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\\RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND TRUTH COMMISSION: THE CASE OF TRANSITIONAL JUSTICE IN POST CONFLICT KENYA//

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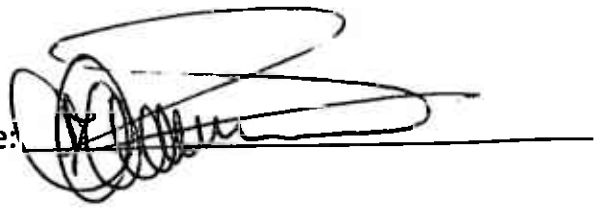
DECLARATION

I declare that this research is my original work and has not been presented for the award of a degree in any other university.

Signature:  Date: 17/11/2012

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This research project has been submitted for examination with my approval as a university supervisor.

Signature: _____ Date: 17th NOV 2012

Prof. Ambassador Maria Nzomo

DEDICATION

To my beloved parents James Lukwo and Priscilla Lukwo, the hardworking peasant farmers in West Pokot County who tirelessly inculcated the value of education in their children.

ACKNOWLEDGEMENT

The completion of this project would not have been possible without;

The support of my family, friends and colleagues

The guidance of my supervisor Prof. Ambassador Maria Nzomo

Thank You.

ABSTRACT

This thesis examines the relationship between the International Criminal Court and Truth Justice and Reconciliation Commission with a specific focus on transitional justice in post conflict Kenya.

The first chapter set lays down the background of the study. The second chapter explains the concept of transitional justice and examines its relevance in post conflict states. It looks at the different elements of a comprehensive transitional justice policy among them criminal prosecutions, truth commissions, reparations and reconciliation. It finally proposes that the different transitional justice mechanisms should work together.

The third chapter looks at the post conflict situation in Kenya analyzing the history of the conflict. The objective of this chapter is to give the reader an understanding of the conflict in Kenya thus necessitating transitional justice in Kenya. This chapter is concluded with the introduction of the idea of conflict transformation.

Chapter four makes an analysis of the International Criminal Court and Truth Justice and Reconciliation Commission in the context of Post Conflict Kenya. It further determines and analyzes the scope of crimes for the two processes and how they complement each other.

The final chapter concludes that truth commissions and the international court are two sides of the same coin in the sense that they play a complementary role to each other.

LIST OF ABBREVIATIONS

AU	African Union
BBC	British Broadcasting Corporation
CJPC	Catholic Justice and Peace Commission
CSOs	Civil Society Organizations
DPCs	District Peace Committees
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DFID	Department for International Development
FIDA	Federation of Women Lawyers
GOK	Government of Kenya
IDPS	Internally Displaced Persons
ICC	International Criminal Court
ICJ	International Court of Justice
IDP	Internally Displaced People
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KNDR	Kenya National Dialogue and Reconciliation Agreement
LRF	Legal Resources Foundation
MOSP	Ministry of Special Programs
NDR	National Dialogue and Reconciliation Process
NCIC	National Cohesion and Integration Commission
NCCK	National Council of Churches of Kenya
NPI-A	Nairobi Peace Initiative- Africa
OHCHR	Office of the High Commissioner for Human Rights
PSS	Psychosocial Social Services
TJRC	Truth, Justice and Reconciliation Commission
UNDP	United Nations Development Programme
UNHCR	United National High Commission for Refugees
WANEP	West Africa Network for Peace building

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CHAPTER ONE

1.0 Introduction

Conflict resolution in Africa has to take into account the root causes of some of the current problems in Africa[1]. These often are traced back to the colonial era when Europeans scrambled for territories with scant regard for ethic boundaries, with the result of today's independent states and polyglot mixtures of culture and linguistic groups. Lack of democratization can be cited as one of the root causes of conflicts. Conflicts in Africa can be minimized in an environment that encourages substantive participation in the economic, political and social realms. Any attempts to exclude ordinary citizens from such participation create a rift between the rulers and the governed. Open political systems that safeguard basic civil liberties basic needs and freedoms of expression are less likely to be to be confronted by debilitating conflicts[2].

Yet another issue that continues to plague the African political dispensation is the lack of legal safeguards commonly referred to rule of law. African countries have still to create individual legal safeguards that are subordinate to political of law. As long as the political system and the elites operating under them and are not subjected to rule of law, such a system will give rise t those in political power paying scant attention to development of a constitutional state that can protect human rights and civil liberties.

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[1] Mobekk, E. (2005) 'Transitional Justice in Post-Conflict Societies: Approaches to Reconciliation' In Ebnother, A and Fluri, P. (eds.) After *Intervention: Public Security Management in Post-Conflict Societies - From Intervention to Sustainable Local Ownership.*

[2] Ross, F. (2004) 'Testimony." In Villa-Vincencio, C. and Doxtader, E. (eds) *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice.* Cape Town; Institute for Justice and Reconciliation.

The role of external powers has been cited as one of the causes of African conflict[3]. During the cold war period, the rivalry between the superpowers fueled much of the conflict in Africa where such countries as Mozambique, Angola and Ethiopia African proxies fought for either the SSR or the United States. But since demise of the Soviet Union, the nature of warfare in Africa has shifted to mostly intra state conflict[4]. Concomitantly with these change has been a lowering of the geo – strategic importance given to Arica by the Western powers. Hence in the prescence of conflict and failing state, the west has either failed to respond or responded with some reluctance as exemplifies in the situation prevailing in such countries as Somalia, Rwanda, Burundi and Democratic Republic of Congo.

Debates have raged over the role of national and international actors in conflict revolutionarized post conflict strategies in Africa[5]. It is undisputable that , for any conflict resolution strategy to work, the various opposing forces must have confidence in the various mediation strategies particularly those individuals and institutions that are involved in the process. There is a new realization in Africa that while the role of external actors is indeed laudable, Africa will have to rely increasingly on its own to provide the long term solutions to its own problems within the framework of its sub regional groupings[6] and the African Union and the United Nations

New governments in transitioning societies are increasingly obligated to provide a measure of accountability and redress for human rights abuses committed by their

[3] Boraine, Alexander, .Amnesty in exchange for truth: Evaluating the South African model. in.*A country Unmasked.* Pgs 258-275

[4] Michael P. Scharf, .The Case for a Permanent International Truth Commission., in Duke J. Comp.& Int.Law, Vol.7:375, 1997, p.399

[5] Human Rights Watch, *Human Rights Watch Memorandum fo the Eighth Session of the International Criminal Court Assembly of States Parties* (New York: November 2009).

[6] Barth, F. 1999. Ethnic groups and boundaries. Boston: Little, Brown. Birch, A. H. 1989. Nationalism and national integration. London: Unwin Hyman.

predecessors, while also creating a social order capable of preventing future abuses[7]. They are thus charged with bringing about what is commonly referred to as "transitional justice," a growing field of study.' At a minimum, an effective regime of transitional justice must establish a historical record of past abuses, prevent future abuses through legal and institutional reform, provide remedies to victims, and punish perpetrators[8]. Within the emerging field of transitional justice, developments in international criminal law have been most prominent in recent years.

The establishment of ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, the promulgation and ratification of the International Criminal Court statute, and the exercises of universal jurisdiction by Spain and Belgium as well as the establishment of Truth Commissions in Kenya, South Africa, and Sierra Leone are but some examples. These developments taken together are strong evidence of a push toward prosecution as a primary mechanism of transitional justice. Where prosecutions are legally barred or otherwise impracticable, however, this push has been accompanied by the emergence of truth commissions as alternative accountability mechanisms[9]. Although each truth commission has its own unique mandate, they are generally constituted to establish a historical record of abuse and to investigate the causes and consequences of these abuses using a variety of methodologies, including holding public hearings, conducting fact-finding missions, and taking statements from victims, witnesses, and even perpetrators.

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[7]Dietrich Bonhoeffer, What is Meant by a Telling the Truth? Ethics 326-334 (Eberhard Bethgetrans., SCMPress 1955).

[8]Mark Freeman, 'Whose Truth? Truth Commissions may not be a panacea. But they often do serve the Public Interest' (2005) available at www.thirdworldtraveler.com/Truth_Commissions/Whos_Truth.html

[9] Musila, Godfrey, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions' *International Journal for Transitional Justice* (2009).

Truth commissions have been praised for capturing values beyond criminal liability essential to long-term stability and prevention of further abuses[10].

Yet truth commissions also have been criticized as a second-best alternative to criminal prosecution." More recently, truth commissions and criminal prosecutions have begun to operate simultaneously in the same post conflict setting-at times by design, as in East Timor, and at times by chance, as in Sierra Leone. Truth commissions and trials have their own particular institutional competencies, and, therefore, their concurrent operation may enhance the process of transitional justice[11].

The clamor for transitional justice in Kenya has been ongoing since December 2002 following the popular ouster of KANU, a party that had institutionalized corruption, ensured utter disregard of the rule of law, total collapse of public institutions and infrastructure, ethnic cleansing and insecurity, torture and assassinations[12]. Kenyans elected the National Rainbow Coalition (NARC) overwhelmingly on the pledge of transparency, accountability and good governance practices. Kenyans felt that the NARC government would be a liberating regime, epitomizing a critical phase in dismantling a stifling dictatorship.

Commendably, the new government immediately established a Task Force in April 2003 to find out if Kenyans wanted such a Truth, Justice and Reconciliation Commission (TJRC). The Task Force found that Kenyans wanted a TJRC to be established immediately (and in any case before June 2004) to address and redress past human rights violations and other injustices including economic crimes and gave a recommendation to the government to the same effect.

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[10] Commonwealth Observer Mission, *Report of the East African Community Observer Mission: Kenya General Elections December 2007-January 2008.*

[11] Pergamon. Buchanan, W. 2000. Understanding political variables. 4th ed. New York: Macmillan.

[12] Kenya Human Rights Institute, *Special Brief: Clarifying Human Rights Violations in the Kenyan Post-election Crisis* (February 2008).

Since 2003, the country's human rights record has shown overall improvement[13], as typified by greater media freedoms, a vibrant civil society, improved legal and institutional frameworks for human rights, and greater attention to the social sectors such as health and primary education. Perceived historical injustices and grievances however, in part motivated the post 2007 election violence, particularly in the Rift Valley where the local communities feel they have over the years lost land unfairly to settler communities from Central Kenya and other parts of the country. The National Dialogue process has agreed on the establishment of a Truth, Justice and Reconciliation mechanism in Kenya, anchored on a statutory framework[14]. The legislation for the Commission was passed by parliament.

Significantly, the post 2007 election violence exposed the fragility of Kenya as a nation state, its institutions, and its governance structures on the one hand. On the other hand, it surfaced the unresolved issues especially those related to access to and ownership of land especially for the majority rural Kenyans; inequity and perennial question of poverty and corruption. There has previously been no forum or opportunity for these injustices and grievances to be articulated and discussed. The post 2007 election violence again focused attention on the need for a truth justice and reconciliation process—something the Commission has always called for. Further, Kenya's internally displaced persons up to three hundred thousand according to some estimates constitute one of the most vulnerable sectors of society[15]. They are vulnerable to violation of a broad range of rights: access to education and health, poor housing, gender based violence, insecurity, among others.

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[13] Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* (August 2008).

[14] Republic of Kenya, *Report of the Commission of Inquiry into the Post-election Violence in Kenya* (Nairobi: 2008).

[15] Office of the High Commissioner on Human Rights, *Report fromOHCHR Fact-finding Mission to Kenya, 6-28 February 2008*, (2008).

1.1 Background of the Research Problem

The political history and governance of the Kenyan state is a catalog of gross human rights violations, the arrogance of power, and the commission of mind boggling economic crimes. Constitutionalism and the rule of law, which are the central features of any political democracy[16] that respects human rights, have been absent in Kenya's history. A democracy is defined by an executive that is accountable and freely elected, a government limited by popular will, and which the people can remove from power through the ballot[17]. The second essential component of democracy is a vibrant, freely and fairly elected legislature in an open contest pitting various political parties against one another[18]. Finally, in a state governed by the doctrine of separation of powers, an independent judiciary, the essential guardian of the rule of law, is the linchpin of the scheme of checks and balances through which the independence of the three arms of the state is assured. Otherwise, there is no other guarantee that the executive the "government" will respect the rule of law and act within established legal norms, processes, and institutions. The constitution is thus not merely hortatory but the fundamental and supreme law of the land, the real and living document that guides, defines, and permits all actions by the state. No individual or official of the state is above the law or can act in defiance of constitutional prescriptions[19]. This is what separates democratic states from undemocratic ones. It is the difference between tyranny and freedoms.

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[16]Kent Greenawalt, Amnesty's Justice in Truth v. Justice: The Morality of Truth 201 & Commissions (RobertI. Rothberg DennisThompson, U. eds., Princeton Press2000).

[17] White, Richard *Breaking Silence: The Case that Changed the Face of Human Rights* (Washington, DC: Georgetown University Press, 2004).

[18] Lindenmayer, Elisabeth & Josie Lianna Kaye, *Choice for Peace: The Story of Forty-One Days of Mediation in Kenya*, International Peace Institute, (New York, August 2009).

[19]Ghai, Yash Pal & J PW McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970).

Since its creation by the British in 1895, the Kenyan state has largely been a predatory and illiberal instrumentality, an ogre defined by its proclivity for the commission of gross and massive human rights violations[20]. Little need be said of the colonial state, which was specifically organized for the purposes of political repression to facilitate economic exploitation. In 1963 Kenya formally became an independent, sovereign state, ending decades of direct British colonial rule. Kenya's post- independence history, however, has been marked by sharp contradictions between the state and the civil society in spite of the image, cultivated in the West during the Cold War, that the east African state was the beacon of hope for Africa[21]. The post-colonial state has engaged in the most abominable human rights violations and economic crimes known to humanity. On December 27, 2002, Mr. Mwai Kibaki, a former Vice President under former President Moi, and leader of the largely united opposition, was overwhelmingly elected President of Kenya, ushering in regime change in an historic election that decisively ended the 24-year reign of President Moi. Those elections offered Kenyans a genuine opportunity to construct a democratic state and to confront the abuses of the past.

Over its forty-year rule of Kenya, KANU failed to foster a culture of the rule of law and respect for human rights. The list of human rights violations and economic crimes is too long to tabulate. But the most severe have included political assassinations, torture and detention without trial, police brutality, massacres of communities, sexual abuse and violence against women and girls, politically instigated ethnic clashes, and a host of economic crimes such as the looting of the public purse and land grabbing[22]. All these violations were

[20]Transitional Justice In Kenya, A Toolkit For Training And Engagement – Kenya Human Rights Commission, Kenya Section Of The International Commission Of Jurists And International Centre For Policy And Conflict

[21]The Costs and Impacts of Gender-Based Violence in Developing Countries: Andrew R. Morrison, Maria Beatriz Orlando November 2004

[22]Kenya Human Rights Institute, *Interventionism and Human Rights in Somalia: Report of an Exploratory Forum on the Somalia Crisis* (2007).

perpetrated in spite of the fact that the Kenyan constitution guarantees on its face fundamental rights. Over time, the government substantially eroded and weakened many of the safeguards since independence. The Bill of Rights gives individuals basic rights but then restricts them with qualifying limitations, otherwise known as claw back clauses. Derogations from the Bill of Rights are also permitted during an emergency.

In the last two decades, the concept of transitional justice has come to represent the midwife for a democratic, rule of law state[23]. The script for the construction of such a phase is now regarded as an indispensable building block for constitution-making, peace-building, and national reconciliation in states emerging out of dictatorship. In fact, policy-makers and statesmen now increasingly realize that a human rights state is a political society that internalizes human rights norms – cannot be created unless the society concretely addresses the grievances of the past. The truth commission has become the effective tool for addressing the abominations of the past. The term transitional justice captures two critical notions. First, it acknowledges the temporary measures that must be implemented to build confidence for the construction of a state ravaged by human rights violations and the plunder of public resources. Secondly, by its own definition, it rejects the application of any rigid set of norms or criteria as a beachhead to the future. In other words, transitional justice calls for deep concessions on either side of the divide, between victims and perpetrators. Hence a balance must be struck between, on the one hand, justice for the victims and some form of retribution against some of the offenders, and on the other hand, a measure of magnanimity and forgiveness on the part of victims. This is the plausible path if reconciliation is to become a reality.

[23]Priscilla B. Hayner, 'Unspeakable Truths' New York:Routlege, 2001 p.4 in 'Truth Commissions' by Eric Brahm. Available at www.beyondintractability.org/essay/truth_Commissions

Many Kenyans seek redress and justice for past violations, yet others are committed to a journey of forgiveness and reconciliation. Some victims of past abuses have asserted that they may only contemplate forgiveness after a full public accounting and justice have been done[24].

The scope of transitional justice goes well beyond the changing of regimes or governments. Any state or society seeking to move away from a difficult and troubled past and start afresh must undertake significant reforms of its governance, public service, administrative and judicial structures. This means initiating measures that would promote far-reaching economic, social and political development aimed at constantly improving the well being of the citizens and the state.

Most societies that have been through conflict or illegitimate rule also endured gross violations of human rights and fundamental freedoms[25], impunity and corruption. Such societies must confront their troubled pasts and seek to provide the citizens with some form of redress for these injustices, as well as renew the citizens' trust in the institutions of governance and public service.

1.2 Statement of the Research Problem

One of the most distinctive features of post-conflict justice in Kenya is the concurrent existence of a truth commission and cases at the International Criminal Court (ICC).

Traditionally, truth and reconciliation commissions have been viewed as an alternative to criminal justice that, sometimes only informally, replaces or at the very least suspends

[24]Vasuki Nesiah, 'Truth Commissions and Gender Principles, Policies and Procedures' (2006) p.17 available at www.ictj.org/static/Gender/GendItandbook.eng.pdf

[25]Pam Spees, 'Gender Justice And Accountability In Peace Support Operations' (International Alert, February 2004),

prosecutions. In Kenya, the two institutions have operated contemporaneously. This unprecedented experiment has demonstrated the feasibility of the simultaneous operation of an international court and a truth commission. The Kenya experience may help us understand that post-conflict justice requires a sometimes complex mix of synergistic therapies, rather than a unique choice

1.3 Justification and significance of the problem

Discussions about some of the general but very important questions concerning the relationship between Truth, Justice and Reconciliation Commissions and International Criminal Court are beginning to emerge with Kenya presenting a classical case of the two processes running concurrently. This project is intended to provide an occasion for thinking about these issues in a systematic way, and to move the discussion forward in significant ways along different dimensions. The project will collect and organize information (facts, data) about past experience; to identify approaches and strategies that ought to be taken in the future. It will also explore the potential for greater coordination and mutual reinforcement between the two processes as well as identify and to warn of potential tensions and risks. It will finally articulate the convergence of objectives of Truth Justice and Reconciliation Commission in Kenya and the ICC process in helping to transform transitional states into stable states which respect human rights and the rule of law. These are among the intertwined policy and academic questions and gaps to be addressed by this thesis.

1.4 Objectives of the Research

The aim of this study is to understand the importance and necessity of transitional justice in a post conflict situation. Specifically, the study will seek to achieve the following objectives:

1. To determine the relationship between Truth commissions and international Courts in relation to transitional justice in Kenya
2. To determine and analyze the scope of crimes for the two processes as much as they complement each other
3. To analyze the complementarity nature of Truth Justice and Reconciliation Commission and The International Criminal Court Process in Kenya

1.5 Hypotheses

The study will be guided by the following hypotheses:

1. A concurrent Truth Justice And Reconciliation Commission process and ICC process positively impacts on transitional justice process in Kenya
2. Truth Justice And Reconciliation Commission process and ICC complement each other complement each other
3. Truth Justice And Reconciliation Commission process and ICC process in Kenya cover different scope of transitional justice as they complement each other

1.6 Literature Review

Transitional justice is a contested and evolving process which emerged in the 1990s. It is defined as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'[26]. Transitional justice, therefore, concerns the whole range of mechanisms or approaches applied by states or societies that seek to reform, heal and transit from illegitimate and repressive rule or situations of conflict to national reconstruction and good governance. The main aim of transitional justice, through its various mechanisms, is to end the culture of impunity and establish the rule of law in a context of democratic governance. Transitional justice processes should also reconcile people and communities[27], provide them with a sense that justice is being done and will continue to be done, as well as renew the citizens' trust in the institutions of governance and public service.

