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A Comparative Study of International and Domestic Criminal Justice in Post-Conflict East Africa

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DECLARATION

I **Mary Inyuma Wang'ele,** hereby declare that this research project is my original work and has not been presented for a degree in any other University.

Signed: _____Date:_____

The project has been submitted for examination with my approval as University Supervisor

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DEDICATION

This research is dedicated to my dear parents Mr. and Mrs. Eliud Simiyu Wang’ele Malaya.

ABSTRACT

Any post-conflict criminal justice processes aims at contributing to democracy and the triumph of the rule of law over the feeling of revenge due to either a prolonged or intensive conflict. Perceptions by the local population are very crucial in such a process. The study analyses international and domestic criminal justice process in post-conflict East Africa, it examines the relationship between community participation in criminal processes and the effect of its outcome on peace and reconciliation. To achieve this objective, the study examines various modes of criminal justice processes in post-conflict East Africa. The study equally examines the factors affecting the success or failure of international and domestic criminal justice within the region by: (i) examining the outcome of the process, (ii) examining perceptions by the local population; (iii) Examine the operations of post-conflict criminal justice institutions in post conflict society. The study is guided by the presumption that community participation in post-conflict criminal justice enhances societal peace and reconciliation. The study will be undertaken using both qualitative and quantitative research methods with the sample population chosen across East Africa. It seeks to test the following hypotheses; (i) That an increase in community participation in post-conflict criminal justice processes decreases the level of societal instability in a post-conflict society; (ii) That decrease in the level of community participation in post-conflict criminal justice processes, increases chances of societal instability in a post-conflict society; and (iii) That there is no relationship between community participation in post-conflict criminal justice processes and the level of societal stability of the post-conflict state. Having laid out and compared various post-conflict criminal justice mechanisms in terms of their respective origins, objectives, their operations; and an evaluation of the outcome, the study will examine community reactions to each criminal justice process with a view of establishing how their participation affects the process of peace and reconciliation.

LIST OF ABBREVIATIONS

UN	United Nations
UNSC	United Nations Security Council
ICTY	International Criminal Tribunal for Yugoslavia
SCSL	Special Court for Sierra Leone
ICTR	International Criminal Tribunal for Rwanda
ICC	International Criminal Court
OTP	Office of the Prosecutor
ODPP	Office of the Director of Public Prosecutions
DPP	Director of Public Prosecutions
CIPEV	Commission of Inquiry into Post Election Violence.
KNHRC	Kenya National Human Rights Commission
PEV	Post Election Violence
WCD	War Crimes Division
ICD	International Criminal Divisions
DRC	Democratic Republic of Congo
LRA	Lord's Resistance Army
EA	East Africa
ICA	International Crimes Act
PCS	Post-Conflict Society
LCC	Local Council Courts
STSL	Special Tribunal for Sierra Leone
ODM	Orange Democratic Movement
PNU	Party of National Unity
IDP	Internally Displaced Person

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CHAPTER ONE

BACKGROUND TO THE STUDY ON CRIMINAL JUSTICE IN POST-CONFLICT EAST AFRICA SOCIETY

1.1 Background of the Study

This paper discusses the different criminal justice approaches in societies going through a transition period after violent conflict. In this chapter, the researcher states the statement of the research problem, the objectives of the study, the justification of the study, the literature review on the topic. On literature review, the research highlights various approaches to justice in post-conflict society. The chapter thereafter, constructs and explains the conceptual framework to be applied in the research, the hypothesis for the study is also outlined in this chapter and the research methodology and design to be applied in carrying out the study. The chapter concludes by highlighting the scope and limitations of the study.

1.2 Statement of Research Problem

It is generally acceptable that post-conflict trials and tribunals work as a deterrent factor and a moral justification to victims of war crime. However, criminal trials have been met with scepticism from the academicians and politicians; they argue that if criminal prosecutions are adopted after a conflict, it may compromise warring groups' will to lay down their weapons hence prevent a ceasefire. They argue in favour of alternatives to prosecution including but not limited to purges, reparation, compensation, amnesty and exile.

Punishment of the perpetrator of crime brings about some kind of justification to the victims of crime; it may be important for restoration of healthy relations between groups and help bring about trust in new social order. To bring about trust among the people more so the worrying communities in a society there has to be community participation in the process. Consequently, the process must be all inclusive. On the other hand, criminal law literature denotes that the process of prosecution both internationally and domestically in post a

conflict society is both physically and procedurally removed from the victims and the community at large. The process is so strict on procedure and the rules of evidence. It is argued that the process excludes the very people who suffered in the process of the conflict.

Scholars are yet to agree on the success of both international criminal justice and domestic criminal justice mechanisms. Scholars like Caroll,[1] have associated the failure of domestic criminal justice mechanisms to lack of capacity due to political instability and lack of resources within the post-conflict state Nash,[2] on the other associates such failure to its outcome, for example he argues that the process is aimed at attaining victor's justice rather than true justice. According to Feher Micheal,[3] international criminal justice's, failure has been associated with political interference and that the process is far removed from the society in context. However, none of these scholars has associated the success or failure of either of the two processes to lack of community participation in the process of post-conflict trials; and whether community participation has any impact on peace and reconciliation. Even though, literature on transitional justice shows that for any post-conflict transitional process to be successful, it must involve all the stakeholders.

This research seeks to evaluate the factors that affect success or failure of international and domestic criminal justice in post-conflict East Africa. The research also aims at establishing the extent to which community participation in criminal justice in a post-conflict society affects the success or failure of the outcome of criminal justice.

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[1] Carroll, Christina M. "An *Assessment of the Roleand Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*." Hein Online 18 B.U. Int'l L.J. 163 2000

[2] Nash, K., 2007. "*A comparative analysis of justice in post-genocide Rwanda*: Fostering a sense of peace and reconciliation?" Africana Vol. 1. No. 1 at p. 79
Feher, Michel, 1999. "Terms of Reconciliation', in Carla Hesse and post, eds, *Human Rights in political Transitions*: Gettysburg to Bosnia. New York Zone pp 325-338

[3] Feher, Michel, 1999. "Terms of Reconciliation', in Carla Hesse and post, eds, *Human Rights in political Transitions*: Gettysburg to Bosnia. New York Zone pp 325-338

1.3 Objectives of the Study

To compare international and domestic criminal justice in post-conflict East Africa society.

1.3.1 Specific Objectives

1. To describe the international and domestic criminal justice system.
2. To establish the extent to which community participation in criminal justice in post-conflict society affects the success or failure of the outcome.
3. To evaluate the factors that affect success or failure of international and domestic criminal justice in post-conflict society.

1.4 Justification

The importance of this study is two-fold. First, it provides an important contribution to the academic report on the impact of criminal justice on peace and reconciliation in post-conflict society. Secondly, it provides a basis for policy change considerations to East African states and Africa at large.

On the academic front, much has been written on the different criminal justice systems that are employed in post-conflict societies. Teitel, Rutis,[4] has argued in support of domestic criminal justice system, on account of bringing justice home, ability to deal with many perpetrators and restoration of trust in the judicial organs of the State among the citizenry and that justice is brought closer to the victims However, the opponents of this process like Bucley-Zistel[5] have argued against it on account of state influence, lack of human, material and financial resources and the feeling of 'victor's justice' among perpetrators. They instead propose the neutral, well equipped international justice system,

[4] Teitel, Ruti, 1999 ' *Bringing the Messiah Through the Law, in Carla Hesse and Robert Post*, eds, Human Rights in political Transitions: Gettysburg to Bosnia. New York Zone pp 177-194

[5] Susanne Buckley-Zistel, "*We are Pretending Peace' – Local Memory and the Absence of Social Transformation and Reconciliation in Rwanda"* in Phil Clark and Zachary D. Kaufman (eds), After Genocide: Transitional Justice, *Post-conflict Reconstruction and Reconciliation in Rwanda and Beyond.* Columbia University Press, 2009. pp 125-44

which will serve to ensure justice to all and deterrence from future violence. On the other hand, Naggy[6] argues that traditional mechanisms are more preferred in a post-conflict society as it offers ordinary people an opportunity to participate in the proceedings. Kerr and Mobbek[7] oppose this position, and argue that traditional mechanism are so much male-oriented hence discriminatory in nature. On the international front, Akhavan[8] together with Humpson[9] both agree that international criminal justice process brings about an element of impartiality, professionalism and it is not susceptible to political interference. However, none of the scholars has attempted to explain the relationship between community participation and peace and reconciliation; and how the citizens of a post-conflict state should be involved in all of these transitional justice initiatives. Most of them appear to take the 'top-down' approach, including even the traditional courts, which it is contended are based on traditional kingships and therefore quite elitist. Consequently, there lies a gap in post-conflict criminal justice literature, which has necessitated this research. There is need for an academic view on how these criminal justice approaches can ensure popular participation by the affected people. The researcher is optimistic that the findings and recommendations in this research will, in future contribute to the body of knowledge on transitional justice.

Further, at the end of this research various recommendations and proposals made will be important for policy makers in post-conflict governments, whilst deciding the best approach for dealing with transitional justice.

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[6] Nagy, Rosemary *Traditional Justice in transitional contexts, in Transitional Justice and Peaceful Building on the Ground*: Victims and Ex-Combatants, Sriram, Chandra Lekha, Garcia-Godos, Jemima, Herman, Johana, Martin-Ortega, Olga (eds) 2012 Routledge

[7] Kerr, R and E Mobekk 2007, *Peace and Justice* – Seeking Accountability after war, Polity Press

[8] Akhavan, Payam 2001.'*Beyond Impunity*: Can International Criminal Justice Prevent Future Atrocities?, American Journal of International Law 95(1): 7-31

[9] Humpson, Fen Osler, 1996. *Nurturing Peace*. Washington, DC: United States Institute of Peace Press.

1.5 Literature Review

The literature review seeks to analyze the scholarly literature in three thematic sections. The first thematic section discusses different scholar's views on justice in post conflict society, the second thematic area discusses literature on domestic criminal justice in States recovering from violent conflicts or war. In this section, literature discusses various models of domestic criminal justice, including; indigenous mechanisms of conflict resolution and the national or courts. In regard to thematic area three, the researcher provides literature on international criminal justice in post-conflict societies. The main approach to this section is in the nature of discussions on various themes provided above; and the various contentions by different scholars.

1.5.1 Criminal Justice in Post Conflict Society

Hartzell, Caroline, [10] aver that reconstruction and maintenance of peaceful communities in the aftermath of conflicts is one of the most critical areas of concern for both policymakers and scholars. Research generally shows that those states that have experienced one armed conflict, particularly a civil war, are more apt to undergo such violence again. Humpson, [11]argues that high recidivism rate among civil war nations means that efforts at promoting a just and stable society are at the forefront of international efforts at postwar peace-building. The renewal of open warfare is, perhaps, the most severe blow that can be inflicted upon an already war-ravaged people and the peace process. James Meernik, [12] adds, "*We recognize, however, that war does not spring unbidden and without warning. Rather, signs and conditions that make war likely are often present all along, even though they may be discernible only with hindsight."*

[10] Hartzell, Caroline A., 1999. *'Explaining the Stability of Negotiated Settlements in Intrastate Wars'*, Journal of Conflict Resolution 43 (February): 3-22.
[11] op cit
[12] James Meernik. *Peace Research Journal,* Vol. 42, No. 3 (May, 2005), pp. 271-289.Published by: Sage Publications, Ltd. Stable URL: http://www.jstor.org/stable/30042301 .Accessed: 20/02/2013 11:06Your use

The movement toward war may be gradual or sudden, but generally, its causes are there on the surface or buried in suppressed desires for vengeance. We would normally expect, or at least hope, that the greater the degree of cooperation and peaceful coexistence among people in a society, the less likely its members are to resort again to organized and widespread violence to achieve their political aims. I am interested in explaining the extent to which post-conflict criminal justice both internationally and domestically contribute to the maintenance of peaceful societies. By societal peace, I mean the degree of conflict/cooperation, short of war, among groups - defined by their ethnic, religious, or other characteristics- within nations. What types of actions are occurring among groups that demonstrate a commitment to peace? Are they threatening one another, or reaching out to build bridges? Are they imprisoning one another, committing violent acts, and injuring human rights, or are they negotiating political compromises, letting one another live in peace, and embarking upon reconstruction? It is this type of peace that will ultimately determine whether a nation slides back into violence or is able to repair the fissures that once tore it apart.

> As Collier,[13] points out, in post-conflict societies, the risk of reversion to conflict is usually alarmingly high. He argues that a typical post-conflict society during the first decade faces a 40% risk of degenerating back into violent conflict.[14] The government's top on priority risk in such societies is therefore the reduction of this risk of recurrent violence. Post conflict societies will also be characterized by a breakdown of law and order, destruction of basic infrastructure and lack of both

[13] Collier, Paul, 2007. "*Post-Conflict Recovery: How Should Policies be Distinctive?"* Centre for the Study of African Economies, Oxford University at p. 3
[14] Collier, P. A. Hoeffler, and D. Rohner, 2007, *Beyond Greed and Grievance*: Feasibility ad Civil War, CSAE, Oxford. At p. 245

human and physical resources. Nash, [15] for instance, while commenting on post conflict Rwanda, stated that:-

"*Following the genocide the Rwandan legal system was in disarray. They lacked not only the basic infrastructure – courts, judges, lawyers, but also the legislation necessary to prosecute crimes of genocide*

Paul and Hoeffler[16] also point out that deep-seated suspicion and animosity between neighbours from previously warring factions as a major challenge to reconciliation and peace. the two scholars argue that the suspicions, if not well handled can easily lead to eruption of violence and a return to conflict. Brown,[17] while, commenting on the Kenyan situation, outlines the challenge of reconciliation and peace as a result of the forceful displacement of victims, loss of property and loss of lives.

1.5.2 Domestic Criminal Justice in Post-conflict Society

In the immediate aftermath of conflict, it is the duty of the new government to rebuild local forums for dispute resolution. However, according to Kerr Rachel[18]. A post-conflict society in faced with several challenges ranging from collapse of law and order, the enormity of crime and the enormous popular participation in it. Consequently, the capacity of any formal judicial system is likely to be overwhelmed. There are various forms of domestic criminal justice that will be discussed later in this study; the first will be justice before the national courts and indigenous mechanisms in post-conflict East Africa with particular focus on the Gacaca Courts in Rwanda and Mato Oput system among the Acholi community of Uganda. The choice of the two traditional mechanisms is informed by the fact they are the

[15] Op cit
[16] Collier, P., Hoeffler A. 2002. *'Aid, Policy and Growth in Post Conflict Societies'* Policy Research Working Paper, The World Bank, Development Research Group
[17] Brown S., 2012.' *The National Accord, impunity, and the fragile peace in Kenya'* in Sriram C. L., Garcia-Godos J, and Herman J., (2012) *Transitional Justice and Peace Building on the Ground*: Victims and Ex-Combatants. Routledge
[18] Kerr, Rachel and Mobekk, Eirin, 2007: *Peace and Justice*: Seeking Accountability After War

widely and expansively adopted indigenous mechanisms of conflict resolution within East Africa. The other traditional mechanisms to be discussed include the Magamba spirit ceremonies in Mozambique, the Conselho in Angola, the Inkundla in South Africa, the Akiriket Council of elders among the Karamajong of Kenya and Uganda.

1.5.3 Justice through indigenous courts

In the United Nations 2004 report on the rule of law, the UN Secretary General acknowledged that 'due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them continue their often vital role and to do so in conformity with both international standards and local tradition'.[19] Traditional transitional justice systems have evolved to play a significant role in post conflict societies. According to Mutisi,[20] he holds the view that traditional justice systems have over the past two decades emerged as a significant addition to the range of mechanisms that societies in or emerging from periods of gross human rights abuses choose to address legacies of violence. Traditional or indigenous justice systems are an informal mechanism of dispute resolution, falling outside the scope of the formal justice system. They are culture and community specific. Examples abound especially in post-conflict African States, of this form of transitional justice system. From Gacaca of Rwanda, Ubushingantahe of Burundi, Ubuntu and Unkundla of South Africa to Mato Oput, practiced by the Acholi people of Northern Uganda, these traditional justice systems vary from one community to another.[21] Nagy, [22] holds the view that traditional mechanisms offer ordinary persons greater involvement in and access to transitional justice than that provided by remote, formal institutions or technocratic reforms. Karakezi et al on their part holds that, apart from releasing pressure from the

[19] UN Secretary-General's report, *The Rule of Law And Transitional Justice In Conflict And Post-Conflict Societies*, s/2004/616-23 August 2004 p. 12
[20] Mutisi, Martha "*Gacaca Courts in Rwanda: An Endogenous Approach to Post-conflict Justice and Reconciliation*" African Peace and Conflict Journal, Vol. 2, No. 1, June 2009
[21] ibid
[22] Op cit

national courts and prisons, which were overwhelmed with the many prisoners, Gacaca courts would create a sense of justice among victims through their participation, creating an ideal environment for reconciliation.[23] Both the perpetrators and the victims have a sense of ownership and legitimacy, given that the process is anchored in local rituals and indigenous practices. They further posit that Gacaca provided a hybrid of retributive and restorative processes of criminal justice, involving communities rather than individuals and focusing on reconciliation, compensation and reparation.[24] Cobban,[25]in support of the Gacaca courts established by the Rwandan government, lauds what he terms as the realization by the Rwandan government that its "previous stress on prosecutions was no longer desirable" and for its "willingness to try to incorporate elements of different, 'restorative' approach to issues of justice and wrongdoing into its policy." Additionally, Drumbl,[26] holds that gacaca can promote 'reintegrative shaming' among perpetrators of genocide, something that Western type of justice is not able. However, this form of criminal justice has also faced strong opposition from some transitional justice scholars. Buckley-Zistel, [27] one of the opponents of these forms of transitional justice, for instance counters that they are not designed and well equipped to deal with mass atrocity. Kerr and Mobekk, [28] also argue that these traditional systems were more of men-oriented and were therefore biased against women, children and young people.

[23] Karakezi, Urusaro Alice, Mshimiyimana, Alphonse, and Beth Mutamba. *"Localising Justice: Gacaca Courts in Post-Genocide Rwanda"* in My Neighbor My Enemy ed. Eric Stover and Harvey M. Weinstein. Cambridge University Press 2004, pg 69
[24] Ibid 73
[25] Cobban, Helena, *"The Legacies of Collective Violence: The Rwandan Genocide and the Limits of the Law."* Boston Review 27 (2): 4-15 2002
[26]
[27] Op cit
[28] ibid

1.5.4 Post-conflict Criminal Justice through National Courts

Generally states have the primary responsibility of preventing human rights violations occurring within their territories and ensuring accountability on the part of perpetrators of such crimes. According to Gahima G,[29] this makes national prosecutions the primary forum for investigation, prosecution and punishment of human rights violations. Transitional justice scholars in support of the view that national courts of the states in which the crimes were committed, cite various advantages. Gahima argues further, that domestic trial can enhance the legitimacy and credibility of a fragile new government, demonstrating its determination to hold individuals accountable for their crimes. He justifies that given the attention such high-profile prosecutions receive from locals and foreign observers, they 'provide an important focus for rebuilding the domestic judiciary and criminal justice system, establishing the courts as a credible forum for the redress of grievances in a non-violent manner'.[30] Kritz, [31] adds that domestic courts can be more sensitive to the nuances of local culture, and resulting decisions 'could be of greater and more immediate symbolic force because verdicts would be rendered by courts familiar to the local community'. It is further argued that national courts, unlike international courts, are able to handle more prosecutions and therefore are more effective in bringing about justice. In-country prosecutions provide a sense of ownership of accountability mechanisms to which society that was a victim of the human rights abuses resorts. In Ruti's, [32] view, the national courts being closer to the victims, they provide a sense of empowerment and control to the people of a post-conflict society, and are more likely to have an impact in changing values and human rights practices than trials conducted by remote tribunals based abroad. It is also argued that national prosecutions are less costly that international trials and tribunals.

[29] Gahima G. *Tranistional Justice in Rwanda*: Accountability for Atrocity, Rutledge 2013
[30] Ibid
[31] Neil Kritz, *Transitional Justice*, Washington DC: USIP Press, 1997
[32] Teitel G. Ruti, *Transitional Justice*, Oxford University Press, 2000

However, Caroll [33] holds a contrary opinion on the effectiveness of national prosecutions. She points to the significant shortcomings emanating from lack of capacity by the local courts as a result of inadequate domestic human, material and financial resources. In relation to trials of the perpetrators of the 1994 Rwanda genocide in the national courts, Alison Des Forges and Timothy Longman, [34] reported that "trials in Rwanda have taken place in an atmosphere of authoritarian rule and continuing violence [while] prosecutions have been influence. National courts, Nash argues, are likely to establish a 'victor's justice' rather than true justice. This, according to Nash, [35] hinders reconciliation, with perpetrators seeing their detainment and prosecution merely as a result of losing the 'war' and not for their actions in the conflict. Drumbl, [36] also points out the fact that many victims do not support the national court approach and many favour confrontation and compensation – appearing to support restorative rather than retributive justice.

1.5.5 International Criminal Justice in Post-conflict Society

Apart from domestic judicial process, quite a number of post-conflict societies have adopted International Criminal Justice as a mechanism of prosecuting those who bear the greatest criminal responsibility during conflict. There is however a robust debate in respect to the extent to which justice provided by external institutions such as the ICTY, ICTR, ICC, can contribute to peace in a post-conflict society. Akhavan, [37] posits that against a backdrop of calculated manipulation of fears and tensions that lead to violence in which citizens are used as unwitting instruments of unscrupulous political elites, removal of such leaders

[33] Ibid
[34] Des Forges, Alison, Longman, Timothy. "*Legal Responses to Genocide in Rwanda*" in My Neighbor My Enemy ed. by Eric Stover and Harvey M. Weinstein. Cambridge University Press 2004. P. 60
[35] Kaley Nash, 2007, "*Comparative Analysis of Post-Genocide Rwanda*: Fostering a Sense of Peace or Reconciliation" Africana, Vol. 1 No.1 2007
[36] Drumbl 173 "*Survivors expressed considerable interest in compensation*; both because this is consistent with historical practices *of reconciliation in Rwanda and because of the dire economic circumstances in which many survivors live"*
[37] op Cit

through prosecution at international courts plays a significant role in post-conflict peace building.

Humpson,[38] while supporting Akhavan argues that international commissions and tribunals bring an element of impartiality necessary to restore trust in the existing judicial processes and the rule of law. Hesse and Post, [39] disagrees with Humpson in his view and instead posit that international tribunals tend to restore trust in the domestic judicial institutions and rule of law. Hesse, Carla and Robert Post noted that prosecutions in The Hague did not by themselves establish the rule of law in Bosnia, rather, Bosnians acted through Bosnian institutions. Akhavan, [40] while agreeing with Humpson, points out that by removing or marginalizing these leaders, the ICTY and ICTR, have significantly contributed to peace building in Yugoslavia and Rwanda respectively, as well as introducing the culture of criminal accountability into the culture of international relations. In particular, Akhavan argues that removal of perpetrators of human rights abuses, the likelihood of retaliation by the victims diminishes while the incentives for the new leaders to cooperate with other ethnic communities and the international community increases. Orentlicher[41] on his part argues that punishment of offenders is very critical to sustainable peace and where the domestic judicial process is not available, then, it is logical for the international institutions to undertake such trials. Teitel, Ruti, [42] on the other hand counters that international tribunals, while useful in promoting individual accountability and the rule of law however, these institutions by themselves do not bring about reconciliation within the post-conflict society. Minnow, in 1998, putting up an argument against international criminal tribunals asserts that international

[38] Op cit
[39] Hesse, Carla and Robert post, 1999. '*Introduction' in Carla Hesse and Robert post*, eds, Human Rights in Political Transitions: Getty's to Bosnia. New York Zone (13-36)
[40] Ibid
[41] Orentlicher, Diane, 1991. '*Settling Accounts*: The Duty to prosecute Human Rights Violations of a Prior Regime 'Yale Law Review 100 (June) 2537-2615.
[42] Ibid

trials suffer from retroactivity, the defendants are charged with acts that may not have constituted an offence as at the time of its commission, in other words in violation of the international principle of *"nullum crimen sine lege"*. The upshot of these arguments against international criminal tribunals is that, as well put by Feher, Michel,[43] they focus too much on the role of individual at the influence of the international community while ignoring the larger context of criminal regimes and their political plans that produced the violence. These scholarly arguments are valid depending on the empirical evidence given in support of their arguments; however, over the course of the last years, the focus of prosecution of international crimes has been often the task of international courts and tribunals. Although post-conflict atrocities can best be handled by the national courts, international criminal courts have widely been recognized.[44] Indeed, in principle national courts and other local forum are the most appropriate medium for adjudicating international crimes reason being that they have at their disposal the capacity and influence needed to ensure apprehension and prosecution of suspects, reparation for victims and enforcement of criminal sentences.

However, prosecution of crimes under international law by national courts has presented two major problems. The first is that national courts are often far from impartiality, especially when they cope with international crimes that were directed against or committed on behalf of their own state.

Secondly, prosecuting international crimes can be a burdensome exercise, both politically and materially. A handful of states have submitted to the jurisdiction of the international criminal process. The new international law, albeit resistance, has demolished one of the most powerful barricade that has been surrounding states as a result of the doctrine

[43], ibid

[44] In the famous Eichmann judgment the Supreme Court of Israel stated that the territorial state, that is, the state where crimes have been committed, is the appropriate place for adjudication.

of sovereignty of states and/or immunity of state officials from prosecution in case of international crimes perpetrated while in office.

1.5.6 The Evolution of International Criminal Law

According to Lauren G. Paul, [45] The concept of international law developed from the judgement of Justice Robert Jackson in the Nuremberg trials, where the judge noted that international law applies to all individuals waging war, from the lowest foot-soldier to the highest government official. Gideon Boas, Schabas, William A. Scharf, Michael, [46] denotes that Nuremberg and Tokyo military tribunals, established in the wake of World War II to prosecute German and Japanese crimes are the first example of this new ground for international law. The second trials of lesser importance against war criminals were held at the same location. For example in the case of *United States of America v. Karl Brandt*, [47] where the trial dealt with minor offenders. Best known in this regards is the '*Doctor's Trial'* against the leading medical staff of the regime, who faced charges of crimes against humanity and war crimes. It is from these trials that the principle of universal jurisdiction of international courts was developed. The principle of individual responsibility for crimes under international law equally evolved from the Judgment of the Nuremberg Tribunal. The recognition of this principle by the UN Charter has made it possible to prosecute and punish individuals for serious violations of international law. The Nuremberg precedent also established a number of other important related principles aimed at ensuring individual accountability for crimes under international law, such as the exclusion of the official position of an individual, including a head of State or other high-level official, or the mere

[45] Lauren G. Paul, 2004. *From Impunity to accountability*: 'Forces of Transformation and the Changing International Human Rights Context' published by UN Press Release.
[46] Gideon Boas, Schabas, William A., Scharf, Michael p., "*International Criminal Justice*: Legitimacy and Coherence, Edward Elgar Publishing, 2012
[47] *United States of America v. Karl Brandt*, et al. (Case No.1), http://www.icwc.de, Accessed on 10th March 2013

existence of superior orders, as valid grounds for relieving an individual of responsibility for such crimes.[48]

Several international and regional instruments of international law were developed thereafter, although it took several more decades since Nuremberg and Tokyo trials before the idea of international prosecution found broad acceptance, first with the institution by the UN Security Council of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), a product of the international law, established in 1994, with the responsibility of prosecution of persons responsible for Genocide and other serious violations of the international humanitarian law, committed within the territory of Rwanda. In 1996, the International Law Commission completed the Draft Code, which reflects the Nuremberg Principles relating to individual criminal responsibility. At the request of the General Assembly, the Preparatory Committee took into account the Draft Code in preparing the Draft Statute for the International Criminal Court (Draft Statute).[49] According to Bassiouni, Cherif M, Ferenez, Benjamin B, [50]on 17th July 1998 a multilateral treaty signed in Rome by 120 States established the ICC. The ICC Statute entered into force on 1 July 2002 after it had been ratified by 60 states.

