

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

**INTERNATIONAL CRIMINAL COURT (ICC) IN CONFLICT
MANAGEMENT: DETERRENCE ROLE IN KENYA'S POST-ELECTION
VIOLENCE**

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DECLARATION

I, Regina Clare Akhaabi hereby declare that this research project is my original work and has not been presented for a degree in any other University.

Signed..... Date.....

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

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DEDICATION

This research project is dedicated to my family for the love, support and encouragement they have given me. It is a great blessing to have you in my life for your never-ending inspiration and believe in me. Thank you all.

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ABBREVIATIONS

ASP:	Assembly of States Party
AU:	African Union
CIPEV:	Commission of Inquiry into Post-Elections Violence
CSO:	Civil Society Organizations
ECK:	Electoral Commission of Kenya
IEBC:	Independent Electoral Boundaries Commission
ICC:	International Criminal Court
IDP:	Internally Displaced Persons
KNDR:	Kenya National Dialogue and Reconciliation
KPTJ:	Kenyans for Peace with Truth and Justice
LRA:	Lord's Resistance Army
MSF:	Medecins Sans Frontiers
OAU:	Organization of African Union
ODM:	Orange Democratic Party
OTP:	Office of the Prosecutor
PEV:	Post-Election Violence
PNU:	Party of National Union
PTC:	Pre-Trial Chamber
SADC:	South African Development Community
STK:	Special Tribunal for Kenya
UN:	United Nations
UNSC:	United Nations Security Council
WCC:	War Crimes Chamber

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ABSTRACT

This study assesses the deterrence role used by International Criminal Court in conflict management with the focus on Kenya. This therefore will assist in determining how deterrence approach was deployed after the post-election violence in Kenya to promote peace and prevent crime. Importantly, this study was motivated by the need for understanding how peaceful elections were managed in 2013 after a tense period in the previous elections. With the intervention of ICC, the previous studies have shown how ICC has helped the other post-conflict states through deterrence approach. Therefore, this study will investigate the role that deterrence approach had in retaining peace in Kenya after PEV. Guided by this goal, the researcher set out to investigate how secondary education has been affected by the pastoral conflicts in East Pokot sub-county that has been experiencing constant violent pastoral based attacks. The study was anchored on a theoretical framework that discusses how deterrence has been developed and being applied to help prevent crimes and promote peace. This study employed a case study approach where primary data was collected through interviews and filling of questionnaires while the secondary data sources were partly used to compliment the research. The data collected was structured along several thematic strands as guided by the objectives. The study found out that deterrence approach had significant contribution to attaining peace especially with the two co-accused persons vying for the top seat while having impending cases at The Hague. The study has critically assessed the transformation of ICC intervention to the progressive pursuance of peace in the country especially with the local justice system. The study established that besides ICC experiencing its challenges of investigating and prosecuting perpetrators of crimes against humanity, it has made significant impact in addressing impunity. The study recommends improved conduct of investigations and proper protection of witnesses, integration of deterrence approach in local justice system, and engaged by the local justice system to help strengthen the system in dealing with issues of violation of human rights.

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

International Criminal Court was primarily established with the intention of transforming the international criminal law positively through minimizing atrocities.¹ Headquarters of The Court is Hague, Netherlands at it became functional in 2002. From its preamble, ICC is determined to crack down culprits of great crimes in opposition to humanity and make certain that they do not skip punishment and that powerful prosecution of the perpetrators of crimes against humanity is guaranteed. Primarily, ICC focuses on ending impunity for the wrongdoers by holding them accountable to their crimes. Therefore by enforcing its jurisdiction over the states with potential criminals it is able to prevent violence and promote peace. Importantly, the practicability of ICC is reliant on cooperation of the member state and its willingness to have justice done by having the suspects voluntarily present themselves before the court or the state arrests them. ICC is not a tool of warfare to provide personnel or resources to aid in resolving conflicts but rather a system for establishing justice during conflict management.² One of the primary tools for ICC in conflict management is the deterrence role. Deterrence in administration of justice involves applying punishment as a threat that can be used to prevent people from indulging in crime. Deterrence approach is employed in conflict moderation whereby the prosecutions are centered on reducing chances of occurrence of further crimes in regards to those prosecuted who have some control over the general public.³ Through prosecution of the indicted

¹ Wippman, D., (1999). "Atrocities, Deterrence, and the Limits of International Justice". *Fordham International Law Journal*, Vol. 23.

² Cronin-Furman K., (2013). 'Managing expectations: International Criminal trials and the prospects for deterrence of mass atrocity'. *The International Journal of Transitional Justice* 7: 442.

³ Kate C., (2013). 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity', *International Journal of Transitional Justice* 7, 434–454

individuals of crimes in opposition to humanity in Kenya's post-election violence amid end December 2007 and February 2008, the research aim to determine how application of the deterrence position has impacted the country henceforth.

The Court has the mandate to prosecute any criminal suspect of serious crimes from any member state that is signed to the statute through approval by United Nations Security Council (UNSC). In 2005, Kenya became a member of ICC and this move was triggered by a series of poor human rights abuses, weakened justice system that was greatly controlled by the executive and the need to end the culture of impunity in the country. It did not have to wait longer to succumb to the clashes that greatly violated human rights that occurred two years down after being ratified. The crimes against humanity that led to invitation of International Criminal Court (ICC) into Kenya 2007 post-election violence are deportation, murder, persecution and rape. Essentially, the cases were referred to ICC after there were failed efforts by the Kenyan Parliament to set up a local tribunal that would conduct investigations on the key perpetrators and prosecute them.⁴

The Court exercises its mandate through the Office of the Prosecutor (OTP) who makes public declarations, conducts preliminary investigations, initiates investigations, summons suspects and orders arrest of the accused. Under the statute, The Court has jurisdiction over any crimes committed that violate humanity within the sovereign states ratified in the treaty.⁵ The approach employed in the Kenyan cases was the deterrence role of conflict management. The Court started investigation over the atrocities of the Post-Elect Violence after the violence had been subdued. Based on the

⁴ Susanne M., D., (2014). "Kenya and the International Criminal Court (ICC): politics, the election and the law." *Journal of Eastern African Studies* 8, no. 1 25-42.

⁵ Nick G. (2006). 'The Role of the International Criminal Court in Peace Processes: Mutually Reinforcing or Mutually Exclusive?' , Institute of Public Policy Research

terms of the Rome Treaty, the Court is welcome to act on the state parties undergoing serious crimes against humanity in the active and ongoing conflicts but in most instances it has been acting in the aftermath of the violent crimes. However, in contrary to its approach of intervention where it comes in after the conflicts have ended it is believed that The Court can increase its effectiveness when it intervenes to states with ongoing conflicts. The tendency to cooperate for the states undergoing conflicts is higher than in the states that have ended the conflicts. The inadequacy of credibility or lack of incentives to aid in intervening in the warring states by the international policy makers is one major hurdle ICC is yet to overcome.⁶ Through the deterrence approach the prosecution is well-placed to influence the conduct and viewpoints of different groups confronting each other within a state and help provide a neutral ground that the groups can engage peacefully.

By deploying this deterrence dimension, the prosecution is motivated to potentially address atrocities issues that may happen in future. The conflict resolution in Kenya during the Post-Election Violence showed milestone progress after a power-sharing agreement was made⁷. This progress paved way for the arrival of ICC to conduct criminal investigation on the perpetrators of the violence, the impact of the deterrent approach deployed is subject to debate on its effectiveness in the Kenyan case.⁸ Special deterrence is a form of deterrence approach whereby the goal is to create consciousness of consequences that an individual may face if they are linked with any criminal acts in the future. For the Kenyan case, special deterrence is evident as the two co-accused politicians with aspirations of vying for country's top elective seats, Uhuru

⁶ Hyeran J. & Simmons B., (2016). 'Can the International criminal Court deter atrocity?' 70 (3) *International Organization* 443.

⁷ Human Rights Watch, (2011). *Turning pebbles: Evading accountability for post-election violence in Kenya* (2011).

⁸ Susanne, *Supra* Note 7 at 26

Kenyatta and William Ruto, formed a coalition that meant uniting the two tribes that had greatly been involved in the PEV. Special deterrence served to discourage the two individuals from subsequent criminal activity that may trigger violence since they have had to face the international criminal law as suspects of similar crimes. It also sent a warning to other persons vying for electoral positions from engaging in subsequent criminal activities otherwise they would face the consequences of their actions. On the other hand, general deterrence means inflicting fear of punishment among individuals whose activities may fuel violence among the general public in so doing it discourage them from indulging in the criminal activities.

1.2 Problem Statement

The problem sought to address extent to which the deterrent approach as a method of conflict management by the ICC was used in Kenya in managing the conflict that arose out of the 2007 elections. Through understanding the application of deterrence approach on Kenyan context, the researcher will be able to successfully show the effectiveness of this approach in conflict management both in the ultimate administration of justice and the future restraint of similar crimes and criminals. The deterrence approach took effect when ICC was welcomed to conduct investigations and evidence to be aligned before the Court in prosecuting the accused perpetrators of the wars. For the Kenyan case, the crimes against humanity emerged upon pronouncement of the contested elections that were marred with rigging which triggered demonstrations that latter transpired into ethnic clashes. The individuals convicted with crimes against humanity were senior government officials believed to have incited their followers and fellow tribesmen to attack people of other ethnic group, precisely, the Kikuyu versus Kalenjin and Luo dominant tribes. The focus of this study is to provide useful and

practical recommendations on the deterrence approach of the ICC based on the lessons learned from Kenya in its intervention during post-election violence.

While pursuing justice, the office of the prosecutor faced challenges in collecting evidence to prosecute the convicted persons. Initially, government was form distinctive tribunal to prosecute perpetrators within sixty day failure to which the ICC would take on the instances.

The invitation of ICC to conduct investigations and to prosecute the highly placed individuals so that the victims of the PEV can be served with justice led to ICC adopting the deterrence approach whose primary goal is to punish the perpetrators of crime in effort to prevent such crimes in future.⁹ The study will show how deterrence approach in the Kenyan context was employed to provide specific punishment imposed on offenders and whether it helped in preventing occurring of crimes in the subsequent general elections. The findings will show if the fear of punishment prevented the political leaders and other senior government officials from propagating violence. The possibility of a clash between the justice and peace objectives will also be assessed with regard to the use of the deterrent approach as a tool of conflict management and administration of social justice. On this part it will be important to determine if justice can be attained much later by chasing a sequential approach rather than going for a peace agreement.

⁹ Grono N., (2012). 'The deterrence effect of the ICC on the commission of international crimes by government leaders'. *International Crisis Group*. 5 October 2012.

1.3 Research Objectives

1.3.1 Main Objective

Examine deterrence approach of ICC intervention on the Kenyan post-election violence cases as the appropriate conflict management tool employed.

1.3.2 Specific Objectives

1. Illustrate impact the deterrence approach conflict management and its application on the Kenyan case in the event of 2007/08 PEV.
2. To establish the challenges that ICC faced with its adoption of deterrence approach on intervening the Kenyan PEV case.
3. To assess the accomplishments of the ICC intervention in regard to deterrence approach in preventing violence in future.

1.4 Research Questions

- i. How was the deterrence as a tool of conflict management applied in the Kenyan context?
- ii. What challenges did the ICC face in its pursuit of investigating and prosecuting senior government individuals purported to have fuelled the PEV?
- iii. How has deterrence approach changed the way Kenya handles its subsequent elections with the precaution of avoiding actions that can trigger violence?

1.5 Hypothesis

- i. The adoption of deterrence approach in the role of ICC intervention on Kenya's post-election faced obstacles during implementation.

- ii. The nature of ICC intervention through deterrence has had a myriad of contributions both negatively and positively in conduct of subsequent elections and in international conflict management within Kenya.

1.6 Justification of the Research

This study will be focused on determining the potential deterrent effect based on how it was deployed in the Kenyan case and whether it had an impact on preventing occurrence of crimes in future especially those aligned to national elections. The researcher aims at illustrating how the deterrent conflict management tool applied by the International Criminal Court has either decreased or increased crimes or chances of occurrence of crimes of similar. Understanding effectiveness of Court's concept of deterrence manifests one of the conflict management tools of preventing crimes in different society settings. Moreover, through the adoption of national legislation which integrates the standard international law into national law, the Court manages to instill societal ethos that can enhance justice at the local criminal justice systems. Therefore, the research will uncover the effectiveness of deterrence approach with the focus on the Kenyan case study and how it was deployed in cultivating respect. Importantly, this study showed deterrence approach has been used to help influence the conduct of the actors through making them deviate from crimes in the future lest they bear the consequences of their criminal acts.

1.7 Literature Review

Deterrence approach is an important strategy for potentially future crimes as there are consequences that come with the crimes, so it helps in behavior change. This section will assess the impact deterrence approach has had in promoting peace by reviewing literature from the post-conflict states that are ratified under the Rome Statute. The preference for deterrence has made the potential perpetrators of crime to focus on

their public records which can be tainted by indictment of serious crimes. It has been argued that deterrence approach is effective as a short-term or immediate strategy of preventing crime rather than a long-term approach. The limited nature of ICC prosecutions is yet to affirm deterrence role for a long-term cause. The ability of law to deter a certain conduct is dependent on three elements that connect punishment: certainty, speed or swiftness (celerity), and proportionality, parameters on which international criminal law agree.¹⁰ The deterrence approach has helped in preventing further crime among countries undergoing conflicts because ICC intervention has enabled creation of local tribunals and trying of perpetrators of crime at The Hague. This literature will provide studies founded on evidence from other states on the reaction when subjected to ICC investigations, indictments or prosecutions and how it has changed their actions in regard to crime.