In the aftermath of conflict or authoritarian rule, people who have been victimized often demand justice. The notion that there cannot be peace without justice emerges forcefully in many communities[28]. But justice can be based on retribution (punishment and corrective action for wrongdoings) or on restoration (emphasizing the construction of relationships between the individuals and communities). Retributive justice is based on the principle that people who have committed human rights violations, or ordered others to do so, should be

[26]Antjie Krog, Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New SouthAfrica 151-152(1998, ThreeRiversPress2000)

[27]Dietrich Bonhoeffer,What Meantby a Tellingthe Truth? Ethics326-334 (Eberhard Bethgetrans.,SCMPress 1955).

[28]Priscilla B. Hayner, 'Fifteen Truth Commissions-1974 to 1994: A comparative study' in Neil J. Kritz, 'Transitional Justice: How emerging democracies reckon with former regimes.' P.229 (Book Preview) available at http://books.google.co.ke/books?id=EVD6BQZdGEC&pg

punished in courts of law or, at a minimum, must publicly confess and ask forgiveness. On the other hand, restorative justice, is a process through which all those affected by an offense, victims, perpetrators and by-standing communities collectively deal with the consequences. It is a systematic means of addressing wrongdoings and emphasizes the healing of wounds and rebuilding of relationships. Restorative justice does not focus on punishment for crimes[29], but on repairing the damage done and offering restitution.

Transitional justice mechanisms seek to address past human rights violations while allowing nations and their people to move forward towards sustainable peace and reconcillation[30]. In other words, through transitional justice, states seek to address the challenges that confront their societies as they move from an authoritarian or otherwise repressive regime to a more democratic one. These challenges include gross human rights violations; lack of rule of law; unaccountable government; historical injustices; disharmony (conflict) among various groups (e.g ethnic, racial, religious) in the society. To address the variety of challenges, injustices of the past and chart forth a new future of a more open, democratic and accountable government, various mechanisms are used: criminal prosecutions and amnesties, truth seeking and telling commissions, reconciliation measures, reparations for victims, gender justice, Institutional reforms, (including constitutional and security sector), Lustration, Legislative reforms.

The said processes for transitional justice should be all encompassing, transparent and safeguar themselves from any iota of political interference[31]. This will in turn foster peace, justice and reconciliation.

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[29]Kent Greenawalt,Amnesty's Justice in Truth v. Justice: The Morality of Truth 201 & Commissions (RobertI. Rothberg Dennis Thompson, U. eds., Princeton Press2000).

[30]Cited by Dumisa B. Ntsebneza, The Uses of Truth Commissions. in Truth v. Justice: The Morality of Truth Commissions 161 (Robert I. Rotberg & Dennis Thompsoneds., PrincetonU. Press 2000).

[31]David D. Caron, International Dispute Resolution: Comparing the Roles Accorded the Parties and the Community Surrounding Them, 85 AM. SOC'Y INT'L L. PROC. 65 (1991) (under the heading "Remarks by David Caron").

Transitional Justice, as an evolving and contested concept and process, has become one of the major governance and reform projects for societies emerging from situations of oppressive rule and conflicts. There are a variety of transitional justice mechanisms which can help affected societies start fresh. These are based on international human rights and humanitarian law in demanding that states halt, investigate, punish, repair, and prevent human rights abuses. Most of these approaches are interlinked, and are most effective when they are applied together. These approaches include prosecutions, informal and traditional justice mechanisms, lustration measures, legal policy and constitutional reforms, truth commissions, amnesty, reparations, and reconciliation[32].

1.7 Theoretical Framework

1.7.1 Liberal Theory

This thesis will be guided by the Liberal Theory which contends that people and countries are capable of finding mutual interest by cooperating to achieve them, at least in part by working through international organizations and according to international law[33]. Liberals reject the realists contention that that politics is inherently and exclusively a struggle for power. However liberals do not dismiss power as a factor, but add morality, ideology,emotions, (such as friendship and mutuality), habits of cooperation as factors that influence the behavior of national leaders and the course of world politics[34]. Liberalism also holds that international politics can be a non zero sum game that it is possible to have a win win situation in which gains of one or more countries do not have to come at the expense of the other. Liberals are

[32]Supra 5

[33]Henry A. Kissinger, "Conditions of World Order," Daedalus 95 (Spring 1960): 503-29; Allison and Zelikow,Essence; Morton Halperin, Bureaucratic Politics and Foreign Policy (Washington, 1974).

[34]Alexander L. George, "The Case for Multiple Advocacy in Making Foreign Policy," American Political Science Review 66 (September 1972): 751-85, 791-95.

prone to thinking that all human and have a common bond that they can draw on to identify and forge ties with people around the world[35].

Unlike realist, liberals do not believe that acquiring, preserving and applying power must be or even always is the essence of international relations. Instead liberals argue that foreign policy should be and sometimes is formulated according to standards of cooperation[36]. Many liberals would also use force, especially if authorized by the United Nations to prevent or halt genocide and other gross violations of human rights. Liberals also dismiss the realists warning that pursuing ethical policy often works against the national interests of a country. The wisest course, liberals contend, is for countries to recognize that their national interests and the common interests of the world are inextricably tied[37]. For liberals this means that improving global economic conditions, human rights and democracy are very much in the national interest of all the states

Liberals believe that humanity is struggling towards a more orderly and peaceful international system[38] and can and must succeed in that goal. All theories recognize the importance of the state in world politics but whereas realist focus almost exclusively of states, liberals put a greater deal on the UN system and other IGOs as both evidence and promoters of greater cooperation. Classical Liberals believe that just as human learn to form cooperative societies without surrendering their individuality, so too can states learn to cooperate without surrendering their independence. These liberals believe that the growth of international

[35]John Lewis Gaddis, "International Relations Theory and the End of the Cold War," International Security 17(Winter 1992-93): 5-58

[36]Wilensky, Organizational Intelligence (New York, 1967); Theodore Lowi, The End of Liberalism: Ideology, Policy and the Crisis of Public Authority (New York, 1969).

[37]Kenneth N. Waltz, "The Emerging Structure of International Politics," International Security 18 (Fall 1993), 76.

[38]John Lewis Gaddis, "International Relations Theory and the End of the Cold War," International Security (Winter 1992-93): 5-58.

economic interdependence and spread of global culture will create a much greater spirit of cooperation among the world countries[39]. Neo- liberals are more dubious about a world in which countries retain full sovereignty[40]. These analysts believe that countries will have to surrender some of their sovereignty to international organizations in order to promote greater cooperation and if necessary to enforce good behavior.

As this study will conclude, liberals would be more likely to predict that the democracies would not fight and that instead they would negotiate a compromise or perhaps even submit the dispute to an international organization and specifically the International Criminal Court as will be examined.

1.8 Methodology

1.8.1 Site Selection and Justification

This study will take place in the Republic of Kenya, a country in East Africa. Kenya is selected for the study for a number of reasons. First, the researcher is a resident of Kenya and therefore has a high level of understanding of the legal and political dynamics and history of the country helpful in the conceptualization of the study and administration of the tools of data collection. Secondly the country is unique with the Truth Justice and Reconciliation Commission operating concurrently with the International Criminal Court Process at The Hague.

1.8.2 Sampling

[39]Robert W. Tucker, "Realism and the New Consensus," National Interest 30 (1992-93): 33-36. See also Paul Schroeder, "Historical Reality vs. Neo-Realist Theory," International Security 19 (1994): 108-48.

[40]Donald Kinder and J. R. Weiss, "In Lieu of Rationality: Psychological Perspectives on Foreign Policy," Journal of Conflict Resolution 22 (December 1978): 707-35.

The sampling for this study will be done at two levels: the first level involved sampling of institutions among them Non Governmental Organizations and Civil Society Organizations involved in addressing issues of transitional justice in Kenya. While the second level will involve the selection of the respondents and key informants to be interviewed within Government department, institutions and CSOs that deal with issues of transitional justice in Kenya. Separate questionnaires and checklists will be developed for the two groups.

1.8.3 Methods of Data Collection

Data for this study will be collected from both primary and secondary sources as described below:

Survey

Questionnaires will be administered to randomly selected members of the public. The questionnaires will be semi structured with both open ended and closed ended questions. The questionnaires will be administered directly by the researcher over a period of one and a half months. Through this method, therefore, the researcher will be able to elicit both qualitative and quantitative data.

Key Informant Interviews

Further information will be derived from the key informant interviews held with government officials in the relevant ministries and government departments. Key informant interviews will also be conducted with representatives of various institutions.

1.8.4 Secondary data

Survey of Official Documents

An array of secondary sources will be used for this study including reports from the Truth Justice and Reconciliation Commission, Ministry of Justice, National Cohesion and Constitutional affairs as well as other organizations. Documents and reports from the International Criminal Court will also be used.

1.9 Scope and Limitations of your study

A major limitation to this research is the both TJRC and ICC are ongoing processes with are very dynamic and keeps changing thus the need to keep abreast with the latest happenings. Furthermore the commission is yet to release its much anticipated report.

1.10 Chapter Outline

This thesis will have five chapters and will be organized as follows;

Chapter One: Introduction to the study

Chapter Two: Mechanisms of Transitional Justice and its relevance in Post Conflict States

Chapter Three: Overview of Kenya's Post Conflict Situation

Chapter Four: International Criminal Court and Truth Justice and Reconciliation Commission in the context of Post Conflict Kenya

Chapter Five: Analysis, Conclusions and Recommendations

CHAPTER TWO

2.0 Mechanisms of Transitional Justice and its relevance in Post Conflict States

2.1 What is Transitional Justice?

Transitional justice is an approach to systematic or massive violations of human rights that both provides redress to victims and creates or enhances opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of the abuses[41]. A transitional justice approach thus recognizes that there are two goals in dealing with a legacy of systematic or massive abuse. The first is to gain some level of justice for victims. The second is to reinforce the possibilities for peace, democracy, and reconciliation. Transitional justice measures often combine elements of criminal, restorative, and social justice[42]. Transitional justice is not a special form of justice. It is, rather, justice adapted to the often unique conditions of societies undergoing transformation away from a time when human rights abuse may have been a normal state of affairs. In some cases, these transformations will happen suddenly[43] and have obvious and profound consequences. In others, they may take place over many decades.

2.2 History of Transitional Justice

The field first emerged in the late 1980s and early 1990s, mainly in response to the political transitions that took place in Latin America and Eastern Europe and the claims for justice advanced during those transitions. At the time, human rights activists and others were

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[41] ADAM, HERBERT AND KANYA ADAM (2001) The Politics of Memory in Divided Societies. In After the TRC: Reflections on Truth and Reconciliation, edited by Wilmot James and Linda Van de Vijver. Athens: Ohio University Press. AKHAVAN, PAYAM. (1998)

[42] GALTUNG, JOHAN. (1969) Violence, Peace, and Peace Research Journal of Peace Research 6(3):167-191

[43] EIZENSTAT, STUART E. (2003) Reconciliation. Not Just Reconstruction. New York Times, July 4, 2003:A21

concerned with the question of how to address effectively the systematic abuses of former regimes[44] but still reinforce and not derail the political transformations that were underway. Since these changes were popularly called "transitions to democracy," people started calling this new multidisciplinary field "transitional justice" or "justice in times of transition." Transitional justice measures that were adopted included prosecutions, usually of regime leaders; truth-telling initiatives, such as opening up state archives and establishing official truth commissions[45]; the creation of reparations programs for victims; and the vetting of public employees, especially (but not exclusively) members of the security forces. Transitional justice emerged as part of a recognition that dealing with systematic or massive abuses requires a distinctive approach[46] that is both backward- and forward-looking. Transitional justice measures aim not only to dignify victims, but also to help prevent similar victim hood in the future. The long-term goals of transitional justice measures are to promote peace, democracy, and reconciliation, with the idea that these conditions help to prevent the systematic or massive violation of human rights.

2.3 Transitional Justice Today

Transitional justice today is a diverse and vibrant field. As it has grown, it has found common ground with social justice movements[47], as well as the fields of conflict resolution, peace building, and historical memory, to name a few. As transitional contexts have shifted from the post-authoritarian societies of Argentina and Chile to the post-conflict societies of Bosnia and

[44] HAMPSON, FEN OSLER (1997). Can Peace building Work? Cornell International Law Journal 30: 701-716

[45] LONG, WILLIAM J., AND PETER BRECKE. (2003) War and Reconciliation: Reason and Emotion in Conflict Resolution. Cambridge, MA: MIT Press.

[46] PETERSEN, ROGER D. (2002) Understanding Ethnic Violence: Fear, Hatred, and Resentment in Twentieth Century Eastern Europe. Cambridge: Cambridge University Press.

[47] AKHAVAN, PAYAM. (2001) Beyond Impunity: Can International Criminal Justice Prevent Atrocities? American Journal of International Law 95(1):7-31

Herzegovina, Liberia, and the Democratic Republic of the Congo[48]. New practical challenges have forced the field to innovate and expand its boundaries. Ethnic cleansing and displacement, the reintegration of ex-combatants, reconciliation among communities, and the role of justice in peace building. These have all become important new issues for transitional justice practitioners to tackle. The reintegration of ex-combatants, for example, is an important issue for several reasons. First, among the ranks of ex-combatants may be perpetrators or even masterminds of massive human rights violations[49]. Second, in general, ex- combatants often receive money and job training as incentives to disarm, whereas victims typically receive little or nothing at all in order to help rebuild their lives. Such imbalances are morally reprehensible, and also unwise. They may foster resentment, making receiving communities more reluctant to reintegrate ex-combatants, and they may also threaten post-conflict stability. As transitional contexts have shifted geographically from Latin America and Eastern Europe to Africa and Asia, transitional justice practitioners have also engaged with localsometimes called "traditional"—justice measures[50], which can offer an important complement to transitional justice. In some countries, such as Sierra Leone and Uganda, communities may wish to use traditional rituals in order to foster reconciliation of warring parties or reintegrate ex-combatants. In such cases, the role of transitional justice is to ensure that a holistic approach is taken one that may include the ritual, but that neither excludes the possibility of criminal justice for those most responsible for serious crimes, nor the

[48] HAMRE, JOHN J., AND GORDON R. SULLIVAN. (2002) Toward Postconflict Reconstruction. The Washington Quarterly 25(4):85-96.

[49] KRITZ, NEIL J. (1999) War Crimes Trials: Who Should Conduct Them, and How. In War Crimes: The Legacy of Nuremberg, edited by Belinda Cooper. New York: TV Books.

[50] HAYNER, PRESCILLA B. (2001) Unspeakable Truths: Confronting State Terror and Atrocity. New York: Routledge.

implementation of other justice measures, such as reparations, to provide additional forms of redress.

Globally, from Australia and the United States to Guatemala and South Africa, social justice movements have adapted transitional justice measures in order to gain redress for legacies of systematic injustice[51]. These movements often focus their efforts on abuses relating to long-term exclusions generated by socio-economic, racial, or gender inequality, instead of the physical abuses, such as murder and forced disappearance, that were at the heart of many early transitional justice efforts[52]. As the field has expanded and diversified over the past twenty years, it has also developed an important foundation in international law. One part of the legal basis for transitional justice traces its initial inspiration to the 1988 decision of the Inter-American Court of Human Rights in the case of Velásquez Rodríguez v. Honduras, in which the Inter-American Court found that all states have four fundamental, or minimal, obligations in the area of human rights.

These are:

1. To take reasonable steps to prevent human rights violations;
2. To conduct a serious investigation of violations when they occur;
3. To impose suitable sanctions on those responsible for the violations; and
4. To ensure reparation for the victims of the violations.

The essence of the decision has been explicitly affirmed by the subsequent jurisprudence of the court, and implicitly affirmed and endorsed in the jurisprudence of the European Court of Human Rights and UN treaty body decisions such as the Human Rights Committee. It has

[51] KEMALI, MARYAM. (2001) Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa. Columbia Journal of Transnational Law 40(1):89-141

[52] LYONS, TERRENCE. (2002) The Role of Postsettlement Elections. In Ending Civil Wars: The Implementation of Peace Agreements, edited by Stephen John Stedman, Donald Rothchild, and Elizabeth M. Cousens. Boulder: Lynne Rienner Publishers.

also been directly incorporated into many important UN documents such as the 1997, 2004, and 2005 reports of UN special rapporteurs on the fight against impunity, and the 2004 report by the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. The 1988 creation of the International Criminal Court was also significant, as the Court's statute enshrines state obligations of vital importance to the fight against impunity and respect for victims' rights[53].

2.4 Why establish a truth commission, and when?

A truth commission reaches out to thousands of victims in an attempt to understand the extent and the patterns of past violations, as well as their causes and con-sequences. The questions of why certain events were allowed to happen can be as important as explaining precisely what happened. Ultimately, it is hoped that the work of the commission can help a society understand and acknowledge a contested or denied history, and in doing sobring the voices and stories of victims, often hidden from public view, to the public at large. A truth commission also hopes to prevent further abuses through specific recommendations for institutional and policy reforms.

While some countries have constructed a truth commission around the notion of advancing reconciliation or have seen such a commission as a tool that would naturally do this it should not be assumed that such an inquiry will directly result in reconciliation either in the community or in the national or political sphere. Reconciliation is understood differently in different contexts. For some, the full acknowledgement of a long-denied truth will certainly advance reconciliation. But experience shows that many individual victims and communities

[53] FREEMAN, MARK, AND PRESCILLA B. HAYNER. (2003) Truth-Telling. In Reconciliation After Violent Conflict: A Handbook, edited by David Bloomfield, Teresa Barnes, and Luc Huyse. Stockholm: Inter- national Institute for Democracy and Electoral Assistance (IDEA). 377

may require more than the truth in order to forgive. Reconciliation is usually a very long and slow process, and the work of a truth commission may be only a part of what is required.

When considering and designing a truth commission, therefore, care should be taken not to raise undue and unfair expectations among the victims that they, or the country as a whole, will or should feel quickly "reconciled" as a result of knowing the truth about unspeakable past atrocities or, in some cases, receiving official acknowledgement of a truth that they already knew. The expectations placed in a truth commission are often exaggerated in the public mind; it is important to manage such expectations and keep them within reason. An honest portrayal of what can be offered by a truth commission is important from the start.

It should be recognized that a truth commission can ultimately have a significant political impact even if unintended in a context where, typically, some of the individuals or political entities that still hold power (or wish to gain power) may be the subject of inquiry. Where elections are planned to take place during the course of a commission's work, or even shortly after a commission is due to conclude, the political consequences of its work can become very clear, and there may be pressure on a commission to halt, postpone or modify its schedule of hearings or the release of its final report. In some cases, it may be important for a commission to take these factors into account in planning its own calendar, while not altering the depth or focus of its investigations in any substantive way.

When is a country ripe for a truth commission? Three critical elements should be present. First, there must be the political will to allow and, hopefully, encourage or actively support a serious inquiry into past abuses. Ideally, the Government will show its active support for the process by providing funding, open access to State archives or clear direction to civil servants to cooperate.