While the international community and international civil society believe that international criminal justice is most appropriate in fighting impunity in post-conflict society, the universal jurisdiction of, ICTY, ICTR, and to a certain extent ICC have, since inception faced several challenges. According to Meron Theodor, [51] one of the challenges the international criminal institutions face is that they do not operate in situ meaning they operate

[48] United Nations Charter, the International Law Commission, Principles of International Law.
[49] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, para. 54.
[50] Bassiouni, Cherif M., Ferenez, Benjamin B, "*The Crime Against Peace and Aggression*: From Its Origins to the ICC" in International Criminal Law: International Enforcement, M. Cherif Bassiouni, Ed. Martinus Nijhoff Publishers, 2008, p. 213
[51] Meron Theodor, 2011, ' *The making of International Criminal Justice*: A view from the Bench', Oxford University Press

outside the societies in context. Proceedings take place hundreds of miles away from where the crimes were committed, hence the notion of **"**imported justice."

Additionally, Barria, Lilian, [52] notes that reconciliation role that international tribunals should play seems considerably more difficult under the circumstances. Moreover, these courts are composed of judges who are not familiar with the historical context of the country in which crimes were committed, or even with the legal culture of the society concerned.

Secondly, Wolfgang Schomburg, [53] acknowledges that fully international criminal bodies tend to grow in size, employing hundreds if not thousands of personnel with significant costs and scarce ownership and accountability. They are therefore inclined to become organs with their own internal logic, momentum and agenda, that can be influenced little by their creators, least of all by individual states.

In Gaparayi's, [54] view in some societies, both process have run concurrently, In Rwanda, for example, after the 1994 genocide, various transitional processes were put in place both by the International Community and the post-conflict government. In response to 1994 killings in Rwanda, the international community created the ICTR, to prosecute the perpetrators of the atrocities. On 12 October, 2000, the Transitional national Assembly of Rwanda adopted the Gacaca Courts as their solution to the question of genocide and other crimes. All these processes function in tandem with the formal courts of Rwanda.

1.5.7 The Concept of Retribution versus Restoration

Another debate among scholars is the relation between justice, reconciliation and peace. Although there is currently a growing consensus of the nexus between peace and

[52] Barria, Lilian A., Roper, Stephen D., "*How Effective are International Criminal Tribunals*? An Analysis of the ICTY and ICTR" in The International Journal of Human Rights Vol. 9, No. 3, 349-368, September 2005
[53] Wolfgang Schomburg, "*The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights" Northwestern Journal of International Human Rights*, Vol. 8, Issue 1, 2009
[54] Gaparayi, 2001. "*Justice and Social Reconstruction*: an evolution of the Gacaca courts" African Studies Review, Volume 51, Number 3, December 2008, pp. 25-50

justice, for example the UN Secretary General has emphasised the importance of integrating justice into the peace process,[55] reconciliation is still frequently described as incompatible with justice. According to Huyes L.[56] Notes that the academic debates surrounding the concept of justice versus reconciliation, justice versus peace, justice versus truth, all emphasise that justice is retributive and reconciliation is restorative and that there is a trade-off involved. Hence inferring that justice, in the meaning of criminal proceedings of one type or another against individuals to attain individual guilt followed by punishment, will not lead to reconciliation, stability or peace. While some scholars hold the view that a punitive mechanism will provide a higher deterrence effect than a non-punitive mechanism, the level of deterrence in trials for human rights abuse during conflict and war is very questionable. As Justice Jackson, [57] stated,

> *"Personal punishment, to be suffered only in the event the war is lost, is probably not to be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat to be negligible."*

In summary the scale of judicial responses to human rights abuses runs from the United Nations' International Criminal Court, to the United Nations' funded special tribunals for Sierra Leone and East Timor and to the domestic processes including truth commissions, traditional courts for example the Gacaca courts in Rwanda and formal judicial processes. However, prosecutions only contributes to the process of transitional justice and the same coexists with other forms of transitional justice.

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[55] Draft report Wilton Park Conference, "*Transitional Justice and Rule of Law in Post-Conflict Societies*: Te Role of International Actors", 24-26 January 2005, p. 2

[56] Huyse, L. "*Justice after Transition*: On the Choices Successor Elites Make in Dealing with the Past", *Law and Social Inquiry*, Vol. 20, no. 1 Winter 1995; C. L. Sriram, "Truth Commissions and the Quest for Justice: Stability and Accountability after Internal Strife" in A. Adebajo & C. L. Sriram, *Managing Armed Conflicts in the 21st Century*, Taylor and Francis, 2001, pp. 92-93

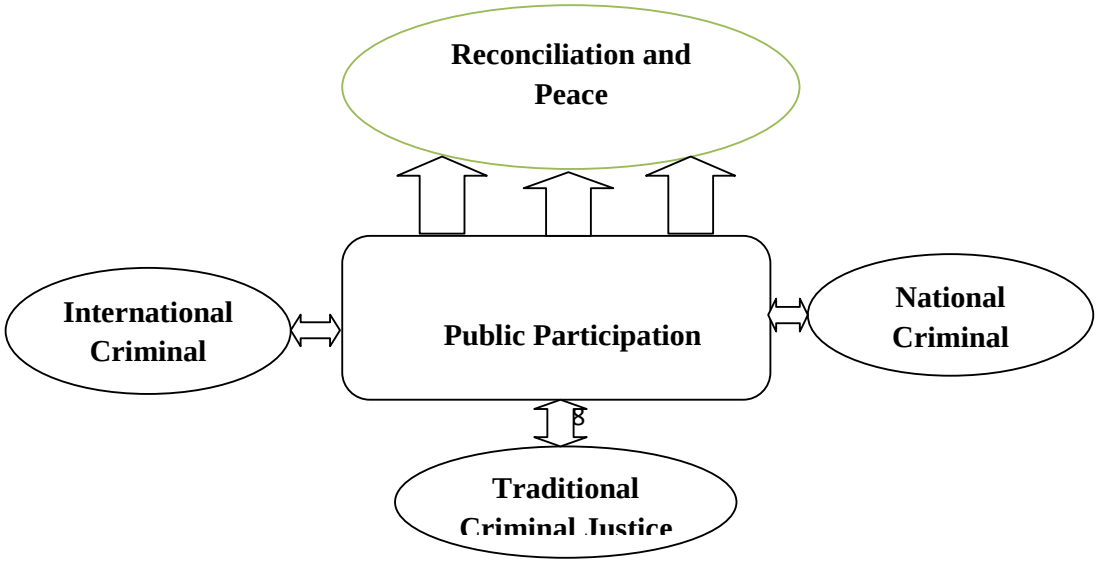
[57] Justice Robert Jackson, Opening statement to Nuremberg tribunal, The Trial of German Major War Criminals, The International Military Tribunal at Nuremberg, 1945 in Minow, Between Vengeance, p. 25

It is generally agreed that the rule of law is the cornerstone of safety and stability in a society, and the fact that people have acknowledged and forgiven one another greatly impacts on the stability of the society. Moreover, where any rule, law or norm generally accepted by the society is breached, every such person must be accountable. With the help of the international community, efforts should be put in reforming domestic judicial institutions and other local transitional processes, to enhance their capacity to deal with massive human rights abuses, which occur during conflict.

1.6 Conceptual framework on Criminal Justice in Post Conflict Society

The concept of criminal justice in post conflict society has emerged as one of the widely discussed concepts in the literature of post-conflict transitional justice. It is indeed worth to note that post-conflict criminal justice plays a critical role in enhancing, justice, reconciliation and sustainable peace. Even though criminal justice process has been discussed widely, public participation in the justice process stands out as a very important factor in the success or failure of the post-conflict justice process. The reason being that public participation enhances chances of the parties accepting the outcome of the process hence legitimizing the process and its outcome. Where the public is not involved in the process, the process is perceived by the community as imported hence the concept of imported justice.

Figure 1.1 below: Demonstrates the centrality of public participation in peace and



reconciliation

The paper sought to advance the argument that in whatever transitional justice process, participatory approach in the criminal justice process should be adopted to attain long-term sustainability as opposed to the usual processes where the victims are removed from the justice process. The paper argues that a top-down 'one-size-fits-all' approach does not guarantee sustainable peace and stability in the end. Patricia Lundy and Mark McGovern, [58] argue that popular participation, allows 'voices from below' to be heard, facilitating any transitional justice process to gain the necessary legitimacy, enhance reconciliation and lead to sustainable peace in the society.

P. Laundy, [59] further argues that much effort has, in the recent past, been put into post-conflict justice by the international community, ranging from financing to legal and institutional set up for the prosecution of perpetrators and reconstruction of collapsed states. Priority is being given to re-establishing the rule of law as a prerequisite for peaceful and stable societies. According to A. Betts, [60] there is however, a raging scholarly debate about the most appropriate theoretical model and level (for instance, international, national, community) at which transitional justice should be engaged and viable they are. M. Ottaway, [61] in his book " Rebuilding State Institutions in Collapsed States, notes that some theories, like the Liberal Peace Theory, tend to argue that universalized and 'best practice' approach, hinged in international legal provision are the panacea to post conflict states' recovery.

[58] Patricia Lundy, Mark McGovern, "*Whose Justice? Rethinking Transitional Justice from the Bottom Up*" in *Journal of Law and Society* Vol. 35, No. 2, June 2008
[59] Ibid
[60] A. Betts, '*Should Approaches to Post-conflict Justice and Reconciliation be Determined Globally, Nationally or Locally?*' (2005) 17 *European J. of Development Research* 735-52
[61] M. Ottaway, "*Rebuilding State Institutions in Collapsed States'* in J. Milliken (ed.), 'State Failure, Collapse and Reconstruction' Oxford, Blackwell Publishing, 2003

Nevertheless, Hearn [62] posits that such attempts to 'influence the rules of the game' show that international justice and rule of law initiatives are not necessarily politically neutral.

According to Ottaway, [63] he argues that the international community has sought to judicialize international relations in governance, development, reconciliation and rule of law initiatives. Ottaway, [64] further argues that, the challenge with this approach, which is driven under the Liberal Peace Theory, is that they are more donor-driven than people-needs based, raising accusations of some veiled form of neo-colonialism by western powers. Critics of this approach to transitional justice, called the 'post-conflict agenda' have argued that the approach raises serious moral and ethical questions for the donors and the international community that remain unresolved. The blatant disregard of the views of the affected members of post conflict society in constructing and implementation of transitional justice processes, and the negative results of such disregard necessitates a rethinking of this approach. Indeed, Mobekk, [65] reports that over 40% of post-conflict societies return to war within five years. The Bottom Up, Participatory approach is therefore more desirable as it ensures active involvement by the affected people in a post-conflict society. The principle behind this approach is well summarized by Kenny, [66] thus;

> "The right to participate in decisions which affect one's life is both an element of human dignity and the key to empowerment – the basis on which change can be achieved. As such, it is both a means to the enjoyment of human rights, and a human rights goal in itself."

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[62] J. Hearn 2000, '*Aiding Democracy? Donors and Civil Society in South Africa'* 21 *Third World* Q. 815-30
[63] Ibid
[64] Ibid
[65] E. Mobekk, 'Conference Report' in After Intervention: *Public Security Management in Post-Conflict Societies – From Intervention to Sustainable Local Ownership,* eds. A.H. Ebnother and P.H. Fluri (2005) at 382
[66] K. Kenny, '*The Right to Participate in International Human Rights Fieldwork'* (2000) International Human Rights Network 18

It is this perspective that has influenced many scholars, researchers and activists engaged in transitional justice projects in many violently divided societies. This paper shall be based upon this theoretical framework.

1.7 Hypothesis

1. That an increase in community participation in post-conflict criminal justice processes decreases the level of societal instability in a post-conflict society.
2. That decrease in the community participation in post-conflict criminal justice processes, increases chances of societal instability in a post-conflict society.
3. That there is no relationship between community participation in post-conflict criminal justice processes and the level of societal stability of the post-conflict state.

1.8 Research Methodology and Design

In this part, the methodological framework of the research paper is discussed. First, the research design is provided. The data collection methods to be applied in this research is stated and explained, the study population and sampling is also discussed. This part ends with a summary of the data analysis, presentation and interpretation methods. This research is restricted only to the issue of domestic and international post-conflict justice mechanisms in the East African region. The outcome of this study is limited only to the data gathered, information from books, journals, pronouncements made by renown local and international law scholars, the relevant Conventions and Protocols, newspaper reports, government reports, and pronouncements by government officers. Interviews were carried out to clarify the issues. As this study is specific to the post-conflict justice initiatives in East Africa, a further study of other regional blocks is suggested.

1.8.1 Research design

This research applied a mixture of both qualitative and quantitative research designs. The researcher adopted both qualitative and quantitative research methodology due to the diversity of the issues involved in the research. Qualitative research methodology helped the researcher to explain the various literature on the different mechanisms of criminal justice as applied in post conflict societies, data collected from the various East African post conflict societies was analyzed and related to the literature review. This method was preferred because of its flexibility. Quantitative research methodology on the other hand was used in explaining the data to be collected from respondents sampled from the victims, perpetrators, civil society, the political class and judicial officers in the post conflict societies.

1.8.2 Data Collection Methods

The researcher acknowledges the sensitivity of the research topic particularly within the East Africa region in view of the fact that it touches on the community's social fibre. The researcher also acknowledged that the case study involves a very wide region inclusive of five states, hence physical presence in all the East Africa countries is not practical in view of the time and cost implications. Consequently, the researcher adopted desk research methodology commonly referred to as literature review. Literature review was based on document review and synthesis of prior documentations on post conflict criminal justice by different scholars. The study examined the concept of retributive and restorative justice, the role of judicial institutions in post conflict criminal justice, international and domestic criminal justice and comparison between international and domestic criminal justice in post conflict society.

The second data collection method was interviews; this was conducted by way of key informant interviews, due to time constraint, majority of the interviewees were conducted through telephone and skype conversations with limited face-to-face interviews. Thirdly, the

researcher also adopted questionnaires as a data collection tool, the questionnaires were structured in nature and delivered to the individual respondents, where the institutional views are required the questionnaires were delivered to the executive authority of the institution. Fourthly, the researcher also adopted focus group discussions; this research tool was adopted mainly among the internally displaced persons who live together in camps, the researcher targeted IDP camps within Kenya.

1.8.3 Study population and sampling

The research adopted a judgemental sampling design, where the sample population was chosen from specific region and on specific issues as per the objectives of the study. This means that the sample population was chosen according to their relevance to the study. This includes specific groups of people for example IDP's, Professionals, practitioners, and other institutions and individuals actively involved in post-conflict criminal justice.

The population from which the respondents were sampled cut across the East Africa society that has gone through violent conflict with the exception of Tanzania for the reason that Tanzania has not experienced violent conflict. The sample population included members of the public drawn from the different post-conflict East African countries, including both victims and perpetrators; members of the civil society; members of the teaching fraternity; persons from the political class; and members of the judiciary and the prosecution. The target population was 60 respondents from each target society, carefully sampled from the mentioned groups.

1.8.4 Data Analysis, Presentation and Interpretation

Data collected by key informant interview and open ended questionnaires were coded by giving all statements numeric codes based on meaning for ease of data capturing. This is followed by data entry and analysis. The data was then analyzed using content analysis. Tables were used and results presented in narration.

1.9 Chapter Summary

This study sought to interrogate international and domestic criminal justice in post-conflict East Africa with a particular focus on critically evaluating the impact of community participation on reconciliation and sustainable peace in post-conflict East Africa.

Chapter 1 contains the introduction and background of the study, the statement of the problem, objectives of the study, justification, hypothesis, Literature Review, Conceptual framework, the methodology that was used in the study, data presentation, analysis and interpretation; and finally the scope and limitation of the study.

Chapter 2 provides a conceptualization of criminal justice in post-conflict society. This chapter contains an introduction, literature review on the role of judicial institutions in post conflict criminal justice, an overview of post-conflict criminal justice with main focus international and domestic criminal justice. The basic concepts in international and domestic criminal justice are also discussed. Literature was provided on other forms of justice in post-conflict society particularly, truth commissions, amnesty and exile forms of justice.

Chapter 3 provides the primary data collected from the field on international and domestic criminal justice process in post-conflict East Africa. The chapter gives a comparison of the two processes and an analysis thereof was discussed in chapter four.

Chapter 4 provides an in-depth analysis and interpretation of the primary data contained in chapter three of this study while subjecting to the objectives of the study, literature review; and testing the hypothesis as stated in chapter 1**.**

Chapter 5 presents the summary of the Key findings conclusions and recommendations. The researcher has made proposals and recommendations on the key areas as per the findings.

CHAPTER TWO

CONCEPTUALIZATION OF CRIMINAL JUSTICE IN POST CONFLICT SOCIETY

2.1 Introduction

This chapter will start by explaining briefly the role of judicial institutions in post-conflict society justice and post-conflict criminal trials will be highlighted. Generally, judicial institutions, consisting of both international and domestic courts as well as tribunals are established to fulfil a variety of tangible, intangible, short term and long term functions including but not limited to meting out punishment to offenders hence dissuading others who may be tempted to engage in similar activities. The courts and tribunals also provide a forum for truth-telling and creation of historical record. A general overview of criminal justice in post-conflict society will be discussed. In so doing, certain principles of criminal law and practice will be defined and explained. This will highlight the general principles of international law and international criminal trials, whereby the principle of complementarily and co-operation and universal jurisdiction on the international criminal court will be explained.

The chapter provides an in-depth understanding of post-conflict retributive justice, in so doing the researcher gives a critical analysis of both domestic and international post-conflict justice. On domestic criminal justice, the paper presents an in-depth analysis of justice before the indigenous and/or traditional court systems for example Conselho of Angola, the Magamba of Mozambique, the Gacaca courts of Rwanda, the Akiriket Councils of elders among the Karamajong and the Mato Oput and Nyouo Tong Ngweno of Uganda. The chapter also discusses the role of national courts, which are the formal courts established by individual states under domestic law; and on the international criminal justice, focus placed on International Criminal Court, International Criminal Tribunal Rwanda, and

International Criminal Tribunal Yugoslavia; and to a lesser extent the Special Tribunal for Sierra Leone.

The researcher also acknowledges the fact that rule-breaking takes various forms which may include property loss, loss of life, respect, human dignity, etc. Therefore, while prosecuting offenders of such rules, sometimes the court or the tribunal may consider reparation of the victims by returning to them what was theirs before the conflict. Such reparations bring about the aspect of restorative justice. In a summary highlights other forms of post-conflict justice including truth commissions. The chapter ends with a conclusion.

2.2 Criminal Justice and the Role of Judicial Institutions

In order to understand the impact of judicial institutions on societal peace, we must begin by understanding the purposes for which these institutions have been created. Judicial institutions generally, and courts or tribunals more specifically, fulfil a variety of tangible and intangible, short-term and long-term, intended and unintended functions. Firstly, Creta V[67] argues that courts promote both specific deterrence - preventing those who have been arrested from committing additional crimes - and general deterrence - dissuading others who might be tempted to engage in criminal behaviour. Traditionally, communal values informed the practices that societies used for thousands of years in resolving conflict and healing rifts that may have been created. According to Krog, [68] African traditional beliefs sustain these practices, he notes thus:

> *"If you have harmed my child, it is because something has gone wrong with you to such an extent that you could do that. That which has gone wrong for you is now harming my life. It means I cannot be the kind of human being I want to be because you are no longer human. Therefore, it is in my interest as the victim, to get you and*

[67] Creta. Vincent M. 1998, *" Comment: The Search for Justice in the Former Yugoslavia and Beyond"*, Houston Journal of International Law 30(Winter): 381-418

[68] Antjie Krog interviewed by Philip Coulter in Walk to Freedom (Ideas, Canadian Broadcasting Corporation, 2004

assist you to get your humanity back so that I can become human again... This is a fundamentally different way of looking at a community and looking at what to do with evil. African traditional religion has no such thing as Satan. The biggest evil is to live in complete disregard of others."

Throughout Africa, societies, and communities have developed and continue to use diverse range of such traditional mechanisms. According to Eyber and Carola, [69] Internally displaced, war affected people in Angola utilize a type of traditional psychological healing called Conselho, this traditional mechanism was based on "the general encouragement given to people to abandon the thoughts and memories of war and losses." Honwana Alcinda, [70] adds that, holistic purification and cleansing rituals attended by the family and broader community are carried out when welcoming ex-combatant child soldiers back into the community in both Angola and Mozambique.

According to Pkalia, Ruto, Mahamud Adan, and Isabella Masinde, [71] in Western Kenya, traditional conflict resolution mechanisms are used by the Pokot, Turkana, Samburu, and Marakwet tribes. Rosalinda, [72] denotes that ceremonies to "cool the heart[s]" of child ex-combatants upon their return to their home communities in Sierra Leone are carried out by the broader community. Rosalinda [73] further, posits that Inkundla in South Africa comprises a series of traditional small claims courts. According to Harrel, [74] whereas Rwanda has chosen

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[69] Eyber, Carola and Alstair Ager 2002. "*Conselho Psychological healing in displaced communities in Angola* " the Lanset 360 (Sep 14), 871

[70] Honwana, Alcinda, 2001. " *Children of War. Understanding War and War cleansing in Mozambigue and Angola."* Cited in Simmon Chesterman (ed). Civilians in War. Builder, Lynne Rienner. 1137-140 Nordstron, Carolyn. 197. A different kind of War story. Philladelphia University of Penslvania Press. 142-152

[71] Pkalia, Ruto, Mahamud Adan, Isabella Masinde. 2004 In Betty Rabar and Martin Karimi (eds.) Indigenous *Democracy: Traditional Con Icit Resolution Mechanisms. Kenya Intermediate Technology Group – Eastern Africa*

[72] Show, Rosalinda. 2005 *rethinking Truth and Reconciliation Commissions*: Lessons from Sierra Leone. United States Institute of peace, Special Report pg 130.

[73] Gacaca, Inkundla, *traditional systems of justice being looked at in the US as restorative justice*. Hrndon VA: Marek Publications , 2001, article accessed online at http:www.marekinc.com

[74] Harrel, Peter, E. 2003, Rwanda's Gamble: *Gacaca and new model of transitional justice*. New York: Writes Club Press.

to utilize its tradition of gacaca, a form of traditional dispute resolution mediated by chiefs and tribal elders, most recently re-vamped, formalized, and used to deal with crimes of genocide.

Uganda on the hand has a particularly vibrant history of the use of traditional mechanisms, and these institutions are still used in many of the 56 different ethnic groups within the country. Novelli Bruno, [75] notes that among the Karamojong, the akiriket councils of elders adjudicate disputes according to traditional customs, such customs include cultural teaching and ritual cleansing ceremonies. The Acholi carry out ceremonies of Mato Oput (drinking the bitter herb) and nyouo tong gweno (a welcome ceremony in which an egg is stepped on over an opobo twig) in welcoming ex-combatant child soldiers back home after they have been decommissioned. The Baganda use the traditional Kitewuliza, a juridical process with a strong element of reconciliation, to bring about justice. The Lugbara, in the northwest of the country, maintain a system of elder mediation in family, clan and inter-clan conflict. Finstrom, [76] notes that, in 1985, too, an inter-tribal reconciliation ceremony, gomo tong (the bending of spears) was held to signify that "from that time there would be no war or fighting between Acholi and Madi, Kakwa, Lugbara, or Alur of West Nile."

Although these mechanisms differ from one region to the other and from one ethnic groups and the other within a particular region, it is important to note that, in all cases, they have always served as important elements in the process of conflict resolution. Ayisi Eric, [77] in his book, "*Introduction to the Study of African Culture*," argues that traditional systems of government were not elaborate because law and order were maintained through the normative system which was part of the social structure.

[75] Novelli, Bruno. 1999. *Karamajong Traditional Religion*. Kampala: Comboni Missionaries pp. 169-172
[76] Finstrom. Sverker, 2003. " *Living With Bad Surroundings*: War and existential Certainity in Acholiland in Northern Uganda, 299
[77] Ayis, Eric O. 1979. *Introduction to the Study of African Culture*, 2nd ed. Nairobi: East African Publishers. 110

Judicial institutions serve a retributive function. As stated in the case of the Prosecutor Vs Drazen Erdemovic, [78] heard by the ICTY, the goal of redress or retribution is 'that punishment shall be proportionate to the crime's gravity and the moral guilt of the perpetrator'. These institutions also serve as a forum for truth-telling and the creation of a historical record. Truth-telling and witness testimony often provide a measure of justice and relief for those most directly affected by wars. According to Meemik, [79] the establishment of a historical record by an ostensibly neutral organization, like an international tribunal, should help end the cycle of violence, by providing an accounting of crimes and responsibility untainted by the political interests of those states and organizations that may have had a hand in the violence.

According Akhvan, [80] Judicial institutions also promote the rule of law rather than violence to resolve inter-communal conflict. Peace and reconciliation are the more intangible, long-term, and intended goals of most judicial institutions. Orentlicher, [81] opines that judicial institutions are re-established gradually and through many small and large acts of deterrence, truth-telling, retribution, and development of the rule of law. The promotion of peace and reconciliation should diminish the likelihood that criminal actions will recur. The critical issue is how we determine the extent to which judicial institutions serve the goal of societal peace by carrying out these other functions. It must first be assumed that the intention of those who design judicial institutions and those who work within them is to collectively improve the lives of those people in whose name they provide justice. We must acknowledge

[78] Prosecutor v. Drazen Erdemovic, IT-96-22, p. 60, 29 November 1996 at http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj961129e.htm

[79] Meernik, James & Kimi Lynn King, 2003. ‘ *The Determinants of ICTY Sentencing*: An Empirical and Doctrinal Analysis ‘ Leiden Journal of International Law. 16 (4) 717-750

[80] Akhavan, Payam, 2001. *'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*?', American Journal of International Law 95(1): 7-31.

[81] Orentlicher, Diane, 1991. '*Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior* Regime', Yale Law Review 100 (June): 2537-2615.

that there almost inevitably will be some unintended and costly consequences stemming from their actions.

Nevertheless, the intended net impact of the actions of judicial institutions is to improve lives. Deterrence, retribution, and reconciliation should ultimately result in greater societal peace. We would expect to find that, as a consequence of the actions of a judicial institution, there has been improvement in the level of peace. Yet, Fletcher and Weinstein,[82] point out that 'very little data' can be found on the linkages between these trials and reconciliation, and that, instead, the relationship between the two has 'solidified into articles of faith that guide policy decisions in the international arena.

The establishment of the ad hoc international tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively brought about a proliferation of international criminal jurisdictions. Precursors of the International Criminal Court – an international, universal criminal jurisdiction. Such tribunals have become the model upon which the second generation “mixed tribunals” were conceived. In the decade that followed their establishment, a number of countries emerging from civil wars typified by the perpetration of crimes against humanity, war crimes or genocide on a large scale, called upon the United Nations (UN) to set up similar jurisdictions in their own territories.

With their administration of justice devastated, biased or otherwise lacking the necessary judicial and administrative capacity, these countries sought the technical and financial assistance of the UN in the conduct of complex prosecutions that they alone were unable or politically unwilling to undertake. In their wish to put an end to historic cycle of impunity, they were also motivated by the interest to give the prosecution of the government’s political enemies a mark of international legitimacy. The United Nations

[82] Fletcher, Laurel E. & Harvey Weinstein, 2002. 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', Human Rights Quarterly2 4(3): 573-639.

Security Council (UNSC), as the parent institution of the ad hoc tribunals, has proved to be reluctant to replicate the experience and establish additional judicial organs whose administrative structure and lengthy and costly proceedings would have further increased the heavy financial burden on Member States of the Organization.

From the finding of the famous Eichmann case, [83] the presiding judges noted that, a model of an "internationalized tribunals" as a national court of mixed jurisdiction and composition was first developed for Cambodia. It was soon followed by a sui generis, treaty-based court of similar jurisdiction and composition for Sierra Leone. Unlike the international criminal tribunals for the former Yugoslavia and Rwanda established as an enforcement measure under Chapter VII of the UN Charter, the legal basis for the establishment of tribunals for Sierra Leone and for Cambodia was consensual, and their legal status, applicable law, composition, and organizational structure had to be negotiated and agreed upon between the parties.

It was in the nature of the negotiating process that political constraints imposed different legal choices on questions related to jurisdiction, organizational structure, and composition of the mixed tribunals. The mixed tribunals for Sierra Leone and for Cambodia had a prominent role in the creation of mixed jurisdictions in East Timor and Kosovo. In analyzing the diversity of mixed jurisdictions from the UN standpoint, this chapter will focus on the Special Court for Sierra Leone and the Extraordinary Chambers for Cambodia, and a comparative analysis of the mixed composition panels in the UN-administrated.