1.5.1 Concept of Deterrence

Despite deterrence and prevention being used in some instances as synonyms it does not imply that they can be used interchangeably. Deterrence entails introducing punishment to a crime committed with the aim of ‘putting an end to impunity’ thus preventing any future crimes at least of the similar nature. Prevention of crime means to deter crime but not necessarily through any judicial means. For deterrence to be realized in preventing crimes especially at international level, the punishment has to be used to act as a threat to the accused or potential offender.¹¹ Essentially, the role of ICC is not to stop war but instead it prohibits particular violations of the law mainly against the human rights. According to Gold and Krasner the ICC deters such crimes by raising

¹⁰ Jo H., & Beth A. Simmons B. A., (2016). ‘Can the International Criminal Court Deter Atrocity?’ [2016] 70 International Organization.

¹¹ Gustavo G., (2000). ‘*Deterrence: a difficult challenge for the International Criminal Court*’, Kellogg Institute.

the risk of punishment for the worst offenses.¹² On the contrary, Ku and Nzelibe claim that effectiveness of the Court irrespective of the approach it plans to deploy is rely on willingness of the state to act by cooperating to provide justice to the victims.¹³

Jo and Simmons assert that what creates the deterrent effect is mainly the possibility of getting prosecuted or condemned rather than the severity of the punishment.¹⁴ It is inevitable to evade punishment at the international law compared to the average national judicial systems. The Court has aimed at targeting high-ranking perpetrators who have power to influence the decisions of the national judicial systems. The objective of going for the highly placed individuals has been identified as the rational way strengthening the effect of deterrence. For instance, when handling the case of DRC, Prosecutor v. Thomas Lubanga Dyilo the court insisted on the significance of pursuing the top-ranking perpetrators heading the governments. According to that decision by the Pre-Trial Chamber, such highly influential persons indicted of international crimes are likely to interfere with the independence of the judiciary system. This decision was influenced by the need to ensure justice is exercised fully on the senior individuals in the government who have power to manipulate the local legal systems to act in their favor and dodge justice as per the rule of law. However, the view was rejected by Appeals Chamber on the argument avoiding any *priori* exclusion would not guarantee a deterrent effect to the Court.¹⁵ This approach the Court was affirmed in September 2016 through a prioritization and a selection case released through a policy paper by the prosecutor. The approach

¹² Goldsmith, J., & Krasner, S. D. (2003). The limits of idealism. *Daedalus*, 132(1), 47-63.

¹³ Ku, J., & Nzelibe, J. (2006). Do international criminal tribunals deter or exacerbate humanitarian atrocities. *Wash. UL Rev.*, 84, 777.

¹⁴ Jo, *Supra* Note 13

¹⁵ Van den Wyngaert, C. (2011). Victims before International Criminal Courts: Some views and concerns of an ICC trial judge. *Case W. Res. J. Int'l L.*, 44, 475.

questioned the Court's decision of primarily targeting the highly placed individuals involved in perpetrating of serious crimes while ignoring the lower-ranking perpetrators who by no means should be exempted from prosecution irrespective of their positions.¹⁶ This ruling in conjunction with the deterrent approach shows that focusing on certain powerful individuals may compromise the idea of trying any perpetrator of crimes against humanity at the Court.

The conduct and influence signatories stipulated under the generally-accepted goals. The ICC was established with the following goals: recognition of the interests of the victims; encouragement of national proceedings; promotion of due process; promotion rule of law generally; and individual and general deterrence or prevention¹⁷. Retribution involves carrying out investigations to collect adequate evidence to successfully prosecute such that the perpetrators of the crimes are identified and are submitted before the Court for judgment and punishment. The Court has the mandate to make sure that the wrongdoers are held accountable for their crimes through investigation, prosecution and punishment.¹⁸ Furthermore, the Court assists the national judiciaries of the signatory states in the humanity. Procedural stages advocated by the Court are: confirmation of crimes and trial, conviction, and sentencing. The overall aspect of deterrence is to discourage the other individuals from engaging in the same conduct of perpetrating violence.

¹⁶ Sharanjeet P., (2014). "Fighting impunity for crimes against children in the DRC," Global Justice, Coalition for the ICC (June, 2014).

¹⁷ Bocchese, M. (2016). Justice Cooperatives: Explaining State Attitudes Toward the ICC.

¹⁸ Carsten S., (2009). 'The *Future of International Criminal Justice*', Hague Justice Portal <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIIJ2013/stahn.pdf>

1.5.2 Application of Deterrence in other States

The deterrent effect for criminal prosecutions has not been effective in most of the countries that ICC has sought to intervene because of the simple reason that there was little success in accomplishment of its goals stipulated within the ratifications. The progress the Court can pride itself in through the deterrence approach is ability to minimize the extent of the conflict and preventing the crimes to escalating to the previous level in future. Successful conflict prevention just like successful deterrence refers to the goals set forth by the Court at its establishment to help avert crime.¹⁹ The ICC prosecution of the perpetrators of crime in effort to change their behaviors is however twofold. In areas where conflicts have ceased and also where they are ongoing, the move by ICC to prosecute individual criminals may prompt them to cement power by stirring more violence. In some situations the deterrence approach is not expected to reap the same benefits as desired. For instance, it is evident that in some states the leaders who have been indicted with serious crimes have extended their stay in power to avoid being handed over to ICC after they get out of office. Such leaders are bound to use excessive force to suppress oppression and any other party that may not be in support of their power.²⁰ In other circumstances, a leader does not feel the pressure of prosecution the ICC for indictment of serious crimes is tipped to sensibly change their behavior to avoid consequences of a large scale legal action.

In the intervention in Uganda where the rebel movement army, LRA rebel movement that is under Kony Joseph, led by Joseph Kony, ICC was heavily criticized for being ineffective in bringing the rebel leader to justice. The criticism was mainly caused by civil society actors who believe that ICC prosecution is ineffective especially

¹⁹ Hyeran, *Supra* Note 8

²⁰ Leanos, B., (2011). Cooperative Justice: Understanding the Future of the International Criminal Court through Its Involvement in Libya. *Fordham L. Rev.*, 80, 2267.

with its deterrent approach. However, the critics fail to understand that the effectiveness of ICC is in post-conflict societies as it does not get involved in quelling politics. During a conflict, the much that ICC can do is to warn of the leaders behind activities that violate human rights of the consequences they may face when the Court goes for them. Otherwise, the Ugandan government is expected to work with the ICC prosecution in arresting of Joseph Kony the leader of LRA. The rebel movement has been associated with abuse of human rights mainly in the Northern Uganda where they have conducted sexual violence such as rapes, recruitment of child soldiers, kidnapping and displacement of people. Arguably, on the grounds that the issue of arrest warrants at the LRA leaders via the court docket in 2005, it has performed a role in bringing the rebellion movement into a negotiation desk. Hence, the impact of deterrence approach has been evidenced to some level as it created room for peace negotiations . The Court remains vigilant on the activities of the LRA that has caused atrocities and the international community has continually criticized their illegal activities. The civil communities have consistently been raising awareness of the need to restore peace and the government to show accountability in confronting the rebel group. However, the involvement of ICC prosecution have been viewed as an obstacle by the leadership of the rebel group that sees the peace agreement as a way of trying to hand over their leader to ICC.²¹

Similarly, the involvement of ICC in the DRC conflict has helped slow down the severity of atrocities by the rebel movements in the Eastern Congo that has been associated with abuse of human rights for example sexual violence, kidnapping and child laborers. Furthermore, the cases of deaths from the intensity of number of attacks

²¹ Akhavan, P. (2005). The Lord's Resistance Army case: Uganda's submission of the first state referral to the International Criminal Court. *American Journal of International Law*, 99(2), 403-421.

by a rebel movement led by Lubang Thomas Dyilo have minimized. The ICC prosecution had issued a statement and threats on the arrest of Lubang for leading a rebel movement that was attacking the civilians. However, the reports have shown lately that the rebel movements have reduced their aggression on the civilians. This change of behavior has been attributed to the fear of facing prosecution under ICC at The Hague. For example, ICC had launched its prosecutorial activities in Ituri and the number of attacks on the civilians by the troop commanders has declined in the region.²²

In 2006, the Office of the Prosecutor made it clear that it was taking a keen interest on the government activities that violated the human rights under former President Pastrana. In a bid to address the issues of injustice on the victimized citizens, the government has responded by promulgate the Peace and Justice Law which is meant to administer prosecution and serve the victims with justice. However, the establishment of justice system has been criticized by the civil rights movements that believe it is only meant to prevent the highly placed individuals in the government as well as the army officers from being prosecuted at The Hague. The argument being true or false it shows that the governments are responding to the ICC prosecution and this will deter further crimes in future although these government officials may use the Peace and Justice as backdoor to evade justice that matches their crimes. The ICC will have achieved its goal of deterrence which is designed to prevent crimes and promote justice. President Pastrana abused power while in office between 1998 and 2002 and the Peace and Justice Law is designed to prosecute him for perpetrating crimes against humanity during his tenure. Another perpetrator that will be targeted is Vincente Castrano who was a paramilitary leader. Most of the paramilitary leaders of Colombia are cautious of involvement of ICC and it is believed they would prefer being

²² Van den Wyngaert, *Supra* Note 14

prosecuted under their local justice system that is based on the new Peace and Justice Law.²³

The use of deterrent approach in Sudan has critically been assessed to determine if it has impacted its administration under President Bashir. President Bashir has been indicted of crimes against humanity and abuse of power that has led to unending conflicts in Sudan. The ICC pressures on President Bashir have been unyielding despite issuing him arrest warrant. Moreover, the efforts of UN Security Council to help resolve the conflicts in Darfur have not born any success. President Bashir remains adamant of the foreign pressures and has refused to bow to the threats by ICC therefore showing how the deterrence effect of ICC prosecution has lacked capacity to prevent crimes. The deterrence approach is not quite effective in countries with ongoing conflicts compared to post-conflict states as evidenced by Sudan. President Bashir was called to appear before The Court due to crimes indicted on him in Darfur. The government under President Bashir has acted to the allegations by closing human rights in Sudan, and expelling thirteen international aid agencies such as Oxfam. The actions were directed at the international community's effort to try and persuade Bashir to end the Darfur conflicts. Such a ruthless retaliation sent a strong message to ICC prosecution that it was not ready to back down even with the threats on President Bashir as his administrations has constantly obstructed any efforts by ICC to conduct investigations. Moreover, a series of announcements on of arrest warrants issued by the prosecutor have gone unheeded since July 2008.²⁴

²³ Bocchese, *Supra* Note 15

²⁴ Peskin, V. (2009). Caution and confrontation in the International Criminal Court's pursuit of accountability in Uganda and Sudan. *Hum. Rts. Q.*, 31, 655.

1.5.3 Role of ICC

The concept of international criminal justice is a policy ultimately dependent on a particular state to put the necessary measures to enable its realization. Political goodwill and effective institutions free from impunity are required to implement the principles stated in the states under the Rome Statute agreement that led to formation of The Court.²⁵ The state has five obligations with regard to human rights; the duties to respect, observe, promote, protect and fulfill. The obligation to fulfill refers to the duty of the state to take administrative, legislative, judicial and practical measures to guarantee that the rights in question are fully executed to the highest standards possible.²⁶ This obligation largely depends on the available resources.

According to James, the adoption of a definition of aggression at international level could provide an impetus for states to also provide for the crime at national level.²⁷ However, it was also warned that certain problems mainly stemming from the unique features of the notion of aggression will remain and will make it difficult for the crime to be implemented at national level. This is specifically the case where states would want to exercise jurisdiction over state acts of aggression initiated and directed by non-nationals. According to provisions of Article 12, ICC is expected to apply the law set out on acts of aggression and crimes of aggression conducted by any member state that signed to the pact.²⁸ The state that does not agree with the jurisdiction ought to write and explain to the Registrar. In the event that the state party decides to leave from the

²⁵ Raub, Lindsey. "Positioning hybrid tribunals in international criminal justice."

²⁶ Murithi, T. (2010). *Sequencing the Administration of Justice to Enable the Pursuit of Peace. Can the ICC Play a Role in Complementing Restorative Justice?*

²⁷ James F. A., (2009). 'The International Criminal Court and the prevention of atrocities: predicting the Court's impact', Working Paper, Villanova Law Review.

²⁸ Nick, *Supra* Note 7

statute, the decision is bound to take three years to be effected at the time it will be considered.²⁹

The pursuit of the international justice for the serious crimes has not been without controversy. African continent having countries affected with some severe incidents of impunity such as the Rwanda genocide and other prevalent conflicts such as civil wars in DRC stands at a better chance to benefit from the international law under the ICC.³⁰ The ICC is designed to provide a practical solution for the victims, prevent occurrence of new crimes and promote adherence to the rule of law which will ultimately promote peace in the conflict-prone territories.³¹ Conversely, other critics of the court have expressed their dissatisfaction with the way it handles the crimes against humanity especially on the African leaders and that the courts are insensitive in resolving conflict which fails to ultimately serve justice to the perpetrators³². The ineffectiveness of ICC in addressing human rights abuses and often poses danger to peace and stability in the countries where it intervenes.³³

The prosecutor's decision to intervene in a situation where international crimes had been committed in the context of disputed election, and the crimes were relatively limited in terms of casualties, has caused some level of controversy in the scholarship. Several commentators have expressed their support for the prosecutor's decision to invoke the *proprio motu*³⁴. In the Kenyan situation, Fork argues that by setting the ICC setting the standard as low as it did, the majority created the possibility for active,

²⁹ ICC (2012). Assembly of States Parties, 'Court's Revised Strategy in relation to Victims', 5 November 2012, ICC-ASP/11/38.