Second, the violent conflict, war or repressive practices must have come to an end. It is possible that the *de facto* security situation will not yet have fully improved, and truth commissions often work in a context where victims and witnesses are afraid to speak publicly or be seen to cooperate with the commission. Indeed, the commission itself may receive threats while undertaking its work. But if a war or violent conflict is still actively continuing throughout the country, it is unlikely that there will be sufficient space to undertake a serious inquiry. Third, there must be interest on the part of victims and witnesses to have such an investigative process undertaken and to cooperate with it. There are, of course, other possible means of addressing the past, including through inquiries by non-governmental organizations (NGOs) or locally based processes that are less formalized than a national truth commission. These choices can ultimately only be made through broad consultation

2.5 A Holistic Approach to Transitional Justice

Although transitional contexts always involve many moral, legal, and political dilemmas[54], the challenges of dealing with systematic or massive human rights violations can be among the most politically sensitive and practically difficult. The political balance of power is often delicate, and successor governments may be unwilling to pursue wide-ranging transitional justice initiatives or they may be unable to do so without putting their own stability at risk. In the wake of massive violations, interest in criminal justice often takes center stage, both because of the need to hold accountable those responsible for massive violations[55], and because of the inherent drama of courtroom trials. But criminal justice can encounter

[54] GIBSON, JAMES L. (2003) Overcoming Apartheid: Can Truth Reconcile a Divided Nation? Unpublished book manuscript

[55] Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal. Human Rights Quarterly 20:737-816.

problems as a stand-alone approach to seeking justice. Especially with instances of massive abuse, such as genocide, there may be tens or even hundreds of thousands of victims and perpetrators. How can they all be dealt with fairly through the judicial system, when there is likely to be an acute caseload problem? Plus, the judiciary may be dysfunctional, since the majority of police, prosecutors, and judges may be too weak or corrupt, or too few in number, to be able and willing to act in the public interest and ensure victims' rights to justice[56].

Aside from the question of whether judicial measures have the capacity to redress systematic or massive violations of human rights, there is the question of whether they are adequate, by themselves, to doing so. Indeed, transitional justice operates on the conviction that they are not[57]. The many problems that flow from past abuses are often too complex to be solved by judicial measures such as trials alone. After two decades of practice, experience thus far suggests that, to be effective, transitional justice should be holistic. That is, it should be made up of several initiatives that complement and reinforce each other. The different elements of a transitional justice policy are not parts of a random list, but rather, are related to one another practically and conceptually.

2.6 The Elements of a Comprehensive Transitional Justice Policy

In the aftermath of massive human rights abuses, victims have well established rights to see the perpetrators punished[58], to know the truth, and to receive reparations. Because systemic

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[56] COUSENS, ELIZABETH M. (2001) Introduction. In Peacebuilding as Politics: Cultivating Peace in Fragile Societies, edited by Elizabeth M. Cousens and Chetan Kumar with Karin Wermester. Boulder: Lynne Rienner Publishers

[57] HAYNER, PRESCILLA B. (1994) Fifteen Truth Commissions, 1974 to 1994: A Comparative Perspective. Human Rights Quarterly 16:597-655

[58] HAYNER, PRESCILLA B. (2001) Unspeakable Truths: Confronting State Terror and Atrocity. New York: Routledge

human rights violations affect not just the direct victims, but society as a whole, in addition to satisfying these obligations, states have duties to guarantee that the violations will not recur, and therefore, a special duty to reform institutions that were either involved in or incapable of preventing the abuses. A history of unaddressed massive abuses is likely to be socially divisive, to generate mistrust between groups and in the institutions of the State, and to hamper or slow down the achievement of security and development goals. It raises questions about the commitment to the rule of law and, ultimately, can lead to cyclical recurrence of violence in various forms[59]. As it is seen in most countries where massive human rights violations take place, the claims of justice refuse to 'go away.' The different elements of a transitional justice policy are not parts of a random list, but rather, are related to one another practically and conceptually[60]. The core elements are:

2.6.1 Criminal Prosecutions

Criminal prosecutions are judicial investigations of those responsible for human rights violations. Prosecutions frequently give great weight to investigating those considered most responsible for massive or systematic crimes. Prosecutions form one of the central elements of an integrated transitional justice strategy that is aimed at moving a society away from a culture of impunity and a legacy of human rights abuse[61]. Preferably, prosecutions for human rights violations and economic crimes, should be carried out within the local or domestic justice systems. However there may be situations where it is not possible to act through the domestic legal system whether due to lack of capacity or political will[62]. In these

[59] Lu, CATHERINE. (2002) Justice and Moral Regeneration: The Lessons from the Treaty of Versailles. International Studies Review 4(3):3-26

[60] SARKIN, JEREMY. (1999) The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda. Human Rights Quarterly 21:767-823.

[61] WILSON, RICHARD A. (2001) The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post- Apartheid State. Cambridge: Cambridge University Press. 380

[62] BROWN, MICHAEL E. (1996) Introduction and Causes and Regional Dimensions of Internal Conflict. In The

circumstances, international processes, for instance, through the creation of international or hybrid tribunals, become of particular concern in addressing impunity and violations of human rights.

2.6.1.1 Importance of Prosecutions

Whilst there are obvious challenges to mounting criminal prosecutions in post-conflict situations, including cost, quality of evidence, and the debates regarding its relationship to fragile peace processes[63], prosecutions have an important role to play. They contribute to individualizing guilt so that it is not ascribed to an entire group which can perpetuate divisions and fuel future conflict. It also helps in discouraging individual acts of revenge by institutionalizing legal and just response thus challenging impunity and deterring such crimes in future by establishing the rule of law[64] and asserting the rights of victims. Establishing the historical facts related to key events and/ or the nature of the conflict itself Removing criminal elements from positions of public office and power Developing and promoting a progressive human rights jurisprudence on justice matters Fostering respect for the rule of law by the prompt and effective administration of justice.

Types of Prosecutorial Initiatives

Criminal prosecutions for mass violations of human rights can take a number of different forms including domestic and international tribunals[65].

a) Domestic Courts: As previously mentioned, prosecutions through the domestic judicial system is most preferable. This is due to the fact that they increase the opportunities for both

International Dimensions of Internal Conflict, edited by Michael E. Brown. Cambridge, MA: MIT Press.

[63] COBBAN, HELENA. (2002) The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law. Boston Review 27(2).

[64] MERTUS, JULIE A. (1999) Kosovo: How Myths and Truths Started a War. Berkeley: University of California Press.

[65] KAYE, MIKE. (1997) The Role of Truth Commissions in the Search for Justice, Reconciliation, and Democratization: The Salvadorean and Honduran Cases. Journal of Latin American Studies 29:693-716.

local ownership and for greater involvement of intended beneficiaries. Their close proximity also allows the local population to see justice being done. Where the domestic judicial system has been compromised by the conflict or previous regime, local trials can help rebuild and restore credibility in these institutions and by doing so build up the credibility of the new dispensation more broadly[66]. However, domestic trials, because of their proximity to the conflict and/or the previous political context, can further undermine credibility and worsen divisions if carried out in a politicized manner or by an un-reconstructed judicial system. In instances where there is little or no political will to end injustices and inequities imposed by state agencies on its citizens, Public Interest Litigation (PIL) initiatives by CSOs and other interest groups have proven to be the avenue of choice, and is sometimes the only choice[67], toward getting the State to respect human rights and act according to the rule of law. Such PILs are instituted by the CSOs or special interest groups in question on behalf of a select group of individuals representing a much wider area of concern. Such litigations seek to urge the state to reform its position on vital human rights issues where it has been lax or unwilling to do so on its own volition.

International Courts

Although domestic Courts remain the most preferred forum to bring lasting change, most of such trials have been rare and repugnant to justice due to lack of political goodwill and weak institutional frameworks[68]. In such instances, recourse to international systems of justice is sometimes necessary. The international justice systems include the International Criminal Court (ICC), improvised or ad-hoc international criminal tribunals, hybrid courts and the

[66]HENDERSEN, ERROL A., AND J. DAVID SINGER. (2000) Civil War in the Post-Colonial World, 1946-92. Journal of Peace Research 37:275-299.

[67]HUMAN RIGHTS WATCH. (1995) World Report 1995. Available at ttp://www.hrw.org/reports/1995/ WR95.

[68] GOLDSTONE, RICHARD J. (1996) Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals. New York University Journal of International Law and Politics 28: 485-503

application of universal jurisdiction. This will be discussed in detail in the next chapter especially in respect to the Kenyan situation.

i) Ad Hoc International Criminal Tribunals

These are Courts designed to deal with specific problems and crimes and cannot be generalized and adapted for other purposes. The Nuremberg Tribunal in Germany between 1945 and 1946 was the first trial for the major war criminals before the International Military Tribunal[69]. It tried 22 of the most important captured leaders of the Nazi Germany. There are currently two major trials under ad hoc international criminal tribunals taking place. The first is the International Criminal Tribunal for the former Yugoslavia (ICTY) and the second is the International Criminal Tribunal for Rwanda (ICTR).

The ICTR is an international Court established in November 1994 by the United Nations Security Council in order to try those with the greatest responsibility for the Rwandan genocide and other serious violations of the international law performed in the territory of Rwanda between 1 January and

31 December 1994[70]. This tribunal is based in Arusha, Tanzania since 1995. Ad hoc Tribunals have been criticized in some quarters for inefficiency, and for the length of trials.

ii) The International Criminal Court (ICC)

The ICC is a permanent international tribunal that came into being on 1 July 2002 the date its founding treaty, the Rome Statute of the International Criminal Court, entered into force[71]. The ICC was set up to prosecute individuals for genocide, crimes against humanity, war

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[69] Supra13

[70] AMNESTY INTERNATIONAL. (1996a) Rwanda: Alarming Resurgence of Killings. Available at http://web.amnesty.org/library/index/engafr470131996

[71] BASSIOUNI, M. CHERIF. (1996) Searching for Peace and Achieving Justice: The Need for Account- ability. Law and Contemporary Problems 59(4):9-28.

crimes, and the crime of aggression[72]. It is important to note that the ICC is not mandated to prosecute any crimes other than those stated above. Furthermore, the court is designed to complement existing national judicial systems. it can exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes. Therefore, the primary responsibility to investigate and punish crimes is therefore left to individual states. The ICC can generally exercise jurisdiction only in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, or a situation is referred to the court by the United Nations Security Council. The mandate of the ICC can be realized through three specific approaches: Self-referral[73], for instance, the Ugandan case where the ICC was invited to intervene over the alleged violations committed by the Lord Resistance Army (LRA) rebels within her territory. The United Nations Security Council reference, as was the case in the in 2008 against the Sudanese President Omar Al-Bashir on alleged war crimes and crimes against humanity committed by government forces in Darfur[74] and by Motion of the ICC Prosecutor to the ICC Pre-trial chambers, as is the case in Kenya owing to the non-prosecution of those responsible for the 2007/8 post-election violence.

iii) Hybrid Prosecutions

These are Courts of mixed composition and jurisdiction, having national and international aspects and operating within the jurisdiction where the crimes occurred. These tribunals are intended to fill in the gap in situations where there is a lack of capacity or resources at the national level and where there are fears of bias or lack of independence of the domestic

[72] BYMAN, DANIEL L. (2002) Keeping the Peace: Lasting Solutions to Ethnic Conflicts. Baltimore: Johns Hopkins University Press.

[73] BORER, TRISTAN ANNE. (2001) Reconciliation in South Africa: Defining Success. Kroc Institute Occasional Paper 20:OP:1.

[74] DOWNES, ALEXANDER B. (2001) The Holy Land Divided: Defending Partition as a Solution to Ethnic Wars. Security Studies 10(4):58-116.

courts. They employ international personnel, and usually have jurisdiction to try international crimes. Hybrid courts are designed in a way that only a relatively small number of defendants accused, often those that initiated or spearheaded serious criminal offences, will come before the Court[75]. The remaining majority of defendants are usually left to face justice before the domestic criminal justice system that is, courts of law, which may not be functioning fairly or effectively enough to try the so called 'Big Fish'. For this reason, the Hybrid Courts devise strategies that maximize the impact of the mechanism and also develop policies and processes that help to ensure that the domestic justice system operates more effectively and efficiently, in a manner[76] consistent with international human rights obligations and standards. Hybrid tribunals have taken different forms. In cases where domestic capacity was lacking, such as in Timor-Leste and Kosovo, the United Nations placed legal institutions with internationalized criminal capacity within the domestic legal system[77] (e.g., the international judges' and prosecutors' programme in Kosovo, and the Serious Crimes Unit and Special Panels in Timor-Leste). Similarly, in Sierra Leone and Cambodia, there was some political will but a limited capacity to prosecute. In these cases, the United Nations concluded special agreements with each respective Government. These agreements resulted in the establishment of the Special Court in Sierra Leone, which sits outside of the domestic legal system and is governed by its own Statute and Rules of Procedure and Evidence. And in the case of Cambodia, this agreement resulted in the design of 'Extraordinary Chambers,' which are governed by their own law and procedures.

[75] WALTER, BARBARA F (1997) The Critical Barrier to Civil War Settlement. International Organization 51:335-364

[76] VAN EVERA, STEPHEN. (1994) Hypotheses on Nationalism and War. International Security 18(4):5-39.

[77] DAALDER, IVO H., AND MICHAEL E. O'HANLON. (2000) Winning Ugly: NATO's War to Save Kosovo. Washington, DC: Brookings Institution Press

iv) Extraterritorial or Universal Jurisdiction

Prosecutions can also take place within a third jurisdiction under the principle of 'universal jurisdiction'[78]. The principle of universal jurisdiction holds that certain international crimes such as genocide and related crimes are prosecutable by a domestic court in any country no matter where the crime took place or the nationality of the victims or suspected perpetrators[79]. This mechanism in some cases may be seen to forward the cause for accountability. However, it bears certain limitations for the transitional justice process. Firstly, there is usually a lack of connectedness or sense of participation of the population of victims where a trial is taking place in a foreign country. Secondly, this mechanism does little to restore the trust of the local population in their own judicial institutions and in the rule of law. Thirdly, this mechanism is highly susceptible to politicization with those opposed to extraterritorial prosecution usually arguing that it amounts to malicious meddling by a foreign country in domestic affairs[80].

2.7 TRUTH-SEEKING

Truth commissions are officially sanctioned, temporary, non- judicial bodies created to establish the truth about large-scale violations, including the responsibility of individuals and institutions and the root causes of the violations[81]. They help to assist in understanding, acknowledging, and addressing the suffering of victims, pave the way for prosecutions and support the processes of reconciliation. Truth commissions have been established in more than 30 countries, including East Timor, Liberia, Morocco, Peru, Sierra Leone and South Africa.

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[78] BYMAN, DANIEL L. (1997) Divided They Stand: Lessons about Partition from Iraq and Lebanon. Security Studies 7(1):1-29.

[79] DAALDER, IVO H., AND MICHAEL E. O'HANLON. (2000) Winning Ugly: NATO's War to Save Kosovo. Washington, DC: Brookings Institution Press.

[80] LIND, JENNIFER M. (2003) Sorry States: Apologies in International Politics. Unpublished Ph.D. Dissertation, Massachusetts Institute of Technology.

[81] LAPIDOTH, RUTH. (1996) Autonomy: Flexible Solutions to Ethnic Conflicts. Washington, DC: United States Institute of Peace Press.

Commissions of inquiry are similar to truth commissions but have a narrower mandate, usually limited to a specific incident, time period or category of violations. They are focused on establishing the responsibility of individuals, rather than the broader causes of a conflict and have a shorter life-span[82].

TRUTH COMMISSIONS

Truth commissions are defined as 'official, temporary, non judicial, fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a period of time. They are officially sanctioned, temporary, non- judicial investigative bodies that have been granted a relatively short period of time for statement taking, investigations, research and public hearings, before completing their work with a final public report[83]. A truth commission can therefore be described as a non-judicial investigative body that has been given some form of official powers by the state but empowered to operate as independently as possible from any state organs. The following are some of the important characteristics of truth commissions[84]:

i) They are temporary bodies, usually in operations for one or two years .

ii) They are officially sanctioned, authorized or empowered by the state

iii) They are non-judicial bodies that enjoy a measure of legal independence

iv) They are usually created at a time of change from conflict to a state of peace and democratic governance i.e. political transition

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[82] Sura 48

[83] CROCKER, DAVID. (2000)Truth Commissions, Transitional Justice, and Civil Society. In Truth v. Justice: The Morality of Truth Commissions, edited by Robert I. Rotberg and Dennis Thompson. Princeton: Princeton University Press.

[84] BLOOMFIELD, DAVID. (2003a) Reconciliation: An Introduction. In Reconciliation After Violent Conflict: A Handbook, edited by David Bloomfield, Teresa Barnes, and Luc Huyse. Stockholm: Interna- tional Institute for Democracy and Electoral Assistance (IDEA

v) They focus on the past atrocities and crimes

vi) They investigate patterns of abuse over a period of time, not just a specific event

vii) They complete their work with the submission of a final report that contains conclusions and recommendations.

2.7.1 Guiding Principles for Establishment of Truth

In setting up an effective truth commission, certain core principles and guidelines regarding its functions, powers and working methods should be adhered to. It should have an identity and mandate[85]. The truth commission must convey legitimacy, credibility, capacity and motivation. Truth commissions should also be given a sufficiently expansive mandate. However, a balance must be struck to ensure that it does not take on too broad a mission to accomplish over a fairly limited time period. The Commission mission should be flexible enough to allow new information to inform the direction of their investigations or activities[86]. Independence is very important for a truth commission. Ideally, it should be institutionally independent and sufficiently funded. It should have power to facilitate proper investigations, truth commissions should be given significant authority such as, the power to summon witnesses and documents, power to protect witnesses and information, and any other authority that may aid its mandate to seek the truth. The Selection of the commissioners the truth commission should be composed of non- partisan commissioners appointed through an open and transparent process[87]. The commissioners should be respectable and fair-minded individuals of high moral standing. The selection process should allow for a range of groups to propose/nominate commissioners who would be vetted on integrity and respect for the rule

[85] HUMAN RIGHTS WATCH. (1999b) Leave None to Tell the Story: Genocide in Rwanda. Available at http:// www.hrw.org/reports/1 999/rwanda.

[86] Supra 34

[87] LEDERACH, JOHN PAUL. (1997) Building Peace: Sustainable Reconciliation in Divided Societies. Washington, DC: United States Institute of Peace Press.

of law, not their partisanship. The composition of a truth commission must reflect a balance between men and women. A truth commission must have safeguards[88]. Safeguards are required to protect national security related information, but not to cover up politically embarrassing facts or other information about wrongful conduct that pose no national security risk. Truth commissions should have the ability to review information and hold hearings privately where strictly necessary to protect the security of individuals and to avoid real national security risks. Cooperation is key for truth commissions. Government agencies must be encouraged and, where necessary, pressed into cooperating with the truth commissions. This requires political will at the highest level of government with public engagement and comprehensive and accessible institution. Through public hearings, outreach efforts, and ultimately, an accessible report, truth commissions must aim to spark public interest and debate. It should provide a well- documented basis for its findings and recommendations for any further investigations, reforms, preventive and remedial measures[89]. This will allow an informed public, and informed public officials to engage the issues in a new light and to use the report as a valuable tool for education, making policy and drawing lessons for the future. Truth commissions are meant to compliment and NOT to substitute other transitional justice mechanisms such as prosecutions or reparations[90].

These guidelines should be embedded in the statute that creates the commission in a way that renders them legally enforceable by stake-holders, civil society, victims and members of the public where there appears to be a detrimental infringement of the guidelines.