2.3 The Genealogy of Post-Conflict Criminal Justice

The concept of justice for victims of violent crime after a period of civil conflict, or repressive or authoritarian rule, is relatively new. For many years, leaders of rebel groups and

[83] In the famous Eichmann judgment the Supreme Court of Israel stated that the territorial state, that is, the state where crimes have been committed, is the appropriate place for adjudication.

states were simply left alone, without consideration of punishment, or having to 'pay' for their deeds. Therefore, tyrants, such as Idi Amin of Uganda or Mobutu Seseseko of the then Zaire simply left their own countries, moved to countries that were willing to house them, and faded into obscurity. It was not until the 1990s that the idea of retributive justice started to gain currency. At that time, of course, there were many situations of violence and conflict underway, or just ending.

According to Quinn, [84] while the genocides of Rwanda and Bosnia were taking place. Bloody civil conflicts continued in countries such as Somalia, Sierra Leone, Liberia, Haiti, and Guatemala. Yet the perpetrators of even the most egregious human rights violations went free. It became clear that someone should be made to answer for such horrible crimes. However, the dilemma was on holding the leaders accountable. Many states recovering from conflict are faced with a myriad of challenges. The task that confronts societies aiming toward transition from authoritarian or repressive regimes to democracy, or from conflict to peace is daunting.

Transitional justice focuses specifically on reforms to the justice sector, working toward the re-establishment of the rule of law and assisting in the rebuilding of the system of courts that is required in a functioning democratic society. Even so, it can be difficult for transitional societies to come to an agreement about just what this means, or how it will be carried out. One worry is that decisions about who should be punished are made by the victorious party, and will not necessarily address the concerns of the population as a whole. Quinn, [85] notes that post-apartheid South Africa, for example, white supporters of the defeated National Party worried that they would be attacked by the newly-victorious (and

[84] Joanna R. Quinn, *'Transitional Justice'*, Goodhart, 2008. p. 366 accessed on June 6, 2013 at http://www.politicalscience.uwo.ca/faculty/quinn/transitional_justice_in_goodhart.pdf
[85] Ibid

mostly black) African National Congress. While Kirkby [86] adds that in Rwanda, the same fear was shared by the Hutu population who believed the Tutsi would want to retaliate for the years of repression since 1959. E. Quinn, [87] on his part points out that, the capacity of the legal system may have been badly compromised during the conflict, and may find itself unable to cope with the large numbers of prosecutions that will be required. According to Quinn[88] more than 120,000 people were identified as perpetrators of the Rwandan genocide, for example, which placed an enormous burden on the court system; it was estimated that it would take nearly 180 years to prosecute all of them. Moreover, in Cambodia, the court system was weak to begin with. According to Craig Etcheson [89] it has been reported that more than 80 per cent of judges there did not hold law degrees, and many of those had never received formal education at all, let alone legal training. Despite the difficulties faced by Cambodians, Trevor Findlay,[90] argues that there was continued reference to ensuring the non-return the policies and practices of the past but there was no clear provision for war crimes trials or other means of achieving justice. It is accepted that there is no single solution that will ever be acceptable to everyone. For victims of heinous crimes, no judicial intervention will be able to bring back their dead loved ones, restore a broken limb or put their life back to where it was before the conflict. Some scars are just impossible to be healed fully. According to P. Hayner, [91] for the perpetrators who had been indoctrinated into believing that whatever atrocities they committed were justified—such as Nazi officers—

[86] Coel Kirkby. *Rwanda's Gacaca Court: Preliminary Critique*, Journal downloaded on Thursday 21st February, 2013 at 09:46. Pg 101

[87] David E. Quinn. *Human Rights Education*: The Third Leg of Post Conflict/ Transitional Justice. International Human Rights law Institute, DePaul university College of Law , 22 November 2005. Pg 397. Accessed at http:/ssrn.com/abstract= 854488.

[88] Ibid 398

[89] Craig Etcheson, "Putting Pol pot in Jail: Dilemmas of Accountability in Cambodia" Paper presented to the Annual Meeting of the American Anthropological Association, Washington, DC , 19-23 November 1997

[90] Trevor Findlay, Cambodia: The Legacy and Lessons of UNCTAD (Oxford: Oxford University Press, 1995) Pg 19

[91] P. Hayner, "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal", Law and Contemporary Problems, vol. 59, no. 173, Autumn 1996, pp. 177-178

whose actions were taken in an environment that condoned, rather than condemned, them, it may be difficult for society to try them. Still, common morality dictates that something must be done.

As the idea of coming to terms with past abuses has unfolded into practical application, different ways of dealing with both victims and perpetrators have developed. The types of mechanisms that states adopt tend to reflect the circumstances that arise from the particular crimes committed, and the social and political conditions that follow. They also correspond to particular ideas about how and why justice must be done, and must be seen to be done. According to Ojendal J and Lija M. [92] transitional justice approaches focus on accountability, and include both judicial and non-judicial responses. In Minow's,[93] view, these approaches are characterized into two distinct *paradigms* (philosophical or theoretical framework): retributive and restorative this typology is useful as a means of both explaining and understanding the different ways of approaching transitional justice. In this chapter, particular focus will be placed on retributive justice while, the researcher will analyse the concept of retributive justice in detail, with examples of how it has been severally applied in transitional efforts.

2.4 Retributive Post-conflict Criminal Justice

Retributive justice has been termed as 'justice of the West' by many commentators. It appears to be the most preferred transitional justice approach for western countries. In this paradigm, justice equates with legal prosecutions of the perpetrators and the restoration of the rule of law. This kind of criminal justice includes the kinds of court proceedings and sentencing that are common throughout much of the world today, all of which are based on the notion of retribution or punishment for crimes committed. According to Brecke, Peter &

[92]Ojendal J., Lija M. (2009). Beyond Democracy in Cambodia: *Political Reconstruction in a post-conflict state*, p. 271

[93]Minow, M. (1998). *Between Vengeance and Forgiveness*: Facing history after genocide and Mass Violence. Boston, MA: Beacon Press p. 76

William J. Long, [94] in a post-conflict state, retributive justice entails the arraignment of persons charged with the commission of crimes before a judicial body, having their guilt and subsequent penalty determined. It seems evident that post-conflict criminal trials can work as a deterrent factor as equally as a moral justification to victims of war crimes, being an important factor on the road to peace building and reconciliation although these processes have been met with resistance particularly by the political class and members of the academia. Rule –breaking and transgressions can take many forms, from heinous crimes to rather trivial breaches but whatever the transgression where a rule of law has been broken the most natural action by the state is punishment of violators of such a rule.

Criminal justice generally presupposes that combatants of war and their accomplices committing crimes against humanity are considered as rational actors, people who understand the consequences of their actions and more often than not they will not be willing to give up fighting knowing clearly that they will prosecuted if they do so.

The rationale behind retributive justice is at least fourfold. First, if a person has done something wrong, those actions need to be publicly acknowledged. The trial process offers an opportunity for the different crimes committed to be openly discussed, many times the revelations coming out for the first time. Sorpong Peou,[95] for instance, discussing the post conflict justice of Cambodia after the Khmer Rouge atrocities, argues that retributive justice would serve to demonstrate that the Khmer Rouge regime committed crimes. He further adds that without such knowledge, the Cambodians would not learn that what the Khmer Rouge Committed was a crime. He takes the general assumption that Cambodians did not know what had happened and would now want to know what exactly happened. Wendy R.

[94] Brecke, Peter & William J. Long, 2003. *War and Reconciliation*: Reason and Emotions in Conflict Resolution. Cambridge: MIT Press.
[95] Sorpong Peou, *Mass Atrocities in Cambodia*, in Ganesan N., Sung Chull Kim (2013) (eds) State Violence in East Asia, p. 145

Lambourne[96] adds that acknowledgement that such crimes were committed would help in the healing process.

Second, those found guilty should be punished for their actions. Punishment in the form of imprisonment serves to remove the perpetrator from the circumstances in which he committed the crime and to rehabilitate him before his release into the community. By focusing on individuals, criminal processes also help make the important point that entire ethnic or political groups do not commit atrocities, but rather specific individuals do. Hartzell, Caroline & Mathew Hoddie, [97] in their journal on institutionalizing peace, they note that in theory, at least, the rest of society is therefore more easily able to reconcile. The proponents of retributive justice argue that in fact, if victims know that perpetrators will be punished in some kind of way, they might be more willing to reconcile with them, once they have paid their condemns. In contrast, Rodrigo Uprimny and Maria Paula Saffon,[98] are of the view that if their claims of justice are denied or ignored, it is more likely that victims will not be able to pardon perpetrators, to abandon their desire for vengeance, and to accept the legitimacy of the new political regime. As Neier[99] urged, referring to the Bosnian process, "justice provides closure; its absence not only leaves wounds open, but its very denial rubs salt in them".

Third, by disciplining the perpetrators for their actions, there is a wider, educative effect for the public. That is, if others see that someone is being punished for committing particular crimes, then they will be deterred from committing the same crimes. This punishment may prevent the emergence of a culture of impunity in the post-transition regime.

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[96] Wendy R. Lambourne, "Justice and reconciliation: Post-Conflict peace building in Cambodia and Rwanda", PhD Thesis. University of Sydney, 2002 Pg 40.

[97] Hartzell, Caroline & Mathew Hoddie, 2003. *Institutionalizing Peace*: Power-Sharing and Post- Civil War Conflict Management. American Journal of Political Science 47(2): pp. 318-332.

[98] Rodrigo Uprimny, Maria Paula Saffon, "*Transitional Justice, Restorative Justice and Reconciliation*. Some Insights from the Colombian Case" in 'Coming to Terms' with Reconciliation – Working Paper Library, accessed on June 7, 2013 at www.global.wisc.edu/reconciliation p. 9

[99] Aryeh Neier, *War crimes*: Brutality, Genocide, Terro, and the Struggle for Justice (1998), pp. 212-213

Indeed, it sends a clear message, according to which, from then on, the violation of human rights will have serious repercussions. Such a message is important not only because it promotes the respect for human rights, but also and especially because it guarantees non-recurrence, which is crucial for the success of a transitional process. For instance, Crocker,[100] argues that, it was the absence of this guarantee that led to the 1999 Sierra Leone transition failure. Based on the concession of a general amnesty to Foday Zanco and other leading members of the rebel group, who were responsible of numerous atrocious crimes, the transition did not last longer than a couple of months. It was abruptly interrupted by the amnestied, who took advantage of government's collapse to incur in a new massacre of civilians and in the take of 500 UN personnel as hostages. This was part of the reason the International Criminal Tribunal for Sierra Leona was established. Crocker,[101] argues further that it is important to remember that the main objective of all transitional processes is the establishment of a new, democratic regime, capable of leaving the former political regime and atrocities therein committed in the past for good.

The ability to conduct a trial demonstrates and reinforces that the justice system is both capable of carrying out retributive actions, and is viable as an institution. If a trial takes place, it must be the case that the justice system is fully-functioning, and able to transmit the full authority of the law of the land. This is more so if the trials are held in the courts of the post-conflict state. According to Craig Kaufman[102] trials help establish the credibility of the courts as a venue where victims can get justice, encouraging citizens to pursue justice through the state rather than through vigilantism.

[100] Crocker, D.A. (2002) "*Democracy and Punishment*: Punishment, Reconciliation, and Democratic Deliberation," Buffalo Criminal Law Review, No. 5, pp. 509-49.
[101] Ibid p. 525
[102] Craig Kaufman (2005), "*Transitional Justice in Guatemala*: Linking the Past and the Future" paper prepared for the ISA-South Conference Miami, Florida, November 3.5, 2005

2.5 Retributive Justice through National Trials

Any state recovering from conflict will want to demonstrate its sovereignty by insisting on handling prosecution of all the perpetrators of atrocities during the conflict. Such was the case in Greece, which experienced a *coup d' état* by a military *junta* in April 1967. The constitution was suspended and martial law was declared. This was followed by several years of brutality that saw thousands of people arrested, injured and killed. The coup continued until July 1974, when, through negotiations with the coup leaders, the deposed prime minister returned to power and restored order. In a series of trials held throughout 1975, more than 150 top officials were condemned for their actions. Many thousands of others were stripped of governmental and administrative positions—an attempt to 'dejuntify' the country in the aftermath of the coup. In Rwanda, following the genocide in 1994, the Rwandan government emphasized the need to end the culture of impunity and it has attempted to do this through national judicial action. In 1996, the government adopted the Organic Law on the Organization of Prosecutions Constituting the Crimes of genocide or Crimes against humanity Committed since October 1990. However, the Rwandan legal system was in disarray. They lacked not only the basic infrastructure – courts, judges, lawyers, but was also overwhelmed by the large number of indictees. In 2004, Amnesty International[103] reported that there were an estimated 90,000 prisoners awaiting charges or trial in prisons with maximum detainment of roughly 30,000.

According to Gloppen, Siri, [104] for any transitional justice process to serve its purpose of attaining reconciliation and lead to lasting peace, both the victims and the perpetrators must acknowledge and accept the process. This is one of the biggest challenges encountered

[103] Amnesty International, *Rwanda Genocide trials*, 2004 report.
[104] Gloppen, Siri, 2005. '*Roads to Reconciliation*: A Conceptual Framework', in Elin Skar, Siri Gloppen & Astrid Suhrke eds. Roads to Reconciliation, Lexington Books: Lanham: pp. 17-50.

by states that choose retributive justice through national courts. Gloppen[105] argues further that in most cases, it is the victorious side of the conflict that assumes leadership. It therefore follows that most of the prosecutions involve perpetrators from the 'losing' side. This makes the accused to feel that they are being victimized for 'losing the war'. With such feeling, the retributive value of the prosecutions is diminished. The victims on the other hand may not feel that these trials are doing enough to help in the healing process. The conflict in Rwanda, for instance, took a community dimension with the Tutsi minority being the target of the Hutu majority. This led to deep-seated animosity between the two communities. For reconciliation to be achieved in such society where neighbours look at each other suspicion, retributive justice where only a handful of perpetrators are prosecuted may not be sufficient. Yet again, one of the greatest impediments to justice at the national courts is lack of political will by the national leadership.

2.6 Post-conflict International Criminal Justice

Owing to the many challenges faced by national courts in enhancing transitional justice, it was felt that International justice should intervene in post-conflict societies. The first ever international prosecution of persons charged with war crimes was the post-War Nuremberg Trials and *Tokyo Tribunal*, which were appointed to deal with Nazi war crimes and the crimes of Japanese officials. According to George Ginsburgs, [106] the political leaders, officials and certain organizations of Hitlerite Germany guilty of unleashing war and committing other international crimes, were sentenced and suffered deserved strict punishment. Thus began the development of the system of international criminal law. Previously, any and all laws had existed only at the national/state level.

[105] Ibid

[106] George Ginsburgs, Vladimir Nikolaevich Kudri (1990). *The Nuremberg Trial and International law*, Martinus Nijhoff Publishers

It was several decades, however, until further international criminal legal avenues were pursued. The international community showed little interest in the prosecution of perpetrators of mass atrocities, genocide, and war crimes. In the 1990s, a number of international courts and tribunals were established, in conjunction with the United Nations Security Council. These included the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both established on an *ad hoc* basis to try cases pertaining to the genocides, war crimes, and other atrocities that took place in those countries. Most recently, the International Criminal Court (ICC), a permanent court with more or less international jurisdiction, was established to try such cases.

One other option in the international arena is that various individual states can step in and conduct trials of those people who have committed criminal acts in another country. Such cases are tried under the international legal principle of universal jurisdiction, which, until the late 1990s, had rarely been used. Universal jurisdiction is claimed on the grounds that the crime committed is considered to be a crime against all, and therefore any state may claim criminal jurisdiction. The idea, then, is that those people who have committed crimes may be tried in a country other than their own, regardless of nationality, country of residence, or any other relation with the prosecuting country, even though their crimes have been committed outside the boundaries of the prosecuting state. This was perhaps an idea borne out of the realization that many times the state going through transition lacks capacity to effectively prosecute the perpetrators.

According to Cohen J. [107] using the case of Rwanda illustrates how retributive justice can be applied by the international community when a state itself is unwilling or unable to

[107] Cohen J. (2007). One Hundred Days of Silence: *America and the Rwanda Genocide*, Rowman & Littlefield. P. 34

prosecute those responsible for criminal violations. Between early April and mid-July 1994, genocide was carried out in Rwanda in which more than 800,000 mostly Tutsi Rwandan citizens were brutally murdered by mostly Hutu citizens. When the genocide came to an end, more than 120,000 Rwandans stood accused of the commission of these crimes. According to Nash Kaley[108] the justice system, as it then existed, was simply unable to deal with such an extreme number of cases. Two separate international and indigenous mechanisms were established which operated along with the national courts.

2.6.1 International Criminal Institutions

The UN resolution no 808 (1993) [109] informed the establishment of the first international tribunal for former Yugoslavia (ICTY). In 1993, the Security Council of the United Nations established an international tribunal for the prosecution of person responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Under Article 7 of the Statute of the ICTY, dealing with individual criminal responsibility, was inspired by the Nuremberg Principles. In his report of 3 May 1993, the Secretary General of the United Nations[110] stated thus:

> *"All persons who participate in the planning preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible".*

This report further suggests that "the Statute should contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment" and that

[108] Nash Kaley, *"A comparative analysis of justice in post-genocidal Rwanda: Fostering a sense of peace and reconciliation?"* Africana, Vol. 1, No. 1 2007. pp. 80-82
[109] Resolution 808 (1993), adopted on 22 February 1993, S/RES/808.
[110] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),

"Person in a position of superior authority should be held individually responsible for giving the unlawful order to commit a crime under the present statute" and "for failure to prevent a crime or to deter the unlawful behaviour of his subordinates".[111]

The second International Criminal Institution to be established is the International Criminal tribunal for Rwanda (ICTR), which was established in 1994 by the United Nations Security Council to prosecute those responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda in 1994. According the UN Secretary General report on Rwanda [112] it was noted that ICTR had jurisdiction over any and all crimes committed during the genocide, the ICTR was really intended as a mechanism to try only those charged with the greatest offences—those charged with lesser offences were to be tried by the *gacaca* courts. The international community recognized the need to strengthen African institutions, and to demonstrate that it had held at least the 'big fish' responsible, in an attempt to show other leaders around the world that they could not hope to get away with such crimes. The idea behind the court was that it would try a finite number of cases and then be disbanded

2.6.2 Universal Jurisdiction of International Tribunals

The second international mechanism being used in pursuit of retributive justice for crimes committed during the Rwandan genocide is the trial of *génocidaires* by courts of, and located in, other countries, using the principle of universal jurisdiction. Belgium was the first country to try Rwandan *génocidaires* in its civilian courts, based on a law of universal jurisdiction passed in 1993. According to Emilie M. and Hafner-Burton[113] in 2001, four Rwandans were charged, convicted, and sentenced under the Belgian criminal justice system

[111] *Ibid*, pg. 55-56.
[112] Ibid p. 77
[113] Emilie M. Hafner-Burton (2013), *Making Human Rights a Reality*, Princeton University Press. P. 42.

for crimes that they had committed in Rwanda. Canada, France, and Switzerland also tried Rwandan genocide cases. Many other states are reluctant to do so.

2.6.3 Complementarity Principle in Criminal Justice

According to Roy,[114]complementarity is a principle, which represents the idea that States, rather than the International Criminal Court (ICC), will have priority in proceeding with cases within their jurisdiction. Roy argues further that, this principle means that the international court will complement, but not supersede, national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the International Criminal Court will act when national courts are 'unable or unwilling' to perform their tasks. The complementarity principle may not necessarily adhere to expected State prerogatives in ensuring of national prosecutions are executed. Irrespective of the national prerogatives in national prosecutions; there is need for cooperation and synergy between the national state prosecutions and the International Criminal Court.

2.7 Justice short of Post-conflict Retributive Justice in Post-conflict Society

Regardless of moral and juridical obligations as well as the possible positive benefits of post conflict retributive justice on reconciliation and peace, successful prosecutions of past abuses are not always carried out as expected. The prosecution of war criminals is most feasible when the insurgents or the former regime is severely defeated and no longer poses a threat to the incumbent, making it difficult to identify the perpetrators as well as the severity of their war crimes. Other forms of post-conflict justice can therefore, be more realistic, or work as supplement to retributive justice. According to Gloppen,[115] truth commissions are a new type of institutions that have developed in order to deal with past atrocities where trials

[114] Roy S. Lee, *Introduction, in the International Criminal Court*: The making of Rome Statute: Issues, Negotiations, Results 27 (Roy S. Lee ed., Kluwer Law International 2nd ed. 2002)pp. 25-89

[115] Ibid 2005 p. 27

have been ruled out or proven too limited. These are non-judicial bodies without the power to impose legal sanctions on perpetrators. Gloppen[116] further argues that the focus is on victims and their stories of human rights violations.

According to Liebman M[117] truth commissions aim to restore the well-being of victims, offenders and communities damaged by crime, and to prevent further offending. It has been even better defined thus: Restorative Justice works to resolve conflict and repair harm. It encourages those who have caused harm to acknowledge the impact of what they have done and gives them an opportunity to make reparation. Othman Mohamed[118] adds that truth commissions offer those who have suffered harm the opportunity to have their harm or loss acknowledged and amends made. Also among those being sceptical toward retributive justice, there is a widespread understanding that to bring out the truth will advance reconciliation. Gloppen, Siri[119] notes that the assumption that truth is a necessary step toward reconciliation is also prominent in the overall debate on transitional justice.

This paradigm of justice is what is referred to as Restorative justice. Marshall[120] defines restorative justice as a "process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future." M. Wenzel and T. Okimoto[121] on the other hand, define restorative justice as the process of repair of justice through reaffirming a shared value consensus in a bilateral process. Restorative processes always seek to dignify and empower victims. Therefore, unlike retributive mechanisms such as court cases, which tend to focus

[116] Ibid p. 28
[117] Liebman M. (2007). *Restorative Justice: How it Works*, Jessica Kingsley Publishers. p. 25
[118] Othman, Mohamed, 2005. '*Justice and Reconciliation*', in Elin Skaar, Siri Gloppen & Astri Suhrke eds. Roads to Reconciliation, Lexington Books: Lanham: pp. 249-270.
[119] Gloppen, Siri, 2005. '*Roads to Reconciliation*: A Conceptual Framework', in Elin Skar, Siri Gloppen & Astrid Suhrke eds. *Roads to Reconciliation*, Lexington Books: Lanham: 17-50.
[120] Marshall T.F. (1996) "*The evolution of restorative justice in Britain*" *European Journal on Criminal Policy and Research* Vol. 4 No. 4: 21-23.
[121] Ibid p. 376

only on the perpetrator, victims often play a central role in restorative processes. Ideally, the victim is also empowered through restorative processes.

2.7.1 Restorative Justice: The Voice of the People

It is generally argued that restorative justice involves the wider community, too, is often a participant in restorative processes. It manifests itself in many forms. A number of these are, and have been, actively used in the West and elsewhere, either instead of, or alongside, retributive mechanisms. According to Zernova Margarita[122] in New Zealand, in 2007, Family Group Conferences, based on traditional Maori principles, including teaching, settlement and community restoration, are used in conjunction with the court system. In many parts of Canada, aboriginal communities use healing circles instead of the courts to deal with community members who have committed crimes against the community. According to Apori-Nkansah Lydia[123] in Sierre Leone, ceremonies to 'cool the heart[s]' of former child soldiers upon their return to their home communities were held in order to cool their hearts. In Kenya, according to the task force on truth justice and reconciliation commission of 2009[124] apart from the charges facing three suspects at the ICC, and prosecution of more perpetrators of the 2007/2008 post election violence, a Truth Justice and Reconciliation Commission was set up to investigate all forms of human rights violations and economic crimes committed since 1963.

Walter, Barbara F [125] while arguing in support of restorative justice, claims that the process is beneficial to victims and offenders by emphasizing recovery of the victim through redress, vindication, and healing and by encouraging recompense by the offender through

[122] Zernova Margarita (2007), *Restorative Justice: Ideals and Realities*, Ashgate Publishing, pp. 12
[123] Apori-Nkansah Lydia (2008), *Transitional Justice in Post-conflict Contexts*: The Case of Sierra Leone, ProQuest Publishers
[124] Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, Kenya 2009.
[125] Walter, Barbara F., 2002. *Committing to Peace*: The Successful Settlement of Civil Wars. Princeton & Oxford: Princeton University Press, pp.38-68.

reparation, fair treatment, and rehabilitation. In addition Llewellyn, J., & Howse, R. [126] notes that the process of coming together to restore relationships, the community is also provided with an opportunity to heal through the reintegration of victims and offenders. In a journal article, *"Retributive and Restorative Justice"*, Wenzel et al[127] define retributive justice as a mending of justice through the imposition of punishment and restorative justice as mending justice through consensus in a "bi-lateral process". They posit that most research has focused on retributive justice as a means of restoring justice but that the practice of restorative justice with its focus on consensus building and open dialogue between the offender and the victim present a formidable challenge to the dominant philosophy of retributive justice, in regard to genuinely restoring justice and balance. They further contend that the community building component involved in a restorative justice model enhances the sense of belonging that produces an atmosphere of reaffirmation in the event of transgression. In contrast, they argue, the retributive justice model lacks that sense of community and fosters the notion of punishment as a just desert.

Hirsch, Ashworht and Clifford[128] have poked holes in restorative approach to transitional justice, according to them; the most common challenge levelled at restorative justice has been the casual way that restorative justice programmes seem to disregard long-cherished principles of fairness, impartiality and accountability in criminal justice. It is argued that restorative justice proceedings often give a significant degree of decision-making power over the offender to the victim and affected community members, but these individuals are not publicly accountable nor are they anything close to impartial. This has been a source

[126] Llewellyn, J., & Howse, R. (1998). *Restorative Justice: A conceptual framework*. Ottawa: Law Commission of Canada

[127] Wenzel, Michael, Okimoto, Tyler G., Feather, Norman T., Platow, Michael J., (2008) "*Retributive and Restorative Justice*"; Law and Human Behavior, 32; 375-389

[128] Andrew von Hirsch, Andrew Ashworht & Clifford Shearing, "*Specifying Aims and Limist for Restorative Justice*: A 'Making Amends' Model? In von Hirsch et al., (2003) eds Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms? Oxford: Hart

of challenge especially from human right activists. Malcom Thorburn[129] argues that restorative justice focuses exclusively on crafting a response to the particular offence that will bring about 'right relation', but this means that questions of horizontal fairness (ensuring that similar offences will attract similar responses) and proportionality in sentencing are largely ignored. Indeed John Braithwaite[130] concedes that "restorative justice can trample the rights of offenders and victims, dominate them, lack procedural protections, and give police, families, or welfare professionals too much unaccountable power".

2.7.2 Truth Commissions

In pursuit of justice in transitional communities, one of the most commonly used restorative mechanisms has been the truth commission. According to Robert I. Rotberg[131], truth commissions are bodies established to look at widespread human rights violations that took place during a specified period of time, on a temporary basis, by the state, often in conjunction with opposition forces and/or the involvement of the international community. Truth commissions are usually established after a democratic regime succeeds an authoritarian/totalitarian regime. Sometimes the transition may be preceded by civil and economic strife, like in the case of Bosnia. Truth commissions seek to uncover the usually untold truth or what exactly happened, and who was behind it. Additionally Robert l. Rortberg[132] notes that truth commissions also provides an opportunity for victims to confront the perpetrators with their accusations and for the perpetrators to acknowledge their wrong doing. It is argued that doing this provides closure.