³⁰ Jo, *Supra* Note 14

³¹ Kenya Law Reports (KLR, 2009). *The International Crimes Act*.

³² Glasius.M. (2008). "Global Justice Meets Local Civil Society: The International Criminal Courts Investigation in Central African Republic", *Alternatives: Global, Political, Vol.33, No.4*

³³ *Ibid*

³⁴ Murithi, *Supra* Note 20

independent prosecutors to use the office as a means to ensure that perpetrators of international crimes cannot escape with impunity³⁵. Furthermore, the author asserts that the Pre-Trial Chamber gives the prosecutor powers to investigate the cases and on Kenyan context the jurisdiction system can provide the prosecutors with adequate powers and resources to conduct investigations effectively.

1.5.4 Limitations of ICC

Since its formation, the Court has faced multiple challenges and some of which it has managed to overcome with time. The lack of a legislative arm has been an obstacle for the court to implement its duties and it had deprived it of the capacity to be effective in conducting substantive investigations and apprehending criminals. The Office of the Prosecutor has had on numerous accounts the governments to arrest criminals and most have barely cooperated. The creation of Assembly of States Party (ASP) to act as the legislative body of ICCC as it includes all member states has not been practical. ASP has been involved in amending the ratifications and being used in electing the prosecutor and the judges.³⁶ However, the body has not managed to successfully to engage the court effectively with the capacity of a legislative body on addressing issues that face the court.³⁷

The failure of cooperation by the some member states has been a hindrance to the Court to effectively in exercising its duties of apprehending the perpetrators of the war crimes. In Libya the prosecutor claimed lack of adequate resources to conduct thorough investigations hindered its operations. Libya is a non-member state and the

³⁵ Kelley, J. (2007). Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements.

³⁶ Schabas W., (2010). *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press) 61

³⁷ Peskin, Nick, *Supra* Note 19

efforts of the ICC to intervene in the Libyan conflict have not succeeded. ICC has been vocal in criticizing the crimes against humanity in Libya. Upon getting a go-ahead from the UN Security Council to prosecute the perpetrators, the court has not made any significant progress. After issuing arrest warrant on President Colonel Gaddafi, he was murdered in October 2011 by the revolutionaries. The failure to convict the leader of the government that committed multiple atrocities gave the revolutionaries an opportunity to cause chaos in the country. To some extent, the deterrence approach of ICC has lacked practicality in countries under dictatorial regimes. The democratic countries are bound to respond more positively to the deterrent approach in impacting Justice internally. The recent arrest warrant on Chief Abdullah al-Senussi who was a spy of Gaddafi has not worked as well. This shows that ICC is ineffective without cooperation of the state, as the Libya, they failed to hand over Abdullah al-Senussi because they prefer a death penalty of the 'lenient' deterrent approach by ICC.³⁸

After the 1994 Rwanda genocide, ICC sought to intervene on the cases after its formation through a special tribunal that was formed. The International Criminal Tribunal Rwanda to the War Crimes Chamber (WCC) failed to meet the expectations of the people as it was centered on the criminals rather than offering support to the victims. It is believed that the court should offer a victim-centered approach in post-conflict states to help meet the psychological needs of the victims. By focusing on the criminals, it has led to a backlog of cases that are taking too long to resolve yet there are more urgent issues to direct the support help. The initiation of special tribunals has been seen as ineffective as the prosecutions take long time.³⁹ The lengthy prosecutions are barely a guarantee of justice as the processes lead to witness bribery, disappearances

³⁸ Leanos, B. (2011). Cooperative Justice: Understanding the Future of the International Criminal Court Through Its Involvement in Libya. *Fordham L. Rev.*, 80, 2267.

³⁹ Ibid

and getting threatened by criminals in positions of power.⁴⁰ For example, the lack of adequate evidence leaves the parties disgruntled and the tribunal processes are expensive for the member states that are reconciling after the conflicts and in the healing process.

1.8 Theoretical Framework

1.8.1 Deterrence Theory

The concept of deterrence emerged with the need to end conflicts at an international level and was influenced by the central focus of promoting international relations. The concept of deterrence emerged at the time cold war was ongoing between Soviet Union and United States. Deterrence has been developed into a theory through consistent analysis of policy alternatives. Essentially, the concept behind the theory is attempting to persuade on party using threats at the expense of another while ensuring the status quo is not upset.⁴¹ The use of threats is seen as the most appropriate that puts into consideration two forms; direct deterrence and extended deterrence. There are three types of deterrence that are deployed in stopping crime; special deterrence, general deterrence and marginal deterrence. Special deterrence is centered on an individual as it is used to stop them from indulging in criminal act as there is a consequence awaiting them. General deterrence is centered on overall prevention of crime whereby the focal point is to change behaviors of the individuals by instilling punishment in public view. Also, general deterrence involves incapacitation whereby the criminal is taken away from environment that they are likely to commit a crime. Marginal deterrence believes in extending punishment based on severity of a crime whereby they expect more serious

⁴⁰ Cassese A., (2013). *International Criminal Law* (3rd edn, Oxford University Press) 326

⁴¹ Kate Nick, *Supra* Note 7 at 438

crimes to be punished more harshly⁴². Therefore, most researchers on the deterrence theory have varying opinions on the three principles of certainty, severity and celerity pertaining reducing crime.

1.9 Research Methodology

This section presents a description of the research design used by the researcher during the study. The section will expound on the case study approach used as research design, the target population, procedure for data collection and data analysis.

1.9.1 Target Population

A target population refers to that population which a researcher wants to involve in collecting data for their study. The researcher recruited three lawyers and two political analysts to provide a wealth of knowledge on the impact of the deterrence approach in Kenya. The consideration for these specific respondents was that they have a solid background of the international criminal law and that the deterrence concept of ICC was a well-known issue to them.

1.9.2 Data Collection

The study will use quantitative approach to collect the data. More so, the quantitative data for this research has been collected from the secondary sources such as reports from commissions on criminality during the post-election violence (for example, CIPEV report), national statistics, reliable media reports and ICC proceedings during trial at Hague. Importantly, this study has been backed up by primary data that was collected through interviews and questionnaires from respondents from the legal

⁴² Paternoster, R. (2018). Perceptual deterrence theory. In *Deterrence, Choice, and Crime, Volume 23* (pp. 91-116). Routledge.

field with an adequate understanding of the criminal law and implications Preamble on the member states.

1.9.3 Data Analysis

Data analysis of information collected from the questionnaires will be done. The technique that will be used to analyze the qualitative approach is to break down the information in the form of themes, generalize common themes and point out differing themes as well. Significantly, the data collected from the study is backed up with facts since all legal issues are based on sufficient facts to support any particular argument.

1.10 Thesis Outline

Chapter one has looked at the background of the study, problem statement, objectives and methods for data collection on the deterrence role of ICC in Kenya while intervening after the post-election violence. The researcher has identified the general objective of the study as and broken it down to three specific objectives that will be explored and researched on in the later chapters of this paper. These three objectives will be discussed in detail upon collecting data. The research employed a descriptive and analytical research design. The study relies on secondary data like government publications, journals and books were used in gathering data.

Chapter two critically focuses on the impact of the deterrence approach as a conflict management tool and its application on the Kenyan case in the event of 2007/08 PEV. The section further investigates the influence the conflict management tool of deterrence that was deployed on Kenya. The major aspects the researcher will aim to investigate are accomplishments reflected in the Kenyan context and can be attributed to the deterrence approach used by the ICC.

Chapter three will investigate the challenges that ICC faced with its adoption of deterrence approach on intervening the Kenyan PEV case. The researcher will also seek to investigate the hindrances that the Court has undergone in an effort to bring the purported perpetrators of crimes against humanity to justice at the international court. For this study, the researcher will try to show how the deterrence approach was deployed successfully or otherwise in connection to the challenges the prosecutor faced.

Chapter four will assess the accomplishments of ICC intervention through deterrence approach towards subsequent conflict management during and post-election related conflicts. In this chapter, the outcomes of conduct of the 2012 and 2017 elections will be investigated in relation to the lessons of the deterrence approach deployed by ICC after the 2007/2008 PEV. Thus, the ability of ICC to stop atrocities as a measure of deterrence, setting the course for a long-term deterrence and the impact of the trials in Kenya will be assessed.

Chapter five will provide the summary of the findings, conclusions of the study, and recommendations on areas for future research.

CHAPTER TWO
IMPACT OF DETERRENCE APPROACH AND ITS APPLICATION IN
KENYA

2.1 Introduction

This chapter seeks to discuss how application of deterrence approach in Kenya has impacted its advocacy for peace and reduced propensity for crimes against humanity through incitements. The issue being investigated is whether the intervention of ICC in Kenya contributed to peaceful elections in the subsequent election years of 2013 and 2017. The ICC was established with the objective of preventing crimes at the international level and to bring to an end to impunity of perpetrators who may influence the justice system of their states. Therefore, under this principle of international criminal justice referred to as *inter alia* in the Rome Statute that crimes can be discouraged as there are consequences. In this study, the researcher is focused on determining if the peaceful elections of 2013 were as a result of the ICC intervention. Also, the study chapter will discuss how the deterrence approach influenced the responsible conduct of individuals running for public office at all levels across the country was cautious of the ICC influence. Else, the peaceful elections happened because the Kenyans learned a lesson from the bloodshed of the contentious 2007 elections. Understanding the application of the deterrence approach on the accused persons who were aligned in court at The Hague, is vital in determining how deterrence approach had an impact in Kenya. Also, the study will expound on the principles of the Rome Statute almost led Kenya to withdraw from the ICC during the hearing of the accused persons of the 2007/08 PEV.

2.2 Impact of Deterrence Approach

The involvement of ICC into post-election violence to mediate since situation had calmed down but to enforce justice based on law. During intervention country was in a transition period and was healing from the outcomes of the PEV. This transition period involved the leaders conducting reconciliation campaigns between the bitter communities that had been involved fighting, relocation of the internally displaced persons and reuniting nation. Furthermore, criminal justice system was involved in the violence. However, the prosecutions were on the individuals at the grassroots and the debate shifted to the senior government officials who had perpetrated the violence. In actual sense, the senior government officials were influential in conspiring attacks, funding armed groups, hate speech and coordinating the violent activities. In a post-conflict country, having perpetrators occupying high positions of power any efforts to bring them to justice for their actions would lead to compromising of the transitional justice models. The 11th parliament was reluctant to advocate creation of special masterminds of PEV under the international standards. However, then members of parliament supported intervention by ICC as the special tribunal was termed as 'vague'.

The invitation of ICC led to aligning of the accused persons before the court at The Hague and the transitional justice process commenced. It is debatable on whether the court should only focus on persons who perpetrated violence by inciting groups to fight or prosecute the individuals who directly committed violence. The approach of the court in such incidents is founded on the belief that cracking down the political leaders and influential senior government officials who mobilized the mob. The argument on the most appropriate transitional justice model bears three dimensions. One claim states that the justice mechanism has to be wholly integrated into the process of transitional justice. Another argument states that it is better for justice to be kept

away from the process of transitional justice to avoid complicating the peace process. The third argument states that both transitional justice process and justice system need to be integrated for peace to be realized.⁴³ When addressing peace-justice issue it is vital for the institution to understand the suitable transitional justice mechanism because employing the incompatible mechanism in post-conflict state can be problematic. On the other hand, applying appropriate mechanism enhances the peace process in the society that is recovering from the effects of the conflicts.⁴⁴ This consideration is vital while attempting to determine whether deterrence approach will be effective and to avoid disrupting fragile peace. The goal of deterrence approach being to promote peace and prevent future violence, it works effectively with consideration of the transitional peace mechanisms.

In post-conflict Kenya, the approach deployed by the court in handling the cases against the indicted persons focused on establishing sustainable peace in the long-run. During the trial of the victims, who had at the moment won the elections in 2013, at the time of the prosecution the court held a firm ground on bringing justice despite being the court's first time putting on trial a sitting president. The interest of the court is to bring justice to the victims who have been affected directly by the actions of the leaders. This move by the ICC of prosecuting two personalities in government showed its seriousness in exercising its mandate of ending impunity. The deterrence aspect is evident in that the action would send a stern warning to the rest of the highly placed persons that there would be consequences for misconduct that may fuel serious crimes against humanity.

⁴³ Wippman, *Supra* Note 6

⁴⁴ *Ibid*

The warnings of the court and the parties affiliated and in support of ICC send a warning or a strong message to potential criminals that their actions will have consequences at the international law space. The Court showed its stance on going after persons suspected of perpetrating violence against humanity by inflicting sanctions. For instance in Kenya, the Western countries that support the court and USA had vowed to impose sanctions on the suspects in the event that they failed to cooperate with the court. Such threats from leaders of influential economies served as warning that choices have consequences to the Kenya that at the time was welcoming all intervention and reconciliation efforts.⁴⁵ Therefore, the suspects are warned that they are under check and will try to evade actions that may trigger violence. At the time when the country was longing for justice for the victims of the PEV, the arraignment of the perpetrators at The Hague gave the Kenyans a ray of hope to end of impunity. This step was promising to the post-conflict nation and sent a strong message to any potential criminal that the international law would be applied on them.

