION B: JURISDICTION AND ADMISSIBILITY

3. In relation to the admissibility case lodged by the Kenyan government on March 31st 2011 against the ICC, do you feel the ICC has jurisdiction to hear the Kenyan cases? [ ] Yes [ ] No Explain _____

_____

_____

SECTION C: WITNESS PARTICIPATION AND JUSTICE

4. Is there **ADEQUATE** legal representation of victims of the 2007 Post Election Violence in the ICC Kenyan cases [ ] Yes [ ] No Explain_____

_____

_____

5. Should the legal representation of victims of the 2007 Post Election Violence initiate Reparation proceedings for the victims at the ICC? [ ] Yes [ ] No
6. When would be the most suitable time to initiate this proceedings between
   [ ] While the cases are ongoing [ ] After the cases are done

   Explain your choice_____

   _____

_____

7. The ICC judicial process on the Kenyan cases has solidified the course of justice on the 2007 post election victims [ ] Strongly Disagree [ ] Disagree [ ]Agree
   [ ] Strongly Agree

SECTION D: KENYA AND THE ICC

8. Are you satisfied that Kenyan government fulfilled **ALL** its legal responsibilities to the ICC as far as the two Kenyan cases are concerned? [ ] Yes [ ] No
   Elaborate_____

   _____

   _____

9. Has the confidence level in the Kenyan Judicial system changed with the onset of the ICC judicial process concerning the Kenyan cases? [ ] Yes [ ]No
   b.) Explain the change_____

   _____

   _____

APPENDIX TWO: QUESTIONNAIRE 2

Dear Respondent,

My name is Laban Machogu a Master of Arts in International Relations student at the Institute of Diplomacy and International Studies, University of Nairobi. I am doing a research thesis titled, **"INTERNATIONAL LAW AND JUSTICE: LONG TERM EFFECTS OF THE ICC CASES AGAINST SIX KENYANS IN PROMOTING JUSTICE IN KENYA"** and hence collecting data for the same. This questionnaire focuses on effects the ICC cases have had in promotion justice in Kenya.

The information you will provide in this questionnaire will be treated with extreme confidentiality and it will be strictly utilized only for academic purposes of this research. For any clarification needed, reach me through no. **0711577695** or email **labanamenya@gmail.com.**

Thanks in advance for your participation.

PART I: BIO DATA.

Please tick the most suitable response.

1. Sex: [ ] Male [ ] Female
2. Age: [ ] 18-24 [ ] 25-34 [ ] 35- 44 [ ] 44-54 [ ] 55-64
   [ ] 65 and above
3. Highest level of education attained:
   [ ] Primary [ ] Secondary [ ] College [ ] University [ ] Other (specify)
   _____
4. **Category of Respondent:**
   i) [ ] Ordinary Kenyan.
   ii) [ ] Post Election Violence I.D.P/ Former Post Election I.D.P.
5. **Profession:**
   [ ] Student [ ] Government Employee [ ] Private Sector Employee [ ] Self Employed
   [ ] Unemployed [ ] Other (specify) _____
6. **Nationality:**[ ] Kenyan [ ] Non Kenyan (specify nationality) _____

7. **Religion:** [ ] Christian [ ] Muslim [ ] Hindu [ ] Traditional African Worshipper [ ] Other (specify) _____

PART II: RESEARCH QUESTIONS

SECTION A: LOCAL vs. INTERNATIONAL JUSTICE

a. In your preference, between the ICC and a local tribunal which one would have been more inclusive (mastermind, suspects, perpetrator, local security structure etc.) in serving justice?_____ Explain your choice_____

_____

SECTION B: KENYA AND THE ICC

b. In your opinion, did the ICC proceedings of the Kenyan cases deter the recurrence of post election violence in the 2013 elections as witnessed in 2007 [ ] Yes [ ] No

c. In your opinion, how have the ICC proceedings in the Kenyan cases impacted on national cohesion, integration and reconciliation efforts among the warring communities? [ ] Positively [ ] Negatively. [ ] No effect.
Explain_____

_____

_____

d. Have the ICC proceedings in the Kenyan cases, brought significant socio-political or economic changes to the Kenyan society [ ] Yes [ ] No
b.) Explain_____

_____

SECTION A: ICC CASES AND JUSTICE

e. In your opinion, are the interests of victims of the post election violence captured in their legal representation in the ICC proceedings? [ ] Yes [ ] No

f. In your opinion, did the ICC observe fundamental human rights of both the accused (the six leaders), and the victims in the Kenyan cases? [ ] Yes [ ] No Explain _____

_____

_____

g. Should the victims of the post election violence seek compensation (reparations) from the ICC for their losses? [ ] Yes [ ] No

h. The ICC judicial process on the Kenyan cases has solidified the course of justice on the 2007 post election victims [ ] Strongly Disagree [ ] Disagree [ ]Agree [ ] Strongly Agree