While no two truth commissions ever look or function in exactly the same way, their aim, generally, is to inquire into past events. Often, the inquiry includes the collection of

[129] Malcom Thorburn (2004), *The Impossible Dreams and Modest Reality of Restorative Justice*: Annalise Arcorn, Compulsory Compassion: A Critique of Restorative Justice, Vancouber, UBC Press at p. 872
[130] John Braithwaite(2002), *Restorative Justice and Responsive Regulation*, Oxford University Press, at 11
[131] Robert I. Rotberg, "*Truth Commissions and the Provision of Truth, Justice and Reconciliation*" in Rotberg I. R., Thompson D. Truth v. Justice: The Morality of Truth Commissions, 2010, Princeton University Press. P. 3
[132] Ibid

details from victims by means of questionnaires and sometimes by means of public testimony. In almost every case, each truth commission also produces a report that contains detailed or summary accounts of exactly what has taken place. In most cases, these reports are widely publicized. In Argentina, according to Hayner B. Priscilla[133] and quoting from the report published by the National Commission on the Disappeared, Entitled *Nunca Más* (*Never Again*), has become one of the best-selling books of all time in that country. There have been approximately twenty-six truth commissions established around the world since 1974. The majority of these have been held in Africa and Latin America, although commissions have also been established in Asia and Europe.

The benefits of truth commissions over retributive mechanisms have been hotly debated. First, truth commissions have a much broader focus than trials. According to Bisset Alison, [134] while the scope of a trial is often limited to the actions of one perpetrator, truth commissions focus on widespread abuses perpetrated by any number of individuals and on the suffering endured by hundreds, or more likely thousands, of victims. Second, truth commissions can have an educative effect through the public broadcasting of public hearings and testimony or through the publication and dissemination of the final report. Such measures might be the first opportunity that people have to hear about what happened in their own country. Third, truth commissions are not a 'one-size-fits-all' approach. Truth commissions may choose to focus on truth or they may choose to focus on reconciliation, as identified by the people of a particular country. They are also able to tailor their activities to suit the circumstances of the particular country in which they operate. Fourth, truth commissions are often seen as a less costly alternative to retributive approaches. Because truth commissions require far less in terms of infrastructure, personnel, and other expenses generally associated

[133] Hayner B. Priscilla, *Unspeakable Truth*: Transitional Justice and the Challenge of Truth Commissions, Routledge, 2010. p. 49
[134] Bisset Alison, *Truth Commissions and Criminal Courts*, Cambridge University Press, 2012. p. 145

with a trial, for example, their expenses are considerably lower. Bisset Alison[135] further notes that the South African Truth and Reconciliation Commission, for example, had a total budget, for all five years of its operation, of 196 million Rand (approximately US$25 million) - a substantially smaller sum than other justice mechanisms.

2.7.3 National Implementation of Truth Commission

Truth commissions are generally established and run by the *national government*, as happened in Chile. In 1973, the Government of democratically elected President Allende was overthrown by General Augusto Pinochetin a brutal and repressive military coup. More than 3000 people were killed, and many more were injured. When the subsequent Government came to power in 1990, a truth commission was established. The *Comisión Nacional para la Verdad y Reconciliation* (National Commission on Truth and Reconciliation) worked for a period of nine months.[136] During that time, the Commission received evidence from victims and their families in 3,400 cases, considered such evidence, and finally prepared a report. Testimony was heard, evidence gathered, and decisions made; in the end, all of the evidence was referred to the courts, except for the testimony of those who had been granted a blanket amnesty. In Kenya, the Truth, Justice and Reconciliation Commission was established by the coalition government, under the Ministry of Justice and Constitutional Affairs. It went around the country organizing public hearings, compiled the report and presented it to the President with recommendations. While the process was driven by Kenyans, it must however be noted that the membership on the commission included several non-Kenyans.

2.7.4 International Involvement in Truth Commission

In other cases, truth commissions are implemented and/or run by the *international community*. The involvement of the international community may come as a result of one or a

[135] Ibid p. 369

[136] Chilean National Commission on Truth and reconciliation, Report of the Chilean National Commission on Truth and Reconciliation (trans. Phillip E. Berryman; Center for Civil and Human Rights, Notre Dame Law Schools; University of Notre Dame Press, 1993, London)

combination of several factors. First, the national government may be too fragile to carry out such investigations on its own. The involvement of the international community gives legitimacy to the national regime, and the support that the international community that strengthens the process immeasurably. Second, the financial resources of the national government maybe too depleted for it to be able to carry out a truth commission on its own. Third, other resources within society, including members of the judicial community, or basic infrastructure needs, may be similarly depleted. The international community can provide for these needs. Fourth, there is enormous expertise in matters concerning truth commissions in the international community, which may be lacking at the national level. The inclusion of personnel from the international community can provide such expertise. Finally, the conditions to bring about the truth commission may have been negotiated between opposing parties under international supervision. The presence of members of the international community can keep disagreements between rival parties that are meant to be working together on the truth commission from flaring up and derailing the process.

However, Iain S. MacLean, [137] points outs that truth commissions while uncovering the truth may help the victims come to terms with the atrocities committed against them, letting the perpetrators go free through amnesty and immunity laws may affect the healing process. In Latin American countries for instance, Carlos Santiago Nino[138] notes that survivors and victims' families are often disillusioned by the failure to bring perpetrators to trial.

2.8 Amnesties and Exiles

There are a number of post-conflict societies where there is limited evidence of post-conflict justice. These states may have decided to ignore their past rather than dealing with it,

[137] Iain S. MacLean, Reconciliation: Nations And Churches in Latin America, Ashgate Publishing, p. 78
[138] Carlos Santiago Nino, *Radical Evil on Trial*, Yale University Press, 1996 p. 96

or there is a lack of information on their efforts. In their dataset on research on post-conflict justice in 2005. Binningsbø, Elster and Gates.[139] Recorded a number of cases where they found evidence of amnesties or exiles being granted. In the conflict literature amnesties are generally viewed as attempts to buy off perpetrators for peace, such as in the case of Colombia. According to Gloppen.[140] Amnesty guarantees in the negotiation process may effectively block the recourse to prosecution. Long and Blecker.[141] Argue that the granting of amnesties limits the realization of justice; though how severely depend on when in the reconciliation process it is granted. Assuming that these researchers are correct in their assumptions, and amnesties help perpetrators from the previous conflict to avoid prosecution; this can mean that they are still intact and can launch another attack. It can also increase the risk of wild justice or private revenge as well as distort the more long-term process of reconciliation.

Another possibility for rebels or wrongdoers to avoid prosecution is to flee into exile. This is not necessarily something the post-conflict society applies as a strategy; as it depends on the willingness of other states. However, post-conflict societies do not necessarily try to prevent wrongdoers from fleeing the country and on some occasions, the victorious part expels its opponents. We are, nevertheless somewhat vague in our expectations regarding the effect of exile on the sustainability of peace. Exile means that wrongdoers are removed from the post conflict society, preventing attempts at private justice and preventing past wrongdoers from launching another attack from the inside, though they may still be able to gather forces for another attack and work as inspiration for those dissatisfied with the post-

[139] Binningsbø, Helga Malmin, Jon Elster & Scott Gates, 2005. *'Civil War and Transitional Justice*, 1946-2003: A Dataset', Paper presented at the *'Transitional Justice and Civil War Settlements'* workshop in Bogotá, Colombia 18-19 October 2005.
[140] Gloppen, Siri, 2005. '*Roads to Reconciliation: A Conceptual Framework'*, in Elin Skar, Siri Gloppen & Astrid Suhrke eds. *Roads to Reconciliation*, Lexington Books: Lanham: 17-50.
[141] Ibid

conflict regime. As with amnesty, it can also be an obstacle to reconciliation, as victims feel that the perpetrators are not properly punished for their past atrocities.

2.9 Conclusion

The issue of transitional justice has taken on increasing importance in the post-conflict societies. It has taken the form of both external and internal intervention. Efforts have been towards the establishment of various forms of transitional justice. The international community has offered support where there is already transitional mechanisms and also assisted in creating such justice mechanisms where there is none. These transitional justice mechanisms are essential to stability and sustainable peace. Transitional justice mechanisms are created to deal with crimes that were committed during a conflict period, at a stage where that society is at the cusp of transition from a society of conflict to one of democracy and peace. There are wide-ranging options available, to the transitional governments and the international community assisting them, to tackle these crimes – not only a dichotomy of punish or forgive, and local ownership of these processes is paramount. Transitional justice mechanisms may take a number of forms that include the international criminal court, international tribunals, special courts, truth commissions, local courts and traditional methods of justice.

CHAPTER THREE:

A COMPARATIVE STUDY OF INTERNATIONAL AND DOMESTIC CRIMINAL JUSTICE IN POST CONFLICT EAST AFRICA

3.1 Introduction

This chapter provides primary description of models of criminal justice in post-conflict East Africa including international and domestic criminal justice processes in post conflict East Africa, by comparing various post-conflict criminal justice mechanisms in terms of their respective origins, objectives, their operations; and an evaluation of the outcome. In this chapter, the researcher sought to examine community reactions to each criminal justice process with a view of establishing how their participation affects the outcome and the consequential effect on peace and reconciliation. Complementarily of the two forms of criminal justice was also examined.

The target countries were Rwanda, Uganda, Kenya, and Burundi. The choice of the countries was informed by: (i) Geographical location; and (ii) there status as post-conflict states and having adopted retributive justice as a conflict resolution mechanism. The data collection method was oral interviews, focus group discussions; and open ended questionnaires. The interviews included phone call conversation, skype interviews and face to face discussions.

3.2 Criminal Justice Processes in Post-conflict East Africa

Post-conflict criminal justice systems in the East African region took the form of two main approaches. There were international criminal justice interventions in the form of ICTR in Rwanda and the ICC in the case of Kenya and Uganda. These targeted the key perpetrators of serious crimes during the conflict. Then there were domestic or local criminal justice mechanisms, which included prosecutions through the national courts as well as informal traditional criminal justice interventions, for example the Gacaca courts in Rwanda; and Mato

Oput in Northern Uganda. Domestic mechanisms are concerned with prosecution of the foot soldiers or persons believed to have planned and executed the commission of the crime.

3.2.1 International Criminal Justice Processes in Post conflict East Africa

International criminal justice has been a common phenomenon in East Africa since the establishment of the UN funded ICTR, after the 1994 genocide in Rwanda, Uganda's reference to the ICC the people who were perceived to be LRA's top commanders, Burundi equally referred its situation to the ICC. The latest situation is the Kenyan cases, which are still pending before the International Court. The presence of the International Court and tribunal in East Africa was necessary due to the many challenges faced by national courts in enhancing ensuring a peaceful transitional justice. Consequently, the international community felt that International criminal process should intervene in these post-conflict societies where domestic criminal mechanisms have failed to act or are unable to prosecute criminal suspects.[142] According to a report of the international law commission, crimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command.[143] The development of international law on post-conflict justice was necessitated by the ruthless murders and destruction of property by the Nazi war under Adolf Hitler and the atrocities committed by the Japanese officials. The international community came to a consensus that such acts, though done within the sovereign states, were violations of universal human rights and customary international law; and therefore a responsibility of the international community. The first ever international criminal prosecutions were the Nuremberg and Tokyo Trials. These were followed decades later by the ICTY and the ICTR.

[142] Article 17 of the Rome Statute
[143] Quote from the Report of the International Law Commission, 1996

Most recently, the International Criminal Court (ICC), a permanent court with more or less international jurisdiction, was established to try such cases.

According to Luis Francesschi,[144] while commenting on whether the ICC can work for Kenya, if Kenya does not want to work with the ICC, he acknowledges that the international criminal prosecutions are a necessary intervention in criminal justice process although within Africa the processes are perceived as a political process rather than a judicial process; and its presence on the continent is viewed as an affront to the principle of sovereignty of states. However, in Luis's opinion the international criminal justice is a judicial process and ought to be treated as such.

The idea of coming up with a permanent International Criminal Court was mooted after the World War II. But it was not until towards the end of the 20th century, that a new impetus for a permanent International Criminal Jurisdiction led to the adoption of the Rome Statute of the International Criminal Court (ICC) in July 1998. The Cold War that had plagued and frustrated codification of the international law principles developed from the Nuremberg and Tokyo trials; the ad hoc nature of the ICTY and ICTR, as well as the international public outcry for the impunity in commission of international crimes necessitated the establishment of a permanent court. According to Phakiso Mochochoko, [145] The Statute came into force on July 1st 2002. The ICC is established under the Rome Statue, which was finalized in Rome, Italy in July 1998. Article 126 of the Statute states that, the Statute shall enter into force 60 days after the deposit of the 60th instrument of ratification or accession. The Court was granted powers to try persons accused of the most serious international crimes including crimes against humanity, genocide, war crimes and, the crime of aggression.

[144] Luis Franceschi is the Dean of Strathmore law School, Interview held on September 2, 2013
[145] Skype interview with Phakiso Mochochoko, Head of the Jurisdiction, Complementarily and Cooperation Division for ICC, August 20, 2013

Mochochoko,[146] further argues that the International Criminal Court is established under the Rome Statute as an independent institution. The Court does not form part of the United Nations. It however maintains a cooperative relationship with the U.N and can receive requests for intervention and prosecution of perpetrators of crimes against humanity, war crimes or genocide from the UN Security Council. The ICC sits at The Hague, in the Netherlands. It however may choose to sit elsewhere if the situation so demands in hearing matters before it. The Court has four main organs, the Presidency, the judicial Divisions, the Office of the Prosecutor and the Registry

According to David Musila,[147] a situation may come before the ICC in three ways. It may be by request from a State Party to the Rome Statute asking the Prosecutor to investigate; by a State not party to the Statute accepting ICC jurisdiction with respect to crimes committed within its territory and by requesting the prosecutor to investigate; or by the Security Council of the United Nations referring a situation to the Court.

According to Michel de Smedt,[148] the prosecutor may, upon receiving information on commission of crimes falling within the court's jurisdiction, initiate investigations suo moto in a State Party to the Rome Statute. However, Gertrude Angote, [149] argues that, before the OTP begins such investigation, the OTP must seek consent of the ICC. In terms of the ICC's jurisdiction, G. Angote notes, "under the Vienna Convention, the international criminal court has an obligation to protect and enforce international customary law. Under this law, even the head of state does not enjoy immunity from prosecution, however, P. Kagwanja,[150] disagrees with Angote's view that once a country is stable with a constitutionally elected

[146]Ibid
[147] Telephone interview with Musila David, International law Expert and Law Lecturer at the University of Nairobi on, August 15, 2013.
[148] Skype interview with Michel de Smedt, ICC Head of Investigations, August 21, 2013
[149] Gertrude Angote, Executive Director, Kituo Cha Sheria
[150] Peter Kagwanja, Chief Executive Africa Policy Institute and former Government Advisor.

government, head of state, a working constitution, it is not a failed state proper the ICC's jurisdiction is essentially ousted.

3.2.2 Impact of the International Criminal Court in post conflict East Africa

The ICC has so far been involved in two post conflict processes in the EA region. It was called upon to intervene in the war between the Lord's Resistance Army (LRA) and the Ugandan army in northern Uganda and in Kenya after the 2007/2008 post election violence.[151] According to Sajjabi,[152] the Ugandan post conflict peace process in relation to the Lord's Resistance Army (LRA) and the government presents the international criminal system through International Criminal Court (ICC) with its first crisis of this kind. Mugimba Robert, [153]notes that, Uganda referred the matter to the ICC, but the government later took the position that it would seek withdrawal of the ICC warrants if the accused agreed to undergo a traditional tribal justice ritual that requires a public confession and an apology without threat of incarceration. On one level, Mugimba, [154]notes that this scenario presents a classic dilemma of transitional justice, raising the often-debated question of whether, and to what extent, criminal justice may be compromised for the sake of peace.

The government of Uganda had in the past engaged in peace talks with the rebel Lord's Resistance Army (LRA) to end the nation's devastating civil war. According to Sulemba Mbajji, [155] he notes that by most accounts, the talks have represented the best chance but yet to realize a conclusive end to the twenty six year conflict, but negotiations have frequently stalled because of the still unresolved question of accountability for serious crimes.

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[151] ICC Press Release, President of Uganda refers situation concerning the Lords Resistance Army (LRA.) to the ICC, 20040129-44 accessed at http:/www.icc-cpi.int.
[152] Telephone interview with Sajjabi Robert, Political activist, Uganda, June 28, 2013
[153] Mugimba Robert, Ministry of Foreign Affairs-Uganda, 02 July, 2013
[154] Ibid
[155] *Telephone interview with Sulemba Haji, Business man, Kampala-Uganda, June 28 June,*

According to Muluga Dorothy[156] in 2005, the International Criminal Court (ICC or Court) issued arrest warrants for a handful of LRA leaders accused of crimes against humanity and other grave offenses more recent developments in Uganda indicate a plan to supplement traditional justice with more formal court proceedings for those accused of the most serious crimes. Muluga,[157]further argued that, the Court's unusual measure of institutional independence ostensibly was intended to depoliticize the business of international criminal justice by leaving the law to the lawyers. By contrast, past tribunals relied on political bodies, such as the UN Security Council, for their jurisdiction in individual cases. Mugimba, [158] notes that, as the Uganda crisis reveals, however, this transfer of formal authority has failed to produce meaningful criteria dictating how exactly the ICC should exercise its authority. According to Mugimba Robert[159] he argues that to put it more specifically, we are often told that the ICC—with its prominent framework of 'complementary' jurisdiction—is a last resort, designed to intervene only when national legal systems fail. Muluga notes that, according to the Ugandan experience, the Rome Statute leaves unanswered fundamental questions about how far states recovering from mass violence should be required to go in pursuit. However, According to Lubanga,[160] "The ICC is looked at as a tool of hope and a representation of the fight against impunity in Uganda. For example, during the April 2011 Walk to Work protests, there were many media reports assessing the likelihood of a case being brought before the ICC against the high ranking security officials for acts of brutality committed against protestors. The Hon Justice Elizabeth Nahamya,[161] while commenting on the ICD processes at the East Africa association of

[156] Skype interview with Muluga Dorothy, Criminal Lawyer, Kampala-Uganda, June 28, 2013
[157] Ibid
[158] Skype interview with Mugimba Robert, Ministry of Foreign Affairs-Uganda, July 2, 2013
[159] Ibid
[160] Lubabga Esther is a advocate of the High Court of Uganda and an International law Senior Researcher at evocates San Frontiers Interviewed, on 22nd July, 2013
[161] Hon Justice Nahamya is a judge of the International Crimes Division of the High Court of Uganda.

prosecutors acknowledged that international criminal justice is a new phenomenon within East Africa and there is need to educate the entire criminal justice fraternity on matters of international criminal justice including investigators, prosecutors and judges. The judge had this to say; "We need to work out how to draw upon the international rules of procedure in order to adjudicate and prosecute these war crimes and crimes against humanity. There is urgent need to be trained in the applicability of international customary law-in other countries, this is understood and utilized but not here in Uganda. Please note that any planned training must invariably include the Judges of the Appellate chambers…we need to be on the same page of understanding the applicable law and the problems it raises."

According to, Mao noted, "The Acholi sub region, an area which was in the midst of conflict with immediate and urgent security concerns prefers the restorative mode of justice as a mechanism for achieving sustainable peace. This includes truth telling, forgiveness and reconciliation. However, in other areas like, Lango and Teso sub regions, preference is for retributive justice.

In Rwanda, the ICTR was a western inspired system of justice. It was born to fill the justice deficit created by the inadequacies in the Rwandan justice system. According to Betty Murungi,[162] ICTR's mandate was the prosecution of people that were responsible for genocide and other crimes of violation of the International Humanitarian Law that occurred in Rwanda and the neighbouring countries between 1 January 1994 and 31 December 1994. The ICTR was formed as a result of the United Nations Security Council (UNSC) Resolution 955. According to Murungi Betty[163] the Rwandan Government wrote to the President of the Security Council calling for the earliest possible creation of an international tribunal to try the alleged criminals. The idea was to associate the international community with the repression

[162]Murungi Betty, Human Rights Lawyer, her response on the ICTR trials and the victims' rights, 12 June 2013
[163]Ibid

of crimes which affected it as a whole. The tribunal was intended to allay suspicions of vengeance and summary justice and, above all, to lay hands on criminals who had found refuge abroad. According to Murungi, [164]it might be added that one of Rwanda's objectives in drawing the international community's attention to the issue of repression was to gain the support necessary for the functioning of its own criminal justice system. According Ngoga,[165] "The Rules of Procedure and Evidence adopted by the Arusha Tribunal were basically marginally different from those adopted at The Hague. The procedure itself was of a fairly accusatorial nature, of the kind which finds its fullest expression in the common-law countries

The resolution creating the ICTR mandated two purposes for the tribunal. According to Ngoga, [166] firstly, the Security Council determined that the crimes committed in Rwanda "constitute a threat to international peace and security" and "that the establishment of an international tribunal will contribute to ensuring that such violations are halted and effectively redressed. He further states that by holding trials, the international community was set to make clear that, whatever the intentions of individual states; the world community of states would not allow the authors of such gross violations of human rights to go unpunished. Second, the resolution called upon the ICTR to help bring peace and reconciliation to Rwanda.

According to Bongani Majola,[167]the first trial started in January 1997, as of 21 February 2013 the ICTR has indicted 95 individuals. Four individuals remain at large as fugitives, two are awaiting trial, 15 are appealing their sentences, and 12 have been acquitted and released from detention. Proceedings against four individuals were terminated after two died and after indictments against two were withdrawn. The cases against ten individuals

[164]Ibid
[165]Ngoga Martin, Rwandan Prosecutor General, interview, 10 June 2013
[166] Ibid.
[167] Skype interview with Bongani Majola, ICTR Registrar, July 27, 2013

have been transferred to national jurisdictions, one of which is pending appeal. The Tribunal has finished proceedings against 32 individuals who are currently serving prison sentences, 13 who have finished their sentences and have been released, and three who have died while serving prison sentences. The ICTR branch of the Residual Mechanism began to function on 1 July 2012.The Tribunal has issued several landmark judgments. In the first judgment by an international court on genocide, a former mayor, Jean-Paul Akayesu, was convicted in 1998 of nine counts of genocide and crimes against humanity. The judgment was also the first to conclude that rape and sexual assault constituted acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, a targeted group.

The conviction of the prime minister during the genocide, Jean Kambanda, to life in prison in 1998 was the first time a head of government was convicted for the crime of genocide. The Tribunal's "Media Case" in 2003 was the first judgment since the conviction of Julius Streicher at Nuremberg after World War II to examine the role of the media in the context of international criminal justice.

In Burundi, according to Sebatwa,[168] the failed October 1993 military coup in Burundi led to the Tutsi military assassination of the then President Ndadaye and several other government dignitaries. This event left the country in turmoil, with initial large-scale killings of the Tutsi, but soon also Hutu, and civilians. From June 1994 on words, with the creation of the predominantly Hutu National Council for the Defence of Democracy-Forces for the Defence of Democracy (CNDDFDD) rebel movement, the country erupted into a civil war.

Mpenda[169] argued that, a peace process started in 1998, with former Tanzanian President Nyerere and, after his death, former South African President Mandela as lead mediators. It did not come to an end until April 2009, when the last rebel movement laid

[168] Sebatwa Beautrice Panda, former Secretary of State Ministry of Justice-Burundi, 05 July 2013
[169] Mpenda Chuma, Tanzanian High Commission staff-Nairobi, 28 June 2013

down arms and was registered as a political party. Several peace agreements were signed, most importantly the Arusha Peace and Reconciliation Agreement (APRA – August 2000), the Global Cease-Fire Agreement with the CNDD-FDD (GCA – November 2003) and the Comprehensive Cease-Fire Agreement with the Party for the liberation of Hutu people – National Liberation Forces (PALIPEHUTU-FNL) (CCA – September 2006). The APRA was signed by the government, the national assembly, an alliance of predominantly Tutsi parties (the so-called G10, including UPRONA) and an alliance of predominantly Hutu parties (the so-called G7, including FRODEBU). Mpenda Chuma[170] further notes that through a complex system of proportionality with minority over-representation, qualified majority requirements, ethnic quota (including as far as the composition of parliament, government and the army is concerned) and grand coalition arrangements, it laid the foundations of a typically consociational power-sharing regime.

Nkruzinsa, [171] notes that, some developments were clearly norm-affirming; they were systematically countered by norm-circumventing bypasses. On a constructivist account, he further argues that Burundi's peace process has clearly been shaped by the international normative environment. Nkruzinsa Somon[172] further argues that offering amnesty for the most serious crimes of international concern in return for a cessation of hostilities was no longer an option, he further notes that transitional justice process and the successful negotiations between the UN and the Government of Burundi were clearly impacted upon by the international amnesty prohibition. Additionally Faustin Nteziryayo[173] while commenting on the same issue notes that the case of Burundi has even been referred to as evidence for the general thesis that the granting of amnesty in connection with truth seeking processes is possible only when the amnesty excludes crimes under international law.

[170] Mpenda Chuma, Tanzanian High Commission staff-Nairobi, 28 June 2013
[171] Nkruzinsa Somon, Ministry of Justice staff, Burundi, 07 July 2013
[172] Ibid
[173] Faustin Nteziryayo, Office of the President staff, 07 July 2013

On a realist account, the sophisticated bypassing of the amnesty prohibition reveals the limits of what international law can achieve. While Burundi's peace agreements and domestic law rhetorically incorporated the amnesty prohibition, the international norm has as of yet not made any difference when it comes to curbing a long standing tradition of impunity for the most serious human rights crimes. According to Faustin Nteziryayo [174] it is imperative of political expediency, such as the negotiated modality of Burundi's transition based on a power-sharing deal, as well as international priority for negative peace and short term stability, have clearly outweighed the desire to hold accountable those responsible for past injustices.

According to Eric Mutua, [175] although the international consensus appears to be growing that peace and justice are not mutually exclusive but mutually reinforcing, the case of Burundi seems to suggest that, although this may well be true over the longer term, when it comes to promoting 'sustainable peace', dirty deals between political and military elites with blood stained hands are only cosmetically affected by the international normative environment, argued Mutua.[176] Ngoga, [177] Negotiating and implementing peace agreements is, first and foremost, a matter of making interests meet and seen from that angle, normative constraints are a nuisance that can be creatively circumvented.

In Kenya to establish the Impact of the international criminal justice process, the following question was put to the respondents in a focus group discussion held at the Strathmore University. According to literature, the international criminal justice process has been viewed as an accountability mechanism, has the process left any legacy? What is the impact of the international criminal justice process in East Africa?

[174] Ibid
[175] Mutua Eric, Chairman Law Society of Kenya, 09 July 2013
[176] Ibid
[177]Ngoga Martin, Rwandan Prosecutor General, interview, 10 June 2013

In response to the question, Ian Obiero[178] noted that the ICC's process has definitely contributed extensively to the fight against impunity in Kenya and the world at large. In Kenya, there were clashes in 1992, 1997 where masses of people were displaced, properties lost and people killed, no individual was prosecuted in relation to those cases, and in fact no investigations were even conducted to establish who the perpetrators of the crimes were. In 2007, after the general election and the consequential violence and the indictment of the 6 Kenyans at the ICC, Kenyans held the March 4th 2013 elections with utmost restraint particularly the political class for fear of the implications in case of violence.

This means that, the ICC process in Kenya has had a deterrent effect on the Kenyan people. However, some of the respondents argued otherwise, Kagwanja.[179] Argued that the ICC process in Kenya has created two categories of people on trial, the indictees, Kenya as a country and even the ICC itself, he argues that by virtue of prosecuting a sitting head of state and his deputy, the ICC is technically interfering with the sovereignty of the state, hence not only are the indictees on trial but also Kenya as a whole. Shaban Latif,[180]

"Most of the people in this country were not even aware when we ratified the Rome Statute, it is now that we are learning of the implications of agreeing to such international treaties."

However, Nderitu[181] in reaction to Kagwanja's argument posited that the ICC process is anchored on the principle of individual responsibility, this principle puts criminal responsibility to individuals and not states or institutions. With regard to institutional and

[178] Obiero Ian. Journalist with radio Waumini and a student at Daystar University
[179] See pg 55
[180] Shaban Latif is the Director –General of the Supreme Council of Kenya Muslims, while commenting on Kenya's attempt to move out of the Rome Statute, reported on the Daily Nation of Friday, September 6, 2013,at page 5
[181] Ibid

legislative reforms, Kioko Kamula,[182] noted, that, "the ICC process has definitely brought about institutional reforms in criminal justice sector, for example the judiciary has established the international crimes division charged with the responsibility of handling transnational crimes. Further, the ODPP has established an international crimes division with specific prosecutors trained in the field international crimes." These developments were initiated after the ICC's presence in Kenya.