The government formed a special tribunal to try individual suspects of crimes that led to post election violence which left over 1,100 persons dead showed their distrust with the local justice system at the time. As a matter of fact, a slogan was commonly used to push ICC, 'Don't be vague, go to The Hague'. At the time Uhuru Kenyatta and William Ruto were strongly advocating for cases to be handled at The Hague. They both influenced the parliament to reject the bill to set up a local tribunal to try the perpetrators. On the other hand, the then president and prime minister, Mwai Kibaki and Raila Odinga, were advocating for setting up of a local tribunal which did not materialize. When the decision to go to The Hague was finally reached, envelope

⁴⁵ Smidt, M., L., (2001). "The International Criminal Court: An Effective Means of Deterrence?", *Military Law Review*, Vol. 167 (2001).

comprising names of suspects was opened by Prosecutor Luis Moreno Ocampo. Among names suspects of the perpetrators of PEV were those of Uhuru Kenyatta and William Ruto who had strongly advocated for the cases to be handled by ICC. The mistrust of the then local justice system by the law makers shows that ICC was the best alternative on the road to attaining justice. Therefore, the court has promoted accountability of political leaders since they are cautious that committing serious crimes will lead to them being referred to the ICC.

ICC has proved its capacity to bring into account the perpetrators of serious crimes as seen in Kenya and such a bold move will earn it legitimacy. Following the peaceful 2013 elections it shows that the Kenyan leaders learned a lesson from indictment of suspects of 2007 post-election violence. Since deterrence approach is centered on minimizing probabilities of crime of similar nature being repeated, the prosecutions on Kenyan leaders showed the court's commitment to promoting peace among the states.⁴⁶ Despite the court's shortcomings, ICC has proved its ability to implement international law. Furthermore, states are alert that the implications of violence are hefty since they can lead to the suspects being sanctioned. The active nature and commitment of ICC in ensuring the human rights are protected by promoting justice and peace is solid evidence the court cannot be manipulated or intimidated.

The use of deterrence approach promotes accountability in post-conflict countries because of the fear instilled on the leaders that there are consequences of perpetrating crime. The impact of prosecution on the perpetrators is manifested in the way they perceive and approach transitional justice in their countries. After undergoing turmoil of politically instigated violence, the leaders focused on calming down the

⁴⁶ Sharanjeet, *Supra* Note 15

temperatures of ethnicity and hatred in the affected areas. This sharp focus shows the belief in transitional mechanism that establishes sustainable peace in a post-conflict state. Arguably, the involvement of an international court in serious crimes has higher chances of promoting accountability which helps to attain peace. Accountability is the foundation for maintaining peace and consequential rights. Accountability is part the beginning peace process that supports reconciliation between the conflicting parties. Thus, deterrence approach is essential in preventing conflicts through instilling accountability to the leaders who have been suspects of human rights atrocities or are potential criminals who may be tempted to engage in crimes that violate human rights.⁴⁷

During the 2013 general elections, most leaders vying for different positions were conscious of fuelling conflicts and have to face the consequences of the international law. Elections emerged as the most peaceful, well-coordinated and transparent than any other the country had held before then. However, all credit cannot go to involvement of ICC that was closely monitoring the conduct of the leader as other factors such as the new constitution. The new constitution led to reforms in different sectors such as the judiciary, police and the Independence Electoral and Boundaries Commission (IEBC) that is involved in managing the elections. Therefore, it bears some truth that ICC played a role in speeding up reforms that could ensure sustainable peace could be reached and prevent post-election violence.⁴⁸ The leaders desisted from actions that could trigger fresh violence because of the court's threats of sanctions and they maintained the importance of co-existence by avoiding hate speeches. The proper coordination of the 2013 general elections can be attributed to the presence of ICC

⁴⁷ Malu, L. N. (2016). The International Criminal Court and Conflict Prevention: Reflections on the Impact of the Court on Deterrence in Kenya. *International Journal of Peace Studies*, 21(2).

⁴⁸ Wolf, T. P. (2013). International justice vs public opinion? The ICC and ethnic polarization in the 2013 Kenyan election. *Journal of African Elections*, 12(1), 143-177.

given that it had suspects vying for the top seats. As a matter of fact, the fear of being arraigned with fresh accusations or proof of their involvement in 2007/08 political cares; they were the most vocals persons on the importance of unity, peace and reconciliation. Therefore, the deterrence role is evident in ensuring peaceful elections in 2013 as it made the politicians to refrain from words or actions of incitement.⁴⁹

2.3 Kenya's Post-election Violence

Eruption of violence in December 2007 that went on until February 2008 was the most destructive level of conflicts to be experienced in the country. The results of the controversial elections that were marred with irregularities were the bedrock of the demonstrations. Kenya has been a victim of clashes associate with irregularities for example in 1990 there were election related clashes primarily in Rift Valley. The 2007/08 whereby PNU supporters clashed with the ODM supporters. The conflicts led to deaths, forced displacements, rapes and destruction of property in areas mainly Rift Valley province, Coast Province and Kisumu. Some the areas that were mostly affected by the violence are Nakuru, Kisumu, Trans Nzoia and Eldoret. These ethnic-based clashed that occurred under influence of incitements by politicians over the rigged elections whereby ODM felt that PNU under the then incumbent president seeking a second term, Mwai Kibaki, massively rigged the elections. ODM had rejected the results and called for national protests and these riots were countered by the police that used extreme force on the protesters. The elections led to widespread displacement of over 600,000 people and the deaths reached 1,400, as the violence occurred within a span of 59 days of the contested elections. Within seven weeks of protests against the contentious elections, there were over 3,561 injuries and over 117,216 incidents of

⁴⁹ International Criminal Court, (2011). '*Situation in the Republic of Kenya.*' ICC-01/09. Retrieved from: <https://www.icc-cpi.int/Kenya>

property destruction.⁵⁰ Compared to the 1990 and 1997 polls' violence, the 2007/08 PEV was intense given that it was a 2-horse race and that both opponents had almost same level of support unlike in previous instances where President Moi was the dominant candidate.⁵¹

Prior to invitation of ICC that had been established in 2002, it was not the first time that post-election violence had been experienced in Kenya. The previous occurrences often led to impunity of the perpetrators and most probably they expected the same. The failure of parliament to commit to setting up a local tribunal to try perpetrators of 2007/08 elections affirmed that there were loopholes in Kenya's justice system. Given the fact that the perpetrators of previous PEV had walked scot free, it was enough proof that the indicted suspects would buy through their freedom under the local tribunal. The uncoordinated and isolated attempts of administering justice to combat impunity in the country showed the highly placed individuals had influence on the criminal justice system. The recommendation for establishment of the commission into the PEV was a promising strategy that gave hopes for dispensation of justice. The commission would provide adequate details on the causes of the violence and provide substantive evidence on the individuals involved in propagating violence. However, some critics disbanded the efforts of commission by stating that it lacked capacity and unclear purpose for enquiring on the PEV especially in relation to connecting the highly placed individuals with their role in the violence.⁵² The formation of this commission

⁵⁰ Human Rights Watch, (2013). "High Stakes: Political Violence and the 2013 Elections in Kenya". Retrieved from: <https://www.hrw.org/report/2013/02/07/high-stakes/political-violence-and-2013-electionskenya>

⁵¹ Sharanjeet, *Supra* Note 15

⁵² Truth, J., & Reconciliation Commission. (2008). Commissions of Inquiry-CIPEV Report (Waki Report).

of inquiry was seen as a way of the political leaders to deflect public pressure that demanded the government to take serious action that would bring culprits to justice.⁵³

The international describes the atrocious criminal activities conducted during the post-election under arson, grievous bodily harm, murder, sexual violence, incitements, use of lethal force by police, and theft. The cases would be investigated under an inquiry that was called Commission of Inquiry into the Postelection Violence (CIPEV). The commission's task was to investigate the conditions that led to widespread violence, prevent the recurrence of violence and provide ways to deal with the outcomes of violence.⁵⁴ After investigating the circumstances that instigated violence across the country, based on the facts of the findings the commission proposed for formation of a tribunal that would prosecute the perpetrators of the crimes. The tribunal would focus on prosecuting the highly placed individuals that were responsible for the atrocities and serious crimes that violated human rights. The international criminal law would complement the Kenyan law under the Special Tribunal for Kenya (STK) that would bring perpetrators to justice. Alternatively, CIPEV advised that if formation of SPK failed to materialize since the parliament would be involved in formation of the special tribunal, then it was ready to hand over the list of the suspects of PEV to the ICC prosecutor to commence prosecutions at The Hague.⁵⁵

2.4 Involvement of ICC

The occurrence of conflicts threatens security and peace of any particular society and if the appropriate measures are not taken to contain the conflicts, they may result into gross violation of human rights. Post-election violence in Kenya is an

⁵³ Wolf, *Supra* Note 33 at 148

⁵⁴ *Ibid*

⁵⁵ Susanne *Supra* Note 7 at 26

example of such a conflict that had the capacity to extremely instigate violation of civil rights. The creation of ICC provided an international institution of justice that could implement international law on its member states. Under the Rome Statute, the court has the mandate to pursue individuals rather than states who orchestrate serious crimes against humanity. The court primarily deals with crimes of genocide, war crimes, aggression, and crimes of the same nature that violate human rights. ICC serves the member states with the mechanism of international justice that is centered on using approaches such as deterrence to facilitate peace process. The intervention of ICC on the post-election violence in Kenya after the conflicts shows that the aim of the court is not to stop violence but to prevent occurrence of the crimes in future and well as prevent violation of human rights.⁵⁶

After the parliament failed to set up a special tribunal based on provisions of CIPEV, the envelope containing the list of key personalities was handed over to Koffi Annan by Justice Phillip Waki. Koffi Annan gave the parliament more time to form a special tribunal based on international standards. However, the government failed to comply with the agreements which led the chief mediator to hand over the sealed envelope to ICC's chief prosecutor.⁵⁷ The CIPEV report was analyzed by the prosecutor from the date of hand in (July 9, 2009) to November 2009 when he began preliminary investigation. The chief prosecutor named the six suspects of the crimes against humanity during the post-election violence in December 2010. From the six suspects early identified, the Pre-Trial Chamber II identified four prime suspects in January 2012 and they were to appear in court for trial upon being summoned. The four

⁵⁶ Dunaiski, Maurise. 2014. "Accountability vs stability? Assessing the ICC's Intervention in Kenya". *E- International Relations*.

⁵⁷ Republic of Kenya, (2008). 'Reports of the Findings of the Commission of Inquiry into the Post – Election Violence in Kenya – The Waki Report.'

indicted persons were Uhuru Kenyatta, Francis Muthaura, William Ruto and Joshua Sang. However, in December 2014 the Office of The Prosecutor dropped the charges against the co-accused Francis Muthaura and Uhuru Kenyatta. Later, in April 2016 the Office of The Prosecutor dropped the cases against Joshua Sang and William Ruto.⁵⁸ Significantly, despite the staunch warnings by the parties affiliated to the international court, it did not stop the alliance between William Ruto and Uhuru Kenyatta from being elected and winning the elections in 2013.⁵⁹

The general elections under a new constitution that was promulgated in 2010 were conducted on March 4, 2013. Notably, there was peace and calmness during the process and after announcement of the results despite few incidents of violence experienced in some areas. The involvement of ICC is one of the factors attributable to the peaceful elections. Also, the political and judicial reforms made under the new constitution played a key role in the peaceful elections. The Government of Kenya (GoK) effected measures to improve the institutions of governance that were in charge of coordinating the elections and ensure it was free and fare. Also, the establishment of transparent judicial system that provided a place to file complaints for the disgruntled persons with the elections helped in ensuring there was a peaceful transition after the elections.⁶⁰ Moreover, another factor that contributed to peaceful elections was adequate policing that had undergone reforms and were more prepared to handle any violence in a humanly way.

⁵⁸ Kendall, S. (2014). 'UhuRuto' and Other Leviathans: The International Criminal Court and the Kenyan Political Order. *African Journal of Legal Studies*, 7(3), 399-427.

⁵⁹ Lynch, G. (2014). Electing the 'alliance of the accused': the success of the Jubilee Alliance in Kenya's Rift Valley. *Journal of Eastern African Studies*, 8(1), 93-114.

⁶⁰ Republic of Kenya, *Supra* Note 37

ICC shaped the ethic alliance between Uhuru Kenyatta and William Ruto besides being influential with its deterrence role that helped reduce recurrence of post-election violence. The ICC intervention factor in the 2013 elections is evident with the re-ethicizing the politics of the country whereby the communities that had clashed in previous elections united and voted as a bloc. By having the community leaders as suspects of crimes against humanity, the leaders focused on emphasizing the need for unity and reconciling a move that showed their belief in unity and helped the contest the elections to go in their favor. The ICC involvement in the 2013 elections was influential in the outcomes in enabling leaders to focus on peace and reconciliation which helped deter violence. The ICC influenced the issue-based politics which centered on developing the nation and addressing agenda of development for the country. Initially, the politics have been centered on who gains when the leader of their community gets in power but the 2013 elections changed the narrative. Therefore, it is true that the involvement of ICC at the time of elections in 2013 aided in uniting the hitherto political foes and in shaping the political alliances. Also, it was influential in uniting the two rival communities, Kalenjin and Kikuyu in Kenya that had locked horns in the 2007/08 contentious elections.⁶¹

2.5 Impact of ICC on the Human Rights

Under Rome Statute, the court can act in different ways to end impunity in a post-conflict country that is signed in the ICC statute. To prevent crimes, the court may incapacitate the criminals to keep them away from causing further violence by imprisoning them or inflicting punishment on them to stop them from repeating the offence. The court may also deploy a deterrence approach that essentially prevents the

⁶¹ Dunaiski, *Supra* Note 37

criminal from engaging in crimes of similar nature in future.⁶² Under the principle of deterrence, it is rationally argued that a criminal cannot indulge in crimes that may be costly to what they gain from their action. Therefore, the court believes that punishing an individual to discourage them from indulging in such crimes in future and by that it will achieve its core objectives of promoting justice and preventing crimes. Conversely, the court prefers deterrence to retribution which believes in punishing the criminals for their punishment and the severity of punishment based on gravity of crimes. Also, the court can use rehabilitation whereby it focuses on reforming the wrongdoers to change their characters rather than punishing them for the crimes committed.