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[88] Supra51

[89] PARIS, ROLAND. (1997) Peace building and the Limits of Liberal Internationalism. International Security 22(2):54-89

[90] SARKIN, JEREMY. (1998) The Development of a Human Rights Culture in South Africa. Human Rights Quarterly 20:628-665.

2.7.2 Mandate and Conditions for Effective Truth Commissions

When properly constructed, truth commissions have the legal powers and institutional capacity to interrogate the truth from all angles by investigating and establishing a factual record for human rights violations and abuses as well as promote justice by ensuring effective reparations to victims[91] and accountability to perpetrators of human rights violations and abuses. The commission also aims to promote healing, reconciliation, recovery and reconstruction at all levels in the society. A truth commission by its conduct may have two phases the truth phase and the justice phase[92]. The truth phase involves the collection of evidence and data and ascertainment of the reality of historic injustices. The justice phase may either involve, recommending the prosecution of perpetrators of violence, reparation of victims and amnesty, and or making their findings public about abuses of human rights and State obligation. The conduct of a truth commission should involve a heightened public awareness of the hearings and as such public education on human rights. The conduct of open hearing should result in inculcating in society a human rights culture[93]. Moreover, the output of the truth commission would be accompanied by sustained and institutionalized efforts in educating the broader public of the commission's findings and the human rights that underpins those findings. Truth commissions are effective only if established within the following contexts and conditions:

i) In a political environment that is focused on providing justice and accountability

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[91] SNYDER, JACK. (2000) From Voting to Violence: Democratization and Nationalist Conflict. New York: W.W. Norton.

[92] VAN ZYL, PAUL. (1999) Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission. Columbia Journal of International Affairs 52:647-667.

[93] KAUFMAN, STUART J. (2001) Modern Hatreds: The Symbolic Politics of Ethnic Wars. Ithaca: Cornell University Press.

ii) Where the process of formation and operations of the commission has been consultative and inclusive

iii) Where there is clear definition of the mandate of the commission

iv) Where there are proper mechanisms for protection of victims, witnesses and survivors

v) Where effective mechanisms and institutions to implement the recommendations of the commission have been set in place.

2.8 REPARATIONS

While prosecutions and vetting processes seek to sanction perpetrators of violations, and truth-seeking and institutional reform aim to benefit society as a whole, reparations are explicitly and primarily carried out on behalf of victims[94].

Hence, in terms of potential direct impact on victims, they occupy a special place among redress measures. Reparations have been broadly defined as compensation for injuries or international torts (breaches of international obligations). The aim of reparations is to eradicate the consequences of the illegal act or to, as far as possible, put the injured person in the position he would have been had the violation or injury not been suffered[95].

Reparations can be conceptualized as a relationship between three terms, namely, victims, beneficiaries and benefits. A reparations programme aims to guarantee that every victim will receive at least some sort of benefit from it, thereby becoming a beneficiary. Whatever benefits a reparations programme ends up distributing and for whatever violations, its aim is to ensure that every victim actually receives the benefits, although not necessarily at the same

[94] HAMBER, BRANDON, AND RICHARD A. WILSON. (2002) Symbolic Closure Through Memory, Reparation, and Revenge in Post Conflict Societies. Journal of Human Rights 1:35-530.

[95] LAPIDOTH, RUTH. (1996) Autonomy: Flexible Solutions to Ethnic Conflicts. Washington, DC: United States Institute of Peace Press

level or of the same kind. If this is achieved, the programme is complete. Completeness refers to the ability of a programme to reach every victim, i.e. turn every victim into a beneficiary. The obligations assumed by a State under international human rights and humanitarian law prescribe for legal consequences not only between States but also with respect to individuals and groups of persons who are under the jurisdiction of the State in question. The Universal Declaration of Human Rights provides for a right to remedy for violations of rights protected 'by the constitution or by law'. The United Nations Human Rights Committee, which monitors adherence to the International Convention on Civil and Political Rights, interpreted this provision as affirming the State's obligation to provide reparations where it stated that: Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without such reparation, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

It is generally understood that the right to reparation has two dimensions under international law[96]: i) A substantive dimension that entails the duty to provide redress for harm suffered in the form of restitution, compensation, rehabilitation, satisfaction and, as the case may be, guarantees of non-repetition ii) A procedural dimension that provides for a system through which substantive redress can be secured. This procedural dimension can be said to be part of the duty to provide 'effective domestic remedies' and which is expressly set out in most major

[96] BURMEO, NANCY. (2002) The Import of Institutions and Transitional Justice. Journal of Democracy 13(2):96-110.

human rights instruments. The Five Basic Categories of Reparations The United Nations instrument referred to as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law 53 and Serious Violations of International Humanitarian Law offers a broad categorization of reparations measures that include Restitution[97]. This refers to the measures which 'restore the victim to the original situation before the gross violations of international human rights law and serious violations of international humanitarian law occurred' for example, restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. It also includes compensation for any damages that can be economically assessed such as lost opportunities, loss of earnings and moral damage[98]. Compensation should be as appropriate and proportional as possible to the gravity of the violation and the resulting circumstances or effects of the violations as are peculiar to each case.

Rehabilitation is also the other aspect which includes medical and psychological care as well as legal and social services. Satisfaction refers to a broad category of measures, ranging from those aiming at a cessation of violations, to truth-seeking, the search for the disappeared, the recovery and reburial of remains, public apologies, judicial and administrative sanctions, commemoration and memorialization, and human rights training. Guarantee of non-repetition which is another broad category that includes institutional reforms tending towards civilian control of military and security forces, strengthening judicial independence, the protection of human rights workers, human rights training, the promotion of international human rights standards in public service, law enforcement, the media, industry, and psychological and

[97] VAN ZYL, PAUL. (1999) Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission. Columbia Journal of International Affairs 52:647-667.

[98] AKHAVAN, PAYAM. (2001) Beyond Impunity: Can International Criminal Justice Prevent Atrocities? American Journal of International Law 95(1):7-31

social services.

2.8.1 Reparations and the Transitional Justice Process

The goal of any transitional justice process is to end the cycles that perpetuate violence and human rights abuses[99]. In the aftermath of conflict or illegitimate rule, people who have been victimized often demand justice. The notion that there cannot be peace without justice emerges forcefully in many communities. But justice can be based on retribution (punishment and corrective action for wrongdoings) or on restoration (emphasizing the construction of relationships between the individuals and communities). Retributive justice is based on the principle that people who have committed human rights violations, or ordered others to do so, should be punished in courts of law[100] or, at a minimum, must publicly confess, apologise and ask forgiveness. A vital part of retributive justice is reparations which generally take the form of financial payments made to the victims either by the offender or by the state as a means of restitution. Both retribution and reparations have symbolic value, as they are concerned with righting an imbalance.' This symbolic value is essential if reparations are to provide recognition to victims not only as victims but also as citizens and as rights holders more generally[101]. Indeed, compensation is important but, if reparations are to be considered as a justice measure, they work best when seen as part of a comprehensive justice policy, rather than as an isolated

effort. Reparatory measures should be designed in such a way as to be closely linked with other transitional justice or redress initiatives, for example, criminal justice, truth telling and

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[99] Boraine, Alex. 2000. Truth and reconciliation in South Africa: The third way. In Truth v. justice: The morality of truth commissions, edited by Robert Rotberg and Dennis Thompson, 142. Princeton, NJ: Princeton University Press.

[100] Cohen, Stanley. 2001. States of denial: Knowing about atrocities and suffering. Cambridge, UK: Polity.

[101] Allen, Jonathan. 1999. Balancing justice and social unity: Political theory and the idea of a Truth and Reconciliation Commission. University of Toronto Law Journal 49:317-37

institutional reform. Truth telling without reparations efforts can be seen by victims as an empty gesture. Similarly, efforts to repair without truth-telling could be seen by beneficiaries as the State's attempt to buy the silence or acquiescence of victims and their families. The same two way relationship may be observed between reparations and institutional reform. Democratic reform without reparative efforts to restore the dignity of citizens who were victimized will have a questionable legacy, especially in the eyes of

the victims[102]. By the same token, reparations without institutional reform to diminish the probability of the violations being repeated again in the future are a truly futile waste of resources. Two considerations are therefore important; first, the positive consequences of a well-designed reparations programme which goes well beyond just the victims. Second, there can be no legal or moral justification for governments to emphasize one form of justice measure over another[103]. The victims should not be asked to trade-off between different justice mechanisms. Thus, Governments should not, for instance, try to buy impunity for perpetrators by offering victims 'generous' reparations.

2.8.2 Reparations in Kenya

The following mechanisms have been attempted with varying degrees of success to ensure reparation.

First and foremost Public Interest Litigation by victims have been instituted by different Non Governmental Organizations as well as individuals. For instance, Nyayo House Torture survivors Symbolic reparations through memorialization. We also have Policy and Administrative actions for instance, through the resettlement of the landless and internally

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[102] Bhargava, Rajeev. 2000. Restoring decency to barbaric societies. In Truth v. justice: The morality of truth commissions, edited by Robert Rotberg and Dennis Thompson, 45. Princeton, NJ: Princeton University Press.

[103] Dyzenhaus, David. 2000. Justifying the Truth and Reconciliation Commission. Journal of Political Philosophy 8:473-92.

displaced Kenyans and those who were evicted from public land such as Mau Forest.

Reparations through Truth Commissions

Not all reparation efforts stem from the recommendations of truth commissions. Some countries have established self- standing reparations commissions or procedures[104]. Others have established their reparations efforts as a result of ordinary legislative initiatives with no particular institution being in charge of their overarching supervision (e.g. Argentina). However, self-standing reparations commissions or procedures naturally find it harder to establish significant links between whatever benefits they distribute and other justice measures. Truth commissions offer several advantages towards giving the greatest degree of satisfaction to the victims of serious and gross human rights violations over and above purely remedial measures[105]. In the course of their work, truth commissions can compile information about the victims which may be important in the design and implementation of reparations programmes information which may otherwise be missing. Truth commissions normally enjoy a very high degree of moral capital, and this might have a positive impact on how their recommendations on reparations are perceived. At least initially, it makes sense to think that recommendations stemming from a truth commission will be more credible than a plan developed solely by Government authorities. This is because, given their membership noting that most commissions include civil society representatives and also their general purpose, it is easier for truth commissions than for ordinary Government institutions to establish participatory processes leading to the design of reparations programmes. It is also easier to create both the reality and the perception of significant links between a reparations

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[104] Gutmann, Amy, and Dennis Thompson. 2000. The moral foundations of truth commissions. In Truth v. justice: The morality of truth commissions, edited by Robert Rotberg and Dennis Thompson, 34. Princeton, NJ: Princeton University Press.

[105] Minow, Martha. 1998. *Between vengeance and forgiveness*: Facing history after genocide and mass vio lence. Boston: Beacon.

programme and other justice initiatives[106], including truth-seeking, if the responsibility for designing the former is primarily given to the entity in charge of designing a comprehensive transitional justice strategy.

The establishment of a complete, successful and comprehensive reparations programme faces a number of challenges. These include:

a) The politics of resources. Establishing a reparations programme requires mobilizing large public resources and this is always, at least in part, a political struggle. This is because while, under international law, gross violations of human rights and serious violations of international humanitarian law give rise to a right to reparation for victims, implying a duty on the State to make reparations, implementing this right and corresponding duty is in essence a matter of domestic law and policy[107]. Claims by the state of insufficient resources and the unbinding nature of the recommendations of most truth commissions make it possible for the state to justify inaction on the recommendations on reparations[108]. Those who are interested in reparations must be prepared, at some point, to deal with the politics on this issue.

b) Insufficient information. There may be little or no accurate information about the victims. There may be a lack of absolutely basic information, such as the numbers of victims to be served by the programme, or of more detailed yet important data, such as the victims' socio-economic profile - age, gender, family structure, links of dependence, level of education and income, type of work, as well as violations suffered and a brief account of their consequences.

c) Participation. Even a well-designed reparations mechanism will fail to distribute benefits to

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[106] Zalaquet, Jose. 1995. Confronting human rights violations committed by former governments: Principles applicable and political constraints. In Transitional justice: Vol. I. General considerations, edited by Neil Kritz, 205. Washington, D.C.: U.S. Institute of Peace.

[107] Supra 20

[108] Adorno, Theodor. 1986. What does coming to terms with the past mean? In Bitburg in moral and politi cal perspective, edited by Geoffrey Hartman, 116. Bloomington: Indiana University Press.

every potential beneficiary if it is not accompanied by effective outreach efforts once it is set in place and easy access for participants throughout its operations. A task made far more difficult in countries with high levels of illiteracy, difficult transport and deep social divisions (ethnic, linguistic, religious, class or regional differences), and little or no faith in the institutional mechanisms of government. The outreach required should have been particularly intensive not only in terms of dissemination of information about the existence of the reparations programme, but also in terms of assisting those going through the process.

d) Evidentiary standards. In any judicial process, certain evidentiary standards need to be set to avoid false or frivolous claims. However the requirements that would qualify one to be beneficiary should be sensitive to the needs of victims (for respect, avoiding double victimization, sparing them cumbersome, complicated, lengthy or expensive procedures). The more demanding the evidentiary requirements, the more false claims will be excluded; but so will perfectly legitimate claims. e) Possibility of exclusion. Usually, the decisions about which types of violations will be redressed are taken before the reparations mechanisms are set up, often when the mandate of a truth commission is determined under the establishing statute. The violations that are consequently excluded may raise several concerns. Firstly, there is a question of justice, of unequal treatment that could undermine the programme's legitimacy. Secondly, such exclusions merely guarantee that the issue of reparations will remain on the political agenda, which may threaten the stability of the initiative as a whole. Some commissions have found themselves preferring to interpret their mandates liberally, so as to include violations that, strictly speaking, were not covered, but that could not reasonably be excluded. This was the case in Morocco and in Brazil.

2.9 RECONCILIATION

Reconciliation is a term that has a variety of different meanings due to the different points of view on the concept that arises from questions regarding how one measures reconciliation or how one determines that a society is reconciled. However, it is largely agreed that the main aim of any reconciliation process is to address the conflicting and fractured relationships between different groups of peoples and this includes a range of different activities. Reconciliation cannot be handled merely as an independent case in a transitional justice programme[109]. If it is to be enduring, reconciliation must necessarily be facilitated by the effective implementation of the various other mechanisms of transitional justice. In short, there can be no lasting reconciliation if the institutions that facilitated or ignored the conflict are not reformed, if the perpetrators of the conflict are not brought to justice, if the victims of the conflict are not compensated, if the true causes and effects of the conflict remain hidden There are three main assumptions guiding the use of reconciliation in the transitional justice process:

I) That truth telling (a full accounting of the past, including the identities of both victims and perpetrators) is necessary for reconciliation

ii) That justice (as defined by holding someone accountable either through legal processes or more restorative measures) promotes reconciliation iii) That comprehensive reform will lead to the transformation of the society and therefore improve the citizen-state relations and obligations.

Roles and Elements of Reconciliation Efforts towards the reconciliation of a divided society should necessarily involve the following:

[109] KISS, ELIZABETH (2000) Moral Ambition within and beyond Political Constraints. In Truth v. Justice: The Morality of Truth Commissions, edited by Robert I. Rotberg and Dennis Thomspon. Princeton: Princeton University Press

a) Developing a shared vision of an interdependent and fair society. This involves the development and acceptance of a vision of a shared future requiring the involvement of the society as a whole, at all levels. Although individuals may have different opinions or political beliefs, the articulation of a common vision of an interdependent, just, equitable, open and diverse society is a critical part of any reconciliation process.

b) Acknowledging and dealing with the past. This means acknowledging the truths (hurts, losses, and suffering) of the past, as well as providing the mechanisms for justice, healing, restitution or reparation, and restoration (including apologies if necessary and steps aimed at redress). To build reconciliation,

individuals and institutions need to acknowledge their own role in the conflicts of the past, accepting and learning from it in a constructive way so as to guarantee non-repetition. c) Building positive relationships. Relationship building or renewal following violent conflict, addressing issues of trust,

prejudice and intolerance in this process, resulting in accepting commonalities and differences, and embracing and engaging with those who are different to us are all vital process to achieving

lasting reconciliation.

d) Significant cultural and attitudinal change. There needs to be significant changes in how people relate to, and direct their attitudes towards, one another. The culture of suspicion, fear, mistrust and violence need to be broken down and opportunities and space opened up in which people can hear and

be heard. A culture of respect for human rights and human difference is developed by creating a context where each citizen becomes an active participant in society and feels a sense of belonging. e) Substantial social, economic and political change. The social, economic and

political structures which gave rise to the conflict and estrangement must be identified, reconstructed or addressed, and transformed[110].

f) The design and implementation of national policies and interventions aimed at reshaping relationships among ethnic, racial, economic and political communities.

g) Social reconstruction and reclamation through the development of a wide range of social, political and economic programs that may, in fact, foster reconciliation among groups.

h) The integration of various processes — legal, social, political and economic— which work toward achieving the fullest measure of reconciliation. This invariably includes programmes, institutions and policies that promote democracy, rule of law and justice.

i) The presence of measures that appreciate the long term nature of reconciliation processes and that facilitate firstly, the peaceful management and eventual elimination of conflict.

j) The creation of new national identities and, in some cases, new philosophies that will guide the unity of the nation. As such, the proper creation and promotion of memorials is a pivotal component of reconciliation as this is the terrain in which divisive identities and myths are created, contested and destroyed.

2.9.1 Approaches to Reconciliation

Reconciliation necessarily involves the following approaches:-

1. A religious ideology that emphasizes the re-discovering of a new conscience in individuals and society through moral reflection, repentance, confession and rebirth.
2. A human rights approach where reconciliation is seen as a process only achieved by regulating social interaction through the rule of law and preventing certain forms of

[110] Lu, CATHERINE. (2002) Justice and Moral Regeneration: The Lessons from the Treaty of Versailles. International Studies Review 4(3):3-26
W.W. Norton

violations of rights from happening again.

3. An inter-communal understanding through which the process of reconciliation is viewed as being concerned with bridging the divides between different cultures and identity groups. of abusive state institutions such as armed forces, police and courts, to dismantle—by appropriate means—the structural machinery of abuses and prevent recurrence of serious human rights abuses and impunity.

2.10 How Transitional Justice Measures Work Together

Practically and conceptually, the various measures of transitional justice call for one another. This logic becomes clear when one considers the possible consequences of implementing any one of them in isolation from the others[111]. Without any truth-telling, institutional reform, or reparation efforts, punishing a very limited number of perpetrators can be viewed as scapegoating or a form of political revenge. Truth- telling, in isolation from efforts to punish abusers, reform institutions, and repair victims, can be viewed as nothing more than words. Memorialization efforts, also, are likely to seem shallow and insincere when not complemented by more robust efforts. Reparation without any links to the other transitional justice measures may be perceived as 'blood money' – an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims' legitimate expectations of justice, truth, and reparation, is not only ineffective from the standpoint of accountability[112], but unlikely to succeed in its own terms. Implementing these measures with the appropriate structure and sequence can be a complex challenge. There

[111] HAYNER, PRESCILLA B. (2001) Unspeakable Truths: Confronting State Terror and Atrocity. New York: Routledge.

[112] Supra 45

are a few general rules that bear mention. First, transitional justice measures should be structured in a way that helps to maximize complementarity and that minimize conflict or contradiction. Second, interrelationships among measures should not be too vague or too complex, which may have the counter-productive effect of causing confusion about each measure's aims and thereby inhibiting public participation and support[113]. And third, the different measures of transitional justice should ideally be sequenced in a manner that helps preserve and enhance the constituent elements of the transition itself—democracy and peace —without which all transitional justice possibilities may diminish in scope and quality.