Prior to the 2007/2008 PEV and the subsequent indictment of the 6 Kenyans, Kenya was a signatory to the Rome Statute although the statute had not been domesticated, due to the need and the call by the civil society to prosecute the foot soldiers of PEV. There was need to domesticate the Rome Statute hence, the International Crimes Act of 2009; and The International Crimes Division of the High Court. Similarly, Kamula noted that "in Rwanda, the presence of ICTR brought about the establishment of the Gacaca courts through the Organic law Act, the ICTR, various reforms were also realized in the criminal justice sector, for example quite a number of judges, lawyers and prosecutors were trained on international crimes." J. Nahamya,[183] while commenting on the ICC's impact in Uganda had this to say "the establishment of the ICD and the passage enactment of the International Crimes Act were some of the institutional and legislative reforms occasioned by the presence of the ICC."

3.2.3 Victim Participation in International Criminal Justice

On the level of victim/ witness participation, from the victim's perspective, I sought to know the views of the victims on the ICC process, Mr. Simon Wanjohi Ndirangu, [184] an IDP at Vumilia IDP Camp in Narok had this to say. *"We as the victims of the violence are not*

[182] Kioko Kamula is a Senior Assistant Director of Public prosecutions in the ODPP, he is an advocate of the high court of Kenya and former Prosecutor with the ICTR
[183] J. Nahamya
[184] Simon Wanjohi Ndirangu at focus group meeting at Vumilia IDP Camp July, 2013

recognised within the existing ICC proceedings, not least because the cases are limited to those victims directly connected with crimes against humanity allegedly committed by the accused/ defendants before the court. If we as victims participated in such proceedings we may be afforded some degree of retributive justice, it would have been likely to achieve this at the level sought and hoped for by many of us. To add insult to injury, majority of us have to live with and see our offenders walk free on a day-to-day basis."

According Wilfred Nderitu, [185] very few victims have registered for participation and possible reparations in respect of both cases before the ICC. According to him, any award to the victims will depend on whether the accused are convicted, any compensation or other form of reparations may take many years in coming, and even then, the ICC Victims' Reparations Fund may not have sufficient funds to bring the relief to those victims. Nderitu noted further that out of the thousands of victims of post-election violence, only 93 victims have applied to be registered as participants in the ICC process, 47 applications have been processed and 46 are still being processed. However, majority of the victims have not come forth or expressed interest in the process, some citing the fear of victimization.

Phakiso Mochochoko[186] agrees with Nderitu and in his reaction to the question he notes thus "in any criminal justice system, witnesses and victims are a very crucial component on the process, such witnesses and victims first require a protection of victims and witnesses' mechanism to enable them be free to give their testimony before the court. Witness and victim protection is a basic human right which strengthens the criminal justice system. Its absence therefore impacts negatively on safe and secure access to the judicial process by thousands of witnesses and victims to whom justice may have been denied for years."

[185] Face to face interview with Wilfred Nderitu, Human Rights Lawyer, and ICC Kenyan Victim representative, on 1August, 10, and 2013.
[186] Ibid

In regard to victims with respect to Uganda, the same question was put to the respondents, according to Joseph Obaga [187] he said, the ICC is yet to be appreciated by the victims of the decades of war in northern Uganda. According to Nobert Mao, [188]"Many of the victims are ignorant of the working of the ICC and its role in the LRA war many of them have faith in the traditional Mato Oput cleansing rituals for the former LRA soldiers seeking forgiveness, as opposed to the ICC. Many victims are keen to see their tormentors account for their crimes, but they are not obsessed with seeing them march off to a foreign prison" Nober further noted that, "Ugandan ICA of 2010, has no specific provisions on victim participation in the ICD proceedings, for example there are no provisions to enable victims to participate in proceedings or make applications for reparations in national court proceedings."

In one of the focus group discussion it emerged that the objectives of the international community in establishing the tribunals do not automatically translate into popular acceptance, not only when, as with the ICTR, the process was imposed "top-down." Naturally, the perception of the tribunal among Tutsis has always been much more positive than among Hutus in the Rwanda. According to Ndugutse, [189] "Just because an institution is international," noted a panellist at a the meeting where I sought to establish whether International war crimes trials are making a difference, "does not mean that local populations necessarily think it's better or that it has enhanced to punish moral authority to punish wrongdoing in the place in question."

However, locally, the ICTR's work remains virtually unknown to the common Rwandese citizen. Peter Karukarama,[190] argues that, the process is far removed from the common people in the villages, those that were most affected by the genocide. Justin

[187] Face to face interview with Joseph Obaga, victim of Northern Uganda War, August 10, 2013
[188] Skype interview with Norbert Mao, lawyer and chairman of Gulu District, August 10, 2013
[189] John Ndugutse, at a conference to discuss the Role of prosecutors in International Criminal Justice held at naivasha, June 2013
[190] Telephone interview with Peter Karukarama, practicing advocate in Kigali, Rwanda, August 2, 2013

Mugiraneza, [191] notes that the process is considered as being too removed from the population for which it was intended to serve. With very remote participation of just a handful of victims as witnesses, the prosecution process does little to bring about reconciliation. The ICTR lacked capacity to prosecute the large number of perpetrators, concentrating mostly on the few key that bore the greatest responsibility in the genocide. According to Theodore Mugenzi, [192] those found guilty were sentenced to years in prison. Yet victims who suffered loss of property and loved ones hoped for a process where orders for reparation would be made to compensate them for their losses. Jean Dusingizemungu.[193] notes that, "The Tribunal's reputation had also been seriously damaged in the eyes of the legal fraternity and civil society in Rwanda by early scandals regarding endemic corruption and bureaucratic inefficiency. Many observers were sceptical about the courts ability to impartially prosecute those responsible for the mass killings in Rwanda from both sides of the political divide.

In Kenya, according to Muthoni Wanyeki,[194] After the ICC prosecutor named six suspects, five of them high-ranking government officials, the Kenyan Parliament passed a nonbinding motion on December 22, 2010, urging the government to withdraw from the Rome Statute and repeal the International Crimes Act. In this context, several members of Parliament called for the establishment of a domestic accountability process to replace the ICC. In mid-January 2011, the government announced that the coalition partners had agreed to establish a special division of the High Court to try PEV cases. However, government officials simultaneously argued that a criminal justice process could jeopardize peace and security, and launched diplomatic efforts aimed at gathering support for a United Nations Security Council deferral of the Kenyan ICC cases.

[191] Skype interview with Justin Mugiraneza, Kigali based Activist, August 3 2013
[192] Skype interview with Theodore Mugenzi, staff in Rwanda High Court, August 3, 2013
[193] Telephone interview with Jean Dusingizemungu, member of civil society, Rwanda, August 5, 2013
[194] Muthoni Wanyeki and Maina Kiai, Turning Pebbles: evading accountability for post-election Violence in Kenya, New York: HRW, 2011

The ICC cases have drawn mixed reactions from the Kenyan public. The indictees dismissed the charges against them as being more of political than criminal. Deputy President William Ruto[195] while commenting on his indictment said, "The allegations sound like they came from a movie." There was thinking that following the peaceful elections in the country in 2013, the country was on the path of recovery and the ICC cases would undo the gains achieved so far.

> "Since the current President and his Deputy are from the two communities that were at war during the post-election violence, their election is a clear indication that the two communities have reconciled and so the ICC cases should just be dropped"[196]

There are those who however support the process at The Hague. "The ICC prosecutions will play a critical role in ending the culture of impunity in this country,"[197] The central questions considered here is whether ICC proceedings regarding the commission of alleged crimes against humanity during the post election violence have mattered, in other words whether this proceedings have in any way influenced the issues of justice, deterrence and if so in what ways? Due to the broadness of the question, the researcher referred to an opinion poll conducted by KNDR and Synovate on Kenyan attitudes towards the ICC process. In terms of whether or not the ICC's processes has had any impact, the answer is clearly 'yes'. Majority of Kenyans want legal accountability for the post-elections violence, and that Kenyans continue to believe that the ICC is the best avenue for achieving it."[198]

Never before have Kenyans have seen such senior public servants and senior politicians facing formal legal proceedings – that have not fizzled out or been thwarted – aimed at bringing them to account. This key development is, in and of itself, significant in

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[195] William Ruto quoted in CNN on April 8, 2011. Accessed July 25, 2013 at http://edition.cnn.com/2011/WORLD/africa/04/07/kenya.international.court/index.html

[196] Face to face interview with a witness who requested to remain anonymous, July 26, 2013

[197] Face to face interview with a witness who requested to remain anonymous, July 26, 2013

[198] Opinion polls conducted by South Consulting for the KNDR as well as by Synovate on Kenyan attitudes towards the ICC process conducted in August 2012.

Kenyans' quest to end a culture of impunity that has crippled the country's economic and political development for decades. Noted one of the respondents in the opinion poll who did not want to disclose his/her identity.[199] However, some of the respondents to the question expressed their reservations on the Kenyan ICC process,

Out of the many suspected instigators and perpetrators of the violence, only three people are currently the subject of international criminal proceedings. This is in stark contrast to the extensive lists compiled by the KNCHR and the CIPEV of many high-level politicians and public servants also requiring investigation as planners, instigators and/or financiers with a view to potential prosecution. According to Eric Mutua,[200] noted that, when the 'lower level' perpetrators are taken into consideration as well, figures for suspected perpetrators number in the thousands, with little if any prospect of them ever facing criminal justice proceedings and of their victims ever accessing justice.

3.3 Domestic Criminal Justice Mechanisms in Post Conflict East Africa

According to Njeri Irene,[201] prosecution of international crimes that include genocide, crimes against humanity, is the primary mandate of the National governments within which the crimes are committed. The international community is only meant to step in when the sovereign states are unwilling or unable to prosecute such cases. It is for this reason that governments of post conflict states have sought to enact the necessary laws for prosecution of such offenders.

Two main categories of domestic criminal justice mechanisms will be discussed, the national court system and the traditional mechanisms. Traditional mechanisms are the indigenous or home grown criminal justice initiatives established by the states, they are

[199] Cited from KNDR and Synovate Research Report.
[200] Telephone Interview with Eric Mutua, Chairman Law Society of Kenya while acknowledging that many Kenyans have faith in the ICC process, there are limitations. August, 10, 2013.
[201] Njeri Irene, Senior International Crimes Research at Institute for Security Studies (ISS) South Africa, 09 July, 2013

informal in nature and they are anchored on traditions and cultural practices of every community. Through this study, mainly the Gacaca courts of Rwanda and the Mato Oput of Uganda will be discussed. Although Kenya and Burundi have also established such traditional mechanism, the research excluded them due to time constraint. According to Kioko Kamula,[202] "The national court system are formal courts and anchored on the national legal frame work and to a certain extent the international law for example the International Criminal Division of the High Court of Uganda which is anchored on the international crimes Act of Uganda. Kamula,[203] further, noted that even though the Gacaca initiative began as a traditional mechanism of conflict resolution, it was later converted into a national court after parliament legislated and passed the Rwandan Organic law formally establishing the Gacaca courts and setting the rules and procedures applicable before the court.

3.3.1Traditional conflict resolution mechanism in East Africa

In Rwanda, Wilfred Nderitu,[204] posits that, Rwandan genocide Gacaca judicial system was not completely an ancient Gacaca method that many Rwandans knew back then. It's a reformed justice system created under the so called Organic Law that Rwandan government enacted to deal with political and justice realities of the country. Organic Law basically means, applying both national justice as well as tradition methods of justice to make it easy to prosecute crimes committed during period between 1990 and 1994. Under the organic law, crimes were divided into four levels depending on the severities of the crimes committed by the accused suspects and their potential punishments.

According to Nderitu,[205] "the first category comprised of suspects who are accused of murders and other serious crimes like planners, organizers and perpetrators who their actions

[202] Ibid
[203] Ibid
[204] Ibid
[205] Ibid

resulted into torture, rapes and murders of which potential punishments include death penalty. This first category was put in the jurisdiction of the national court. The cases that fall under category two, three and four were assigned to the Gacaca system. Suspects who their cases fall under the Gacaca Justice System include individual perpetrators, conspirators and those who committed or directly involved in homicides as well as people who destroyed other peoples' properties. According to Ngoga,[206] The judicial remedies and/or punishment for categories two, three and four under Gacaca System ranged from life in prison, community services, and reparation and community reintegration. He further explained that the Gacaca System structurally was divided into administrative cell courts (local courts), sector courts and appellate courts. Overall, Gacaca had 12,103 community-based courts with 1,545 courts at the high level, 1,545 courts of appeal and 9,103 courts at the community level.

Through the centuries in Rwanda, Gacaca system has been used as a method of disputes' resolutions in areas like land and cattle disputes, dowry disagreements, and other crimes. It is based on truth telling and confessions as well as rending punishments to violators while still emphasizing the need of harmony and social order. According to Kalisa Pierr[207] Gacaca main objective is reconciliation through restoration of harmony, social order by punishing, shaming and requiring reparations from the offenders as well as giving everyone in the community an opportunity to participate in the deliberation of justice, for example on how to punish the violators as well as having a say in the reintegration of the perpetrators back into the community.[208] Based on this government agenda, the international community provided financial resources to the Rwandan government in its state reconstruction process.

[206]Ngoga Martin, Rwandan Prosecutor General, interview, 10 June 2013
[207]Ngoga Martin, Rwandan Prosecutor General, interview, 10 June 2013
[208] Skype interview with Pierre Kalissa, Advocate in Kigali, August 5, 2013

Charles Nzasengimana[209] notes that, "to address the fact that there were thousands of accused still awaiting trial in the national court system, and to bring about justice and reconciliation at the grassroots level, the Rwandan government in 2005 re-established the traditional community court system called "Gacaca" (pronounced GA-CHA-CHA). In the Gacaca system, communities at the local level elected judges to hear the trials of genocide suspects accused of all crimes except planning of genocide. The courts gave lower sentences if the person was repentant and sought reconciliation with the community. Often, confessing prisoners returned home without further penalty or received community service orders."

The over 12,000 Gacaca courts tried as many as 1,951,388 Genocide suspects. Majority of these cases fell in the third category, which involved suspects accused of crimes of relatively lesser magnitude. "Up to 1,270,336 cases were in the third category, which was composed of people who either looted or destroyed property," says Domitille Mukantaganzwa, the Executive Secretary of the National Jurisdiction for Gacaca Courts.[210] A total of 1,678,672 suspects were found guilty, while 272,716 were acquitted.According to Domitille Mukantaganzwa, [211] as many as 75,000 convicts who were convicted in Gacaca courts are still on the run. Some were tried and found guilty in absentia, while others escaped in the course of their trial.

According to Josef Kayigamba,[212] "The Gacaca trials also served to promote reconciliation by providing a means for victims to learn the truth about the death of their family members and relatives. According to the Rwandan High Commissioner to Kenya[213] the genocide perpetrators were also given the opportunity to confess their crimes, show

[209] Telephone Interview with Charles Nzasengimana, former Gacaca court Judge at Nyamata, North Eastern Province, August 15, 2013
[210] 'The Legacy of Gacaca' an article in The New Times Rwanda accessed on July 20, 2013 at http://www.newtimes.co.rw/news/views/article_print.php?i=14958&a=52323&icon=Print
[211] Ibid 19
[212] Face to face Interview with Josef Kayigamba, staff at Rwandan High Commission, Nairobi, June 26, 2013
[213] Face to face interview with Rwandan High Commission, Nairobi, 26 June 2013

remorse and ask for forgiveness in front of their community. “The Gacaca courts officially closed on 4 May 2012. They were supported by both the victims and the perpetrators. Ndinga Surayimani,[214] notes that, “to go in front of the family [of people] you have killed – it's very hard, but it's better to explain to them because we want forgiveness. We had no problems with our neighbours before.” But some survivors are sceptical about the effectiveness of Gacaca for its emphasis on restorative more than retributive approach. Many were angered that Gacaca courts would let many killers off the hook by allowing them to enter plea bargains. For instance, Bonaventure Niyibizi, [215] notes “You have all these people who are recognizing that they have killed not one person, not two, not ten but so many people.” Additionally Jean Byangariza, [216] argues that there was lack of trust in the Gacaca process among the victims who saw it as a cosmetic ploy to have their former tormentors go scot-free. ‘All of them are free on the basis that they have confessed to the killing of my mother and what is even more disturbing is I don’t believe the confessions they made were genuine.

In Uganda, according to Amuat,[217] much discussion within both the government and civil society has focused on Ugandan proposals to confront LRA abuses through the deployment of traditional informal dispute resolution methods historically relied upon by Uganda’s various peoples to mete out justice at the local village level. Indeed, traditional justice measures already have provided a method of integrating returning LRA members into their communities. She further notes that, these efforts have received the encouragement of Uganda’s Amnesty Commission, acting under its statutory duty “to consider and promote appropriate reconciliation mechanisms in the affected areas.”Although traditional justice appears to enjoy some formal role within the Ugandan legal system as a general method of

[214] Telephone interview with Ndinga Surayimani, a perpetrator of Rwanda genocide who faced Gacaca, August 5, 2013
[215] Skype interview with Bonaventure Niyibizi, a genocide survivor and former chair of Ibuka (Remember), an association for genocide survivors, August 6, 2013
[216] Skype interview with Jean Byangariza, a genocide survivor, August 6, 2013
[217] Amuat Carol, Social Worker, Northern Uganda, interview, 03 July 2013

resolving cases referred by local courts, the transplantation of justice to the village setting is marked both by the informality of the procedure employed and by a focus on monetary compensation and reconciliation rather than more severe criminal sanctions."

Kasibe Naoni,[218] while commenting on the criminal justice within the Acholi community says, "Given concentration of both LRA victims and perpetrators among the Acholi population, much attention has focused on a particular ritual known as mato oput (literally, "drinking of the bitter root") which the Acholi have traditionally used to address both intentional and accidental killings, and which exemplifies the aforementioned values. Kasibe Naoni [219] adds that although the particular elements of the mato oput may differ from case to case, the defining feature of this tradition is that it restores social harmony after a homicide through confessions, negotiated compensation, and, ultimately, reconciliation between the offender and the victim's kin. The process culminates in a ritual whose individualized elements; typically including the beating of a stick, ritual slaughter, and the eating and drinking of various substances (including the "bitter root" for which the ceremony is named) all play a symbolic role in furthering the goals of truth seeking and reconciliation. According to Ojinga Moses[220] in addition to Amnesty Act, these and other cleansing rituals have played an important role to date in the reintegration of former LRA members into their communities.

The Mato Oput process is meant to heal the wounds of the violence and to reconcile the reformed rebels and the victims. According to Kenneth Oketa[221] it is only after taking them through the mato oput ceremony that the former LRA soldiers can be re-integrated back into the society. But according to Richard Odong,[222] for LRA soldier and an elder within the

[218] Kasibe Naome, Chief Justice's office-Uganda, interview, 03 July 2013
[219] Ibid
[220] Ojinga Moses, Social Researcher, Peacebuilding, Northern-Uganda, 04 July 2013
[221] Telephone interview with Kenneth Oketa, Prime Minister of Acholi Cultural Authority, July 20, 2013
[222] Telephone interview with Richard Odong, former LRA soldier, July 20, 2013

Acholi community, "The perpetrator must confront the victims and tell them what they did, something many former soldiers find difficult, given that some of the killings were done on the roadside or in the bush. Many LRA soldiers have undergone the ritual and been reintegrated back to the society. As Moses Odonkyero,[223] puts it "The fact that so many [former LRA] have moved back to their villages, away from the cities and protected areas, is an indication that they have been accepted back."

However it is viewed by some as falling short of the required punishment for serious crimes against humanity. As well put by one of the, Okello-Lucima,[224]

" To apply mato oput and partial ICC indictments to end the northern Uganda conflict and as a basis for a just peace, is tantamount to consciously promoting impunity and acquiescing in state- led propaganda that seeks to absolve the Ugandan state from responsibility to protect, and its own unjustifiable counter insurgency strategies that like the LRA's insurgency methods, victimized unarmed women and children; targeted entire ethnic group for collective punishment in order to discourage support for insurgency."

Mato Oput being a purely Acholi traditional ritual, its effectiveness has been put to question, considering that the LRA war did not only concentrate within the Acholi community, victims of LRA atrocities include the Langi, Teso and Madi. This has raised the question: why should only the Acholi do the forgiving.[225]

3.3.2 Post-Conflict Criminal Justice through National Courts

Following the genocide the Rwandan legal system was in disarray, lacking in the basic infrastructure as well as the necessary legislation for the prosecution of crimes of genocide. In 1996 Rwanda adopted the Organic Law on the Organization of Prosecutions Constituting

[223] Skype interview with Moses Odonkyero, Journalist in Northern Uganda, July 20, 2013
[224] Skype interview with Okello-Lucima, quoting from his article 'Mato Oput is a cloak for impunity in Northern Uganda'
[225] '*Reintegrating LRA Fighters*' In Think Africa Press, published March 16, 2012 accessed July 21, 2013 at http://thinkafricapress.com/uganda/reintegrating-lra-rebels

the Crimes of Genocide or Crimes against Humanity Committed since October 1990.[226] This law created four categories of offences thus. Category one consisted of persons whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity; persons who acted in positions of authority at the national, perfectoral, communal, sector or cell level, or in a political party, the or fostered such crimes; notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; and persons who committed acts sexual torture.[227]

Category two consisted persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators of accomplices of intentional homicide or of serious assault against the person causing death. Category three were persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person. In addition, category four included persons who committed offences against property. In 1996 it was reported that there were 120,000 detainees in Rwandese jail.

According to 2009 armed conflict database[228] on 23 October 2009, the minister of internal security revealed during a press conference that Rwandan jails were still holding 38,933 people accused of crimes committed during the 1994 genocide.

In Uganda, the International War Crimes Division (ICD) (formerly War Crimes Division) had its genesis in the Kony rebellion which occurred in Northern Uganda from 1986. Therefore, its creation in 2008 fulfilled both the ICC's requirement of a competent Court under Article 17 of the Rome Statute; and the Government of Uganda's commitment to

[226] Organic Law No. 08/96 of August 30, 1996 accessed on July 19, 2013 at http://www.preventgenocide.org/law/domestic/rwanda.htm
[227] See Section 13(1) of the Organic Law Act.
[228] Armed Conflict Database, ISS, Timeline 2009

the actualization of the Juba Agreement on Accountability and Reconciliation of 29th June 2007, which provided for the establishment of a Special Court to try those who committed serious crimes and human rights violations.[229]

According to Kamula,[230] "the ICD which was formerly known as War Crimes Division (WCD), was created to deal with issues of accountability and reparations for serious crimes committed in Northern Uganda, it seat in Gulu, Uganda. Its mandate is to try genocide, crimes against humanity and war crimes, as well as terrorism, human trafficking, piracy, and any other international crime as defined in Uganda's 2010 International Crime Court Act, 1964 Conventions Act, Penal Code Act, or any other criminal law. Structurally, at least three judges sit on the ICD, appointed by Uganda's principal judge in consultation with Uganda's High Court Chief Justice.[231] One of the ICD judges serves as a head of division and is assisted in administrative work by the registrar of the court. Prosecution function is entrusted to a unit of Uganda's Director of Public Prosecution (DPP). Between five and six prosecutors are appointed to this unit, although the number of those actively working on ICD cases fluctuates depending on workload. Investigation of crimes that are tried before the ICD is done by the Criminal Investigations Department (CID) of the Uganda Police Force.

Not much has been reported about the ICD's prosecution of people charged with serious war crimes either from the LRA or from the Ugandan Army. To date only one former LRA member, Thomas Kwoyelo, has been indicted before the ICD for war crimes. In the case of Uganda v Kwoyelo Thomas [232] he was charged in August 2010 with 12 counts of violation of Uganda's 1964 Geneva Convention Act, including the grave breaches of willful killing, taking hostage, and extensive destruction of property in the Amuru and Gulu districts of

[229] See clause 4 of the Juba Agreement and the relevant parts of Annexure 3 thereto apply
[230] Ibid
[231] ICD Practice Directions Para 4-5
[232] Uganda v Kwoyelo Thomas, High Court (War Crimes Division), case No. 02/10, Indictment, August 31, 2010

Northern Uganda. But his trial remains docked with controversy, with his defense lawyer arguing that the blanket amnesty granted to LRA soldiers should extend to Thomas as well. "High officers in the LR were granted amnesty. Caleb Alaka, [233] recalls that, "since the brigadiers were granted amnesty, the denial by the directorate of public prosecution infringes on Kwoyelo's constitutional rights to fair treatment."

According to the Human Rights Watch report on the ICD process, it is reported that one alleged LRA member, Patrick "Mission" Okello, has been in custody of Uganda Military intelligence since March 31, 2010 but is yet to be brought before the ICD. The ICD is Uganda's effort to complement the ICC in the prosecution of perpetrators of crimes against humanity. It is however contended that the court has failed to live up to those expectations. As Elise Keppler et el observe,[234] "National war crimes trials should provide accountability for crimes committed in Uganda. However, outstanding questions remain for the International Crimes Division if it is to succeed in reaching its potential as a forum for delivering meaningful justice." In Uganda, according to J. Kagezi[235] the establishment of the International Crimes Division in the High Court of Uganda was meant to herald the local prosecution of perpetrators of serious crimes. But ever since its inception, the court has only managed to prosecute one former LRA soldier.

In Kenya, the Commission of Inquiry into Post-Election Violence commonly referred to as Justice Waki Commission[236] set up to investigate the 2007/2008 post-election violence recommended that while the key perpetrators were to be prosecuted by a special tribunal locally or at the Hague, the lesser offenders were to be prosecuted in Kenyan courts. Over

[233] Caleb Alaka, Thomas Kwoyelo's defense attorney, quoted in Mark Kersten 'Uganda's controversial first War Crimes trial: Thomas Kwoyelo" accessed at http://justiceinconflict.org/2011/07/12/ugandas-controversial-first-war-crimes-trial-thomas-kwoyelo/ on August 24, 2013

[234] Elise Keppler, senior international justice counsel at Human Rights Watch

[235] J. Kagezi. *Practical aspects of Prosecuting and Adjudicating International and Trans-national Crimes*, The East Africa perspective Presented at The Annual 7th Conference of the East Africa Prosecutors' Association, Windhoek, Namibia. 9 October 2012

[236] Executive Summary Report of the full report of the Commission of inquiry on Post Election Violence, full report can be accessed at http://.dialogue Kenya.org/doc/PEV Report.

6,080 files PEV related files were opened by the Criminal Investigations Department of the National Police; and forwarded to the Director of Public Prosecutions for further action, the office of the Director of Public Prosecution recommended closure of most of the files for lack of evidence, and this is according to the 2012 Multi-Agency Task Force.[237] This has negatively affected the perception of the public in the Institutions, which were meant to have reformed and enhanced their accountability to the people of Kenya.[238] According to Moses Chelanga[239] the failure by the police to effectively investigate the perpetrators has frustrated any chances of justice for victims of post-election violence locally. The office of the DPP could not proceed with most of the cases as it depended entirely on the investigation reports from the police.

According to Betty Murungi,[240] while she acknowledges that the strengthening of Kenya's judiciary is a precondition for the impartial prosecution of international crimes and other serious crimes in national courts, it is no guarantee of success. She further argues that Judicial independence and the courts' ability to conduct impartial proceedings in these types of cases also depend on the extent to which other actors, including government officials; respect the separation of powers and the rule of law. In an apparent effort to deal with international crimes, the government enacted the International Crimes Act which came into effect in January, 2009. However, Alex Muteti,[241] an international law expert charges that, "since the Act does not apply retrospectively, it does not apply to the post-election violence of 2007/08."

[237] Report of the DPP – Multi-Agency Task Force appointed in June 2012 to Review and Re-evaluate all the PEV related files. The report is yet to be published.
[238] Interview with Moses Chelanga, Advocate of the High Court of Kenya and Human Rights Activist, August 3, 2013
[239] Face to face interview with Eddie Kaddebe, prosecution officer at the Office of the DPP, Nairobi, August 4, 2013
[240] Ibid
[241] Noted Alex Muteti, member of the Multi-Agency Task Force on PEV

According to Angote,[242] "Kenya is not ready to prosecute PEV related cases, she argues that, legally as at the time PEV, Kenya, although had ratified the Rome Statute did not have a legal framework on international crimes, even the offences allegedly committed under the municipal law, there is laxity on the part of the ODPP, to prosecute the perpetrators of PEV, this is evidenced by the fact that majority of the files opened and forwarded to the DPP have been closed for no reason."