The human rights of the victims of the PEV have been impacted by the outreach, reparations and pursuit of justice by the ICC. The interpretation of the international law on Kenyan soil enabled show the importance of respect for human rights irrespective of political endeavors or social status. The ICC provided hope for the victims whose rights were violated and its intervention would help rediscover justice that seemed far-fetched under the local justice system that was easy to manipulate. The court providing of reparations to different groups of persons involved in the search for justice and respect for human rights. Since ICC intervened, the incidents of violence have minimized across the country that believes in tolerance and co-existence. The Kenyatta/Ruto alliance was made possible by their indictment at the court as suspects of perpetrating violence that resulted into serious crimes against humanity. This move helped alleviate ethnic tensions between the Kikuyu and Kalenjin that had gone against

⁶² Schabas, *Supra* Note 22

each other in PEV. The involvement of ICC has reduced cases of sexual violence, incidents of forced displacements and lowered rates of death that are politics-related.⁶³

The involvement of ICC and application of deterrence approach in Kenya has helped in promoting human rights and lower violations. The ICC played a key role in influencing the government to take action against political incitements at political rallies or any media platform. The freedom of speech was to be upheld but people have to show responsibility while expressing their opinions to the public. Since the ICC intervention, the government has taken serious measures on hate speech or use of derogatory or demeaning language that may be aimed at a particular ethnic group. ICC strongly issued warnings on individuals who may indulge in hate speeches or political incitements with the motive of stirring conflicts. The PTC judge issued a warning that the court would not hesitate to act on any individual who may violate their summonses of appearing before the court when required.⁶⁴ The involvement of the court to the Kenyan cases in relation to the six persons who were indicted with the crimes against humanity impacted their freedom of speech to prevent the accused from stirring fresh conflicts. The decision was to avoid re-offending and to preserve peace despite the court's action having minimal impact on the Kenyans.⁶⁵

2.6 Application of Deterrence Approach in Kenya

The primary principles embedded in the theory of deterrence are swiftness, certainty and severity. The principle of severity states that the rationality of justice is can be measured with the punishment. Thus, the heftier the punishment the less likely

⁶³ Farer, T., J., (2000). "Restraining the Barbarians: Can International Criminal Law Help?", *Human Rights Quarterly*, Vol. 22 (2000).

⁶⁴ Claudio C., (2015). ' *The Priority of Conflict Deterrence and the Role of the International Criminal Court in Kenya's Post-Electoral Violence 2007–2008 and 2013*'. *Human Rights Rev*, published online, Springer Science Business Media Dordrecht.

⁶⁵ Louise A., (1999). *The Prosecution of International Crimes: Prospects and Pitfalls*, " *Washington Law Journal*, Vol 13,23 May(1999)

the would-be offender will commit a crime. According to this principle, it is commendable for the criminal justice system to impose severe punishments to reduce likelihood of a crime being committed. In the context of international law being applied on states, inflicting sanctions on the states run by perpetrators of crimes against human rights can help prevent crime.⁶⁶ However, the principle does not advocate for very severe punishments that may be unjust, it supports a balance to also avoid weak penalties that may fail to prevent crime. According to the principle of certainty, the effectiveness of a deterrence relies on the offence being committed lest it theory is invalidated. If there is no concrete evidence that the offence was committed, then the deterrence theory is ineffective.⁶⁷ This principle has been used to criticize ICC whereby the prosecutor may announce arrest warrant on suspected perpetrators even without succinct investigations to be used on them at the Court. This scenario is evident in Kenyan case, whereby the cases against the six indicted persons crumbled due to lack of adequate evidence yet the Office of the Prosecution had pronounced them as key perpetrators of the PEV.

The principle of swiftness refers to the sense of urgency that needs to be applied while pursuing justice for deterrence theory to have an impact. The ICC has been criticized for taking too long in prosecution and when conducting investigations of top-ranked individuals who have perpetrated violence. As an international court, it is expected of the court to have well-laid structures and procedures that will ensure justice is administered efficiently. Also, swiftness means sense of urgency in sending a

⁶⁶ Akhavan, P., (2001). "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" American Journal of International Law, Vol. 95, No. 1 (2001).

⁶⁷ Smidt, *Supra* Note 30

message or incapacitating the perpetrators to prevent further offences.⁶⁸ The deterrence theorists argue that speed action in issuing penalties helps in deterring crime.

ICC applied deterrence approach through various ways to achieve their goal of preventing conflicts especially during the sensitive 2013 election violence. One of the commonly used methods was warnings and public announcements against incitements and hate speeches during political campaigns. Further, it pressured the government to remain vigilant in responding effectively to ensuing conflicts in case they occurred. The focus is to protect the civilians from the attacks in the event the violence arose and the police to suppress the conflicts with reasonableness without employing excessive force. ICC managed to use threats of sanctions on the political leaders who may perpetrate violence and this served as a stern warning to all the leaders across the country. Also, the Court had set a proper path for the local criminal justice system to be prepared to handle any election discrepancies. For the two accused individuals seeking the presidency, Uhuru Kenyatta and William Ruto, winning elections would provide them an opportunity to continue the campaigns of peace. Initially, after agreeing to cooperate with the Court until they clear their names they had conducted several peace campaigns to unify Kenyans.

The creation of new policies that would safeguard the way elections would be conducted by the election body, IEBC, is a contribution of the ICC intervention. The invitation of ICC to conduct investigations stated that the lack of transparency and integrity of the former election body, ECK, contributed to the outbreak of PEV. The government took the initiative of creating policies that were founded on rule of law. The advocacy for such a transparent body that was guarded by straightforward structural frameworks helped in free and fair elections. The ICC intervention through a

⁶⁸ Ku, *Supra* Note 14

deterrent approach ensured that the institutions and systems that played a role in the PEV were cleaned up and were firm under more transparent administration. The deterrence approach enabled the leaders as well as the citizens to obey the law upon understanding that the law was more stringent. The highly placed government individuals were much aware they are equally susceptible and they had to conduct themselves responsibly.⁶⁹ The ultimate consequence of political incitements that could trigger violence would call for ICC to act immediately with a penalty of almost equal magnitude such as imposing sanctions on the perpetrators.⁷⁰

2.7 Conclusion

The deterrence approach was effectively adopted by ICC while addressing the post-conflict state. The outcomes of deterrence became evident mostly during the 2013 general elections. The warnings by the Court and the pronouncements by the civil societies helped get the leaders in check. After the ICC got involved through indictment of the suspects of 2007/08 PEV who had perpetrated crimes against humanity, it turned the narrative of tribal hatred to unity. The deterrent approach was evidenced by peaceful campaigns, respect for rule of law by all the parties and transparency of public institutions. Compared to 2007 elections, the 2013 elections were issue-based and were centered on uniting the Kenyan people regardless of their ethnic lines. Such a conduct helped sustain peace and prevent crime. The conduct of the elections body IEBC, was outstanding and such effort can partly be attributed to the deterrent approach whereby the body had been established under the new constitution. Also, the criminal justice system that was more independent and transparent is partly an outcome of the deterrence approach.

⁶⁹ Farer, *Supra* Note 40

⁷⁰ Malu, *Supra* Note 32

CHAPTER THREE

CHALLENGES FACED BY ICC DURING PEV INTERVENTION IN KENYA

3.1 Introduction

This chapter discusses the challenges that ICC encountered while handling the violence cases. While ICC can prevent recurrence of crimes in some situations, it is not expected for the court to adopt the deterrence approach in all instances. The application of deterrence varies with aspects such as type of actor being targeted, nature of the conflicts, level of intervention by the court, and the context of domestic politics. Some of the challenges encountered by ICC that will be discussed within this chapter are limited resources, non-cooperation by the states, institutional restriction and criticism over alleged selectivity in dispensing justice. These challenges are associated ramifications under such application of the principle of complementarity.

3.2 Evidence of Deterrence Approach in Kenya

In Kenyan context the use of deterrence was evidenced by the constant warnings given by the prosecutor on the political leaders pertaining incitement of the public.⁷¹ The sensitivity of the conflicts was during the election period prior to 2013 general elections. The insistence on peace and need for tolerance among the competitors in a heated political environment sent a strong warning to the leaders. The deterrence role was vital in sensitizing the leaders and creating awareness that the international community was watching over conduct of the elections. Also, the international criminal justice had aided in establishment of local justice system that could address the election

⁷¹ Marshall, K. A. (2010). Prevention and Complementarity in the International Criminal Court: A Positive Approach. *Human Rights Brief*, 17(2), 4.

issues in future despite failure of the government to commit to creation of a special tribunal.

The deterrent approach was evident in preventing crimes in Kenya during the 2013 general elections whereby the two co-accused persons running for the top jobs in the country emphasized on importance of unity. Despite having pending cases at The Hague, Uhuru Kenyatta and William Ruto showed unwavering resilience in preaching peace and uniting the two rival tribes in Kenya. Based on this instance, it is clear that the deterrence approach contributed to the unification of the two leaders and their tribes that had engaged each other aggressively in the 2007/08 post-election violence. Moreover, the warning and public statements issued on the misconduct of political parties in which the leaders could take responsibility helped in maintaining peace and preventing crime.⁷²

This study found an outstanding proof that the deterrence effect helped prevent violence and promote peace in Kenya. For instance, the alliance formed between Uhuru Kenyatta and William Ruto brought the Kikuyu and Kalenjin together after a period of war. The two leaders were very determined to win their elections and would prove their innocence in front of the Kenyans despite indictment at the ICC whereby the elections worked in their favor. The presence of ICC during the period of elections as there were ongoing cases helped the leaders to focus on uniting the nation and alleviating any tensions that are of ethnic nature.⁷³ Also, the insistence by an ICC judge on the court's alertness to authorize arrest of any individual who could be involved in political incitement through preaching hatred kept the political leaders in check. In the 2013 campaigns the aspiring political leaders were cautious not to incite the public or use

⁷² Malu, *Supra* Note 32

⁷³ Dunaiski, *Supra* Note 37

hate speech that could trigger violence else they be arrested arraigned in court. Conversely, the use of deterrence of approach on Kenya during the 2013 elections is equivocal given that it some leaders would take advantage of the warning by ignoring the threat to win elective positions and thwart the court.⁷⁴ The aspect of cost of the threats issued by the ICC prosecution is seen with the indulgence of some leaders eliminating witnesses, forcibly disappearance and bribing while preaching peace.

Despite the deterrence approach working effectively in the subsequent elections in 2013 and 2017 elections, it does not offer a long-term deterrent effect. The deterrent effect is aimed at holding the political leaders to ensure that they do not instigate violence between their followers. The deterrence approach has been effective in Kenyan context particularly in the election period whereby the conversations of unity and reconciliation helped create a peaceful society. However, besides creating fear of being prosecuted for evils such as hate speech, it does not detail any other norms or policies that can prevent violence. Having the deterrence approach in place did not guarantee peaceful elections since there were no norms acted effectively by the political leaders.

Additionally, this research has not acknowledged any change in the government's willingness and commitment to end impunity through setting up strategic measures such as a tribunal court that could address such crimes in the event that they occur in the future. On the contrary, Kenya's leaders time and again attempted to forestall the ICC court cases from going forward and lobbying the United Nations and African union.⁷⁵ Kenya has additionally most effectively prosecuted a handful of low-degree perpetrators of the 2007 violence, and that the Kenyan government said that it

⁷⁴ Malu, *Supra* Note 32

⁷⁵ Lynch, *Supra* Note 93

addressed the problem satisfactorily and might now not be going back. President Kenyatta said as a great deal in his 2015 kingdom of the state cope with⁷⁶. This obviously suggests that the country and its leaders presently believe that there are not any forces that could gas violence of such nature because the leaders had learnt a lesson at the seriousness of the ICC on propagation of crimes towards humanity.

3.3 Challenges of Deterrence as an Intervention in Kenya

3.3.1 Concept of Rationality of Actors

The deterrence approach is conceptually challenged by a rational actor. Since all they accused persons of indictment of crimes claim to act based on rationality, it is clear that not all their rational decisions help them to avoid committing crimes.⁷⁷ This uncertainty of decision making whereby the calculations of cost-benefit among leaders may result into the perpetrators taking advantage of situations to commit crimes and pretend it was by mistake. For instance, the criminal behavior of rebel movements the leaders act rationally in perpetrating crime which is part of their decision-making. One of the irrational decisions the rebel movements does is attacking the civilians when they realize they are losing in a conflict against an enemy such as another group. The decision to kill the civilians in order to create pressure on the other group, whether a rival rebel group or government, is perceived rational by the rebels as long as they are not losing in the fight.⁷⁸

Similarly, when pursuing the type of actors of violence, ICC is adopted deterrence approach in a democratic country such as Kenya. In some scenarios where

⁷⁶ Daily Nation., (2015). 'Uhuru Kenyatta defends Kenya's cooperation with ICC.' *Daily Nation*, 12 August. Retrieved from: <http://www.nation.co.ke/news/Uhuru-Kenyattadefends-Kenya-cooperation-with-ICC/-/1056/2829550/-/n4x45yz/-/index.html>

⁷⁷ Hyeran, *Supra* Note 8

⁷⁸ Wippman, *Supra* Note 6

it has deployed deterrence approach in democratic states it has ultimately failed to bear the expected results. In the democratic states, the leaders have a rational perspective of things and may avoid higher risks that may lead to persecution over the benefits of power. On the contrary, in unconsolidated democracy, the leaders of such states for example as seen in the case of Sudan, they are ready to risk anything for power.⁷⁹ President Bashir showed that he is not threatened by sanctions but all these efforts of retaining power at the expense of a vulnerable population that is struggling from internal conflicts. Therefore, the aspect of rationality that is integrated in the deterrence approach does not apply in some cases where the leaders of non-democracy states have bestowed upon them total power. Such leaders have the propensity to abuse power and they are not afraid of the implications of the international community as long as they have access to the state resources. In Kenya, the leaders are conscious of their welfare and that is the reason President Uhuru Kenyatta and his deputy William Ruto decided to cooperate with the court. Failure of the two leaders to comply, it would put the affairs of the nation at a complicated state especially with domestic prosecution and sanctions that cut of business international relations. In fact, prior to the 2013 general elections the United States and some other European countries had warned Kenyans choices would have consequences. The warning was to mean that in the event that the electorates voted for the accused persons indicted with crimes against humanity it would stain the relations.