Conclusion

It is increasingly common for countries emerging from civil war or authoritarian rule to create a truth commission to operate during the immediate post-transition period. These commissions officially sanctioned, temporary, non-judicial investigative bodies—are granted a relatively short period for statement-taking, investigations, research and public hearings, before completing their work with a final public report. While truth commissions do not replace the need for prosecutions, they do offer some form of accounting for the past, and have thus been of particular interest in situations where prosecutions for massive crimes are impossible or unlikely owing to either a lack of capacity of the judicial system or a *de facto* or *de jure* amnesty. As described below, the work of a truth commission may also strengthen any prosecutions that do take place in the future.

Unlike courts, for which there are clear international norms regarding their appropriate structure, components, powers and minimal standards for proceedings, truth commissions will reasonably differ between countries in many aspects. This research is intended to summarize

[113] ALLAN, ALFRED, AND MARIETJIE M. ALLAN. (2000) The South African Truth and Reconciliation Com- mission as a Therapeutic Tool. Behavioral Sciences and the Law 18:459-477.

these lessons, with the intention of guiding those setting up, advising or supporting a truth commission, as well as providing guidance to truth commissions themselves. The United Nations and other international actors have an important role in assisting such bodies in their establishment and operation. Many critical operational decisions and difficulties are outlined below, as is the role that various national and international actors may play.

Ultimately, there is no single formula for dealing with a past marked by massive and systematic abuse. Each society should indeed must choose its own path. To date, practice has taught us that a society's choices are more likely to be effective when they are based on a serious examination of prior national and international experiences[114]. Such examination reduces the likelihood of repeating avoidable errors, which transitional societies can rarely afford to make. Ensuring active consultation of, and participation by, victim groups and the public is another crucial factor. Without such consultation and participation, the prospect of designing and operating credible and effective transitional justice policies is greatly reduced. Moreover, the potential benefits of transitional justice initiatives will likely affect more people when a gender-mainstreaming approach cuts across all of them. Transitional justice measures that neglect the distinct and complex injuries women have suffered, as well as gendered patterns of abuse that may have affected both women and men in their access to justice[115], will miss key opportunities to address the gendered legacies of authoritarianism and conflict. It is also important to ensure ongoing intellectual and practical exchange between transitional justice specialists and those working in other closely related fields such as conflict resolution, democratization, development, peace building, and anti-corruption. This process is essential to creating policies that are both comprehensive and realistic.

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[114] FLOURNOY, MICHELE AND MICHAEL PAN (2002) Dealing with Demons: Justice and Reconciliation. The Washington Quarterly 25(4):111-123

[115] Dwyer, Susan. 1999. Reconciliation for realists. Ethics and International Affairs 13:85

Finally, because transitional justice is a relatively new field, there is a need to continuously assess the empirical impact of transitional justice measures. Through assessment, future policies will stand the best chance possible of achieving the immediate goals providing redress for victims, as well as the longer term goals of peace, democratization, and reconciliation.

CHAPTER THREE

3.0 Overview of Kenya's Post Conflict Situation

The infamous 2007/8 post-election violent conflict that engulfed Kenya and attracted global attention was by no means unprecedented. A repeated failure to address the root causes of these violent conflicts has occasioned their re-occurrence and further entrenched their underlying factors, such as impunity, weak accountability in governance, corruption, politicized ethnicity, inequitable resource distribution, poverty and marginalization[116]. Indeed, the country's history includes episodes of violent conflict, some of the causes of which are still unresolved.

In Kenya, the post-elections aggressions, violence and destruction appeared to be ethnically based, and some news broadcast even used the world 'genocide' to describe the situation[117]. However, the root cause of the violent explosion in Kenya is more complex than mere issues of identity or ethnicity as such. Conflict has its roots in persistent past injustices, long-terms socio-economic disparities and historically bad governance that has created very unequal society which has no public trust neither to the impartiality of the state institutions nor to those who are holding the highest offices[118]. In fact, Kenyan society has been deeply divided

[116] Keating, T. and Knight, A. (eds.)(2001). Building Sustainable Peace. Tokyo: United Nations University Press and Alberta, Canada: Alberta Press

[117] Kiai, Maina (2008). 'Crisis in Kenya: What lessons for Democracy?' Keynote Address at The World Movement for Democracy 5th Assembly with theme 'Making Democracy Work: From Principles to Performance', Kiev, Ukraine, 6-9.4.2008

[118] Hellsten, S. (2004). 'Human rights in Africa: from Communitarian Values to Utilitarian Practice', Human Rights Review, Vol. 5:2, January-March 2004: 61-85

into a class society in which the political elites hold the power as well as vast fortunes, while the people in the grass roots survive below the poverty line. The emerging middle class focuses more on business and improvement of their own quality of life than on changing the system to be more accountable and equitable to all.

Since the establishment of a multi-party system in 1991 Kenya has witnessed violent conflicts during election times. As noted earlier this violence is linked to long-standing grievances and the failures of governance that run deeper than mere electoral politics. Kenya has a history of extensive corruption and systemic abuse of office by public officials that has resulted in a situation in which encouraging statistic about economic growth co-exist with depressing figures of poverty[119]. Political contexts have become all the more charged because of what is at stake. Those who achieve political power benefit from widespread abuses of office, irregular acquisition and theft of land, the corrupt misuse of public resources and politically motivated manipulation of ethnicity and, in general, the culture of impunity. All these forms of bad governance occur at the expense of groups who are out of and outside of power at the particular moment[120]. Besides political manipulation of ethnicity and negative campaigning based on ethnicity rather than issues, the socio-economic disparities add up to the tensions between the different groups increasing distrust in the governments[121], which remains partisan and self-interested, but maintain power with the support of its own kin. The result is what could be called 'mock-democracy' where apparently democratic processes and institutions produce undemocratic and unequal power structures.

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[119] Human Rights Watch (2008). Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Governance. Nairobi

[120] Jones, Charles (1999).'Patriotism, Morality and Global Justice' in Ian Shapiro and Lea Brilmayer (eds.) Global Justice, Nomos XLI. New York University Press, new York and London

[121] Murshed, S.M. (2002). Conflict, Civil War and Underdevelopment: An Introduction', Journal of Peace Research, 39:4: 387-393.

The violent conflict that followed the 2007 elections took Kenya by storm. Pockets of violent conflict spread rapidly across the country. Perpetrators included state and non-state actors alike. What began as a reaction to a contested election quickly degenerated into a violent conflict whose root causes predate the election crisis. This was not the first instance of violent conflict in Kenya since its independence. Violent conflict has previously manifested itself as political violence; resource-based conflict, such as land conflicts and cattle rustling; and identity-based conflict linked closely to politics and economics. Many of these violent conflicts are triggered by political processes such as general elections[122]. In certain parts of the country, Kenya's first two multi party elections in 1992 and 1997 were marred by incidents of violent conflict that caused forced displacement, death and destruction of property. The link between electoral processes and violent conflict is in part testament to the high-stakes nature of Kenyan politics, whereby the winner gains all in terms of power, control and resources[123]. This nexus between political power and economic control in Kenya was made possible by the former constitution, which enshrined centralized and executive powers and which enabled successive regimes to utilize politics to access national resources to benefit a select few. Nevertheless, the magnitude of the violent conflict that followed the 2007 elections was unanticipated. Although Kenya has weathered previous storms of violent conflict, the escalating nature of the 2007–2008 Post Election Violence brought Kenya to a near standstill. The political deadlock was finally broken by means of the Kenya National Dialogue and Reconciliation process. The Kenya National Dialogue and Reconciliation process, which ended the 2007–2008 post-election violence (PEV), considered in its fourth agenda item long-term issues and solutions to address the root causes of conflict that have led to episodic

[122] Yannis, A. (2003). 'State Collapse and its Implication for Peace-Building and Reconstruction' in J. Milliken (ed.) State Failure, Collapse and Reconstruction. Oxford: Blackwell

[123] International Crisis Group (ICG) (2008). Kenya in Crisis. Africa Report no. 137, 21.2.2008, Nairobi.
Ivision, D. (2002). Postcolonial Liberalism. Cambridge: Cambridge University Press.

violence in Kenya, and made proposals for extensive reforms. Cognisant of the nation's history of recurrent violent conflict with underlying, unresolved root causes[124], this process included an agenda item popularly referred to as Agenda Four. The other three agenda items were included to guide deliberations on immediate action to stop violence and restore fundamental rights and liberties; provide measures to address the humanitarian crisis and promote reconciliation and healing; and provide means to overcome the political crisis. The focus of Agenda Four is long-term challenges and solutions that recognize that poverty, the inequitable distribution of resources, and perceptions of historical injustices and exclusion on the part of segments of the Kenyan society constitute the underlying causes of the prevailing social tensions, instability and cycle of violence. Under Agenda Four, the following measures are proposed: constitutional, legal and institutional reforms; tackling youth unemployment, poverty, inequality and regional development imbalances; consolidating national unity and cohesion; and addressing impunity and the need for transparency and accountability. Constitutional reform is particularly significant as the basis for guiding all the other proposed reforms and strategies of Agenda Four. Following nearly two decades of constitutional review[125], the Agenda Four proposal for constitutional reform provided a renewed incentive for a new constitution. This proposal, included within the agenda item dealing with long-term causes of and solutions to violent conflict, communicates the notion that a new constitution has the potential to deter future cycles of violence.

On 27 August 2010, Kenya celebrated the promulgation of a new constitution following a peaceful referendum that favoured the adoption of the proposed new constitution. This

[124] Eade, D. (2004) 'Part Two: Introduction: Peace and reconstruction. Agency and agencies' in H. Afshar, and D. Eade (eds.). Development, Women and War. Feminist Perspectives. A Development in Practice Reader. Oxford: Information Press, Oxfam

[125] Kevin E. Davis and Michael J. Trebilcock, "Legal Reforms and Development," *Third World Quarterly* 22, no. 1 (2001): 21–36.

emotive event was greeted with euphoria and heralded a new beginning for the republic. The document was ratified by over 67 per cent of voters. The threshold of 25 per cent of votes cast in each province was surpassed in all eight of the country's provinces, demonstrating widespread support by the electorate[126]. Although a new constitution is not in itself a cure-all to alleviate the root causes of conflict, its effective implementation will create frameworks and institutions to support the restoration of justice and sustainable peace. In seeking to alter or introduce structures that administer justice and governance more effectively, the reforms in the new constitution are in line with the ethos of conflict transformation. One of the key components of Conflict transformation is the establishment of Truth Justice and Reconciliation Commission[127] which is one of the subject of this thesis.

Conflict transformation is a conceptual framework that looks beyond the immediate conflict situation to the root causes of the conflict to comprehensively address issues of content, context and structures. This thesis recognizes that Kenya has had intermittent violent conflicts in the past, and that resolution efforts, when undertaken, have tended to be aimed at resolving the immediate crisis. A repeated failure to comprehensively deal with violent conflict by addressing the root causes resulted in residual tensions that precipitated subsequent cycles of violence[128]. Agenda Four recognizes the crucial role to be played by a new constitution in addressing root causes of conflict through the provision of structures and frameworks to

[126] Calas, B. (2008). From rigging to violence. Lafargue, J. (Ed.). *The general elections in Kenya, 2007.* (pp. 165-185). Dar es Salaam: Mkuki na Nyota Publishers, Ltd

[127] Kirsti Samuels, "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt," Social Development Paper No. 37, Conflict Prevention and Reconstruction Division, World Bank, 2006.

[128] Hagg, G, and Kabwanja, P. (2007). 'Identity and Peace: Reconfiguring Conflict Resolution in Africa', in African Journal on Conflict Resolution, Special issue on Identity and Cultural Diversity in Africa, Vol. 7, No. 2: 9-35

achieve peace and justice. The TJRC (Truth, Justice and Reconciliation Commission of Kenya as examined by this thesis is part of the accountability component of Agenda Four of the National Accord signed in 2008. By addressing the cause and effects of historical injustices and gross violations of human rights the TJRC will contribute towards national unity, reconciliation, and healing.

3.1 Kenya and Conflict Transformation

The term conflict, as used in this thesis, refers to both literal violence that causes physical harm and non-physical violence of a structural nature that causes harm through the denial of rights and justice[129]. Galtung distinguishes between personal and structural violence: personal violence is direct and refers to physical harm, whereas structural violence is indirect and relates to repressive structures that perpetrate social injustice. Galtung defines violence as the '... cause of the difference between the potential and the actual, between what could have been and what is[130]. Violence is that which increases the distance between the potential and the actual, and that which impedes the decrease of this distance. Hampshire defines structural violence as the disabilities, disparities and even deaths that result from systems, institutions or policies that foster economic, social, political, educational and other disparities between groups[131]'. Gourevitch,discusses the cycle of violence, illustrating how the reaction and responses to structural violence engender secondary violence at three levels, namely self-destruction, community destruction, and intra- and interstate destruction[132]. These theories of

[129] Burton, J. (1993) Conflict: Resolution and Prevention. London: St. Martins Press. Coady, C.A.J. (1991). 'Politics and the Problem of Dirty Hands' in P.Singer (ed.) A Companion to Ethics. Oxford: Blackwell

[130] Galtung, J. (1995). Peace: Research, Education, Action. Oslo: Pandora Press.

[131] Hampshire, S. (1978). 'Morality and Pessimism' in S. Hampshire (ed.) Public and Private Morality. Cambridge: Cambridge University Press

[132] Gourevitch, C. (2003). 'We wish to inform you that tomorrow we will be killed with our families': Stories

violence are important for understanding and addressing the root causes of conflict, as they provide necessary linkages between direct and indirect, and primary and secondary violence. Within this theoretical framework, it can be seen that violent conflict in Kenya has roots that reach as far back as colonial times, when harmful policies, such as those of land alienation, were enacted. British colonialism was responsible for substantial land-alienation policies at the expense of the locals and to the benefit of settler agriculture, giving rise to Kenya's so-called white highlands. At the dawn of the new republic, the government sought to maintain this precedent of land alienation, making land, one of the first resources to be distributed inequitably. History illustrates how land has been significant as a political tool to garner power and support, as an economic tool to demonstrate wealth, and as a social factor with claims to ancestral land being grounds for forced displacement.

A brief look at key causes of conflict in Kenya reveals threats within the political, economic and social spheres, with crosscutting implications. In the political sphere, the key identified root causes of violent conflict include the 'politicization of ethnicity; non-adherence to the rule of law; reliance on centralized and highly personalized forms of governance; inequitable development; corruption and abuse of power; a winner- takes-all form of political victory; and a perception that certain groups are not receiving a fair share of resources'[133]. Furthermore, progressively over the 49 years of the country's independence, an increasingly powerful presidency has rendered the quest for political power a zero-sum game'. Once elected, the president is able to assume total control over state resources in the absence of effective accountability structures. This control has been at the expense of other political players and has yielded

from Rwanda. Oxford: Picador.

[133] Jon Elster, "Introduction," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 2006).

incremental political powers to the president. The previous constitution allowed for an excessively powerful presidency with ineffective accountability structures, and allowed past presidents to sanction marginalization and impunity. This mode of imperial presidency has allowed presidents to manipulate political processes to their own ends. Two ways in which this has played out in Kenya include the use of the state as an instrument of material acquisition and ensuring political exclusion through ethnic marginalization. The aspect of wealth acquisition has led to the high-stakes nature politics[134]: political power has emerged as one of the primary means to access and amass wealth in a political environment that is above censure.

Closely related to this is the politicization of ethnicity as a means of both political and economic marginalization[135]. During colonial times, the divide-and-rule system emphasized and encouraged differences as a way of creating disunity and preserving colonial rule. These politicized ethnic differences persist and form the fault lines for exclusionary politics and conflict. Successive governments have used ethnicity as grounds for mobilization and resource distribution, as evidenced by the ethnic make-up of political parties and public appointments of previous governments[136]. It is justifiable to argue that in terms of political exclusion in Kenya, ethnicity and class are two sides of the same coin. Given the historical ethnic exclusivity of Kenyan politics, the ethnic group represented in power has often had an advantage over other groups in terms of accessing education and wealth. This has resulted in a class structure that is heavily skewed along ethnic lines. Ethnicity has thus become the

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[134] Anga Timilsina, "Getting the Policies Right: The Prioritization and Sequencing of Policies in Post-Conflict Countries," Pardee Rand Graduate School, 2007.

[135] Hagg, G, and Kabwanja, P. (2007). 'Identity and Peace: Reconfiguring Conflict Resolution in Africa', in African Journal on Conflict Resolution, Special Issue on Identity and Cultural Diversity in Africa, Vol. 7, No. 2: 9-35

[136] Cussac, A. (2008). "Kibaki tena?" The challenges of a campaign Lafargue, J. (Ed.). *The general elections in Kenya, 2007.* (pp. 55-104). Dar es Salaam: Mkuki na NyotaPublishers, Ltd.

medium through which class politics is conducted[137]. This was highly visible in the incidents of PEV following Kenya's contested 2007 election – the violence occurred in the less affluent areas, where residents were mobilized to fight each other on ethnic grounds. The consistent insidious manipulation of ethnicity by successive governments has undermined nationalism and artificially fragmented the country into regional ethnic blocs[138]. The politicization of ethnicity has been managed under the cover of impunity. Despite various commissions of inquiry, disclosures on graft and investigative efforts, suspects with political standing continually evade justice. The transitional justice processes have been derailed by political interest. The Commission of Inquiry into Post-Election Violence (CIPEV, popularly known as the Waki Commission, after Justice Philip Waki, who chaired the commission) was established to investigate the violence.

A key recommendation it made for transitional justice was the establishment of a Special Tribunal by the government to prosecute key suspects[139]. The tribunal was to be established within a specified time frame, failing which the names of chief perpetrators of violence would be submitted to the International Criminal Court (ICC). The failure to establish the Special Tribunal would be interpreted as Kenya's incapacity or unwillingness to prosecute the perpetrators[140]. Parliament voted against forming the tribunal, and subsequently a list of suspects was submitted to the ICC. The ICC was initially meant to complement the judicial process of the Special Tribunal, which as a local entity may have provided a more accessible

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[137] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

[138] Manji, *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (London and New York: Zed Books, 2006).

[139] Supra 14

[140] The *Economist*. Corruption in Kenya: How to ruin a country. February 26, 2009.

transitional justice process and the capacity to try more cases more quickly[141]. In December 2010, Parliament once again moved to derail the justice process by passing a motion to have Kenya withdraw from the ICC, a move that followed the naming of six suspected masterminds of the PEV. However, the move was highly criticized, primarily by civil society organizations, and the cases against the six commenced at The Hague[142]. Despite the progress made towards democracy over the past years, the determination to evade due judicial process is not only galling, but also a possible indicator that the political goodwill by parliamentarians to build Kenya on foundations of justice and peace is compromised. The repeated failure of justice for victims may indeed lay the foundation for further violence and instability in Kenya. The economic roots of conflict are intertwined with the political and social causes. Through political marginalization, improper use of the state's economic resources has created uneven levels of development around the country. Some regions enjoy economic wealth; others are poor. The impact of climate change, in the form of frequent droughts, failed rains and natural disasters, has aggravated this disparity, and the less developed regions, which are often geographically vulnerable areas, face chronic human-security challenges over food, health, livelihood sustenance and harsh environmental conditions[143]. This has resulted in chronic poverty in certain areas and a rapidly growing divide between the rich and the poor. The distribution of resources among the privileged and those in power according to ethnically-based patronage systems has created, and continues to reinforce, patterns of horizontal inequality by ethnic grouping and geographical location. This uneven distribution of resources

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[141] Johan Pottier, *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century* (Cambridge: Cambridge University Press, 2002); and Ambreena

[142] Lafargue, J. and M. Katumanga (2008). Post-election violence and precarious pacification. Lafargue, J. (Ed.). *The general elections in Kenya, 2007.* (pp. 13-34). Dar es Salaam: Mkuki na Nyota Publishers, Ltd.