In June 2012, the DPP constituted another Multi-agency task force composed of all criminal justice agencies of the government, with the mandate or reviewing and re-evaluating all PEV related files, 6,080 files were received by the multi-agency task force.[243] But in December, 2012, during a press release on the preliminary findings of the multi-agency taskforce, Kenya's Office of the Director of Public Prosecutions announced that hundreds of these cases had to be dropped for lack of evidence. "Most of these victims were not at home, were not at the scene," Said the Dorcas Oduor. [244] according to Dorcas the evidence that was clear is many people's homes were burnt down but the details of how much they lost cannot be confirmed or verified because their property was all destroyed in the fires, she adds. Respondents expressed dissatisfaction in local prosecutions enhancing any justice to the victims of post election violence. Kadebbe[245] observes,

"The prosecutions have already been politically influenced and no one will be found guilty by our courts," said Eddie Kaddebe, one of the respondents. Rodah Nyamongo,[246] in addition to the sentiments above said "I do not think the Kenyan justice system is ready to deal with the perpetrators of PEV as at now, first, the witnesses protection mechanism in

[242] Ibid
[243] Ibid
[244] Deputy Director of Public Prosecution, Dorcas Oduor as quoted in "Kenyan Prosecutor: Insufficient evidence has made prosecution of post election violence cases difficult" published in Kenya Monitor, October 26, 2012. Accessed on July 24, 2013 at http://www.icckenya.org/2012/10/kenyan-prosecutor-insufficient-evidence-has-made-prosecuting-post-election-violence-cases-hard/
[245] Face to face interview with Eddie Kaddebe, prosecution officer at the office of DPP, July 28, 2013
[246] Rodah Nyamongo is a student at daystar University, while commenting on whether on whether Kenya is ready to prosecute PEV cases during a public debate on ICC process in Kenya held on 4th September, 2013

Kenya are very weak, I am aware that there exists the witnesses protection agency in Kenya, however the agency lacks the capacity to provide protection to witnesses, in fact, majority of people are not even aware of the existence of the witness protection agency. Consequently, Kenya is far from sustaining domestic criminal justice in relation to PEV. Further, Kenya is not ready to prosecute international crimes due to their complexity."

Shollei Gladys,[247] notes that over the last two years, Kenya's judiciary has undergone significant changes. With the passage of the Judicial Service Act, the Vetting of Judges and Magistrates Act, the Supreme Court Act, and other laws, the institutional framework for a reformed judiciary is now in place additionally Shollei,[248] notes that the new chief justice, Willy Mutunga, is generally seen as being committed to the principles that underpin a strong and independent judiciary. Furthermore, a vetting process has been implemented that is likely to help remedy problems in the judiciary, such as widespread corruption and incompetence.

However, noted one of the Judges of the high court of Kenya who did not want to be named in this research paper, [249] commented thus that "Even with a legal framework in place to domesticate the Rome statute, capacity gaps still exist within the justice sector. The area of international criminal justice is a relatively new area and therefore many of the prosecutors and investigators do not have specialized knowledge on international criminal law which is a key component of the cases they are prosecuting."

3.4 Complementarity of the international and domestic criminal justice processes

From the foregoing, it is clear that neither international nor domestic criminal justice mechanisms can singularly be effective in bringing about justice to victims in post conflict societies. According to Max Du Plessis, Antoinette Louw, Ottilia Maunganidze, [250]

[247] Shollei Gladys, Registrar Judicial Service Commission, Kenya, 27 June 2013
[248] Ibid
[249] Kenyan Judge who did not want to be named in this paper. Interviewed on June, 6, 2013
[250] Max Du Plessis, Antoinette Louw, Ottilia Maunganidze, 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions', Institute of Security Studies, paper No. 241 at 1

International criminal justice mechanisms are instrumental in bringing about symbolic justice to the victims by indicting the top leadership of perpetrators of crimes against humanity. The Rome Statute[251] it provides that the ICC is meant to act in a complementary relationship with the national jurisdictions of State Parties. State parties to the Rome Statute should be put in place mechanisms to prosecute international criminals in their own local courts, or cooperate with the ICC by arresting and handing over persons being sought by the court. The complementarity of these criminal justice mechanisms are well illustrated in the East African region. The ICTR for instance has been able to prosecute only the top leadership of the Indarahamwe and Hutu genocidaire, those who fall in category 1 of the Organic Law.

Locally, the national courts and the traditional Gacaca came in handy to deal with the lesser offenders. In Uganda, the ICD was established under the Uganda International Criminal Court Act 201, to prosecute those charged for crimes against humanity and other serious international crimes. This was to complement the ICC in its bid to have Joseph Kony and other LRA top leadership arrested and charged at The Hague. The ICD is however yet to record any serious prosecutions. The same is true for Kenya where most of the post election violence offenders have gone scot-free due to poor investigations carried out by the police.

However, on a more general note, the majority of the respondents had little or no knowledge at all on the operation of the principle of complementarity that is the basis for the ICC's recognition of the primary role of national legal systems in the fight against impunity.

3.5 Comparison of International and Domestic Criminal Justice in Post Conflict EA

The two criminal justice mechanisms have both been used in East Africa as a means of attaining transitional justice. While there have been successes in either of them, there have also been challenges facing each mechanism. The international criminal justice processes were perceived to be pushed by the Western powers, even when the respective countries

[251] See the Preamble to the Rome Statute and Article 17

requested for the international intervention. A number of countries therefore, for instance Kenya, have fought the process and are trying to frustrate the ICC cases facing three of its citizens. This means that the international efforts may not do much to bring about justice in Kenya. The ICTR has however been successful in prosecuting and ordering the imprisonment of a number of the Rwanda genocidaires. The process is however, too removed from the community in which the atrocities were committed and therefore may not have such a big impact on the peace process.

Domestic criminal justice mechanisms on the other hand, have suffered the lack of resources, lack of political good will and failure to adhere to international legal standards. Prosecutions in the national courts have failed to achieve the desired goals due to frustration from sitting governments and feeling of 'victor's justice' on the part of the perpetrators. The traditional criminal justice interventions, that have been more of restorative than retributive, have played a critical role in enhancing reconciliation and reintegration of communities. They however faced challenges of not being able to effectively punish serious offenders, failure to adhere to the international criminal procedure standards and respect of human rights.

3.6 Conclusion

Support by the local population is key to the success international or domestic criminal justice. In Uganda, the greatest support for amnesty and alternative justice reportedly comes from Kony's own Acholi people, whereas other populations of Ugandan victims and even distinct segments of the Acholi people are more likely to demand Kony's prosecution. On the contrary, alternative justice is something of an all-or-nothing proposition. To provide an effective inducement, the contemplated scheme requires the ICC to lift the warrants completely, and not simply to eliminate charges with respect to specific victims who have provided their consent. Honoring victims' interests therefore requires a single set of views encompassing the interests of all victims. This, in turn, requires taking account of a broad

range of viewpoints and devising a method of weighing those viewpoints in pursuit of a single answer. The Rome Statute provides no guidance as to how this should be done, and there is indeed no easy answer.

Although there may be broad support among Uganda's victims for employing Mato Oput that sentiment may itself be a product of various assumptions, including the fear that peace will otherwise be impossible to achieve or the belief that the Ugandan government is unwilling to commit the resources necessary to defeat the LRA. If so, then the interests of the victims may at some level become dependent upon the very policy preferences of the LRA and the Ugandan government that are under evaluation by the ICC. On the other hand, the mechanism in Burundi was to a large extent domestic oriented.

Regarding the Kenyan criminal justice system, it is of the utmost importance that the Kenyan government ensures that serious crimes committed in the run-up to the March 2013 elections, including those committed in Tana River, Baragoi and elsewhere, are swiftly and independently investigated and prosecuted, regardless of whether political actors or other powerful individuals may be implicated. The Kenyan government must continue its efforts to build strong and independent legal-sector bodies, including ensuring the full and urgent implementation of reforms of legal-sector bodies stipulated in the 2010 Constitution.

International partners must continue to support accountability for the PEV, which requires that pressure be put on the government to cooperate fully with the ICC and establish a national accountability mechanism. International partners should also continue to support the capacity building of Kenya's legal-sector bodies and encourage the government to pursue accountability for serious crimes committed recently in other ways. Finally, civil society has an important role to play in advocating that international and other serious crimes be investigated, prosecuted, and adjudicated by the relevant authorities.

In comparison to Arusha Tribunal which was retributive in its scope and mandate, the Gacaca System put more emphasis on measures that encourage national healing and reconciliation between Tutsi and Hutus. Unlike the Arusha Tribunal, which further exacerbated the ethnic polarization between Hutus and Tutsi, Gacaca System has narrowed the ethnic division among Rwandan's communities. Because Gacaca proceedings encouraged full and open participation in its trials, both Hutus and Tutsi have become more interested in healing and reconciliation, forgiveness and co-existence than seeking vengeances or impunity from each other.[252] As with the ICTR, the majority of Rwanda's rural population had little understanding of and felt little connection to the formal justice system. Although that system operated in provincial capitals rather than abroad, it is still remote from most ordinary people, both geographically and socially. Trials are formal events, with their own formalities and procedures, largely alien to most people. Also, most people live in such a state of extreme poverty that their lives are dominated by the daily struggle for survive

[252] Ibid

CHAPTER FOUR:

ANALYSIS OF DATA ON CRIMINAL JUSTICE IN POST-CONFLICT EAST AFRICA

4.1 Introduction

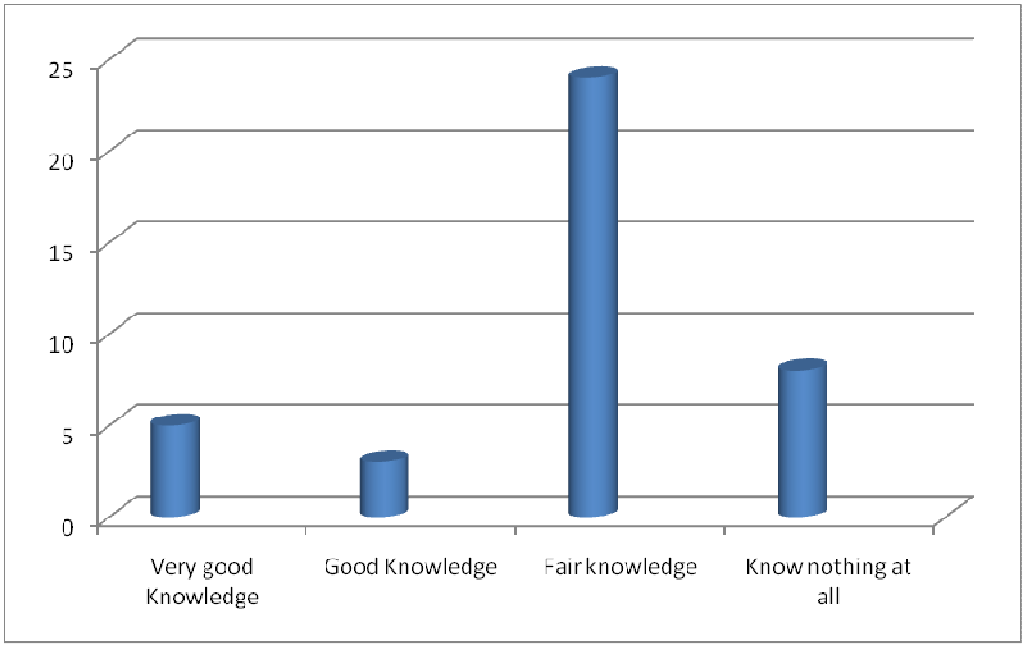
This chapter presents the findings of the research on international and domestic criminal justice processes in post conflict East Africa. It incorporates issues raised in the literature review, discussions in chapter 2; and the primary data contained in chapter 3. Various themes to be discussed under this chapter include the role of retributive justice in reconciliation and sustainable peace, complementarity of international and domestic criminal justice in post-conflict society, retributive vis-a-vis restorative justice, effectiveness of international and domestic criminal justice in post-conflict society and the effect of community participation on reconciliation and sustainable peace. The findings further present an interrogation of the impact of the various criminal justice systems on peace and stability. The chapter ends with a conclusion.

The findings have been drawn from a total 40 questionnaires (representing 67% of the 60 questionnaires) administered to respondents drawn from civil society, lawyers, victims and perpetrators in the three EA post conflict states being; Rwanda, Uganda and Kenya. Further information has been drawn from key informant interviews and focus group discussions with selected individuals and groups from the ICC, ICTR, and institutions of higher learning, Judiciaries of East African States, prosecution departments and the diplomatic community. Part of the information was reviewed from, newspaper reports, documentaries and features, parliamentary hansards and government reports. Some respondents requested anonymity and all effort has been done to respect their wishes.

4.2 General Perceptions of International Criminal processes in East Africa

To establish how the general public perceives the international criminal processes and their impact on reconciliation and peace process, a questionnaire was distributed to respondents in Kenya, Uganda and Rwanda. The questionnaire was given to 18 victims, 9 perpetrators, 8 civil society members and 5 judicial officers. Of the population sampled, 24 respondents representing 60% of the 40 respondents only had fair knowledge of the working and role of the international criminal justice process. 8 of the respondents knew nothing about the processes, and this was especially from the victims. 5 had very good knowledge and 3 had good knowledge. This is presented by figure 4.1 below.

Figure 4.1: Illustrates the general Perceptions of the International Criminal Processes



This response was a clear indicator of how the international criminal justice mechanisms are removed from the people affected by the conflict. A majority of the respondents confessed not knowing what was going on at the ICC or the ICTR. This shows that majority of the people are not even aware of the existence of the international criminal

process, let alone understanding the operations of the international criminal court and tribunals.

This finding confirms the assertion by Laundy, according to Patricia Laundy.[253] In her study on "*Rethinking Transitional Justice"* she argues that international criminal trials are both physically and procedurally removed from the community. While undertaking a study of Bosnians and Serbians view of International Criminal Tribunal for Former Yugoslavia, she opined that majority of the people did not have an idea of what the process was all about. Laundy's view is supported by Meron Theodor,[254] who argues that the fact that the international criminal trials do not take place within the context of post-conflict society compromises its legitimacy leading to the process being perceived by the locals as "Imported Justice". In Rwanda, although the International Criminal Tribunal for Rwanda seats in Arusha, a few miles from the Republic of Rwanda the court was never accessible by the community which was at the time recovering from the genocide. The situation in Kenya and Uganda was no different. On the issue of procedure, Barria, Lilian,[255] argues that the international criminal court is the strictest judicial organ on matters of procedure and the rules of evidence. This means that, a common citizen who does not understand the basics of criminal law may not be able to comprehend the proceedings even though he/ she may be present in court during the proceedings. Lillian further note *"assuming the seat of the court is transferred to the community or the state where the crime was committed, the common and majorly illiterate people cannot comprehend such procedures."*

One of the objective of this study is to establish the extent of community participation in international and domestic criminal justice, from the response on general perceptions of international criminal justice mechanism, it is evident that majority of the East Africa people

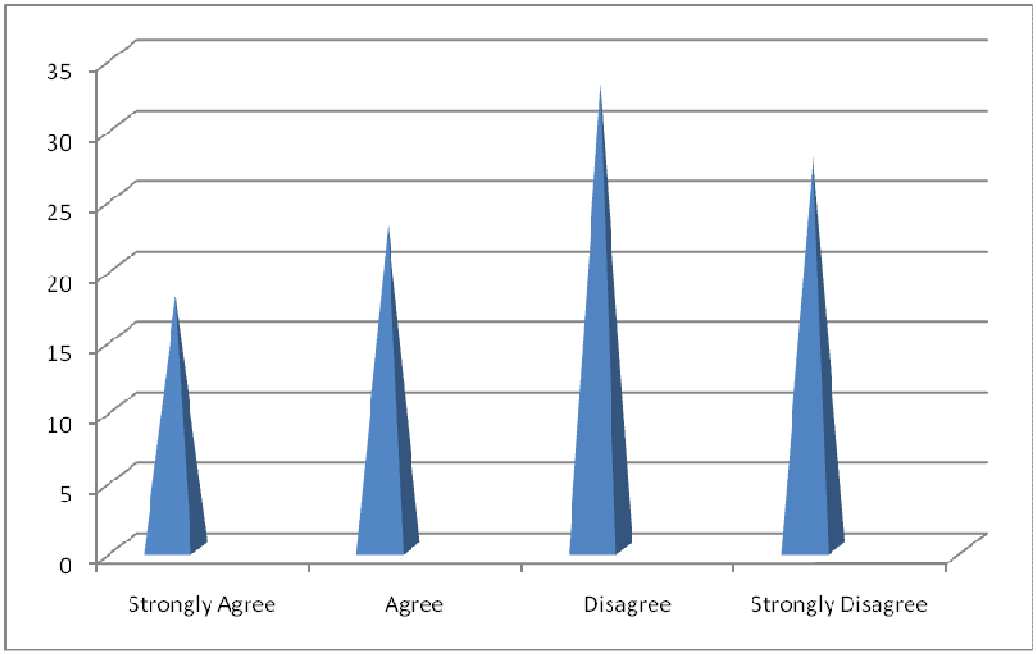
[253] See Chapter 1 p. 18
[254] See Chapter 1 p. 6, L.R p. 15
[255] Op cit

are not conversant with the international criminal justice. That being the case, it therefore follows that in relation to international criminal justice the level of participation by the community is low, despite the fact that they are the people affected by the conflict.

4.2.2 International Criminal Justice and administration of justice

The study sought to establish how much the ICTR and ICC processes have helped in bringing about justice for the victims and perpetrators of international crimes in the region. This is diagrammatically presented in figure 4.2 below:

Figure 4.2: Showing whether respondents think the International Criminal Justice processes brought about justice to the victims and perpetrators



According to Akhavan,[256] literature denotes that removal of perpetrators of crimes and human rights abusers diminishes the likelihood of the victims retaliating against the offenders, and enhances the incentives for co-operation on the one hand, On the other hand

[256] See page 4

Teitel,[257]argues that international tribunals though critical do not bring about justice as expected by the community. Minnow and Michel[258]agree and attribute the failure of the international criminal justice institutions to lack of domestic legislation. Majority of state parties to the Rome Statute have not domesticated it. This means that there is a disconnect between the domestic and the international law. The principle of dual criminality requires that for one to be prosecuted by the international court, the offence prescribed under the Rome Statute must also be prescribed under municipal law. This therefore means that the Rome statute is not applicable in individual states where it has not been domesticated. Consequently, an attempt to legislate or domesticate the Rome statute after the conflict defeats the very concept of dual criminality hence in majority of East Africa states the international criminal court has been operating retrospectively.

From the study, 18% of the respondents strongly agreed that the processes had brought justice, 23% agreed, 33% disagreed while 28% strongly disagreed to the proposition that the international criminal justice processes brought about justice at all.

From the finding above, research has established that majority of victims and perpetrators of crime in post-conflict East Africa do not believe in justice before the international criminal court. As to the perpetrators of crime, they felt that they were being charged with offences which were never stipulated under the domestic law as crimes at the time the offences are alleged to have occurred; many East Africa states attempted to legislate on international law after the offences had been committed. The general view of majority of the respondents was that the strict procedures of international law and the fact that the process takes place miles away from the state where the crimes were committed makes them see no justice. Among respondents from Uganda 60 % of the respondents, feel that the Rome

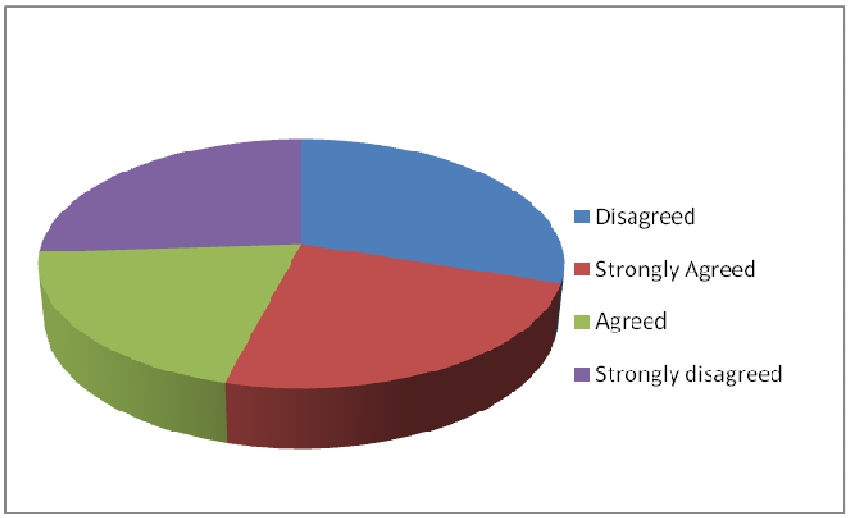
[257] See page 3
[258] See page 2

Statute leaves unanswered fundamental questions about how far states recovering from mass violence should be required to go in pursuit of criminal justice.

4.2.3 International Criminal Justice and Reconciliation

The study also sought to find out the impact of the international criminal justice prosecutions to the reconciliation of the previously warring sides. The respondents were asked whether they agree to the proposition that the warring communities have reconciled because of the international prosecutions.

Figure 4.3: Illustrates the respondents response on whether they agree that international criminal justice brought about reconciliation



From the study, 24% agreed strongly that the prosecutions had helped in reconciling the communities, 20% agreed, 30% disagreed and 26% strongly disagreed.

On the issue of the impact of international criminal justice on reconciliation, various debates have been put forth by international scholars, according to Meron Theordor, [259]he argues that although international criminal justice is required to play the role of ensuring reconciliation by virtue of punishing the offenders and ensuring the new leaders co-operation with all the ethnic communities as a means to reconciling all the communities, it seems

[259] See literature review page 15

difficult under the circumstances, first and foremost he argues that the international courts are composed of judges who are not familiar with the historical context of the country in which crimes were committed, they are aware of the legal culture of the particular society. According to Theodor, [260] the judgements of the courts do not therefore reflect the wishes of the people and is far much removed hence diminishing chances of the community accepting the outcome of the court and embracing each other.

In Kenya, the reaction to the ICC process drew mixed reactions. The indictees dismissed the charges against them as being more of political than criminal. Of the respondents that the researcher interviewed, opinion was evenly split between those in support of the ICC cases and those opposed to the process. 53% out of the 40 respondents agreed that the prosecutions would act as an important deterrent in future for anyone who may want to take the country back to such conflict. 45% think that with the current political situation where the president and his deputy are indicted by the ICC, the prosecutions will not do much in reconciling the communities more than the perceived unification by the elections.

Relatives of the perpetrators and majority of the members of the community where the perpetrators who were being prosecuted hailed from, in all the East African countries who were interviewed felt that their people were being victimized by the government of the day. In Kenya for example majority of the Kalenjin and the Kikuyu communities were very indifferent to the international criminal court trials as at the time of the interview; and they felt that it amounts to neo-colonialism; they still insist that Uhuru Kenyatta and William Ruto are innocent of the crimes they face at the ICC. According to media reports of January 2008[261] the two communities have been of the view that they have been politically reconciled and that the ICC process is not relevant. These political sentiments essentially amount to

[260] Op cit

[261] Statements by politicians made from early January, 2008, published by the Kenyan Media including the Daily Nation at http://www.nation.co.ke.

undermining the court process and its outcome. The ICC prosecution of the three indictees is still on-going, with the hearing of the case slated to start in September 2013. However opinion still remains divided on whether the prosecutions will have much impact on the reconciliation and peace of the communities that were worst hit by the conflict. From the statistics in Chapter 3, the opinion is split evenly for those opposed and those I support of the ICC prosecutions.

In relation to Rwanda, the respondents were of the view that perpetrators of violence ought to have come from both sides of the warring groups i.e. from Hutus and Tutsi communities however, the Hutus felt that they were being victimised by the Tutsis who are running the government. This lends credence to the feeling of 'victor's justice' by those facing trials, as they feel they are being victimized for 'losing the war'.

It is therefore correct to conclude based on this finding that, international criminal justice process in post-conflict societies has very minimal contribution on the process of administration of justice

4.3 Perceptions on Domestic Criminal Justice Processes

In domestic criminal justice, it is appreciated that there are various models of domestic criminal justice being the national courts and the traditional mechanisms, among East Africa states, every state has adopted its own traditional mechanisms as the circumstances may require. Rwanda for example, after the genocide, the government established the Gacaca courts under the Organic Law, in Uganda various traditional mechanisms have been adopted depending on the community, for example the Acholi community adopted the Mato Oput, in Kenya among the Karamajong community the Akiriket Council of elders is commonly used. In regard to national courts, majority of the East Africa states inherited the common law system of litigation and all of them share similar

court system. In this paper I will analyze domestic criminal justice in post-conflict East Africa. Note that this analysis is in no systematic manner.

Gahima[262] argues in support of prosecution through national courts, he argues that these local prosecutions 'provide an important focus for rebuilding the domestic judiciary and criminal justice system, establishing the courts as a credible forum for the redress of grievances in a non-violent manner'. Kritz[263]posits that domestic courts can be more sensitive to the nuances of local culture, and resulting decisions 'could be of greater and more immediate symbolic force because verdicts would be rendered by courts familiar to the local community'. Teitel[264] adds, these prosecutions are more likely to change values among the people because they are conducted closer to the people than the remote international prosecutions.

4.3.1 Post-conflict Traditional Criminal Justice Mechanisms in East Africa

According to Ayisi Eric,[265] traditional mechanisms serve a critical role in the process of conflict resolution in every society. Due regard should therefore be given to traditional or indigenous mechanisms in administration of justice to help them carry on with their vital role without compromising the general principles of justice. Nagy argues that traditional criminal justice offers the common persons an opportunity to access justice without much formality. These mechanisms have been viewed as alternative conflict resolution mechanisms to the national or formal mechanisms, they are quick hence relieve the national court off the pressure while reducing congestion in national correctional centers. Mutisi Martha,[266] while agreeing with Ayisi, opines that the traditional mechanisms are sensitive to the victims,

[262] For instance see, Gahima G. *Transitional Justice in Rwanda: Accountability for Atrocity*, Rutledge 2013
[263] Neil Kritz, *Transitional Justice, Washington* DC: USIP Press, 1997
[264] Teitel G. Ruti, *Transitional Justice*, Oxford University Press, 2000
[265] Ayis, Eric O. 1979. *Introduction to the Study of African Culture*, 2nd ed. Nairobi: East African Publishers. 110
[266] Mutisi, Martha "*Gacaca Courts in Rwanda*: An Endogenous Approach to Post-conflict Justice and Reconciliation" African Peace and Conflict Journal, Vol. 2, No. 1, June 2009

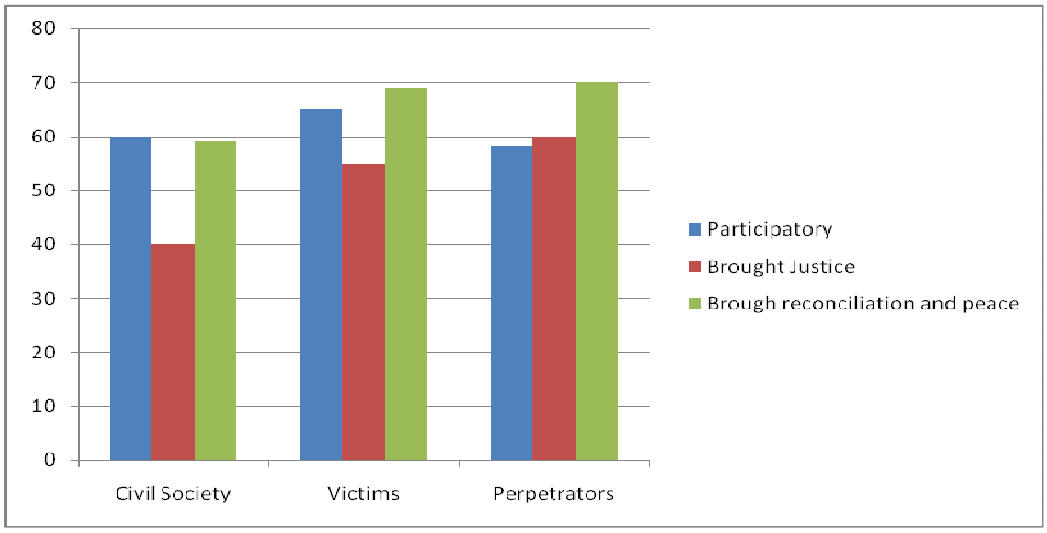
offenders and the community at large, given that the process is anchored on the traditions of a particular community as opposed to the formal courts which focuses on individuals as opposed to the community, as such traditional mechanisms are viewed to focus much on society healing and reconciliation. It is on this basis that the research herein sought to establish how the various communities have perceived the kind of traditional mechanism that have been adopted or established by the various East Africa states and the finding is as below.