The effectiveness of ICC deterrence approach is more likely to be experienced by the nations that value legitimacy of the leaders in front of international community. The leaders who believe in a leadership of the people, by the people and for the people

⁷⁹ Edoardo C., (2014). "Pointing Fingers for Peace: Can the ICC Deter Future Conflict in Kenya". <http://consultanctafrika.com>

will be committed to heeding to the ICC prosecution. Since ICC has understood the deterrence approach is more likely to promote justice and prevent crime in such societies, it has opted to use the approach to attain its goals. Kenya is a democratic country that believes in an open society that has improved relations with other nations. Therefore, the Kenyan business leaders and politicians are conscious of the involvement of ICC and that cooperation with the Court is beneficial to the state. For this reason, when the prosecutor commenced investigations in Kenya, the government showed support to help bring the perpetrators of PEV violence to justice. Importantly, in the 2013 elections the Kenyan leaders were at forefront not to instigate any electoral violence as the ICC would not hesitate to conduct prosecutions. Given the fact there were ongoing cases at The Hague at the time of elections, prosecuting any leaders found perpetrating violence at such a period and state the prosecutions would be swift.⁸⁰ The relevance of intervention by the Court is evidenced whereby the would-be perpetrators would incur higher costs upon prosecution compared to the gain and this rational actor would prevent them from undertaking criminal actions.⁸¹

3.3.2 Lack of Empirical Evidence

The lack of practical evidence to support deterrence approach makes it a contentious model that is only founded on theoretical perspectives. The absence of empirical evidence to show how this approach of punishment and prosecution prevents the perpetrator from engaging in crime makes it controversial and impractical. The outcomes of the post-conflict nations in response to the ICC prosecution do not provide concrete proof that it is out of the intervention. It is difficult to prove any transformation

⁸⁰ Akhavan, *Supra* Note 17 at 408

⁸¹ Republic of Kenya, *Supra* Note 37

experienced by countries that deterrence has been adopted that the entire change is attributable to the prosecution or punishment on the perpetrators.

Despite the lack of actual explanation to why an individual has not committed a crime, this underlying assumption is not to suggest that deterrence is untrue. When the cases of Sudan and Kenya are compared on basis of ICC intervention, there is evidence of deterrence approach. In Kenya, the change of behavior that has contributed to peaceful 2013 and 2017 general elections and reduced incidents of politics-triggered clashes shows positive response to deterring crime. On the other hand, failure of President Bashir to respond to allegations of human rights abuse have made him more aggressive and difficult to work with which evidences the negative side of deterrence approach. Such instances have showed evidence of how deployment of a deterrence approach can affect the leaders and influence their decision making in regard to ICC intervention. Notably, the Court is constantly gaining legitimacy as its efforts to promote justice and prevent crimes is widening and gaining ground.⁸²

Failure of deterrence approach to bring justice to the victims through prosecuting the perpetrators of serious crimes based on the crimes committed means letting them go away with impunity. This approach is designed to sort of instill fear for punishment in the event of crimes in the future and this shows lack of capacity in cases where the perpetrators are not afraid of the punishment.⁸³ Consequently, it provides an atmosphere where committing of atrocities is like any other crime in every society. For instance, in Kenya the inspector general of police was among the indicted persons whereby he overstepped his powers by authorizing the police to use force without

⁸² Grono *Supra* Note 10

⁸³ Louise, *Supra* Note 41

caution to halt violence. The police went ahead to abuse the powers by using excessive force on the civilians. The highly placed individuals such as government officials may easily manipulate the local criminal judicial systems by influencing the ruling which denies the victim justice. The authority of the commanders is obeyed by the police without questioning which may be irrational to some extent but still has to be done.⁸⁴ Consequently, the law enforcers do not feel responsible for their behavior as they may justify themselves by referring to the received orders.

3.3.3 Infancy of International Criminal Justice

ICC is still considered an infant court since its establishment in 2002. Most states feel that is the lack of experience yet it is involved in fighting international crimes makes it less effective. It is understandable at some point that the international institution has failed to deliver in some instances due to inexperience but with time it will regain experience and credibility. For instance, the arrest of Charles Taylor showed that the Court was in track of attaining its goals and it was described as ‘Pinochet effect’ by Naomi Roht-Arriaza.⁸⁵ It came as a breakthrough for the court but the challenges the court has been experiencing in bringing the perpetrators of serious criminals to justice is comprehensible. As Roht-Arriaza claims that no one should expect any type of court to convert a tyrant or warlord for that matter into advocator of peace overnight, the court does not use magic. Such high expectations from the most states have made them believe that the court is set for failure but time has proved otherwise. The court is making a difference in international justice as it has managed to minimize crime through its deterrence approach. The change of tactics used by perpetrators of crime in the modern world prove to be a major challenge in future and may cause the court to

⁸⁴ Malu, *Supra* Note 32

⁸⁵ Roht-Arriaza, N., (2004). *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, University of Pennsylvania Press.

change its approaches of promoting international justice.⁸⁶ For instance, the crimes of nuclear weapons cannot merely be addressed with punishment of threat but other stronger and realistic means such as military confrontation. The lack of empirical evidence to support practicability of the deterrence approach still makes it unrealistic to some extent.

It is important to understand that deterrent approach does not work all the time and it is expected for it to receive criticism. It is the same way for other approaches of preventing crimes for example it is not all times that military intervention by the United States works as expected. Some states that fail to fully practice democracy view the American fight against international terrorism as coercive diplomacy. The criticism and interjections does not stop US from conducting its activities as its long-term goal is to attain peace and reduce levels of crime through terrorism. So as to the ICC, it should continue with its deterrence approach of seeking to effectively deter crimes and promote justice. After all, whether it the change in behavior of the would-be criminals because of the threats by ICC, the Court has attained its goal despite the critics feeling otherwise regarding the approach being deployed by the Court. Kenya is an example of the state that has improved its affairs on politics-related impunity as the Court has caused behavior change among the leaders to not allow their selfish interests and hunger for power lead them to inciting violence among their followers.⁸⁷

3.3.4 Non-cooperation of States

The principle of complementarity has had its ups and downs for the ICC as it means the purpose of the Court is to complement the national justice systems rather than to replace them. The key jurisdiction of the Court of going after the perpetrators

⁸⁶ Wippman, *Supra* Note 6

⁸⁷ Grono *Supra* Note 11

directly without having to seek permission from any member state or institution has been an issue with some states.⁸⁸ This mandate has been objected as some states claim they have the capacity to handle their international issues and involvement of ICC only taints their image across the globe. According to the ratification, the Court only should come in whenever the state shows incapacity or unwillingness to prosecute the perpetrators of international crime. The several efforts by the Court to Kenya to allow it to form a special tribunal to try the perpetrators of 2007/08 PEV did not come to fruition. Thus, the move by ICC is always reliant on the action of the member states to prosecute criminals under a tribunal of international standard. This is a concrete reason that the Court was not set up to replace the national criminal justice systems. The prosecutor is focused to not interfere with the impartial proceedings of the cases at the domestic levels. However, some states have fully failed to comply with the ratifications forcing the Office of Prosecution to act within its mandate under the principle of complementarity while maintaining independence of the state.⁸⁹

Failure of the member states to outline measures to prosecute criminals has forced the Court to intervene and it comes to facilitate or oversee justice. Some states have just sought to use their ways of evading justice through the locally created tribunals to avoid intervention by the ICC. However, based on the Rome Statute, the law or intermediary institution being established has to meet the threshold of the international standards set up. Also, in case the Court intervenes and the state takes measures of handling its crimes through a transparent and credible judicial process, then the Court is at liberty to back down. For a couple of years, the issue on direct involvement of the court has been a concern and a contentious issue for investigating

⁸⁸ Marshall, *Supra* Note 46

⁸⁹ *Ibid*

crimes. One thing that is clear from the Rome Statute is that it is obligatory for the States to work with the help of the Court to establish justice systems that will ensure justice is attained and that crime of similar nature is prevented.⁹⁰

3.3.5 Criticism of Being Anti-Africa Bias

The claim and debate that the ICC is primarily a justice system influenced by West to purport its control over African states does not have factual basis at all and can be termed as political propaganda by the disgruntled parties. Such claims are based on improper understanding of the ICC but the debate that it is a court for all people Africans included as they were part of its creation is correct. As most of the matters before it are self-referrals by the countries or been referred by the UN Security Council and when the prosecutor has been granted leave to investigate a matter he/she has to go before the trial chamber to for the court to determine whether there is adequate evidence to confirm charges. If the ICC does not have jurisdiction in a case no matter how much evidence it has the matter will be thrown out of court and jurisdiction is conferred on the ICC in three ways by state referrals, If a matter is referred to by the UN Security Council, if a non-member party submits itself to the jurisdiction of the court or if the trial chamber allows the prosecutor to investigate a matter like in the Kenyan case.⁹¹

There are claims that the influence of the Court on African soil is undermining instead of assisting African efforts to solve the continent's problems. This argument has been vocalized by the AU in the Darfur situation has become difficult to resolve as the government has failed to show commitment and willingness to fully address the issue. Neither should be pursued at the expense of the other. This has also been expressed in

⁹⁰ Corradetti, C. (2015). The Priority of Conflict Deterrence and the Role of the International Criminal Court in Kenya's Post-Electoral Violence 2007–2008 and 2013. *Human Rights Review*, 16(3), 257-272.

⁹¹ Edoardo C., (2014). "Pointing Fingers for Peace: Can the ICC Deter Future Conflict in Kenya". <http://consultanctafrika.com>

the case of Joseph Kony that peace should be pursued rather than justice because he said he will not sign the peace agreements, until the warrant of arrest on him is lifted and this is seen by the religious leaders, civil society in Uganda to undermine the peace process. The problem is it is not guaranteed that once the warrant of arrest is lifted he will stop the atrocities or he will even sign the peace agreements⁹². The situation in Darfur was referred to ICC by UNSC and with the support of African countries that recognized the gravity of the crimes that were committed. In resolution 1564 the Security Council charged the secretary general with the responsibility to establish a commission of inquiry to investigate human rights violations in Darfur to determine whether or not acts of genocide had occurred⁹³. The commission was composed of respected African and Arab members and in 2005 February under the leadership of Antonio Cassese presented the report to the Security Council recommending that due to the serious crimes committed in Darfur, UNSC should have acted by referring them to the Court.

However, most African states have been unwilling to prosecute perpetrators of international crimes and that is why these matters are before the ICC. Additionally, the prosecutor has given reasons for not investigating some situations, as the crimes happened before the Rome Statute came into force others are of the crime of aggression which the ICC has no jurisdiction over till 2008 and others are not crimes under the Rome Statute. There are no factual grounds to assert that the ICC is a western court. None of the states that have objected to the ICC actions have initiated national prosecutions an example is Kenya and Sudan but in any event even though these states

⁹² Cronin-Furman K., (2013). 'Managing expectations: International Criminal trials and the prospects for deterrence of mass atrocity'. *The International Journal of Transitional Justice* 7: 442.

⁹³ Bellamy, A. J., & Williams, P. D. (2006). The UN Security Council and the question of humanitarian intervention in Darfur. *Journal of Military Ethics*, 5(2), 144-160.

were to initiate national prosecutions, there would be no justice as it is impossible to prosecute a head of state in his own country.⁹⁴

3.4 Conclusion

The ICC has faced multiple challenges in its mandate to prosecute the perpetrators of serious crimes which range from collection of evidence and apprehension of the suspects. One of the greatest challenges faced by ICC is its inability to conduct the trials fast. Quicker proceedings are a focus by the ICC in prosecuting the criminals as it earns it credibility and is significant to any deterrent effect. However, its desire to conduct quicker proceedings is limited by lengthy process of collecting evidence, refusal of states to cooperate, adjournment of the proceedings by the legal teams representing the suspects and failure of suspects to appear before the court for hearing. Additionally, the concept of deterrence as deployed in Kenya has been criticized and questioned on its rationality to keep the suspects or any other persons from engaging in serious crimes. Most of the challenges faced by the court at The Hague have been attributed to its infancy and lack of capacity to independently conduct investigations and arrest the perpetrators of crimes⁹⁵. Also, the court has been criticized and deemed an anti-African court since most of the cases have been targeting leaders of African states yet other regions undergoing violence are not subjected to the court despite being members signed into the Rome Statute.

⁹⁴ Lynch, G., & Zgonec-Rozej, M. (2013). *The ICC intervention in Kenya*. London: Chatham House.

⁹⁵ Wolf, T. P. (2013). International justice vs public opinion? The ICC and ethnic polarisation in the 2013 Kenyan election. *Journal of African Elections*, 12(1), 143-177.