[143] Maupeu, H. (2008). Revisitng post-election violence. Lafargue, J. (Ed.). *The general elections in Kenya, 2007.* (pp. 187-223). Dar es Salaam: Mkuki na Nyota Publishers, Ltd

has meant that a large proportion of the population is economically and politically disenfranchised. In particular, the youth, who constitute the largest segment of the population, bear the brunt of this disenfranchisement, and experience high levels of unemployment. An emerging issue linked to this is the growing phenomenon of criminal groups. These groups mainly comprise young people and are found in specific geographic locations – and in some cases, are formed on ethnic lines. The main activities of these groups are extortion through illegal levies and participation in violent crime and conflict. Traditional achievements in recent years have included substantial economic growth and improved service delivery[144]. In a report for a UN Habitat meeting in March 2010, however, the Kenyan ministries of housing and local government observed that urban inequality was growing at a faster pace than efforts to curtail it were being put in place, and this has had a direct impact on the provision of essential services like water, electricity, sewerage systems and good roads in residential areas. This inequality is evidenced by the mushrooming of informal settlements, often created by those who are employed in more affluent neighborhoods. The inequalities of class and ethnicity were apparent during the PEV in 2007–2008, with most of the violence concentrated in lower-income areas and along ethnic lines[145]. Linked closely to this is endemic corruption, which has been at the heart of the mismanagement of public funds. Inconsistent attempts to tackle high-profile corruption plague the integrity of different governments. The political elite's evasion of justice further entrenches the inequalities that propagate division and conflict[146]. Social causes of conflict have emerged from a culture that has experienced generational political and economic disenfranchisement. Taking the example of criminal

[144] Calas, B. (2008). From rigging to violence. Lafargue, J. (Ed.). *The general elections in Kenya, 2007.* (pp. 165-185). Dar es Salaam: Mkuki na Nyota Publishers, Ltd.

[145] International Crisis Group, *Kenya in Crisis: Africa Report N°137 – 21 February 2008,* (2008).

[146] Human Rights Watch, *Human Rights Watch Memorandum fo the Eighth Session of the International Criminal Court Assembly of States Parties* (New York: November 2009).

groups, it is evident that the traditional culture of respect for elders has given way to a 'might is right' culture. Such groups, usually young and armed, take control and intimidate residents, regardless of age, and show no traditional respect for seniority. This was the case during the PEV, with the criminal groups controlling sections of the country to protect their own interests[147]. In the context of the PEV, the argument that there is a normalization of violence carries some weight. It proposes that there is a need to analyze why 'ordinary' Kenyans violently turned against each other and why there is a prevalence of violence in society in general[148]. The impunity surrounding violence over the past decades indicates a growing tolerance for violence as a means of expression and as a response by state institutions.

Given that economic prospects for the youth have not necessarily been enhanced by economic growth, the role of youth gangs in the PEV indicate that power was devolved to them suddenly, unintentionally and organically. As political and economic events have destroyed cultural values, morality has adapted to situations of ethnic manipulation, impunity, violence and corruption[149]. Efforts to address these root causes of violent conflict were frustrated by the absence of a legal framework that could fundamentally transform these structures of injustice that have been discussed.

The PEV, tragic as it was, provided an opportunity to critically examine these structures and the root causes of conflict with the goal of transforming systems in order to establish justice and achieve sustainable peace[150]. At the crux of this was constitutional reform.

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[147] Republic of Kenya, *Report of the Commission of Inquiry into the Post-election Violence in Kenya* (Nairobi: 2008).

[148] International Federation for Human Rights (FIDH), *Step by Step Approach to the Use of Universal Criminal Jurisdiction in Western European States* (Paris, 2009).

[149] Ghai, Yash Pal & J PW McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970).

[150] Human Rights Watch, *Human Rights Watch Memorandum for the Eighth Session of the International Criminal Court Assembly of States Parties* (New York: November 2009).

The previous constitutional order contributed to the post-election crisis that befell Kenya in January 2008. As the Commission of Inquiry into Post-Election Violence noted, successive amendments of the Constitution increased the powers of the president exponentially, thus giving him control over governmental agencies and leading to the emasculation of institutions with countervailing power such as the legislature and the judiciary[151]. As a result, Kenyan citizens saw these agencies and institutions as lacking impartiality and integrity. They lacked faith in the ability of the Electoral Commission to conduct free, fair elections, thereby increasing their tendency to resort to violence after "unfair" electoral outcomes. Further, the previous Constitution established a first-past-the-post electoral system and granted the president almost unfettered powers over the distribution of national resources, thus making the quest for the presidency a zero-sum game in which losing was not an option[152]. Each ethnic community believed that capturing the presidency would guarantee almost exclusive access to national resources and public sector jobs since the president controlled their distribution. As a result, the stakes were extremely high in every presidential election, and many politicians resorted to violence to gain or retain political power. Indeed, as multi-party democracy was being reintroduced in the early 1990s, local civil society and international actors acknowledged that the Constitution was a recipe for disaster and needed to be transformed if Kenya was to become a real constitutional democracy in which political power could be exchanged peacefully between ruling and opposition parties. However, despite violence being perennial feature of electoral processes in the multiparty era, the quest for a suitable constitutional framework remained elusive for a long time[153]. Thus while

[151] Bossa, S B, *A Critique of the East African Court of Justice as a Human Rights Court*. Paper presented in Arusha, Tanzania on 26 October 2006.

[152] Commonwealth Observer Mission, *Report of the East African Community Observer Mission: Kenya General Elections December 2007-January 2008*

[153] Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of*

President Daniel Arap Moi eventually bowed to pressure from local civil society actors and the donor community to initiate a process to review the Constitution in the late 1990s, his government sought to derail the process through various mechanisms. At first, it used highly draconian means, including the deployment of the state security apparatus and authoritarian public order laws, to frustrate regime opponents clamoring for a new constitutional order. When this tactic did not succeed, it resorted to manipulating the process of constitutional reform by ensuring the passage of a constitutional review law that allowed Moi to control the process. Thus the Constitution of Kenya Review Act of 2001 enabled his regime to control both the composition of the constitutional convention and the process of making the Constitution.

Transitional justice has been defined as "justice associated with periods of political change" and is "characterized by legal responses to confront the wrongdoings of repressive predecessor regimes[154]." Its aim is two-fold: to address the human rights violations committed by predecessor regimes (with a view to providing justice to victims of such violations and eradicating impunity) while building peace by reforming abusive state institutions and promoting reconciliation. Thus transitional justice is not only concerned with retribution for past wrongs or providing justice to those who have suffered under repressive regimes; it also seeks to heal society, facilitate exit from authoritarianism, and establish a just society based on the rule of law[155]. Typically, the mechanisms for pursuing transitional justice include prosecution of the perpetrators of human rights violations, truth commissions

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Kenya's Post-2007 Election Violence (August 2008).

[154] Ghai, Yash Pal & J PW McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970).

[155] Kenya Human Rights Institute, *Interventionism and Human Rights in Somalia: Report of an Exploratory Forum on the Somalia Crisis* (2007).

that seek to reveal the truth about past wrongs, reparations for victims of human rights abuses, and institutional reform. The envisaged institutional reform should be seen in two related contexts. First, there are reforms that establish rules for redressing past human rights violations. Second, there are reforms that seek to forestall the recurrence of such violations. The latter category of reforms seeks to establish better institutions for preventing or managing societal conflicts and enhancing accountability in the exercise of governmental power, since the abuse of power often leads to human rights violations. Ultimately, transitional justice aims to foster building peace by addressing the needs and grievances of victims of past human rights violations while establishing mechanisms that prevent the recurrence of such violations and facilitate reconciliation[156]. Further, it should be emphasized that reconciliation will not occur unless the grievances of the victims of such violations are acknowledged and addressed.

There is an assumption that transitional justice will take place in a context in which democratic leaders *replace* authoritarian predecessors[157]. In practice, however, the process of transition is often murky, contested, and drawn out. Accordingly, there is a need to take into account the politics of transition in any given polity. In Kenya, for example, many of those now tasked with implementing the agreements of the process were either suspected perpetrators or abettors of the human rights violations and economic crimes that form the rationale for transitional justice. So long as these individuals continue to wield power, it may be assumed that they will do their very best to derail the redress of past wrongs and the establishment of accountability mechanisms[158]. In addition, transitional justice initiatives in

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[156] Juma, Dan, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper', *Essex Human Rights Review* Vol. 4 No. 2 (September 2007).

[157] Danish Institute for International Affairs, *Fragile States and the International Criminal Court: Friends or Foes?* (Copenhagen, October 2008).

[158] Hayner, Priscilla, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge,

Kenya are being designed and implemented in a polarized political environment in which the approaches the antagonists adopt are defined by a desire to either retain or capture political power in the next general elections to be held in 2012.

These perceptions can be explained by the historical politicization of ethnicity and the accumulation of immense power in the presidency, which created an imperial president. Since independence, the state has always been identified with narrow ethnic interests, thereby engendering resentment among the ethnic communities that are excluded from government. Such exclusion occurs because the president invariably governs mainly through trusted members of his own ethnic community and co-opted members of other ethnic communities[159]. In this arrangement characterized by political patronage, the primary beneficiaries of national resources, public goods, and services are the political elites and their cohorts. Over the years, this created the perception that only the community whose son happened to be president would receive these things. Since the reintroduction of multiparty politics in 1991, it has therefore become vital for each ethnic community to capture the presidency, since the politicians and the public alike feel strongly that this is the only way to ensure access to public goods and services. Quite literally, elections have become a matter of life and death[160], and politicians have politicized perceptions of exclusion, which have become effective tools for mobilizing members of their ethnic communities[161]. Accordingly, the new Constitution needs to enhance perceptions of inclusion if it is to facilitate a real transition to democracy and peace. The post-election violence and subsequent displacement

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2002)

[159] Human Rights Watch, *Establishing a Special Tribunal for Kenya and the Role of the International Criminal Court* (New York: March2009).

[160] Y P Ghai and J P W B McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present.* (Nairobi: Oxford University Press, 1970), p 428.

[161] Musila, Godfrey, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions' *International Journal for Transitional Justice* (2009).

of thousands of people from their homes, especially in Rift Valley Province, also gave prominence to long festering and explosive issues relating to the ownership and distribution of land, as well as land administration. In many cases, there are perceptions that "outsiders" have illegitimately acquired the ancestral land of "natives" and should therefore be evicted, by force if necessary. Many claim that these outsider ethnic communities have benefited from politically biased allocation of land. At the same time, "gross corruption in the acquisition, registration and administration of land matters has been a major problem." Land has been a major resource for political patronage and has been illegally and irregularly allocated to politically[162].

3.2 Conclusion

It has long been acknowledged that national reconciliation cannot occur in Kenya unless "the mistakes and atrocities of the past are properly, fairly, and comprehensively investigated, the perpetrators held accountable, and victims recognized and their dignity restored." Thus the 2003 Task Force on the Establishment of a Truth, Justice and Reconciliation Commission found overwhelming support among Kenyans for the idea that reconciliation would only be possible after the truth about the past is known and justice is provided to the victims of past human rights violations and economic crimes. Over the years, many citizens have been the victims of severe human rights violations such as polltical assassinations, torture, detention without trial, police brutality, massacres of communities, sexual abuse and violence, ethnic clashes, and economic crimes[163] such as the looting of the public purse and land grabbing. The task force therefore recommended establishing an independent truth commission that

[162] Human Rights Watch, *Ballots to Bullets: Organized Violence and Kenya's Crisis of Governance* (New York: March 2008).

[163] International Crisis Group, *Kenya in Crisis: Africa Report N°137 – 21 February 2008,* (2008).

would investigate gross human rights violations and economic crimes and recommend prosecutions.

Unfortunately, the recommendations of the Task Force were not implemented due to a lack of consensus in the coalition government occasioned by the wrangles of the partners over sharing power and constitutional review. The idea of establishing a truth commission was only revived in 2008, when the post-election crisis not only occasioned further human rights violations but also served to remind Kenyans of the urgent need to redress some of the long-held grievances that may have helped fuel the national crisis[164]. Parliament thus enacted the Truth, Justice and Reconciliation Act of 2008 to establish "an accurate and complete record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December, 1963 and 28th February, 2008." At the same time, CIPEV recommended that the government establish a Special Tribunal for Kenya to "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections." Further, the commission recommended that if the government failed to do so, then the International Criminal Court (ICC) should consider prosecuting those suspected to bear the greatest responsibility for the post-election crimes. The government has so far failed to enact the required law[165], and the ICC has been conducting its own investigations. In part, the failure of the government to enact this law can be attributed to the fear of the main political parties that they will lose the support of their constituencies should they expose certain politicians to criminal prosecution.

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[164] Kenyans for Peace and Justice, *Truth and Justice Digest[s]* (2009). 12. Koskenniemi, Martti, 'Between Impunity and Show Trials', *Max Planck Yearbook for United Nations Law* 6 (2002).

[165] Kenya Human Rights Institute, *Special Brief: Clarifying Human Rights Violations in the Kenyan Post-election Crisis* (February 2008).

At one point, the government even declared that the TJRC process presented the most appropriate mechanism for securing justice for post-election crimes. This declaration was interpreted as a bid to buy time with the aim of defeating the cause of justice, although the TJRC process is also being derailed by a lack of confidence in the chairman[166], due to allegations of bias and misconduct that came to light after he had been confirmed in this position. The effect is that for the victims of past human rights violations, justice may be delayed unduly if not denied altogether.

In any case, the ICC can at best only punish a few individuals[167]. Others found to bear the greatest responsibility for the post-election crimes, including police and other security officers who committed despicable crimes against the populace, would therefore need to be brought to justice under national law in a timely manner, lest the evidence against them be lost or destroyed. The question of establishing local legal mechanisms that complement the ICC process therefore needs to be addressed urgently. Further, the government needs to reconcile such criminal justice mechanisms with the TJRC process.

3.3 Introducing Conflict Transformation

Conflict transformation is a conceptual framework that connects an occurrence of violent conflict to underlying patterns and contexts[168]. Recognizing conflict as normal and a potential motor of change. Lederach posits that the term conflict transformation more aptly relates to constructive efforts at change that go beyond the resolution of specific problems. In essence,

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[166] Republic of Kenya, *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Nairobi: 2008).

[167] Republic of Kenya, *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Nairobi: 2008).

[168] Minow, Martha, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).

conflict transformation, in adopting a broader contextual analysis of conflict, interrogates the existing structures that allow the manifestation of injustice and violent conflict, and proposes the transformation of these

structures accordingly. The rationale is that, although a conflict crisis may be resolved, without adequately addressing the context of violent conflict, there is a strong likelihood that violent conflict will reoccur[169]. Conflict transformation requires long-term analysis of violent conflict situations, their contexts and ways in which these situations can be transformed to reduce the risk of future violent conflict. In the case of Kenya, episodic violent conflict that appears to have common root causes is indicative of a failure to address contextual issues surrounding the episodes of conflict, thereby leading to consequent episodes of violent conflict arising from the same or similar issues[170]. This form of conflict has often been handled on a case-by- case basis, with no effort made to transform systems and how they affect Kenyans.

CHAPTER 4

4.0 The International Criminal Court and Truth Justice and Reconciliation Commission in the context of Post Conflict Kenya

4.1 The International Criminal Court and Kenya

[169] Kenya Human Rights Institute, *Special Brief: Clarifying Human Rights Violations in the Kenyan Post-election Crisis* (February 2008).

[170] Human Rights Watch, *Establishing a Special Tribunal for Kenya and the Role of the International Criminal Court* (New York: March 2009).

In the past 50 years, there have been many crimes against humanity and appalling war crimes for which no individuals have been held accountable[171]. Historically, although states have prosecuted people from other countries for crimes against humanity, they have generally been less willing or able to put their own nationals on trial[172]. One recent solution has been temporary international criminal tribunals established by the United Nations. These have tried people for war crimes and other serious international crimes following, for instance, the Rwanda genocide in the 1990s (The Rwandan Civil War) and the conflict in the former Yugoslavia (The Bosnian War)[173]. However, because they were established to try crimes committed only within a specific time frame and during a specific conflict, there was general agreement that an independent, permanent criminal court was necessary. On 17 July 1998, the international community reached a historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court (ICC). Effective since 2002, the ICC is a permanent international institution established for the purpose of investigating and prosecuting individuals who commit the most serious crimes of international concern, namely, genocide, crimes against humanity, and war crimes.

4.2 Background to the ICC Intervention in Kenya

[171] De Waal, Alex & Julie Flint, 'Case Closed: A Prosecutor without Borders', *World Affairs Journal* (Spring 2009).

[172] Bass, Jonathan, *In Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000).

[173] Temple-Raston, Dina, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes and a Nation's Quest for Redemption* (New York: Free Press, 2005).

On December 27 2007, Kenya held its general elections, the fourth since independence[174]. The Presidential contest was a closely run race between the incumbent Mwai Kibaki of the Party of National Unity (PNU) and Raila Odinga, the candidate for the Orange Democratic Movement (ODM).

The announcement of the results was delayed and tension was rife across the country. President Mwai Kibaki was declared the winner and was hastily sworn in as President amongst allegations of electoral manipulation by the ODM. This series of events lead to widespread protests across the country, especially by ODM supporters who felt that they had been robbed of victory[175]. The protests degenerated into violence across various parts of the country, and took on an ethnic dimension. Power Sharing Stops Violence The violence, which left more 1,300 people dead and forced over 300,000 from their homes, ended when President Mwai Kibaki and Raila Odinga agreed to share power. The power sharing deal, which was brokered by the former UN Secretary General Kofi Annan, also stipulated that a local tribunal should be set up to prosecute those behind the violence. Leaders of both parties agreed to set up are Commission to investigate the Post-Election Violence (the Waki commission, after its chairman, Justice Philip Waki) in 2 May 23 2008. They also established an independent review committee to look at the flaws in the election (the Kriegler committee), and a Truth, Justice, and Reconciliation Commission to help heal historical grievances dating from well before the 2007 general elections[176]. Subsequently, the Waki commission recommended wide-ranging reforms of the police as well as the creation of a special tribunal or Kenya,

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[174] Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* (August 2008).

[175] Danish Institute for International Affairs, *Fragile States and the International Criminal Court: Friends or Foes?* (Copenhagen, October 2008).

[176] Commonwealth Observer Mission, *Report of the East African Community Observer Mission: Kenya General Elections December 2007-January 2008.*

independent of the judiciary, anchored in a constitutional amendment and staffed by both Kenyan and international judges and prosecutors. In the event that no special tribunal was established, the Waki commission recommended that Mr. Annan hand over a sealed envelope containing the names of suspects to the ICC. ICC Jurisdiction invoked After more than a year of inaction and missed deadlines by Kenya's authorities to prosecute the post election violence perpetuators, on July 9 2009 Mr. Annan handed over the envelope and other materials from the Waki commission to the ICC Prosecutor. Following an analysis of the situation, Prosecutor Luis Moreno-Ocampo decided that there was a reasonable basis to proceed with an investigation[177]. Accordingly, in November 2009 Mr. Moreno-Ocampo announced that he would request ICC judges to allow him permission to proceed with an investigation in Kenya's election violence.