4.3.2 The Mato Oput of Uganda

In Uganda, the study sought to establish how respondents perceive the traditional Mato Oput and its effectiveness in administering justice for both the victims and the perpetrators as well as bringing about reconciliation and peace. Questions were posed to establish how the process is participatory, whether it brings about justice and ensures reconciliation and peace. According to the respondents in this study, 60% argue that the local mechanism is more likely to deliver long-time peace than the international mechanism. 80% of the respondents support the traditional mechanisms on the basis that it is home grown and they understand the operations of such mechanism. Many of the respondents were of the view that whichever the mechanism that is adopted by the state, meaningful and effective engagement with the civil society is paramount to the success of the Northern Uganda criminal justice.

Historically, respondents argue that ttraditional informal dispute resolution methods were used by Uganda's various communities to deliver justice at the community level. Among the Acholi community, 80% do agree that the traditional method of integrating returning members of the Lord's Resistance Army into the Northern Uganda Acholi community has effectively yielded peaceful co-existence between the community and the former rebel fighters. These responses were as presented in figure 4.4 below:

Figure 4.4: Graph showing how different groups perceived the Mato Oput process in terms of being participatory, just and enhancing reconciliation and peace



From the study, research has established that the traditional Acholi Mato Oput is a practice exclusively practiced by the Acholi people of Northern Uganda based on restorative justice. The influential Acholi traditional leaders opposed the ICC indictment of the four LRA top commanders, since they feared that this would prolong the war. The process is lauded as being both retributive and restorative hence fosters justice and reconciliation among the worrying communities.

4.3.3 Domestic Transitional Justice in Burundi

In Burundi, According to 80% of the respondents, the peaceful transitional justice in Burundi was largely successful due to the international amnesty prohibition. The successful negotiations between the UN and the Government of Burundi were clearly impacted upon by this prohibition. All the respondents were of the view that granting of amnesty in connection with truth seeking processes was only viable option in a situation of amnesty of crimes under international law. The respondents also argued that the local Burundi politically negotiated power-sharing deal, was genuine hence the sustainable peace in Burundi. The respondents

therefore argued that the local justice mechanisms mean well for the community if done in a genuine manner, hence more effective than the international justice systems.

4.3.4 The Gacaca Courts in Rwanda

According to the Rwandan government website[267] the government held the position that there can be "no reconciliation without justice." Prosecution of perpetrators of the Rwandan genocide began by use of national courts; however, due to the massiveness of the people involved which was straining the judicial system and the prisons within the state, the local mechanism commonly referred to as Gacaca was established as a complementary to the national courts. With time, government institutionalized the Gacaca courts by training the judges and providing the necessary structures to see to it that as many perpetrators and victims as possible can access justice within a short time. The Organic law on the Organization of Prosecutions Constituting the Crimes of genocide or Crimes against humanity Committed since October 1990 provided the legal framework within which those charged with different forms of war crimes could be prosecuted nationally.

The establishment of Gacaca courts and their entrenchment into the legal system of Rwanda was also an initiative of the Rwandan Government with the help of the international community. It was believed that this form of traditional justice would play a crucial role in enhancing reconciliation and lasting peace in the war ravaged villages of Rwanda. Proponents of this system, like Nagy[268] argued that traditional mechanisms offer ordinary persons greater involvement in and access to transitional justice than that provided by remote, formal institutions or technocratic reforms. It was believed that the confessions and truth telling would have a therapeutic effect on the victims, who would then be able to accept the perpetrators back to the society and coexist with them.

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[267] http://www.gov.rw/government.genocidef.html accessed on July 23, 2013

[268] Nagy, Rosemary "*Traditional Justice in transitional contexts, in Transitional Justice and Peaceful Building on the Ground*:" Victims and Ex-Combatants, Sriram, Chandra Lekha, Garcia-Godos, Jemima, Herman, Johana, Martin-Ortega, Olga (eds) 2012 Routledge

According to Matsiko Peter[269] the challenge of reconciliation focuses on several interrelated issues and attention has to be paid to the suffering of individuals and of the nation as a whole. Furthermore, Matsiko argued that the truth about past atrocities had to be established through the Gacaca Courts rather than the ICTR. He went on to argue that, it was very important that the basic human emotional needs of justice, empowerment, security and recognition were met in order for the Rwandan society to move forward from the genocide. The fact that the court was based in Tanzania and not in Rwanda made it difficult for Rwandese to attend the trials or to receive prompt news of its work during the trials sessions. Matsiko went on to state, ‘‘until 2000 the official languages of the ICTR were English and French. Kinyarwanda, the native language of all Rwandese, was only accepted as the official language for the court proceedings in 2000”.

According to 90% of the respondents, the government's main objectives in adapting gacaca courts for genocide hearings was to expedite trials by using about 11,000 gacaca courts instead of the then thirteen specialized courts and by holding hearings near the places where perpetrators, survivors, and witnesses live; to establish the truth about the genocide by compiling a list of perpetrators, victims, and damages in every jurisdiction; and to reconcile and promote unity among Rwandans by public acknowledgment of guilt and innocence. These aims represent a dramatic rethinking of the functions of justice in a post-conflict society, stressing community participation over legal procedure and adding a degree of restorative justice.

According to 98% of the respondents, the strongest element in favor of gacaca was the lack of an alternative. Neither the ICTR nor the formal justice system seemed capable of providing the basis for justice or reconciliation in Rwanda. The formal justice system has seriously compromised human rights standards, such as the rights to a speedy trial and to

[269]Matsiko Peter, First Secretary, Rwandan Embassy in Kenya

minimal conditions of detention. Hence, some alternative is necessary. Gacaca's reliance on Rwandan cultural mechanisms of conflict management adds to its appeal.

According to 97% of the respondents, the gacaca system constituted a radical break with the domestic and international formal systems. It did remedy the slow pace of the judicial practice; it also had the potential to create significant benefits in terms of truth, reconciliation, and even grassroots empowerment. These potential benefits followed from the central role played by local communities, as well as from the fact that the system involves many more people and contains less time-consuming rules. However, for precisely the same reasons, gacaca results were also subject to unpredictable political, social, psychological, and economic dynamics. The results are a potentially dangerous. Then again, in a country like Rwanda, there were no easy, cheap, or perfect solutions.

The speed at which the gacaca courts operated shortened the length of suffering endured by those suspects awaiting trials. If more financial and political resources were put into the gacaca process from the beginning, there would have been a good chance that most of the cases would have been judicially prosecuted within the five to seven years from the time the gacaca commenced. On a positive note, many of the people interviewed stated that the gacaca process has been helpful in mending the wounds of the past. 10% of respondents were of the view that gacaca courts violated the due process.

4.3.5 Limitations of the Gacaca Court Process

Gacaca courts suffered a myriad of challenges like any other post-conflict society undergoing the transition process. The absence of qualified judges, absence of national standards to measure justice and absence of security during trial failed to provide an environment where people can testify or attend the hearing without fear of reprisal. As a

consequence of these factors, Mugabo[270] argued that, many people who might have attended or gave credible information decided to stay away from the courts due to security reasons.

According to the respondents, gacaca courts were poorly funded by the government and had poor access across the country. Even during the trials, 30% of people interviewed believed that some communities that live in inaccessible areas never got a chance to conduct a gacaca trial because of the inaccessibility of those areas. To the respondents, gacaca was the best alternative to failing ICTR. They argued that gacaca court was a unique opportunity that dispensed justice to both the victims, survivors and those alleged of committing massacres, crimes of war, crimes against humanity and so many other violations done to thousands of people during the 1994 genocide.

Furthermore, the respondents argued that gacaca courts had no resources to deal with psychological and traumatic consequences that emerged during the genocide era. They argued that lack of professionals to counsel traumatized witnesses, survivors and genocidaires increased genocide experiences and memories. In addition, Gacaca courts proceeding had potential risk of increasing ethnic tension and hatred between Tutsi and Hutus which could have culminated into desire for vengeance and retribution especially during the gacaca trials. However, this potential risk faded away as gacaca courts seemed to have encouraged healing and reconciliation contrary to initial thoughts.

4.3.6 Other Interventions in Transitional Process in Rwanda

According to the respondents, President Paul Kagame pardoned hundreds of genocide prisoners who had confessed and asked for forgiveness. As noted in chapter three, Ndagiza[271] argued that, before they went back to their communities, they were taken to solidarity camps for rehabilitation and taught how the new Rwanda operates. In 1999, five years after the

[270] Ibid
[271] Fatuma Ndagiza, Secretary General of the Reconciliation Commission, 23 June, 2013

genocide, the government set up the National Unity and Reconciliation Commission to work towards reconciling the convicts and the victims. However, it was not until when President Kagame passed a decree to set free at least 23,000 people who fall in the 2-4 categories of genocide crimes. These categories cover those who killed because they were forced to and had since confessed. There are 18 solidarity camps countrywide, where these people went through what is known as engando (rehabilitation and sensitisation) before they return home. About 12km east of Kigali is Kinyinya solidarity camp, which played host to close to 1,000 pardoned genocide convicts.

In conclusion, according to the respondents, Rwanda could not accept the limitation of the Tribunal's rationale to acts committed in during the 1994 genocide. It cogently argued that the acts committed in 1994 had not occurred spontaneously but had been preceded by a planning period, and that smaller-scale massacres had occurred before 1994. It was told that, under its Statute, the Tribunal's jurisdiction would not be limited in time in respect of any person who had planned, instigated or otherwise aided and abetted in the execution of any of the crimes referred to in the Statute. However, that approach required delicate proof of a causal link between such acts, regarded as a form of criminal participation, and the 1994 genocide itself. Moreover, the crime of incitement to commit genocide, covered in Article 2, paragraph 3 of the Statute, does not require a link with the subsequent commission of an act of genocide but remains subject to the 1994 time-limit.

The views of the Rwandan prosecutor on the international community for investing more money in the ICTR than in rebuilding the judicial system in Rwanda are a crucial issue among the local citizens. This can be compared to the amount that USAID planned to invest in gacaca each year; less than $1 million, with the $5 million the US had offered as a reward for information leading to the arrest of a genocide suspect indicted by the ICTR. This US action seemed to have been like a public relations effort. They did nothing to stop the

genocide, but later they tried to appear to be standing up for Rwandans. A number of legal experts and political analysts have echoed these sentiments, arguing that rebuilding Rwanda's domestic judicial system should have been given priority over supporting the ICTR. Law professor Jose Alvarez, for example, argues that, While international tribunals need to be kept as an option of last resort, good faith domestic prosecutions that encourage civil discussions may better preserve collective memory and promote the mollification of victims, the accountability of perpetrators, the national (and even international) rule of law, and national reconciliation.

Besides the ICTR and gacaca, Rwanda opted for a specific constitutional law to institute proceedings and repress the genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994.28 In strictly legal terms it did not need to do this, because Rwanda could have directly applied the international law defining genocide and crimes against humanity. Although Rwanda has not explicitly provided penalties for those crimes, it could have invoked the dual indictment mechanism whereby the same act (e.g. premeditated murder or genocide) is regarded as a crime in both national and international law but the penalty applied is the one provided solely for the criminal offence under domestic law. There is not yet a consensus on the direct applicability of rules of international law in domestic law.

The choice of a specific constitutional law removes that ambiguity by repressing acts punishable under the Penal Code which at the same time constitute crimes of genocide or crimes against humanity. The acts committed must therefore meet both those qualifications if the law is to be applied. That requirement reflects a concern to avoid any criticism based on retroactivity of the law. Genocide and crimes against humanity are defined by reference to relevant international instruments. It is worth noting that the Rwandan legislators did not

deem it expedient to mention resolution 955, which contains the most recent definition of crimes against humanity.

4.4 The Role of National Courts in Fighting Impunity

National court, is one of the domestic forums for conflict resolution within a state, national courts are anchored on a state legal framework both on substantive law and procedural law. Contrary to traditional mechanisms of justice where justice is anchored on cultural practices and traditions, proceedings conducted in an informal setting and more often précised over by council of elders, national courts are formal, based on written law of the land and presided over by judges. Majority of East Africa states adopted the common law judicial system initially practiced by the colonies. This system of litigation is a purely adversarial system of litigation where the accuser and the accused present their case before the judge for determination.

According to Gahima [272] in a post-conflict society, it has been argued that the national courts present the best forum for conflict resolution, in terms of investigations, prosecution and punishment of the perpetrators of crime. This is because; the process is seen to be legitimate and enhances legitimacy and credibility of a new and fragile government. In this vein, Carsen Stahn[273] argues that international criminal court is toothless on the basis that it lacks the capacity to undertake investigations as it neither has its independent police force to undertake investigations nor effect arrests of suspected criminals but it relies on individual states to arrest and surrender suspects to ICC. He uses the example of the ICC indictment of Al Bashir, the president of Sudan who is accused of crimes against humanity at the ICC, the court is entirely relying on the government of Sudan and other State Parties to the Rome Statute to arrest and surrender its own leader to the ICC for prosecution.

[272] See literature review page 2
[273] Carsten Stahn. *Complementarity, a Tale of Two Notions*, Criminal Law Forum 19, 2008, 87-119

On the issue of traditional mechanism, it is argued that it suffers from procedural flows, it does not respect the principle of natural justice and human rights, hence members of the civil society argue that traditional mechanism though quick, they violate the human rights particularly of the accused.

Be that as it may, it is theoretically argued that national courts are the best forum for conflict resolution. However, Carroll[274] argues that post-conflict national criminal justice suffers great shortcomings on the basis that they suffer from near breakdown of law and order, insufficient professionalism, lack of political goodwill to punish perpetrators of crime, massive displacement of people resulting to lack of evidence, to sufficiently prosecute criminals, some of post-conflict societies also lack professionals to undertake such trials, hence in Carroll's argument such processes do not bring about justice and reconciliation. In fact, according to Nash, national prosecutions hinder reconciliation as the perpetrators see their detainment and prosecution merely as a result of losing the war and not necessarily as a consequence of their actions in the conflict.

This study sought to establish the role of national courts in criminal justice in post-conflict criminal justice. To establish how the general public perceives the national court processes and their impact on reconciliation and peace process, a questionnaire was distributed to respondents in Kenya Uganda and Rwanda targeting, victims, perpetrators and civil society groups. The questionnaires were distributed equally among the target groups.

From the study, 60% of the respondents believe, national courts are not capable of bringing about justice in a post-conflict society, the victims attribute this, to lack of witness protection measures leading to witnesses being reluctant to testify in court, displacement of people, poor investigations and too much political interference in the judicial process was

[274] See literature review page 2

also cited as some of the challenges faced by the national court. Majority of the perpetrator/ respondents felt that they face a lot of animosity while in court; they do not think the process is fair. Of the 28 respondents, 20% feel that national courts can bring about justice, their response mainly was attributable to the fact that the process is carried out within the society and where truth comes out in court and punishment meted out accordingly, there is a feeling of relieve among the victims of crime and they are able to forget about the occurrence and move on with life. 10% of the respondents did not understand the process; they simply said the court process is for the rich.

From this finding, it is established that national prosecutions in a post-conflict society play a very minimal role in justice, peace and reconciliation. From the research finding, it is clear that justice before the national courts suffers many challenges hence not capable of reconciling the communities and restore healthy societal relationship contrary to Gahima's argument that prosecution before national courts enhances legitimacy and credibility of the government of the day and brings about reconciliation.

In Kenya for example, there is not much to report about the efforts to prosecute the perpetrators of the 2007/08 post election violence locally. Despite the reformed judiciary and the enactment of the International Crimes Act, not much effort has been done to have the perpetrators of lesser crimes during the conflict prosecuted in the national courts. The Kenyan Chief Justice, Dr. Willy Mutunga[275] while commenting on judicial reforms in Kenya announced that the judiciary is establishing the International Crimes Division of the High Court to deal with international crimes. The office of the Director of Public prosecution equally established the international crimes division charged with the responsibility of prosecuting internal crimes. Although these reforms are lauded, it is reported that over 6,080

[275] Dr. Willy Mutunga, commenting on judicial reforms while addressing judges at an annual conference in Mombasa in April, 2013. Published on daily nation of April, 2013

case files that were forwarded to the ODPP for prosecution, the DPP recommended closure of the files for lack of sufficient evidence.[276]

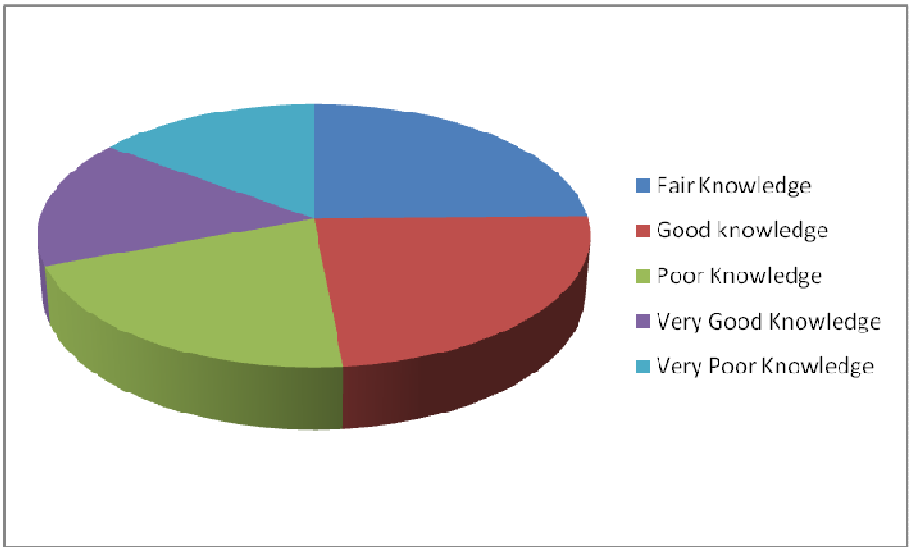
In Uganda, much of the post conflict criminal justice mechanisms were concentrated in Northern Uganda, where the LRA rebels have waged war for over 20 years. The Ugandan government established the International Crimes Division of the High Court commonly referred to as the "War Crimes Division" to deal with the human rights violations in Northern Uganda; while referring the top leadership of LRA to the ICC; and through the traditional Acholi Mato Oput, to administer justice to the many lower cadre LRA fighters and re-integrate them back to the community.

The ICD was meant to be a special court for the prosecution of all the human rights abuses locally. It was not a court established to prosecute the LRA soldiers alone. It was meant to investigate all forms of war crimes by both the government soldiers and the LRA. However from the statistics outlined in Chapter 3, it is yet to do much in terms of prosecuting the perpetrators of war in Uganda. There is so far only one LRA soldier facing charges of war crimes before the court, and none of the soldiers from the government side has as much as been investigated. Through telephone conversations and direct administration of questionnaires, the study sought to establish the impact of the ICD to the peace process in Northern Uganda.

On the question of how well the respondents know about the International Crimes Division and its role, majority indicated lack of knowledge of this court and its work in the Northern Uganda conflict. 16% indicated that they know it very well, 24% have good knowledge, 25% have fair knowledge, 20% have poor knowledge and 15% have very poor knowledge. This is presented in figure 4.5 below:

[276] See pg 68

Figure 4.5: Pie chart showing respondents' knowledge of the ICD

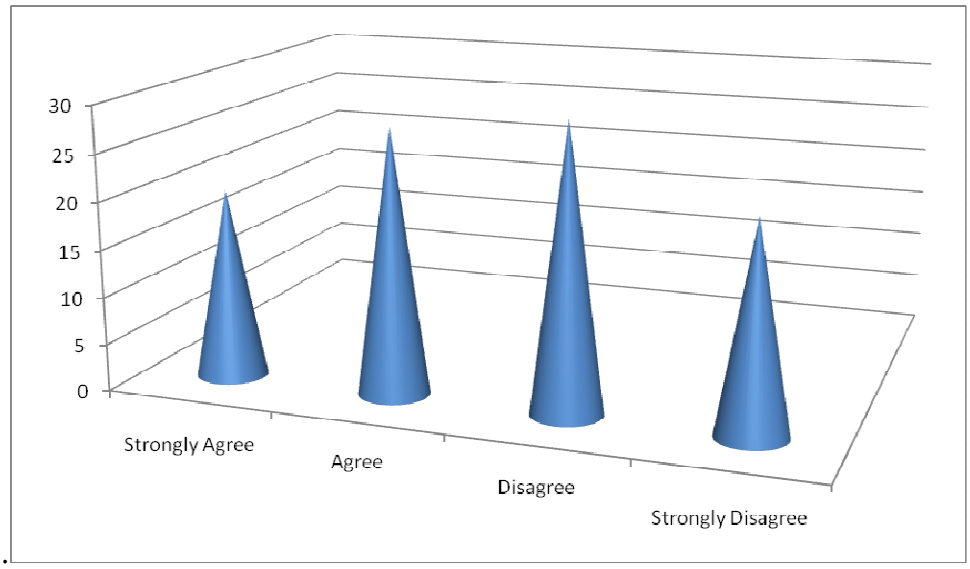


The research finding concludes that although International Crimes Division is a homemade criminal justice institution legally mandated to deal with crimes against humanity, very little is known about the existence of the court. In this vein, John Ndugutse,[277] a criminal lawyer and former Senior Assistant Police Commissioner of Uganda associated the lack of knowledge of the ICD to the fact that the court was purely created to deal with LRA – officials situate in Northern Uganda. Be that, as it may the general public in Uganda has very little if not nothing to do with the ICD. Since its inception, the ICD has only handled one prosecution so far, that of Thomas Kwoyelo.

The study also sought to establish whether the prosecution of Thomas Kwoyelo brought about reconciliation and peace in Northern Uganda? Out of the 40 respondents, only 8 respondents, representing 20% strongly agreed with this position, with 28% agreeing, 30% Disagreeing and 22% strongly disagreeing. This is presented in the graph 4.6 below.

[277] Face to Face Interview with John Ndugutse, Human Rights lawyer and Former Senior Assistant Commissioner of police, Republic of Uganda on 10 July, 2013

Figure 4.6: Graph showing how respondents reacted to the proposition that the prosecution of Thomas Kwoyelo has brought about reconciliation



From the finding, it is clear that majority of the respondents do not support the proposition that the trial of Thomas Kwoyelo has brought about reconciliation within Northern Uganda. In fact majority feel that Thomas Kwoyelo, just as the other LRA fighters ought to have benefited from the Amnesty Provision under the country's Amnesty Act of 2000.[278] Similarly prosecution before the ICD just like other national prosecutions suffers from a myriad of challenges. From the study above, research established that LRA has since migrated from Northern Uganda, therefore gathering evidence outside the country has proved very difficulties especially when corporation from the neighboring countries is not forthcoming. Secondly, ICD is under staffed and under resourced which makes its work very difficult.

[278] After the Constitutional Court ruling, the ICD deferred Kwoyelo's release to the DPP of Uganda and the Amnesty Commission. Since then, a legal battle has ensued relating to the process of issuing Kwoyelo with an amnesty certificate. Kwoyelo remains in prison and has still not received his amnesty certificate from the authorities. Seenhttp://www.ucicc.org/index.php/icd/ about - Kwoyelo; and http://www.acholitimes.com/index.php/perspectives/opinion/8-acholinews/947-col-kwoyelo-asks-african-court-to-intervene-in-his-caseover-illegal-detention 71.

4.5 Complementarily and Co-operation of International and Domestic Criminal Courts

Complemementarity is posited as a driving feature of criminal justice regime. The international criminal court is expected to act in what is described as a complementary relationship with domestic jurisdiction of individual states that are state parties to the Rome Statute.[279] It therefore follows that where domestic mechanisms have failed to undertake prosecutions in a post-conflict society, the jurisdiction of the international criminal court is invoked. Roy S. Lee[280] observes that the international criminal court complements, but does not supersede the national jurisdiction. However, irrespective of the national prerogative there is need for co-operation particularly mutual legal assistance between the two criminal processes to ensure and uphold human rights both internationally and nationally.

The principle of complementarity is ably illustrated from the discussions above, in case of Rwanda, it was clear that there was nearly a total collapse of the state, the state machinery could not at the time undertake any justice mechanism, in fact the whole world looked up to the United Nations for Intervention hence the establishment of the international criminal court. In Uganda, it should be noted that it was the first country to refer crimes committed within its territorial borders to ICC in 2004.[281] This was after the government of Uganda acknowledged the challenges it faced in prosecuting the high ranking LRA officials. It is therefore evident that Uganda is one of the many African countries that have co-operated with the ICC.

In Kenya, the move by the International Criminal Court was instigated by failure of the government to locally prosecute perpetrators of war crimes committed before, during and after the 2007 general election. The Commission of Inquiry into Post Election Violence

[279] See The Preamble to the Rome Statute which says that the International Criminal Courts Jurisdiction will be complementary to the National Jurisdiction. The Principle is also captured under Article 17 of the Rome Statute.
[280] Roy S. Lee, *Introduction, in the International Criminal Court*: The making of Rome Statute: Issues, Negotiations, Results 27 (Roy S. Lee ed., Kluwer Law International 2nd ed. 2002) pp. 25-89
[281] ICC Press Release, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44. See http://www.icc-cpi.int/menus/icc/

(CIPEV) had recommended creation of a special tribunal to prosecute crimes committed as a result of the post-election violence, however, in early 2009, parliamentarians from a cross the ODM and PNU divide united to defeat the special tribunal bill.[282] The ostensible argument against the special tribunal was that no special tribunal in Kenya could be trusted to deal independently and impartially with the question of legal accountability for the post-election violence in Kenya. Meanwhile a report released by the director of Public Prosecutions in relation to PEV related cases concluded that there was no sufficient evidence to institute prosecutions against the alleged offenders and he recommended closure of the files.[283] Indeed, majority of PEV related murder cases that were prosecuted before the national courts were dismissed for lack of evidence.[284]

The victims of the human rights abuses did not have faith in the national court system, equally there was no political will to prosecute such offenders. Consequently, the ICC moved in *suo motto*, to undertake investigations and prosecutions of the persons who bore highest criminal responsibility. Kenya has equally collaborated with the ICC in as far as the indictment of the president of Sudan, His Excellency Al Bashir is concerned, in the year 2012, the International Commission of Jurists (Kenyan Chapter) moved the high court of Kenya urging the court to issue arrest warrants against the Sudanese president who face charges of crimes against humanity at the ICC. The high court ruled based on the constitution that because international law forms part of the Kenyan law, Kenya is obliged to respect the warrants of arrest issued by the ICC against Omar al Bashir and directed the attorney general

[282] See the decision by Parliament on the Special Tribunal in the Hansard athttp://www.Parliament.go.ke/index.php.

[283] See ODPP, Task force Report on 2007/2008 Post Election Violence released on 12th August 2008. Unreported. This report is accessible at the ODDP Library. Nairobi

[284] See judgement of the High Court in the case of Kirui Vs. Republic, Samuel Kirui was a police officer attached to Kondele Police Post at the time of post-election violence, he was accused of intentionally shooting at civilians who were protesting the outcome of the 2007 presidential elections. Can be accessed at http://kenyalaw.org/CaseSearch/.

and the minister for internal security to affect the warrants.[285] Research therefore concurs with Roy's argument that the processes complement each other as opposed to the general perception that the international criminal court supersedes the national courts.

4.6 Conclusion

From the analysis above, it is evident that no one criminal justice mechanism is sufficient to guarantee transition in a post conflict society, with the victims and perpetrators reconciling and living peacefully. It can however be safely concluded that a process that actively involves the community members has a higher success rate of reconciliation than processes that are far removed from the affected people.

It is also safe to conclude that the international criminal justice serves as a complementary process to the domestic justice, from the research above it is clear that the international criminal court has only exercised its jurisdiction where the individual state is unable or has failed to undertake criminal prosecution in the post-conflict society, or where the situation is referred to the ICC by the individual state. The international criminal court's presence in East Africa has arguably helped leverage improvement to criminal justice systems with respect to adjudication, judicial reforms. Therefore, even though the international criminal court may not have impacted much on the administration of justice in East Africa, it is evident that it has contributed to a better justice system within the region.