CHAPTER FOUR

ACCOMPLISHMENTS OF ICC IN USING DETERRENCE APPROACH

4.1 Introduction

The Court employs a variety of mechanisms as it tries to intervene in post-conflict states that are bleeding for justice. The cases and the outreach programs make up the direct mechanisms through which the court intervenes. Whenever ICC deploys the direct mechanisms, it aims at impacting the international law to the domestic courts, raise awareness of the Court on its interest for justice and to influence the domestic legal situations. On the other hand, the presence of AICC or use of threats by the Court is indirect ways that ICC can use to address the issues of violation of human rights and prevention of crimes. The use of either indirect or direct approaches has had different outcomes in different countries. Indirect mechanism that was primarily used on Kenyan case has seen judicial change, stability in the country, deterrence of crime and unification of the conflicting parties. Within this chapter, the accomplishments of ICC through its deterrence intervention approach as applied in Kenyan context will be discussed. Furthermore, the chapter will extensively discuss the indictment and prosecution process as well as how the use of deterrence has set the course for a future long-term conflict resolution. Also, the study will discuss the failures of the tribunal in effort to establish justice as per the international standards.

4.2 Indictment and Prosecution of Perpetrators of PEV

An elite-driven conflict that emerged after announcement of the 2007 general elections that were marred with irregularities sent the nation to a whirl of violence and ethnic clashes. The outcome was thousands of displacements of people from their original homes, sexual violence, loss of over 1,100 lives, multiple sustained injuries and loss of property. The conflicts almost paralyzed the nation economically, socially and

politically. However, two years later, the involvement of ICC had changed the landscape in politics and administration of the country that had ushered in a new constitution. Despite the reluctance of the government to improve judicial system that would ensure justice for the victims, the government was reluctant in setting up a special tribunal to prosecute highly placed government officials who perpetrated violence.⁹⁶ The findings of the study unveiled that the political leaders opted for ICC due to lack of independence of the judiciary that could be manipulated by the executive. Also, it is argued that the leaders who were advocating referral of the cases to The Hague did not believe it would affect the political landscape of the nation.

The journey to resolving the governance crisis when the nation was healing from the PEV commenced with the initiation of Kenyans for Peace with Truth and Justice (KPTJ). This commission was to conduct thorough investigations on the victims' issues on the ground and document a report that would be used to administer justice for the long-term. Alongside religious groups and Civil Society Organizations (CSO), KPTJ conducted its research and presented the report to the government for implementation. The organization called for more accountability by the government in ensuring the concerns raised by the Kenyans would be addressed adequately. So far, KPTJ has been implemented in the first term of Uhuru administration through full placement and compensation of the internally displaced families. Further, it has sought to address the historical injustices that have been a trigger of violence.⁹⁷ KPTJ led to institutional transformation and criminal accountability to help attain sustainable peace. The organization has helped in police reforms and need for the security organs to protect

⁹⁶ International Criminal Court, (2016). '*Kenya, Situations and Cases.*' Retrieved from: <https://www.icc-cpi.int/kenya>

⁹⁷ Republic of Kenya, *Supra* Note 37

human rights by not using excessive force that violates human rights as seen in the PEV.

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KPTJ helped bringing into awareness the serious issues that transcended during the PEV conflict such as police brutality, sexual violence, displacement, killings and destruction of property. It helped the justice system to tighten its belts in bringing the culprits to justice. KPTJ helped the government to take more stern action into engaging the communities to help in reconciliation and overcome ethnicity that had taken toll in most parts of the countries that experienced violence. The areas in Rift Valley, Western and Nairobi had predominantly recorded high cases of ethnic violence.⁹⁹ During the court's processes for administering justice, the religious groups, donors, government, civil society and KPTJ offered material and psychological support to the PEV victims. The state helped by providing financial and land compensation to the victims to help them resettle and rebuild their lives.¹⁰⁰

The need for reconciliation and healing from the political violence led to unification of the two rival tribes that had been affected most by the ethnic conflicts, Kikuyu and Kalenjin. After the pre-trial chamber confirmed the charges of indictment with serious crimes against humanity, the two leaders, Uhuru Kenyatta and William Ruto had their interests on the top seats. When the cases were seen as an obstacle, they took advantage of the opportunity of uniting the two tribes and the rest of communities. Further, they launched an alliance, Jubilee, which helped them clinch the victory over their bitter rivals of theCORD alliance led by Raila Odinga and Kalonzo Musyoka. The indictment of these two leaders from the most populous tribes in the country boosted

⁹⁸ Ngari, A. (2012). Reconciling Kenya Opportunities for Constructing a Peaceful and Socially Cohesive Nation.

⁹⁹ Mueller, S. D. (2014). Kenya and the International Criminal Court (ICC): politics, the election and the law. *Journal of Eastern African Studies*, 8(1), 25-42.

¹⁰⁰ Ibid

their popularity and increased their chances of winning the elections. This aspect of ICC involvement played a role in shaping the political landscape in the country at that period when there was need for healing and ensuring justice for the victims.¹⁰¹

4.2.1 Collection of Evidence

The Office of the Prosecutor (OTP) was required to conduct investigations which would provide adequate evidence while aligning the accused in the court at The Hague. The investigations in Kenya took the form of both formal and public engagements with relevant parts of the Kenyan government, as well as informal and discrete interviews with victims of the post-election violence. These victims provided testimony on what transpired after the disputed election results were released and were expected to describe the longer-term consequences of the violence. The evidence from the victims would determine the depth of the investigations and provide grounding for the cases as they aided in establishing the relationship between the actual perpetrators and the instigators, planners and higher level financiers.

Initially, the OTP had clarified that it considered focusing on the two cases alone since they greatly corresponded with the country's political divide during the PEV. However, later it was required to conduct investigations on the crimes that were committed by the state agencies. The consultations between the OTP and the intermediaries which comprised of governance, human rights and sectors of civil society found the necessity of including the state agencies that were believed to play a part in the PEV. The inclusion of the state agencies was influenced by the opinion the prosecution of the involved agencies that would be of importance to provide justice at

¹⁰¹ Amnesty International, (2014). 'Crying for Justice, Victims' perspectives on justice for the Post-elections violence.' Retrieved from: <https://www.amnesty.org/en/documents/afr32/001/2014/en/>

all levels.¹⁰² This bold stance was considered to be a necessity for sternly warning the highly placed officials in government to deter any individual from perpetrating crimes in future. In addition, on the principle of complementarity, the court purposed on using the Court to help the local judicial systems to administer justice for the victims of violence that the Court could not prosecute. For the ICC to exercise jurisdiction, a state party with national jurisdiction over a particular matter must be either unable or unwilling to conduct a bona fide investigation or prosecution of the crimes alleged.¹⁰³

The local justice system was confronted with the task of handling multiple post-election violence related cases that involved over 2,000 persons. The suspects who were held in custody for active involvement crimes were to be presented in the court of law for prosecution. However, most of the offenders of petty crimes held were released after six months after the opposition party, ODM, stated that most of the detainees were its supporters and were wrongly targeted. ICC provided a platform for administering justice in line with the international standards. The judicial reforms under the new constitution that had promulgated two years after the PEV ensured that the country was placed in a better place to resolve conflicts in a civil way. The transparency, integrity and independence of the judiciary would ensure the election petitions would be resolved articulately and on time.

The effort of Commission of Inquiry into Post-Elections Violence (CIPEV) in investigating the perpetrators of crimes was a milestone to ensuring justice at the senior level. The investigations would later aid in prosecuting the highly placed individuals in government who had supported their tribes and allowed for violent confrontation. The commission compiled a list of key suspects that was kept private until the right

¹⁰² Mueller, *Supra* Note 59 at 27

¹⁰³ Marshall, *Supra* Note 45

structures for prosecution had been established.¹⁰⁴ CIPEV recommended that the government to establish a special tribunal to be tasked with investigating and prosecuting the perpetrators of the crimes. This tribunal was to be guided by the legislation developed by the parliament and would involve the regional and international parties its adjudication. The failure of government through the parliament to set up a local tribunal led to the list being handed over to ICC to prosecute the perpetrators. Upon referral to the ICC, the government was still given an opportunity to create a Special Tribunal that would leverage domestic criminal prosecutions.¹⁰⁵ The failure to comply led to the Office of the Prosecutor being authorized by Pre-trial Chamber II to conduct investigations on the suspects who perpetrated violence in Kenya.

4.2.2 Apprehension of the Suspects

The Office of Prosecutor conducted analysis of the CIPEV report and later launched investigations on the key suspects in November 26, 2009. The *proprio motu* gives the Office of the Prosecutor mandate to initiate investigations based on their initiative.¹⁰⁶ The decision to launch investigations on a state party before getting a referral from a state ratified in the statute or through UNSC occurred for the first time. Upon confirmation of crimes against the six indicted persons after the investigations by the prosecutor were wrapped up by March 31, 2010 a warrant of arrest was issued. Alternatively, the Pre-Trial Chamber (PTC) summoned the indicted persons to appear for hearing of their cases. The focus of the Court is to Impact the victims of the violent

¹⁰⁴ South Consulting, (2010). 'The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, Review Report for October – December 2009.' Retrieved from: http://south.co.ke/images/south/KNDR_Reports/5threviewreport.pdf

¹⁰⁵ Ibid

¹⁰⁶ Seda, D. (2015). *Domestic prosecution of international crimes in Kenya: a critical analysis* (Doctoral dissertation, University of the Western Cape).

crimes by prosecuting the most powerful perpetrators. The Court distinctively encourages the victims to be actively involved in the trials. Moreover, the court is entitled to submit files to the Registrar prior to the trials at the Chambers of the Court.¹⁰⁷

The Prosecutor, Luis Moreno-Ocampo, unveiled the names of the key suspects involved in perpetrating crimes at the height of PEV in December 2010. The PTC judges confirmed crimes against four individuals from the original six in January 2012. The crimes were divided into two; one being the crimes of persecution, forceful transfer and murder were aligned against two suspects in the *Prosecutor v. William Ruto and Joshua Sang* case.¹⁰⁸ Such crimes were perpetrated against the supporters of PNU and it led to eviction of most of the supporters who are of Kikuyu origin. The second case on persecution, rape, forceful transfer and murder were aligned two key suspects in the *Prosecutor v. Francis Muthaura and Uhuru Kenyatta* case. The two co-accused were behind planning and execution of crimes against the supporters of ODM as a strategy for PNU under Mwai Kibaki to remain in power and serve a second term.¹⁰⁹ The crimes were perpetrated through a gang called Mungiki that is of Kikuyu ethnic.¹¹⁰

4.3 Ability to Stop Atrocities

The findings of this study affirm that indeed the deterrent effect was experienced at a higher level of ICC intervention whereby radical change in terms of behavior of political leaders and the institutions is evident. The peaceful conduct of the 2013 elections showed ability of the deterrence approach to impact a state on shifting focus to ensuring peace. The presence of ICC during the time of elections enabled the

¹⁰⁷ Dutton, *Supra* Note 64

¹⁰⁸ Lynch, *Supra* Note 37 at 94

¹⁰⁹ Kendall, *Supra* Note 37 at 402

¹¹⁰ Obel Hansen, T. (2013). Kenya's power-sharing arrangement and its implications for transitional justice. *The International Journal of Human Rights*, 17(2), 307-327.

two co-accused leaders to unite and foster unity for the two tribes. This cause also put other political leaders on notice that any attempt of conflict would be met by full force of the law. The deterrent approach helped the judiciary to be prepared to handle cases associated with disputed elections which would help stop violence. The ethnic tensions have been eased with two political rivals overcoming their differences and it is a factor that helped alleviate bad blood that would cause revenge in 2013 elections.¹¹¹ Furthermore, the insistence of the court that it would issue arrest warrants on any political leader involved in hate speech helped deter violence through incitements. This study established that that the Kenyan civil society constantly reminded the political leaders that they were under watch by the ICC and it kept them from inciting violence else they face the international law at The Hague. As a matter of fact, the involvement of the ICC in Kenyan case helped unite the country and deter further violence during a sensitive period of 2013 elections when the country was still vulnerable and in tension due to the violence in 2007/08.

The government has consistently showed efforts to halt violence through using political campaigns to preach peace and alleviate ethnic differences. The tolerance and unity that is being experienced has been achieved through efforts of many stakeholders one of them being ICC that has helped the leaders to stay accountable. The advocacy for peaceful negotiations and use of the justice systems to resolve any conflicts has enabled the country to stabilize in the recent past.¹¹² The restructuring of the police and increased integrity has enabled the law enforcers to use reasonable force when dealing with protesting groups as seen in the aftermath of 2017 elections. These changes in the conduct of leaders and public in the country is an evidence of stability in the country

¹¹¹ Fatima F., (2015). Preventing Post-Election-Violence-Based on the Kenyan-Experience; The History & Major Drivers of Electoral Violence in Kenya.

¹¹² Lynch, G., & Zgonec-Rozej, M. (2013). *The ICC intervention in Kenya*. London: Chatham House.

that started with the invitation of the international court in a post-conflict state.¹¹³ Therefore the impact of ICC and its application of deterrence approach in Kenya have helped attain peace and justice through reducing violation of human rights, improved legal avenues, conduct of political leaders, and reduced incidents of excessive use by the police.

4.4 Setting Course for Future Long-term Deterrence

Despite finding evidence positive effect on application of deterrence approach, the study did not find adequate proof for a lasting solution in preventing crimes against humanity in future. In fact, several participants of this study claimed that they were not confident that the next elections would be peaceful.¹¹⁴ Also the study does not show any change in the government's willingness to end impunity. On the contrary, the Kenyan leaders at some point while the cases were underway at The Hague repeatedly tried to stop the ICC proceedings from going forward through lobbying the United Nations and African Union. Kenya has also only prosecuted a handful of low-level perpetrators of the 2007 violence.¹¹⁵ Furthermore, President Kenyatta affirmed that the healing and reconciliation process would not involve digging into the past on the injustice done against the victims of the PEV and called for Kenyans to forgive one another and bury the hatchet during his 2015 State of the Nation address.