4.3 The Rome Statute

In this section, the Rome Statute, which governs the operation of the Court and its interactions with State Parties, is discussed. The Rome Statute, the treaty that established the ICC, entered into force in July 2002, on the eve of the 50th Anniversary of the Universal Declaration of Human Rights (1948-1998). The object and purpose of the Rome Statute: As stated in the Preamble of the Statute, the primary reason for the establishment of the permanent International Criminal Court was to create a jurisdiction and ensure that most serious crimes of international concern do not go unpunished in order to put an end to the impunity for the perpetrators of these serious crimes and thus contribute to their prevention. As listed under article 5 of the Rome Statue, the Court has jurisdiction over individuals that

[177]Kenya Human Rights Institute, *Special Brief: Clarifying Human Rights Violations in the Kenyan Post-election Crisis* (February 2008).

are responsible for the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole[178]. Complementarity: Essentially, the principle of complementarity holds that the ICC will not substitute national courts and it will only intervene in cases where the Prosecutor is able to prove that national courts have neither the desire nor the means to initiate and conduct proceedings. In other words, States retain the primary role in punishing crimes over which even the Court has jurisdiction and thus by its complementary role, the ICC is a court of last resort.

Jurisdiction: The Court has jurisdiction over all crimes committed in the territory of a State that has ratified the Statute, or that has expressed its agreement to the jurisdiction of the Court. In addition, the Court has jurisdiction on all crimes committed by nationals of States that have ratified the Statute or that have expressed agreement to the jurisdiction of the Court. If the Perpetrator is a national of a ratifying State, the Court has jurisdiction, even if the territorial State[179] (i.e. where the crime was committed) has not accepted the jurisdiction of the Court. Where the perpetrator is a national of a State that has not accepted the jurisdiction of the Court, as long as the territorial State has done so, the Court is enabled to proceed[180]. The Role of the Security Council: The Statute attributes two important functions to the Security Council. Its main function, which it derives from Chapter VII of the 1

Rome Statute for the International Criminal Court, allows it to mandate the Court to investigate and prosecute offences in the absence of ratification or consent on the part of the

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[178] Kenya Human Rights Institute, *Interventionism and Human Rights in Somalia: Report of an Exploratory Forum on the Somalia Crisis* (2007).

[179] Musila, Godfrey *Between rhetoric and action: The Politics, Process and Practice of the ICC's work in the Democratic Republic of Congo*(2009).

[180] Office of the High Commissioner on Human Rights, *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008*, (2008).

State in whose territory the offence has been committed or of the State whose nationals are under suspicion. Secondly, the Security Council can suspend the activity of the Court for a limited period and in exceptional cases. An Independent Prosecutor: The Prosecutor has a right to take action without having to wait for a State to denounce a particular crime[181]. He can initiate proceedings on the basis of reports from intergovernmental or non-governmental organisations, or other reliable sources. However, the ex- officio action of the Prosecutor is to be performed under very close judicial supervision by the Pre-Trial Chamber of the Court, which will judge its appropriateness and legal foundation, before giving authorization to the Prosecutor to proceed. Universality: In principle, the Court is a creation of States and must represent all cultures. On a practical level, universality is necessary in order to be able to combat impunity and to engender support of member States for the investigation and prosecution of alleged crimes[182]. Similarly, by requirement of the Statute, the membership of judges of the Court needs to reflect an equitable geographical spread and the representation of the principal legal systems' of the world. Geographic and legal systems representations are thus key factors in the working structure and staffing of the Court[183]. As a counter to the much publicised concern that the court could be "politicised", there are a range of safeguards under the regime of the Statute which are the admissibility and jurisdictional regimes of the Court, a qualified and independent Prosecutor and qualified and independent judges.

4.4 The Duty of Cooperation under Article 86 of the Rome

[181] Supra 5

[182] Minow, Martha, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press,1998).

[183]South Consulting, *Report[s] on the Status of Implementation of the Kenya National Dialogue and Reconciliation Agreement,* (Nairobi, January - October 2009).

Statute: The International Criminal Court requires the cooperation and participation of States as it cannot act alone[184]. The ICC has neither police nor any other enforcement machinery at its disposal and its task is even more difficult as it may have to consider evidence from all over the world. As such, the Court can only rely on States in order to carry out its mandate. The court's function is thus entirely dependent on effective and rapid cooperation of all States parties. Furthermore, as the Rome Statute is not self-executing, States parties have to pass domestic implementing legislation in order to meet their obligations to the Court as far as cooperation is concerned. A State becoming party to the Statute must from the very beginning permit the Court to exercise its jurisdiction and power in its territory, within
the crimes it is empowered to investigate and prosecute[185]. Overview of Part IX of the Rome Statute; the cooperation of States with the Court:

4.5 The ICC Today

The Court has now been a reality for almost eight years with 114 countries being state parties. Since 1st July 2002 when the Rome Statute of the International Criminal Court entered into force, much progress has been achieved in the physical establishment of the Court in The Hague[186]. Since 2002, the Prosecutor has received over one thousand communications containing allegations of crimes. Most of these crimes are however not admissible before the ICC due to various reasons. Situations before the ICC Nevertheless, there are five situations which are now formally before the ICC; a) The Government of Uganda's referral of the situation with the Lord's Resistance Army in the north of the country, the situation in the

[184] Juma, Dan, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper', *Essex Human Rights Review* Vol. 4 No. 2 (September 2007).

[185] International Crisis Group, *Kenya in Crisis: Africa Report N°137 – 21 February 2008*, (2008).

[186] Koskenniemi, Martti, 'Between Impunity and Show Trials', *Max Planck Yearbook for United Nations Law* 6 (2002).

Democratic Republic of Congo, the UN Security Council referral of the situation in Darfur, The investigations in the Central African Republic, Investigations authorized by the ICC Judges relating to crimes against humanity in Kenya in the period between June 1, 2005 and November 26, 2009 Uganda: The first situation to come before the ICC is that of Uganda involving the Lord's Resistance Army which waged a campaign of terror in Northern Uganda abducting over 20,000 children, using many as soldiers and sex slaves, and committing rape and murder[187]. In as much as the LRA richly deserves prosecution, the crimes have not been committed by one side only, as the Ugandan Army has been accused of various abuses including killing and forced displacement of civilians. The Ituri conflict in Eastern DRC: This conflict involves the agriculturalist Lendu and pastoralist Hema ethnic groups in the Ituri region of northeastern Democratic Republic of Congo (DRC). Although the Prosecutor concentrated on Ituri for the moment, he may extend his investigations to the entire territory of the DRC. While there have been many phases to the conflict, the most recent armed clashes ran from 1999 to 2003, with a low-level conflict continuing. The conflict had been vastly complicated by the presence of various armed groups who participated in the Second Congo War, the large amount of small arms in the region, a scramble for the area's abundant natural resources, and the ethnic tensions of the surrounding region.

Kenya is the latest situation to come before the ICC. The recent decision by pre- trial chamber, discussed at length elsewhere, underscores that the Prosecutor's investigative powers extend to crimes committed by any party in Kenya[188]. While Kenya as a state party to the Rome Statute is guaranteed the prerogative to repress crimes punishable under

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[187] Scharf, Michael, *The Story Behind the First International War Crimes Trial Since Nuremberg* (Durham: Carolina Academic Press, 1997).

[188] Republic of Kenya, *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Nairobi: 2008).

international law, the ICC has been forced to intervene due to the inability of decision-makers in Kenya to institute credible and effective mechanisms at the national level as recommended by Judge Waki. It is important to bear in mind that the ICC process will

target only a select number of individuals, and therefore, it is imperative that Kenya establish a Special Tribunal to try lower-to mid-level perpetrators as a supplementary mechanism to the ICC process[189]. This is critical to allow the vast majority of victims to access justice for the crimes that were committed against them. Summary of the PTC II Judgement On 31 March, 2010, the Pre-Trial Chamber II issued its decision authorising the Prosecutor to commence his investigations into Kenya. Pre-Trial Chamber II assented to the Prosecutor's request by a two-one majority. The Chamber was mandated to review the conclusion of the Prosecutor by examining the available information, the supporting material as well as the victims' representations in order to determine whether there is "reasonable basis to believe that a crime within the jurisdiction of the Court has been committed or is being committed." In their review the Chamber Judges considered three factors when making their decision: (i) the Court's jurisdiction; (ii) admissibility of the case; and (iii) interests of justice. With regards to the question of jurisdiction, the Judges considered whether the following three conditions were satisfied: firstly, did the alleged crime occur within the period set out in Article 11 of the Statute? Essentially, according to Article 11, the Court only has jurisdiction only with respect to crimes committed after the entry into force of the Statute. Secondly, does the alleged crime fall within the category of crimes under Article 5 of the Statute? According to Article 7 acts that would constitute crimes against humanity include murder, rape and other forms of sexual

[189] Musila, Godfrey, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions', *International Journal for Transitional Justice* (2009).

violence, deportation and forcible transfer of population and other inhumane acts. Thirdly, was the crime committed on the territory of a State Party to the Statute or

did a national of any such state commit the crime? After a careful examination of the available information, the majority of the Chamber oncurred that the requirements regarding jurisdiction

were fulfilled and the request was within the jurisdiction of the Court and a crime against humanity had been committed in Kenya[190]. Secondly, the Judges considered whether the case is or would be admissible under Article 17 of the Statute. However, bearing in mind the particular and early stage of the proceedings, the Judges construed this requirement to be within the parameters of an "entire situation" rather than in relation to a specific case. Thus, the Judges' assessment of admissibility at this stage involved the admissibility of one or more potential cases within the context of a situation[191]. An assessment of gravity entails a generic examination of whether the persons or groups of persons that are the object of an investigation include those that may bear the greatest responsibility for the alleged crimes; and that the crimes were allegedly committed within the incidents, which are the object of an investigation[192]. In this case, noting the lack of progress by the Kenyan government to establish a Special Tribunal to conduct national proceedings; noting the Kenyan authorities inadequacies to address the election violence; and given the brutality of the alleged crimes (for example, burning victims alive, attacking places sheltering IDPs, beheadings and hacking people to death) the majority of the Judges concluded that the case would be admissible under

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[190] South Consulting, *Report[s] on the Status of Implementation of the Kenya National Dialogue and Reconciliation Agreement*, (Nairobi, January - October 2009).

[191] White, Richard *Breaking Silence: The Case that Changed the Face of Human Rights* (Washington, DC: Georgetown University Press, 2004).

[192] Bossa, S B, *A Critique of the East African Court of Justice as a Human Rights Court*. Paper presented in Arusha, Tanzania on 26 October 2006

Article 17 of the Statute[193]. Finally, interests of justice: under Article 53(1)(c) the judges had to assess whether given the gravity of the crime "and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". According to the judges, the prosecutor does not have to establish in a positive sense that an investigation is actually in the interests of justice.

It is only if the Prosecutor decided that an investigation would not be in the interests of justice that this decision would fall under judicial scrutiny[194]. Thus a consideration of this requirement was unwarranted, as the Prosecutor had not decided that an investigation "would not serve the interests of justice".

4.6 The Special Tribunal for Kenya

From the outset, the Special Tribunal's promoters, including the commission, saw the tribunal as one way to strengthen domestic justice in Kenya. Including a reference to the ICC in the report was clearly meant to encourage the government to establish this tribunal; ultimately the aim was that justice would be done in compliance with the principle of complementarity. The presumption was that Kenya had or could swiftly secure the judicial capacity sufficient to investigate and prosecute international crimes, and that any lack of political will could be overcome by realizing that the ICC would step in if the government failed to act[195]. Nevertheless, CIPEV and other promoters of judicial accountability feared that the Kenyan judiciary could be pressured through corruption and political interference. Significantly, the

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[193]CCF, UNICEF, UNPFA, UNIFEM, *A Rapid Assessment of Gender-based Violence during the Post-election Violence in Kenya Conducted: January-February 2008* (Nairobi 2008).

[194]Conot, Robert E, *Justice at Nuremberg* (New York: Harper & Row, 1983).

[195] Mutua, M. (2008). *Kenya's quest for democracy: taming the leviathan.* London: Lynne Rienner Publishers.

draft Special Tribunal for Kenya statute proposed placing internationals in key positions to alleviate concerns of potential political interference with the independence of the process or with witnesses. In December 2008, Kenya implemented the Rome Statute through the International Crimes Act, which grants local courts jurisdiction over international crimes. While this lifted a legal impediment to investigating and prosecuting international crimes[196], the constitutional bar against retroactive prosecution meant that the Act could not be used to investigate and prosecute crimes committed during the post-election period as such.

The Special Tribunal for Kenya was recommended by the CIPEV as a preferred option for justice in relation to the Post-Election Violence. The ICC option was only to be invoked in default of establishing a credible domestic mechanism. As proposed, the Special Tribunal sought to hold accountable those responsible for grave crimes committed during the 2008 post-election crisis. The main rationale for establishing this mechanism, which would be partly staffed by judicial officials drawn from other jurisdictions, is the widespread concern that the national courts were likely to be susceptible to political

interference[197]. Because of the possibility that the tribunal would try large numbers of suspects, the Special Tribunal Bill provided for a multiplicity of chambers, including specialised ones to focus on issues such as sexual and gender-based violence (SGBV). Without a doubt, the tribunal would be a unique judicial mechanism. While similar tribunals have been few and far between, they do have the potential to act as engines for reforming national judicial systems[198]. For one, their creators have tended to confer upon them high

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[196]Supra 21

[197]Nasong'o, SW (2007). Negotiating New Rules Of The Game: Social movements, civil society and the Kenyan transition. G.R. Murunga, S.W. Nasong'o (Eds.). *Kenya: the struggle for democracy*. (pp. 19-57). New York, NY: Palgrave Macmillian.

[198]*Ajulu, Rok* 2003: Kenya: A Reflection on the 2002 Elections. Third Time Lucky or More of the Same?, Braamfontein, South Africa.

levels of judicial integrity, professional and technical competence, which can impact positively on national judicial systems to which they are linked. Even though the Special Tribunal Bill contemplated a relationship with the ICC, the need to develop a broader policy or legislative framework[199] that would link it to other justice mechanisms was acknowledged. These included mechanisms such as the TJRC and the regular courts. For example, it might be desirable to prosecute a specific individual for grave crimes committed in the context of the post-election crisis yet later it might emerge that there is greater value in bringing that particular individual before the TJRC to testify about historical injustices. In other words, this proposed policy or legislative framework would have to synchronise the objectives and work of the Special Tribunal, other prosecutorial mechanisms as well as non-prosecutorial mechanisms such as the TJRC. Concerns were raised about the Special Tribunal as conceived, in terms of whether it was capable of establishing a credible and effective framework for the pursuit of justice for the post-election violence. Other concerns that were raised included the legitimacy of the tribunal. In the event the tribunal was established but lacked sufficient popular support, is there a chance that. As mentioned earlier the Bill was the subject of a parliamentary boycott in the latter half of 2009. Human rights groups could collaborate with victims to generate ex post facto legitimacy for the body? Is this a reasonable and realistic strategy for achieving the establishment of a Special Tribunal?

Potential constitutional controversy It was noted that the Special Tribunal Bill as drafted may not pass in parliament on constitutional grounds. Even if it did pass, there was the risk that its constitutionality would be challenged in court. The problems cited in the bill included its attempt to oust the High Court's jurisdiction in respect of post-election crimes and to

[199] *Waki* 2008: Final Report. The Commission of Inquiry into Post-Election Violence (CIPEV), Nairobi.

completely shunt aside key criminal justice agencies such as the Attorney General and the police from the tribunal's operations. Additionally, if passed into law, the Bill would provide for retroactive criminal offences, yet there is a constitutional prohibition against charging individuals with acts which at the time of their commission were not recognised as crimes in Kenya[200]. This would violate due process rights and specifically the principle of legality or *nullum crimen* that is contained in Section 77(4) of the Constitution of Kenya. Some observers argue that the discussion about constitutional changes is unnecessary. There is precedent in Commonwealth jurisprudence allowing for prosecution of conduct that at the time it was committed was criminalised under international law but not national law[201]. Kenyan law also includes customary international law, which covers most of the atrocities that occurred during the post-election crisis, in particular, crimes against humanity. In theory therefore, these crimes exist in Kenyan law, and as such, should not be thought of as retroactive criminal offences. This situation however raises the classical monist- dualist dilemma in international law regarding differing requirements for domesticating legislation to give effect to international agreements. Consequently violations of international customary law may only be prosecuted in national courts if implementing legislation is enacted to give international law the force of domestic law. Criminal law in particular would require the existence of specific legislation as there needs to be a high degree of certainty about the nature of the crimes in question and the corresponding punishment. In fact, recent jurisprudence shows that as far as criminal law is concerned, even countries that follow the monist tradition (civil law countries) require domestic law to operationalise international law obligations relating to the punishment of crimes. This partly explains why Senegal passed a

[200] *UNOSAT* 2008: Overview of the Damage in Kibera & Huruma Estates. Following Post- Election Violence – Nairobi, Kenya, in: www.unitar.org/unosat/node/44/1046 (25.5.2011).

[201] *Wong, Michela* 2009: It's our Turn to Eat. The Story of a Kenyan Whistleblower, Forth Estate, London

torture law and amended its constitution to enable it to try former Chadian dictator, Hissène Habré, for torture he allegedly committed in Chad during the 1980s despite the fact that Senegal was party to the Torture Convention of 1984 and would have been expected – as human rights groups had argued – to prosecute even without domestic legislation[202]. Some participants suggested that human rights groups are becoming too conservative in their interpretation of the constitutional rights of suspected perpetrators of human rights abuses. For instance, if they are clear that they seek to advance the right to life, should they not therefore promote an interpretation of the constitution that enables them to achieve this purpose? Whilst this perspective raises different moral and jurisprudential issues, human rights groups should remain conscious of beneficiaries of unjust constitutional orders who tend to hide their excesses under the constitutional cloak[203]. Opponents of this viewpoint assert however that such a radical interpretation of the constitution invites legal discrimination. It opens the possibility that certain criminal suspects could be sucked into a legal black hole where due process protections are denied. One may therefore query the wisdom of pushing for passage of the Special Tribunal Bill when there is the expectation that it will be challenged on constitutional grounds. How practical would it be for human rights groups to push for this legislation? What might they do differently? Perhaps human rights organisations could work with parliamentarians to make the necessary changes to the bill. Alternatively, and in addition, they would need to develop a lobbying strategy to build political support to allow for safe passage of the Bill through Parliament.

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[202] *Daley, Patricia* 2006: Ethnicity and Political Violence in Africa. The Challenge to the Burundi State, in: Political Geography 25, 657-679.

[203] Human Rights Watch, *Ballots to Bullets: Organized Violence and Kenya's Crisis of Governance* (New York: March 2008).

4.7 RELATIONSHIP BETWEEN THE ICC AND TRUTH COMMISSIONS

While welcoming the creation of the ICC, some authors have expressed concerns that its approach may prove to be too blunt in dealing with the varied and complex situations facing democracies in transition[204]. The ICC has been seen as both morally impressive and legally a little frightening because "it could be misinterpreted, albeit incorrectly, as foreclosing the use of truth commissions. Similarly, it is my observation in this thesis that when the ICC comes into being, it will not, either by definition or by approach, discourage attempts by national states to come to terms with their past as in the case of Kenya. It would be regrettable if the only approach to gross human rights violations comes in the form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights.

This thesis observes that there is a cause for celebration for Kenya to pursue criminal accountability for gross violations of human rights through the ICC. However important, prosecution should not be viewed as the only, or even the most important, means to end impunity[205]. If we confine to courts the struggle to guarantee human rights, we ignore many other important initiatives designed to assist victims, rebuild societies and defend democracies. Therefore, we should try to sequence the use of the ICC and national mechanisms such as truth commissions to cover the entire gap.

4.8 The ICC and Domestic Transitional Justice: Reaching forward

As stated previously,in this thesis, prosecution is not always the right way to deal with all

[204] Muigai, Githu. (1995). 'Ethnicity and the Renewal of Competing Politics in Kenya.' In Glickman, H. (ed.) *Ethnic Conflicts and Democratization in Africa.* Atlanta: The African Studies Association Press.