The traditional approaches like Gacaca and Mato Oput were found to have dealt with more cases, and were applauded by both the victims and the perpetrators enhancing not just justice but reintegration of the perpetrators back to the community. It is also clear from the statistics that retribution tempered by orders of reparation was more favored over the purely retributive approach of the formal criminal justice in post conflict cases. Although, the

[285] See judgement of the High Court in favour of the application by the International Commission of Jurists (ICJ)-Kenya to issue an arrest warrant against the Sudanese President at http://kenyalaw.org/CaseSearch/.

concept of reparation is equally dependent on the outcome of the prosecutions at both international and domestic level.

From the analysis above, is evident that the question of witness protection remains a critical factor to the success or failure of criminal justice process, both internationally and domestically, the safety and security of witnesses in criminal justice continues to be an issue of concern, where witnesses are threatened whether real or perceived threat leading to fear of them appearing in court to testify, it definitely compromises the case before the court , in the Kenyan situation, it has been established that majority of the files could not be prosecuted for lack of availability of witnesses, in Northern Uganda, it has been established that the migrations by the LRA to the neighboring countries has compromised the cases before the ICD and the traditional mechanisms due to non availability of witnesses.

CHAPTER FIVE

SUMMARY OF FINDINGS AND CONCLUSIONS

5.1 Introduction

The researcher herein sought to compare and contrast international and domestic criminal justice in post conflict East Africa using with Kenya, Uganda and Rwanda as case studies. The specific objective of the study was to establish the extent of which community participation in post-conflict criminal justice affects peace and reconciliation. Secondly, the research sought to evaluate factors that affect success or failure of international and domestic criminal justice in post-conflict society. Transitional justice is critical for any society that has gone through civil unrest. The paper looked at different approaches to justice – the retributive criminal justice through international courts and tribunals, justice through national courts, and the more restorative traditional mechanisms. The paper discussed each of these different mechanisms in reference to the East African Region, in countries which have experienced civil upheavals. The paper sought to do a comparative analysis of domestic and international criminal justice mechanisms, with a view to establish the best approach in ending impunity among the war leaders, restoring law and order and encouraging reconciliation and peaceful coexistence among the previously warring communities.

It however drew some important lessons and analogies from post conflict criminal justice interventions further a field, for instance the Nuremberg trials and the International Criminal Tribunal for Yugoslavia. The paper sought to establish how effective these criminal justice mechanisms have been in ensuring reconciliation and sustainable peace in the communities recovering from violent politically instigated and in most cases ethnic based wars. After such unrest, most societies suffer from a complete breakdown of the judicial system and the rule of law. There exists a lot of animosity and suspicion between members of the opposing ethnic or political groups. There is always a very high chance of recurrence of

violence as opposing groups seek to retaliate and revenge for the lost lives and property. There is therefore need for interventions, either locally or internationally in order to end the culture of impunity.

5.2 Summary of the Research Findings and Conclusions

In summary, six (6) conclusions have been drawn from the research summed up as follows: (i) International and domestic criminal justice processes are complementary in nature; (ii) Criminal Prosecutions in a post-conflict society upholds the rule of law and enhances the community's confidence in the government of the day and its institutions; (iii) Retributive justice, although a very important process in post-conflict society, it must be carried out simultaneously with Restorative Justice process for reconciliation and sustainable peace. (iv) Community participation in criminal justice processes legitimizes the criminal justice process and reduces chances of conflict recurrence; (v) Mass movement of people during and after the conflict limits their participation in the criminal justice process; (vi) Indigenous mechanisms of conflict resolution are widely and informally used by most communities within East Africa region.

5.3 Key Findings and Conclusions

From the research above, various findings have been drawn. This section will discuss the key findings of the study relating them findings with the objectives of the study; and thereafter various conclusions will be drawn on every finding.

5.3.1 Main Objective: To compare International and domestic criminal justice in post-conflict society.

This study had the main objective requiring the research to compare international and domestic criminal justice process in post-conflict society. Research has established that each of the two processes has its own strength and limitations, consequently none of them can

stand on its own in a post-conflict society. This means that both the two processes have strength and weaknesses and where one fails for example where the domestic process fails the international criminal process steps in. On one other hand even though the international court may take over cases, still it relies entirely on the individual state to investigate cases and even where necessary effect warrants of arrests. Akhavan[286] Post-conflict literature denotes that post-conflict societies suffer from several challenges for example lack of trust among the citizen, total breakdown of law and order, dysfunctional judicial and administrative institutions and as such the state may not have the capacity to prosecute the perpetrators of crime during the war period. Nash,[287] while commenting on the Rwandan legal system noted that where a state has completely failed to undertake the prosecution the international criminal court does not necessarily take over the process but assists the affected state to undertake the process.

Theoretically, international criminal court jurisdictionally complements the national courts where the later is unable or unwilling to prosecute perpetrators of war crime. By complementing each other, it means that the two processes support each other for example the international criminal court can help re-establish the criminal justice in a post-conflict state either financially or otherwise. Occasionally, the international court provides judges to preside over cases within a particular state. It is also clear that none of them can alone be effective in enhancing justice in post conflict society. Criminal justice operates on the precept that removal of perpetrators of human rights abuses, the likelihood of retaliation by the victims diminishes whistle the incentives for the new leaders to cooperate with other ethnic communities and the international community increases.

[286] See literature review page 4
[287] See literature review on page 2

Perpetrators of heinous crimes must be prosecuted and punished as a way of ending impunity. However, under the Rome Statute, the international criminal court operates on the principle of complementarily, the international community only steps in where the national government has failed to effectively deal with the punishment of the perpetrators of war crimes and crimes against humanity commonly committed during conflict. Even so, the lack of capacity to prosecute every person involved in the conflict means that the international interventions only go for the key perpetrators, mainly the leaders of the warring groups. This usually leaves a big group of soldiers who were acting under instructions of these leaders, who should also be punished for their acts. Such prosecutions are normally undertaken by the domestic courts. It is at this stage that the international criminal justice mechanisms come in to complement the domestic criminal justice system.

On the other hand national institutions may not have the capacity and necessary political will to deal with the senior perpetrators of crimes against humanity, but they can ably handle the lesser offenders. Collier, P, Hoeffler,[288] argues that in a post-conflict society, there exists deep rooted suspicion among the community and if this suspicion is not well handled, it leads to eruption of conflict. Domestic criminal justice may take the form of formal judicial prosecutions or the traditional predominantly restorative mechanisms. Formal courts administer retributive justice that is aimed at punishing the offenders and deterrence of the rest from such crimes in future. Brown[289]argues that this kind of mechanism lack of proper police investigation like was the case in Kenya, a breakdown of the legal institutions like was the case in Rwanda, forceful eviction of victims and massive displacement; and lack of political goodwill by the governments of the day hinders the criminal justice process.

[288] See literature review page 6
[289] See literature review page 7

In terms of the legislative framework, research established that many countries do not have a legal framework on international crimes or crimes against humanity as stipulated under the Rome Statute. For instance at the time of the 2007/2008 post- election violence in Kenya, the country had not domesticated the Rome Statute, till January 2009, when Kenya enacted the International Crimes Act which again could not apply retrospectively or in respect of crimes committed before the existence of the ICA. Further, the breakdown of judicial infrastructure and lack of manpower, as well as lack of political goodwill from the government of the day also derails any efforts for local realization of retributive justice. This was the case in Rwanda, where many judges and lawyers had either been killed or were living in exile.

In further comparison of international and domestic criminal justice, research extended to traditional or indigenous mechanisms. Traditional criminal justice mechanisms like the Gacaca courts in Rwanda and the Acholi Mato Oput in northern Uganda combine both retributive and restorative justice systems. They are more concerned with truth, compensation for loss, forgiveness and reconciliation between the perpetrators and the victims. They are informal and do not follow strict rules of legal procedure, facing challenges of going contrary to human rights principles. Gacaca courts were instrumental in bringing justice to many lesser offenders of the Rwanda genocide and helped lessen the pressure from the national courts. Being set in the traditional communities and involving the victims actively in the prosecutions, they helped in the reconciliation process as the victims had an opportunity to confront their persecutors in truth-telling sessions that generated a sense of justice.

These informal traditional approaches to criminal justice however face the challenge of lack of strong punitive mechanisms that can help deter a repeat of similar violence. There were also cases of some perpetrators fearing to admit wrong doing for fear of retaliation, and

where they had committed crimes against their relatives. This was especially common in the Mato Oput ritual where soldiers who had been abducted as child soldiers and forced to kill their own relatives, and were later seeking to be reintegrated back to the community. Mato Oput also faced the challenge of only affecting the Acholi yet it was not only this community that suffered in the over 20 year war waged by the LRA.

According to Eric Ayisi[290] traditional justice mechanisms denotes that, apart from traditional or indigenous mechanisms helping ease pressure from the national courts and even offloading prison authorities, they have, over the years emerged as a significant addition to the other range of mechanisms that post-conflict societies with gross violations of human rights also serve as alternative criminal process to the national court process. In assessing the various models of criminal justice in post-conflict East Africa, it emerges that justice before the traditional mechanisms is quick, mets punishment commensurate to the crime; and not strict on procedural matters. The later consumes a lot of time in the national and international justice systems. From a theoretical perspective these mechanisms reduce the workload in the national and international processes like it was experienced in the Gacaca courts. From the research finding, justice before the traditional mechanism appears to be satisfying and acceptable by the victims, the perpetrators and even the community at large because of the wider participation by the community. The consequence of this acceptability of the process is that it legitimizes the process and reduces chances of the society reverting back to conflict.

In conclusion, it is evident that although attention in terms of criminal justice has shifted from the age old traditional mechanisms of conflict resolution to formal courts and international mechanisms, the society should not lose sight of the important role these mechanisms play in post-conflict criminal justice process. Therefore due regard must be given to such informal mechanisms for administering justice or settling disputes to ensure

[290] See page 28

there is continuity with their role with compromising the international standards and the municipal law.

5.3.2 Specific Objective 1: To describe the international and domestic criminal justice in post-conflict East Africa

This objective of the study was intended at undertaking an in-depth description of criminal justice mechanisms; while explaining how relevant criminal justice processes is in post-conflict society. Research has shown that it is imperative to undertake criminal justice in post-conflict societies; and where the individual state fails or is unable, then it is incumbent upon the international community to do so with a view to bring to account the perpetrators of crimes. In Orentlicher, Diana's, [291]view, she underscores that where there is rule breaking then the perpetrators of such rule breaking must be punished for the crimes committed during conflict; because failure to do so encourages impunity, further, removal of such perpetrators of human rights abusers reduces the likelihood of retaliation by the victims. From a theoretical perspective, non punishment of perpetrators will encourage impunity because punishment acts as deterrence to those who do or may be planning to do the same thing, out of fear, they desist. Hypothetically, ensuring that those who commit crimes are punished means there is a decrease in societal instability. This implies that in the event that the state fails for whatever reason there must be another organ to ensure punishment. In the event that justice is carried out, it implies that in the long term the community returns to normalcy and societal peace is restored.

Criminal justice mechanisms are meant to handle the perpetrators of heinous crimes that were committed during the time of conflict. According to Akhavan,[292] criminal justice ensures protection of the rule of law rather than the use of violence to resolve communal

[291] See Literature Review Page 12
[292] See Literature Review Page 4

differences. They are efforts meant to help the society transit from a failed state to one of democracy, rule of law and peace. There are wide-ranging options available, to the transitional governments and the international community assisting them, to tackle these crimes – not only a dichotomy of punish or forgive, and local ownership of these processes is paramount.

Criminal justice mechanisms may take a number of forms that include the international criminal court, international tribunals, special courts, truth commissions, local courts and traditional methods of justice. This paper has established that none of these mechanisms can solely be able to bring about reconciliation and peace in a post conflict society. The study established that where effective transitional justice takes place then there is a likelihood that the society will return to normalcy, democratic ideals are promoted and the state recovers from a failed state.

5.3.3 Specific Objective 11: To establish the extent of which community participation in post-conflict criminal justice impacts on the success or failure of the outcome

Under this objective, the researcher acknowledged that there are various factors that affect the success or failure of criminal justice systems. One of these factors being community participation in the criminal justice. Criminal Justice process is based on the believe that communities and individuals are ultimately the important stakeholders in the process aimed at discouraging impunity. It is rightly argued that for any post-conflict society to attain sustainable peace, it is important that stakeholders are involved in an all-inclusive bottom-up approach to peace-building. However, since many post-conflict societies are always deeply divided, have populations that are suspicious, lack of law and order, lack basic judicial infrastructure and manpower and the political will, there is usually difficulty in undertaking a smooth peace-building process. This situation renders it, one of the critical

limbs for peace-building, but also complex and elusive. In spite of all this, it is imperative that the justice process is adhered to.

Mobbekk[293] alludes to the fact that the main objective of criminal justice is to restore confidence in the establishment of a new, democratic regime capable of ensuring that people forget about the former regime and the atrocities committed in the past and at the same time it legitimises governments, and restores confidence of the people in the rule of law and the institutions. This finding affirms the hypothesis that increased community participation reduces societal instability. Theoretically, criminal prosecutions in a post-conflict society uphold the rule of law and enhance the community's confidence in the government of the day and the institutions.

Mobekk[294] further denotes that the level of acceptance and legitimacy of any criminal justice process depends on the extent of community involvement. It is argued that international criminal courts are far removed from community hence there is either limited or no community participation in the process. Community participation, Patricia Lundy and Mark McGovern,[295] argue that traditional mechanisms allow the voice from below to be heard, facilitating any transitional justice process to gain the necessary legitimacy which ultimately enhances reconciliation and peace. Meron Theodor[296] argues that majority of communities in East Africa either have no idea or have very little information about international criminal justice. One of the main reasons advanced by Theodor [297] is that the international criminal institutions do not operate *in situ*; hence the process is removed from the community. In relation to domestic justice, even though the proceedings are held in situ, literature denotes that the process suffers too much legalese i.e. strict rules of procedure and

[293] See Literature Review Page 20
[294] Ibid
[295] See Literature Review Page 19
[296] See Literature Review Page 15
[297] See Literature Review Page 20

evidence which essentially excludes the very people who suffered due to crime. In summary, both international and domestic processes allow very minimal participation by the community. The consequence of reduced community participation is that the community is likely to reject the outcome of the process and its legitimacy is also questioned.

This essentially means that an increase in community participation in national and international post-conflict criminal justice process increases legitimacy of the outcome hence reduces societal instability. Further it is clear from the study that one of the factors that affect the success or failure of international and domestic criminal in post-conflict society is community participation. Consequently; and in fulfilment of the objective above, it is evident that whatever transitional justice process undertaken by a post-conflict society, a participatory approach must be adopted in order to realise long-term sustainable peace as opposed to adopting a process which excludes victims of crime.

5.3.4 Specific Objective 111: To evaluate the factors that affect success or failure of international and domestic criminal justice in post-conflict society

Under this objective, research has established that there are various factors that affect the success or failure of criminal justice in post-conflict society. One such a factor is mass movement of people during conflict which undermines their participation in the investigation and prosecution of the criminal cases in a post-conflict society. For example in the Kenyan case, it was established that over 6,080 case files were opened against the perpetrators of the 2007/08 post election violence, the researcher established that only 94 of these cases were prosecuted and resulted into convictions, only 2 murder cases were successfully prosecuted, 3 robbery with violence cases and others were general offences.[298] Majority of the cases could not be prosecuted due to due to 'lack of sufficient evidence'. All the other cases were dropped by the Office of the Director of Public Prosecution, frustrating all hope of

[298] See page 68

prosecution of the many who were involved in the violence and leaving it only to the ICC to prosecute the three indictees now facing charges of crimes against humanity at the Hague. It was established from the DPP's PEV report that at the height of the PEV, many people relocated from their homes and could not be found to testify or record their statements.[299] Although the failure to prosecute the cases has been attributed to poor investigations, a perusal of the PEV related files discloses that in majority of the cases the complainant's could not be traced.

The other factor established from the research is the choice or the justice process by the post-conflict society. As discussed early in this paper, there are two forms of justice in a post-conflict society, these includes: Retributive and Restorative justice. Research has established that retributive justice, although a very important process in a post-conflict society, it must be carried out simultaneously with restorative justice for reconciliation and sustainable peace to be realised. Literature denotes that justice, which is retributive and reconciliation, which is restorative are like two sides of the same coin, and in transitional justice, there is always a trade-off. According to Robert Jackson[300]he observed that punishment alone is not sufficient to deter war mongers particularly if they feel that the chances of defeat are minimal. This means that transitional justice is both retributive and restorative. Theoretically, individual punishment to war criminals where war is lost is not sufficient deterrence to the individual or the group of individuals where there are opportunities for a re-insurgence. Hypothetically, establishing individual guilt during criminal trials in post-conflict society followed by punishment of individuals does not necessarily lead to reconciliation and stability.

[299] See page 76
[300] Justice Robert Jackson, Opening statement to Nuremberg tribunal, the trial of German Major War Criminals, the International Military Tribunal at Nuremberg, 1945

As relates to retributive versus restorative justice systems, a purely retributive mechanism may seek to punish the perpetrators and deter them and others from ever engaging in acts of war in future, however it is not enough to bring about reconciliation between the previously warring factions, which is an important element of peace. Without proper reconciliation, there is always the likelihood of retaliatory attacks at some point in future.

Retribution may also not work as a deterrent in a situation where those being incarcerated feel that they are being 'punished' because they lost the war, and not because they committed crimes. Retributive justice, especially when spearheaded by the new government in place will most likely target the perpetrators from the opposing political side, creating a sense of 'victor's justice' that does not guarantee true reconciliation. These were the sentiments among those who faced prosecution in Rwanda after the 1994 genocide. The Rwandan government, through the Organic Law, sought to prosecute the perpetrators of the genocide, but many of them were from the Hutu side. Interviews with some of these people showed that they felt 'victimized' rather than facing justice.

The victims on the other hand also feel that a purely retributive justice, while it will ensure the perpetrators imprisoned or facing some other punishment, does not do much in restoring them to their original position. Many of them favour a mechanism that includes compensation for lost loved ones, lost limbs and property, something, a purely retributive justice mechanism does not grant.

A purely restorative justice approach on the other hand has been challenged for its failure to punish perpetrators of crimes, and therefore not being deterrent enough. It is too lenient to the perpetrators and yet many victims agree that it is not possible to fully compensate a victim who has lost loved ones. Reparation cannot return the dead and therefore restorative justice may not be necessarily effective in bringing about a feeling that

justice has been done. The two systems are most effective when they complement each other and not when they are used in isolation.

It has therefore been established that there are various factors affecting the failure or success of criminal justice in post-conflict society, two of such factors were established being (i) community participation; and (ii) the choice of the transitional justice mechanism. It has also been established that transitional justice should involve both retribution for crimes committed and restoration to the victims who suffered loss in the war. While retribution will ensure punishment for the perpetrators and deterrence from such acts in future, restoration will help soothe the victims for what they suffered and therefore encourage reconciliation, forgiveness, acceptance of the perpetrators back to society, and sustainable peace in the society.

5.4 Conclusion

One of the objectives of this research was to establish the extent of which community participation in post-conflict criminal justice affects the success or failure of the process. The study findings confirm both negative and positive hypotheses. This means that post-conflict criminal justice is a critical process in post-conflict transition. As noted by Hartzell, Caroline and Mathew Hoddie,[301] by removing the perpetrators of crime and human rights abusers from the society, prosecuting and punishing them upon establishing of their guilt, is a very critical process both to the victims and the society at large. Furthermore, such punishments serve as a deterrent to them and all others who plan to involve themselves in crime. However, while undertaking such prosecutions either nationally or internationally, involvement of the community is paramount. It is important that the people affected either directly or indirectly by the crime are part and parcel of the process. When victims of crime open up in court or

[301] See Page 36

tribunal and tell their story, there is a feeling of satisfaction from such victims, their pain is eased and more often they are ready to forgive and embrace one another as before. Apart from being heard in court, such victims ought to be compensated for their loss as a measure of enhancing reconciliation and sustainable peace.

However, where the community is not involved in the process, chances of accepting the outcome of the process are very minimal. In such a case there is always a feeling of betrayal by the government and its institutions. Consequently, the very legitimacy of the government is compromised, chances of accepting the outcome of the process diminish and there is a likelihood of recurrence of conflict hence increasing chances of societal instability.

In respect to comparison of the international criminal justice and the domestic criminal justice and their impact on post-conflict peace and reconciliation, the results were rather weak and insignificant, with the exception of traditional mechanisms of post-conflict resolution that has a strong and significant effect on societal peace and stability after conflict. Further, the complementarity relationship between the two processes has helped the region realise major developments in the criminal justice system, including legislative reforms, judicial and other institutional reforms.

5.5 Recommendations

This study was necessitated by the need to establish the level of which community participation in criminal justice process affects peace and reconciliation. The study was also intended to evaluate some of the factors that affect the success or failure of criminal justice in a post-conflict society. The research was premised on the presumption that there is a relationship between community participation in criminal justice process and societal peace and reconciliation. Various findings were derived from the study; and conclusions drawn as stated in chapter 4 and 5 of the study. From these findings and conclusions two

recommendations are derived: (i) Policy Recommendations; and (i) Academic Recommendations.

5.5.1 Academic Recommendations

At the commencement of this study, the research problem highlighted the gap in literature which necessitated this research, having undertaken the research albeit, the challenges I concluded that indeed there is a clear relationship between community participation in post-conflict criminal justice and peace and reconciliation. However, due to limitations in time, resources and limited data available particularly on the Kenyan case, the study could not ascertain the specific mechanisms that can be put in place to ensure maximum community participation. With more people developing interest in the study of International Conflict Management and with more data becoming available on post-conflict societies for example, Kenya, Sudan, and Uganda and other international trouble spots, a comprehensive research need to be undertaken on this subject. Such investigations should be able to yield more rigorous results which may require the legislature to amend the relevant legal framework. The analytical results in this paper should open up for new questions and more research to be done.

5.5.2 Policy Recommendations

This section will state and explain some of policy recommendations that are drawn based on the findings of the study.

5.5.2 Multi-faceted approach

Post conflict states desiring post-conflict criminal justice should not restrict themselves to only one or two approaches to transitional justice, but rather make use of the various available criminal justice mechanisms in dealing with justice, reconciliation and

restoration of the rule of law. Where both international and domestic criminal justice is applied, the government and the community at large must ensure that the two processes complement each hence the need for corporation.

5.5.3 Proposed Government Initiatives

For whatever mechanisms, there is need for political will on the part of the government to be able to support the process and ensure its success. Political will by government will ensure proper investigation and prosecution of crimes committed during the violence and support development and implementation of restorative justice programmes of post conflict victims through:

a. Compensation of victims for lost property
b. Restoration of land and any other identifiable property in the hands of non-owners
c. Medical and psycho-social support programmes to those who suffered physical and psychological injuries in the conflict
d. Non-discrimination when dealing with perpetrators and cooperation with international criminal justice agencies like the ICC and ICTR

5.5.4 Enhancement of Capacity of Traditional Mechanisms

In relation to traditional justice mechanisms it is important that states enact enabling laws to institutionalize the processes and give them legal mandate. Further such institutions require financial and material support to the institutions implementing the traditional justice mechanisms and finally ensuring the implementation and enforcement of the orders issued by the traditional courts against the perpetrators.

5.5.5 Bottom-up Approach

Public participation in post-conflict legitimises the process and reduces chances of societal relapse, consequently while undertaking the process, it is important that the

government ensures, the active involvement of as many of the victims affected by the violence, in the transitional justice processes. This can be done through:

a) Public awareness campaigns on the criminal justice programmes
b) Regular information to the affected people of the progress of the investigations and prosecutions
c) Inclusion of compensation orders in retributive criminal justice programmes where it is proved that the perpetrators caused loss of limb, life or property
d) Inclusion of restoration orders where it is proved that perpetrators are holding the property of the victims.

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APPENDICES

Appendix 1: Questionnaire on Criminal Justice in post conflict Rwanda.

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

Good morning/ afternoon, my name is Mary Wang'ele a Master's of Arts in International Conflict Management student at University of Nairobi, Institute of Diplomacy and International Studies. I am currently undertaking research on Criminal Justice Processes in Post- Conflict East Africa, as a requirement for the award of the Master Degree. Due to your personal and professional experience in this field of study, I have selected you to provide relevant information to the study by filling the questionnaire attached herewith and revert. The information you give in response to these questions and statement will be held in confidence and not used for any other purpose apart from the academic purpose.

SECTION A: GENERAL INFORMATION

1. Personal Characteristics. (Please tick the answer)

Gender

Male ☐ Female ☐ Trans-gender ☐

Education

Primary ☐ Secondary ☐ University ☐ None of the above ☐

Age

20-30 ☐ 31-40 ☐ 41-50 ☐ 51 and above ☐

Religion

Christian ☐ Muslim ☐ Any other-Specify----------

1. **Organization**

a. Name of the institution/work department ……

b. Geographical location of the institution/work station …….

c. Position at the institution …….

d. Number of years working ……

SECTION B: PERCEPTIONS ON INTERNATIONAL CRIMINAL JUSTICE

i. International Criminal Justice In Post-Conflict Society

On average, how do you rate your understanding of international criminal justice mechanism?

Very good ☐ Good knowledge ☐ fair knowledge ☐ know nothing at all ☐

ii. International Criminal Justice and the Administration of Justice.

International criminal justice is relevant in enhancing the delivery of justice in post-conflict East Africa?

Strongly Relevant ☐ Relevant ☐ Do not know ☐ Irrelevant ☐

iii. International Criminal Justice And Reconciliation

International criminal justice in post conflict society brings about reconciliation of the previously warring communities.

Strongly Agree ☐ Agree ☐ Disagree ☐ Strongly disagree ☐

SECTION C: PUBLIC PERCEPTION OF DOMESTIC CRIMINAL JUSTICE

1. **Traditional criminal justice mechanisms in post-conflict society.**

(i) Traditional criminal justice mechanisms in post-conflict society involve the community at all stages of the proceedings

(a) Civil Society;

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

(b) Victims;

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

(c) Perpetrators

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

(ii) Traditional criminal justice has succeeded in bringing about justice in post-conflict East Africa?

a. Civil Society;

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

b. Victims;

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

c. Perpetrators

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

(ii) Traditional criminal justice in post conflict society has succeeded in bringing about reconciliation of the previously warring communities.

a. Civil Society;

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

b. Victims;

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

c. Perpetrators

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

2. Justice Through National Courts In Post-Conflict East Africa

(i) National Courts are the most suited criminal justice mechanism in post-conflict criminal justice

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

(ii) Post-conflict criminal prosecution enhances peace and reconciliation.

Strongly Agree ☐ agree ☐ disagree ☐ strongly disagree ☐

(iii)Post-conflict criminal prosecution provides a forum where the public participates in the process.

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

SECTION D: COMPLEMENTARITY AND CO-OPERATION OF INTERNATIONAL AND DOMESTIC COURTS

(i) There is a correlation between domestic and international criminal justice in post-conflict society.

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

(ii) Do you agree to the proposition that where National Courts have failed to undertake prosecutions in a post-conflict society, then the International Court ought to intervene?

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

(iii)Do you agree to the preposition that states must co-operate with the ICC during the pendency of criminal trials before the international court?

Strongly Agree ☐ Agree ☐ disagree ☐ strongly disagree ☐

Any other information on Criminal Justice in post conflict East Africa will be appreciated.

……

THANK YOU FOR TAKING YOUR TIME!

Appendix 2: Questionnaire Forwarding Note

Dear Sir/Madam,

I am a student at the University of Nairobi, Institute of Diplomacy and International studies, undertaking a Masters of Arts Degree in International Conflict Management. My research study is to undertake a Comparative Study of International and Domestic Criminal Justice in Post- Conflict East Africa, as a requirement for the award of the Master Degree. As a key player in the field of criminal justice in post-conflict societies, this is to request you to kindly fill the questionnaire attached herewith and revert. The responses shall be treated with utmost confidentiality.

Should you require further clarifications or details, do not hesitate to let me know.

Please let me know when you have done so.

Thank you,

Mary Wang'ele