Despite the failure to establish a convincingly long-term effect on the Kenyan cases, the ICC has not convincingly shown its capacity to become the justice institution for international reference.¹¹⁶ There are more steps it needs to make to attain credibility and legitimacy to enhance effectiveness of investigating and prosecuting the

¹¹³ Lynch, *Supra* Note 37 at 96

¹¹⁴ Fatima *Supra* Note 65

¹¹⁵ Cronin-Furman *Supra* Note 7

¹¹⁶ Hyeran, *Supra* Note 9

perpetrators of serious crimes. For instance, the crumbling of cases and prolonged period it takes to resolve cases is a hitch especially to the developing countries that are in dire need of effective justice system. The Court's inability to conduct investigations independently and its overreliance on cooperation of the states is a tumbling block in non-democratic states. Also, the obsession of the Court with only conflicts within Africa has made it receive a lot of criticism yet there are other countries that are under conflicts across the world that it does not intervene.

According to the Office of the Prosecutor (OTP), Kenya's non-cooperation included not turning over crucial evidence, witness intimidation and interference, as well as political and diplomatic attacks on the Court. For instance, between 2013 and 2014 the case against Uhuru Kenyatta and Francis Muthaura crumbled and the prosecutor was forced to drop charges due to lack of sufficient witness. The explanation for dropping the cases was that the witnesses had been interfered with as well as adamancy of the country to cooperate by blocking the prosecutor from gathering further evidence.¹¹⁷ However, Kenya vehemently disagreed with this stand and defended its allegiance to the court despite the pronouncements of then prosecutor, Fatou Bensouda, that Kenyan Government had breached the treaty obligations.¹¹⁸ The ICC also has the power to provide reparations and directly impact individuals. However, the failure to do so in this case also affects Kenyans. The ICC has thus far failed to influence the domestic legal situation, as no lower level offenders have been tried. Yet, the direct

¹¹⁷ Hansen, T. O. (2016). Complementarity in Kenya? An analysis of the Domestic Framework for International Crimes Prosecution

¹¹⁸ Gaitho, M., (2016). 'Key mistakes that doomed Ocampo, Bensouda case at the ICC.' *Daily Nation*, 7 April. Accessed 7 May 2016. <http://www.nation.co.ke/news/Key-mistakesthat-doomed-Ocampo-Bensouda-case-at-the-ICC-/-/1056/3149146/-/td2rwi/-/index.html>

impacts and mechanisms and their failures have given rise to even greater impacts through indirect mechanisms that the Court cannot control.¹¹⁹

4.6 Conclusion

The invitation of ICC in Kenya has helped accomplish success in promoting peace and justice. The court acted according to the mandate and prosecuted the key suspects of propagating violence that led to violation of human rights. The deterrent approach helped the judiciary to be prepared to handle cases associated with disputed elections which would help prevent further violence. However, the cases crumbled due to lack of adequate evidence and this exposed one of vulnerabilities of the Court. The deterrence mechanism used has helped Kenya to attain peace as the leaders are conscious of their conduct and consequences of incitements. The presence of ICC helped create a more united nation by having the co-accused leaders form an alliance that united the two rival tribes that were highly affected by 2007/08 elections. The research has affirmed that deterrence approach had made major accomplishments in the country.

¹¹⁹ Kate, *Supra* Note 8 at 436

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter provides the findings of the study. The deterrence approached in Kenya after the post-election violence in Kenya will be summarized. The deterrent benefits of effective criminal justice proceedings have been regularly noted by the ICC as well as countries that are ratified to the pact (Rome Statute) and intermediaries that engage with the court. The ICC's primary value is thus its potential deterrent effect. The ICC activated its jurisdiction of intervening on a member state that failed to administer justice by creating a tribunal that would prosecute senior perpetrators of PEV. The Court is mandated to prosecute, issue arrest warrants, conduct investigations and punish the criminals involved in serious crimes against humanity. The court has proved its legitimacy regardless of the criticism by exercising its mandate in 15 years in existence. This chapter provides the summary of the findings of this study, conclusion and recommendations on how deterrence approach can be applied effectively in preventing violence in future.

5.2 Summary of Findings

The study found that the application of deterrence approach in Kenya had major impacts to the country. First, the Court issued warnings against use of political incitements and that the judges threatened to issue arrest warrants on leaders instigating violence through hate speeches. This initiative helped in the 2013 elections as the state and the leaders were conscious of any incitements that may cause violence. Also, the political leaders conducted peaceful campaigns without uttering statements that could trigger violence. Secondly, the involvement of ICC led to change in conduct of the police. The change of systems of law enforcement under the new constitution ensured

that the police were not used to violate human rights. In the event of protests, the police used reasonable force to scatter the protesters unlike in 2007/08 when it has used excessive force. The country has remained committed to peaceful mechanisms of resolving conflicts.

Thirdly, the government speeded its measures of setting up credible, transparent and integrity structures and procedures within public institutions. The promulgation of new constitution in 2010, two years after the PEV, enabled the Kenyan government to establish improved systems that would deter violence in future. For example, the restructuring of commissions such as IEBC helped in setting a foundation for credible elections in 2013. Also, the country's judiciary system improved tremendously and by 2013 elections it had capacity to handle election petitions.

The failure of government to create a special tribunal led to intervention of ICC that has helped attain great success in deterring crimes in the long-term. The threats of deterrence approach has aided in stopping violence as all leaders are aware that their activities that may cause serious crimes may lead to their punishment. ICC has helped transform the local judicial system by impacting the conduct of the court in addressing crimes and ensuring that justice for the victims is a priority.¹²⁰

ICC faces challenges that range from limited resources, institutional restrictions, manipulation by states and alleged selectivity in the way it dispenses justice. These limitations have drawn criticism to the Court as the critics question its capacity as an institution of implementing international law and justice. ICC has received criticism as an international system of impacting justice and preventing crime. The criticism over illegitimacy is due to lack to investigate and prosecute the perpetrators which has been

¹²⁰ Buitelaar, T. (2015). The ICC and the Prevention of Atrocities.

inconvenienced by the lack of capacity to conduct investigations independently. The court has been criticized for its focus on the African states yet there are other countries it has failed to intervene. However, the ICC could contribute significantly to the promotion of international justice and peace, and have a major impact on the prevention of crime.

The capability of the court has been evidenced by its ability to prosecute highly influential leaders who have been involved in perpetrating serious crimes. The argument in support of the deterrence impact of the ICC during the 2013 elections is that the fear of investigation and possible prosecution. The good conduct of the leaders was attributable to the deterrent effect whereby they refrained from inciting the public and using hate speeches that could instigate conflicts lest they be arrested and prosecuted. The ICC is seen as one element that contributed to peaceful elections and the deterrence approach has had a long-term effect in promoting peace and justice in the country.

5.3 Discussion of Findings

With respect to Kenya's criminal justice system, it is clear that the Court's involvement in the PEV cases aided by bringing about some positive changes which strengthen the rule of law, most notably in the judiciary at the level of adjudication. The deterrence mechanism is hindered by the inadequate capacity to directly prosecute domestic institutions that play a part in serious violations of human rights. For instance, ICC does not have the mandate or the capacity to provide rule of law assistance to affect positive complementarity. According to this complementarity principle outlined in the statute, the national jurisdictions are mandated to conduct genuine investigations and

to bring the alleged perpetrators to account in a timely manner.¹²¹ The actors such as the civil society organizations and professional associations help in providing the technical assistance through reinforcing national capacities that investigate and prosecute the perpetrators. Such institutions have played a key role in the Kenyan context through advocating for the states to upgrade their rule of law and in making constitutional reforms in conformity with their Rome Statute obligations. Arguably, by giving the court the means to directly influence domestic rule of law reform, it risks lending more credence to the criticism that the Court is a means of judicial neo-colonialism.

The varying opinions of critics of the ICC involvement in Kenya have been affirmed by the inability of ICC to conduct investigations and trials explicitly. Many people believe that the ICC should not have intervened because the crimes committed in the PEV were not grave enough offenses to be tried internationally.¹²² While there is no defined threshold for violence or suffering that can amount to a crime against humanity, there are other cases which could have been tried instead of those in Kenya. Others critique the investigations of the Prosecutor. Of the original six accused, only three Kenyans are left to stand trial which is attributable to fabricated and exaggerated evidence and witness tampering that led to the dismissal of the other cases.

The principle of complementarity has had its ups and downs for the ICC as it means the purpose of the Court is to complement the national justice systems rather than to replace them. The key jurisdiction of the Court of going after the perpetrators directly without having to seek permission from any member state or institution has

¹²¹ Marshall, *Supra* Note 46

¹²² Wolf, *Supra* Note 39 at 112

been an issue with some states.¹²³ This mandate has been objected as some states claim they have the capacity to handle their international issues and involvement of ICC only taints their image across the globe. According to the ratification, the Court only should come in whenever the state shows incapacity or unwillingness to prosecute the perpetrators of international crime. The application of deterrence approach has helped reduce the rate of criminal activity in the countries that ICC been involved. However, some nations have not responded positively to the approach as the leaders of such non-democratic states continue to perpetrate crimes against humanity. The Court has limited violation of human rights in countries that have complied with the ratification based on threat of facing consequences such as imposition of sanctions. In Kenya, presence of the Court during the 2013 elections deterring people from engaging in crimes as the warning of sanctions had been issued.

5.4 Conclusion

The invitation of ICC in Kenya has helped accomplish success in promoting peace and justice. The Court acted according to the mandate in investigating and prosecuting the key suspects of propagating violence that led to violation of human rights. The deterrent approach helped the judiciary to be prepared to handle cases associated with disputed elections which would help prevent further violence. The deterrence approach employed in Kenya helped in achieving peace as the leaders are conscious of their conduct and consequences of incitements. The involvement of ICC in the Kenyan PEV cases through deploying deterrence approach came with direct and indirect benefits. First, it enabled the two co-accused leaders to unite the tribes that had bitterly engaged in 2007/08.

¹²³ Ibid

The presence of the Court in handling the crimes against humanity in Kenya led to sensitization on importance for respecting the human rights. This was evident in the 2013 campaigns where the leaders were cautious against using hate speech and the law was stern on those presumed to incite the public. The legal threat of the ICC has created awareness on importance of promoting peace, reconciliation and tolerance in ethnic diverse country. Also, the presence of the ICC increased the urgency for a new constitution and it indirectly influenced the writing of the 2010 Constitution, the creation of an independent judiciary, and a judiciary which is influenced by international norms. The threat of the Court also led to peaceful elections in 2013.

The police were overwhelmed by the massive numbers of the attackers and the relatively effective coordination of the attacks. However, in most parts of the country affected by the violence, failure on the part of the Kenya Police to act on intelligence and other early warning signs contributed to the escalation of the violence. The post-election violence is also the story of lack of preparedness of, and poor coordination among, different state security agencies. While the National Security Intelligence Service seemed to possess actionable intelligence on the likelihood of violence in many parts of the country, it was not clear whether and through which channel such intelligence was shared with operational security agencies. The effectiveness of the Kenya Police Service and the Administration Police was also negatively affected by the lack of clear policing operational procedures and by political expediency's adverse impact on their policing priorities.

The ICC has been identified as the single factor that had the most influence on the 2013 elections. Some of the influences attributed to the ICC included raising the stake of the elections, re-ethicizing Kenya politics, shaping the political alliance that was formed to contest the elections, influencing the result of the elections, and deterring

election violence. The ICC has also been attributed with being responsible for the emergence of issued-based politicians at national and county levels outside the three main coalitions. The ICC's intervention in Kenya helped to shape political alliances, bringing together two hitherto political foes into a coalition. Kenyatta and Ruto, then co-accused in the cases before the ICC, became the presidential candidate and running mate of the Jubilee Coalition. This alliance also brought together two rival ethnic groups, Kikuyu and Kalenjin, in a coalition, which is believed to have helped to ensure peace and limit incidents of violence between the two rival political groups.¹²⁴

5.5 Recommendations

The Court should improve its mechanisms of investigation and prosecution of the persons involved in perpetrating serious crimes that lead to violation of human rights. Deterrence role has shown its capacity to prevent crimes and should be embraced despite the lack of empirical evidence. The Court should not only go for the highly placed individuals but also the persons of influence who are directly involved in scheming and committing the crimes.

Also, the protection of the witnesses and the victims should be improved to ensure justice is achieved. In the Kenyan situation, the lack of adequate witness protection resulted into disappearance, killings and threatening on the victims and their families. Since the cases involve highly influential persons, bribery of the witnesses can be used to coerce them into telling false information or from revealing the truth about the atrocities. In Kenyan context, the prosecutor claimed there were several accounts of witness interference that resulted to some witnesses backing down

¹²⁴ Wright, *Supra* Note 47

witnessing at the court and others confessing that they had been paid to give untrue information.

The Court should consistently be engaged by the local justice system to help strengthen the system in dealing with issues of violation of human rights. Moreover, deterrence approach should be used by the local justice system to keep potential criminals from committing crimes. The Court should further promote accountability and employ measures that will end impunity in the non-democratic states. The prosecution of high profile personalities has shown the capacity of the Court and the local justice system can work with the ICC to deter masterminds of crimes against humanity from evading justice.

It is recommendable for the local justice system in Kenya to deploy the deterrence approach to prevent and mitigate violence. This practice can effectively be deployed in controlling incitements by political leaders and ethnicity through hate speech. Hate speech monitoring was highly sensitized during the 2013 general elections whereby the political leaders were warned of legal consequences in case they violated this rule. Moreover, the regulation on hate speech helped put the media on check in sensitizing the public on importance of preaching and maintaining peace and raising alarm on leaders with the intention of inciting the people.

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