[205] Kenya Human Rights Commission et al (2010) Transitional Justice in Kenya: A Toolkit for Training and Engagement. Nairobi: Zand Graphics.

situations, especially when a country makes the transition from conflict/war to peace or from oppression to democracy, it should be allowed to choose its own method of confronting its past. Thesis examined the Kenyan TJRC like a case study in order to respond to the question: Whether the ICC could interfere in domestic transitional justice? This question led to the complementarity principle of the ICC.

The Rome Statute provides that the principle of complementarity is inapplicable when States are "unwilling genuinely" or "unable" to investigate and prosecute[206] an accused (article 17). "Unwillingness" means that proceedings were undertaken for the purpose of shielding an individual from criminal prosecution, there was undue delay, or that there was no independent and impartial tribunal. Further, the case must have been conducted in a manner inconsistent with the intent to bring an individual to justice[207]. Also, the principle of complementarity is inapplicable where a State is unable to genuinely carry out an investigation or prosecution. The word "genuinely" implies a measure of good faith on behalf of the State.

In Kenya, The Truth commission was established by the best efforts of negotiators to investigate human rights violations[208]. This is justice, to my view of prosecuting some few and other not, and still walk free as if they were granted de facto amnesty. Others decry the fact that most perpetrators of the worst crimes did evade justice. In my view, however, the Kenyan TJRC exercise is notable for its insistence on hearing the victims, consulting with all members of society, allowing participation by all stakeholders, and conducting the exercise in complete transparency. In a situation where legal infrastructure is either decimated by war or

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[206]Tina Rosenberg, .Afterword: Confronting the Painful Past., in Martin Meredith, *Coming to Terms:South Africa.s Search for Truth*, 1999, p 328

[207] Alex Boraine used the term .most available. during course sessions for the Fellowship in Transitional Justice/Cape Town/2005

[208] J. Mendez, 1997Accountability for Past Abuses., *Human Rights Quarterly*, 19, pp. 255- 282.

underdeveloped-or both- impunity already exists[209]; the state simply does not have the capacity to prosecute all it rightfully should. It has been illustrated that there will be those who walk among the population every day and everyone will know, this is the man who did x or y on that day in that place. This is a situation that sadly will not be fully or even adequately resolved through transitional institutions like TJRC. In light of this, the work of a TJRC is not about providing amnesty as a way of legitimating impunity. The impunity exists and generally mass violators don't feel a need to obtain legitimacy[210]. They cannot share why they did, what they did, and they simply try and survive when times change.

The function of a TJRC is much more strategic than to challenge violators wherever they may be. This is hard because one wants to address the intimacy of every violation, to say that every evil act should be accounted for. but in most post-conflict societies like Kenya, this is simply not going to happen. Or rather, it is necessary to work with this political reality strategically, in a sequenced way: first go after the command structure, the ideologues, the most notorious figures; include some smaller cases – to show that all small cases are significant. Everything should s not be done at once[211]. Not only because the alternative is practically, literally impossible, but because the point of a TJRC is to create possibilities for transformation and not to solve literally everyone's pain. To expect the latter is to invite disaster; nevertheless, what a TRC can do is very real. It is important to continue to inspire all those who decide to turn a page in a country's history without forgetting the plight of those who suffered. Therefore, we conclude that, if perpetrators appear before an independent and democratic

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[209] Charles Villa-Vicencio, .Reconciliation as Political Necessity: Reflections in the wake of Civil and Political Strife., p.3

[210] Miriam J. Aukerman, .Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,. *Harvard Human Rights Journal* 15 (2002): 39-97

[211] See Holmes J., The Principle of Complementarity, in Lee R. S. (ed.), The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, Results, Kluwer, 1999, pp. 41-78;

truth commission that hears applications for conditional and accountable amnesty, they should not face prosecution by the ICC. In this case, amnesty (conditional) is granted for the purpose of domestic reconciliation and not to shield him from criminal prosecution. However, can all truth commissions have the same purpose of not shielding perpetrators? It is important to draw the line in order to avoid some contradictions between truth commissions and ICC.

Having submitted in this thesis that truth commissions are proposed for different reasons and driven by diverse motives. They can be used firstly, for the purpose of national reconciliation and in the interests of the society[212]; secondly, sometimes they can be used to avoid accountability or prosecution and merely to shield an offender from justice. Then, we should ask ourselves if the Kenya TJRC process can be considered as a genuine and serve the interests of the country and therefore is complementary to the ICC. As we may know, in some countries the purpose of a truth commission may be not genuine and reasonable. There is a question about truth commissions, because one cant say a priori which ones are a reasonable response to the situation, and which ones are a cover-up. It's going to require extreme care. There may be some problem with the capacity to subvert those processes if they are reasonable, and we'll just have to hope that the institutions within the court take a sensible view about it. But complementarity extends to covering internal processes which don't necessarily involve prosecutions of individuals, so there's no reason why the principle of complementarity ought not to cover an appropriately constituted truth commission.

Truth Commissions demand fewer resources than courts and, if designed properly, can provide some accountability[213]. However there is need to ensure that establishment of truth

[212] Juan E. Méndez, .How to Take Forward a Transitional Justice and Human Security Agenda: Policy Implications for the International Community., Cape Town, April 1, 2005

[213] Andre du Toit, .The South African Truth and Reconciliation Commission (TRC): Local History, Global Accounting., in *Politique Africaines* 92 (2003), p5

comissions comply with international law. Unlike the Kenya Truth Justice and Reconcilliation Commission, the South African TRC is internationally recognized, and has been favourably endorsed by numerous international human rights organisations and commentators. The TRC was passed pursuant to a valid Act of Parliament and imposes a form of public procedure and accountability for the actions of perpetrators. It was country's decision in favour of peace. This is not impunity because there was political consensus in South Africa that getting as much of the truth out as possible and having fewer, but more effective prosecutions, was a just result. Given that, this was what the majority of the public wanted, that is not impunity. In this line, speaking on the relationship between the prosecutorial mandate of the ICC and the amnesty administered by the South African[214] TRC, the Secretary-General of the United Nations has observed: "The purpose of the clause in the Statute (which allows the Court to intervene where the state is 'unwilling or unable' to exercise jurisdiction) is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power[215]. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.

However, this cannot be said to be the same in Kenya. In assessing whether we met some minimal requirements to approach legitimacy under international law, one can point out that the Kenya TJRC was not created and is not operated transparently in order to sustain

[214] A. Boraine, .A Country Unmasked: South Africa.s Truth and Reconciliation Commission. (2000)

[215] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (2002) Blackwell Publishers Ltd, UK, pp 112.113.

democratic legitimacy. There is a clear lack of citizen involvement in the reation and functioning of a TJRC, and openness to ensure domestic legitimacy. There is no endorsement of the TJRC and its work as a mechanism of transitional justice. Moreover, there are many critiques because the chair of the commission was not endorsed and was said to have occasioned some of the historical injustices in the past.

To avoid contradictions between truth commissions and ICC in order to merit international legitimacy, this thesis suggests that one possible test would be whether the procedure in question had been freely ratified by the successor regime, so it's not just a way that the generals can sign their amnesty on the way out of the door.

Truth commissions are not alternative to prosecutions, all are two sides of the same coin and should be used complementarity but sequencing for their success. Saying that "prosecutions should remain an option both during and after the TJRC against those perpetrators who did not adequately participate in the process[216]" seems to be too simplistic and could undermine the entire effort to heal the wounds of the nation and to fight against impunity. In addition to satisfying the above minimum criteria for international legitimacy, a Truth commission should also be created and operated transparently in order to sustain democratic legitimacy. Citizen involvement in the creation of a truth commission, and an openness to media coverage of its operations, are necessary to ensure domestic legitimacy.

There are two conditions of legitimacy that should be insisted upon for any program of transitional justice. First, transitional justice policy should be developed as part of an open, democratic debate[217], which includes consultation with and participation of the relevant

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[216] Charles Villa-Vicencio, Truth Commissions, in Charles Villa-Vicencio and Erik Doxtader (Ed) 2004, *Pieces of the Puzzle: keywords on reconciliation and transitional justice*, Cape Town, p 92

[217] Justin M. Swartz, .South Africa.s Truth and Reconciliation Commission: A Functional Equivalent to Prosecution. (1997), 3 DePaul Dig. Int.l L. 13 at 19

stakeholders and full transparency of decisions. If decisions about how to reckon with the past are adopted exclusively by the parties to a conflict, without appropriate consultations with the victims of abuse or with society at large, the result will almost always generate dissatisfaction and rejection. Second, transitional justice policy should be contemplated in as comprehensive and holistic an approach as possible[218]. This is not only because there will always be an 'impunity gap', meaning that many cases of abuse will not be resolved by trials, thus generating the need for a broader treatment of the universe of violations. It is also because the emerging principles in international law establish that the obligations of the State are four-fold: to prosecute perpetrators, to unearth the truth, to offer reparations to victims, and to reform abusive public institutions[219].

Assessing when it may be useful or not to prosecute, one should look in the scope of article 53 of the Rome statute. In fact, the negotiations leading to the adoption of the Rome Statute were also an opportunity for the delegates to discuss how to deal with national amnesties and national truth and reconciliation commissions[220]. Views on the matter were extremely varied, as some participants felt that prosecution was the only appropriate response whereas others felt that alternative mechanisms were acceptable. The drafters of the Rome Statute decided not to include these in the Statute, and preferred instead to leave a door open to the Prosecutor[221], with the inclusion, in article 53 of the concept of the "interest of justice". Indeed, article 53 provides that the prosecutor may desist from acting either in relation to opening an investigation or in continuing with an investigation that has been opened if it

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[218] Charles Villa-Vicencio and Erik Doxtader (Ed) 2004, *Pieces of the Puzzle: keywords on reconciliation and transitional justice*, Cape Town, pp.89-90

[219] Brown B.S., Primacy or Complementarity: Reconciling the Jurisdiction of National

[220] Schwart, *A Functional Equivalent to Prosecution, id.* Erin Daly, *Transformative Justice: Charting a Path to Reconciliation,*

[221] Courts and International Criminal Tribunals, 23 Yale J. Int.l L. (1998), p. 383;

appears to him/her that the decision to desist would be in the interests of justice. The criteria for a decision not to proceed with an investigation are set out in article 53(1.c) and are different from the criteria for a decision not to proceed with a prosecution, established under article 52(2.c). Article 53(1.c) provides that, taking into account the gravity of the crime and the interests of victims, the Prosecutor may consider that there are nonetheless substantial reasons not to open an investigation; Article 53(2.c) simply provides that taking into account all the circumstances, including the interests of the victims, the gravity of crime, the alleged role of the accused and his/her age and health, the Prosecutor may decide it would not be in the interests of justice to proceed with a prosecution. However, is the concept of "interest of justice" limited to retributive justice, or does it encompass larger considerations? This problematic raises other questions: What is meant by justice here, what serves the interest of justice. And for whom is justice served? The victims? The state affected? Lawyers? The world?[222] Although the fact that there is information indicating that X crime in the ICC jurisdiction has been committed, the guiding principle according to the Rome Statute is what serves the interest of justice, and it is a very difficult task. From which and whose perspective is this determination to be made? What serves the interest of a wider society (issues of peace and security, for instance) may not serve the interests of individuals. Therefore, what is meant by justice here? Justice in the narrow sense of criminal justice, or justice in the broader, restorative, sense? Talking about "justice", we should note that it is a flexible concept as earlier discessed in this thesis.

The fundamental goals of retribution and reconciliation in criminal justice can be balanced in various ways. An absolute rule that requires prosecution imposes a rigid retributive justice[223].

[222] International Legal Perspectives 73, 155-156 (2002); Kader Asmal, *International Law & Practice: Dealing with the Past and the South African Experience*, 15 AM. U. INT..L L. REV. 1211, 1228 (2000).

[223] Juan E Mendez, .Transitional Justice in Historical Perspective., Outline, Somerset West Conference, March

It could well be decided in a particular case that justice is served not by prosecuting before the ICC or even by stimulating prosecution in particular case but by the encouragement of other mechanisms such as restorative justice. For example, truth commissions such as the South African TRC emphasizes reconciliation between victims, perpetrators and society at large. This satisfies the societal need for justice. For that, the concept of "interest of justice" is not limited to retributive justice; it does encompass also restorative justice. However, one could asks if in the interest of justice, it may be possible to grant amnesty to perpetrators and complying with the Rome Statute. Here, it is important to note that the response may differ depending on the forms of amnesty (blanket amnesty or conditional amnesty; whether granted by a truth commission or by the outgoing or ingoing government as a political act of reprieve).

The Contribution of truth commissions to the ICCs "Zero" (0) case goal Moreno Ocampo, the former Chief Prosecutor of the ICC states that "the 0 case goal" means the absence of trials by the ICC, as a consequence of the effective functioning of national systems[224]. This would be a major success. This is only possible if national mechanisms are neither unable nor unwillingness to investigate and prosecute. Here comes the necessity of truth commissions, if the ICC goal is real to have zero case. If democratic and genuine truth commissions deal with national situation and complement the national criminal justice, then, the ICC goal will be achieved[225]. The question should in fact be "how local or national institutions and accountability mechanisms could be strengthened in order to address the question of

28, 2005 Inaugural Address

[224] Juan E Mendez, .Transitional Justice in Historical Perspective., Outline, Somerset West Conference, March 28, 2005 Inaugural Address

[225] Naomi Roht-Arriaza, .Amnesty and the International Criminal Court., *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley, New York: Transnational Publishers Inc., 2000) at 79.

impunity". Because if at the national level states are able to deal with human rights violations (through trials or/and truth commissions), then there is no need to strengthen the ICC.

4.9 Conclusion

As we may recalled, in many transition periods two methods are used to establish record of grave human rights crimes following a conflict/war: prosecutions at national or international level and truth commissions with various names, which investigate situations and submits reports. Both of those two methods are not sufficient and therefore, the need to complement each other. In fact, the ICC presents a historic opportunity for the international community to take a stand against large scale violations of human rights. However, even if it achieves its full potential, it realistically will not be able to address all situations in which national courts are unwilling or unable to prosecute all perpetrators. Among other factors, there are temporal and other jurisdictional limitations on what cases the ICC can hear. To maximize these opportunities, we should use truth commissions to fill the gap. There is a growing demand for transitional justice mechanisms such as truth commissions, around the world[226]. The problem however, it is to test if all those mechanisms imply good faith. Is the effort designed to generate more truth, more justice, reparations, and genuine institutional reform? If so, they are welcome. If the object is to evade the State's and society's legal, ethical and political obligations to their people, they should be rejected. The answer should be found in the design of the process itself, but also in the degree of participation, consultation, and transparency that surrounds them.

Moreover, in order to build a bridge across retributive and restorative justice symbolized respectively in this thesis by the ICC and Truth Commissions, we should start by avoiding

[226] Charles Villa-Vicencio, .Restorative Justice., in Charles Villa-Vicencio and Erik Doxtader (Ed) 2004, *Pieces of the Puzzle: keywords on reconciliation and transitional justice*, Cape Town, p.33

seeing truth commissions as an alternative to prosecutions. Even if many of them have been accompanied by grants of amnesty to the major perpetrators of human rights crimes, viewing truth commissions, as substitute for prosecutions is not a right way and can lead to contradictions. Therefore, we should try to consider truth commissions as complementary to national and international prosecutions, not to substitute them[227]. There are two sides of the same coin: transitional justice. However, the processes must be sequenced in a way that one does that not affect the effectiveness of the other. For example, taking the Sierra Leone case, I may propose for the future in other countries, to sequence the work of the Court and TRC. A country should not rush ahead with prosecutions at the cost of political instability and social upheaval or that every single perpetrator must be brought to justice, an impossible task in most countries that have experienced widespread human rights abuses[228]. By documenting abuses and preserving evidence, a truth commission can enable a country to delay prosecutions until the international community has acted, or the new government is secure enough to take such action against members of the former regime[229].

Furthermore, to reinforce the relationship between Retributive justice (prosecutions) and Restorative justice (truth commissions), it may be useful to examine the utility of conducting prosecutions after Truth commissions as a means of uncovering more "truth" that was not revealed through the process.

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[227] J.G., Schukking J. (eds.), Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos Asser Press. The Hague, 1999, p. 129;

[228] Leila Nadya Sadat, .The New International Criminal Court: An Uneasy Revolution. (2000), 88 Georgetown L.J. 381 at 418.

[229] Schabas W., An Introduction to the International Criminal Court, Cambridge, Cambridge University Press, 2001, pp. 66-70;

CHAPTER 5

5.1 CONCLUSION AND RECOMMENDATIONS

As highlighted in Chapter One, this thesis aimed to establish the relationship between Truth commissions and the International Criminal Courts in relation to transitional justice in post conflict Kenya. It further sought to determine and analyze the scope of crimes for the two processes and how they complement each other. This was extensively covered in Chapter two and Chapter four. Chapter three analysed post conflict situation in Kenya aimed at giving the reader a background and history of conflict in Kenya. This final chapter concludes that the International Criminal Court and Truth Justice and Reconciliation Commission complement each other as will be discussed below.

As observed in this thesis, one major challenge facing countries emerging from civil conflict is how best to deal with the painful legacy of the violent past, while maintaining the fragile social harmony that often characterises post-conflict societies. This poses a dilemma in priorities: On one hand is the question whether the first consideration be given to bringing the perpetrators of past human rights violations to justice, and so combat the culture of impunity that has come to characterise many civil conflicts. On the other, is the question if it is important to start by focusing on measures designed to ensure that peace and stability are secured, and with them the prospects for a country's longer-term recovery.

Transitional justice as seen in this thesis is a contested and evolving process, which emerged in the 1990s[230]. It is understood as a set of practices, mechanisms and concerns that arise

[230] Lambourne, W. (2004) 'Post Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation.' *Peace Conflict and Development*, 4. pp 2-24.

following a period of conflict, civil strife or repression, and aimed directly at confronting and dealing with past violations of human rights and humanitarian law. This thesis therefore concludes that transitional justice, concerns the whole range of mechanisms and approaches applied by states or societies that seek to transform, heal and transit from illegitimate and repressive rule or situations of conflict to national reconstruction and good governance. These mechanisms largely include legal policy and constitutional reforms, prosecutions, reparations, lustration measures, reconciliation and peace building measures, memorialisation, and truth commissions[231], among other as earlier discussed in this thesis. Through such mechanisms, society aims to end the culture of impunity and establish the rule of law in a context of democratic governance. Transitional justice processes also aim to reconcile people and communities and provide them with a sense that justice is being done and will continue to be done, as well as to renew the citizens' trust in the institutions of governance and public service.

This thesis observes that through these measures, transitional justice endeavours to legitimize the institutions of governance in the eyes of the citizens. After a period of conflict, the challenge facing transitional justice is often how to balance the demands of justice against the many political constraints. The nexus between the International Criminal Court and Truth Commission is that one hand, perpetrators of the violence must be held accountable to avoid impunity and a possible return to war. This accountability is often carried out by way of prosecutions. However, the immediate post- war period is always a very fragile time of competing interests[232]. Since most institutions, including the economy and justice sector,

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231 Huyse, L. (2003) 'The Process of Reconciliation.' In Barnes, T. et al (eds.) *Reconciliation after a iolent Conflict.* Stockholm International Institute for Democracy and Electoral Assistance.

232 Fletcher, W. (2006) 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective.' *Human Rights Quarterly*, 31 (1). pp 163-220.

would be run down after the upheaval of a conflict, bringing the perpetrators to justice may not always be the most urgent action especially in places where these perpetrators may be very many like Rwanda after the 1994 genocide or where they hold key positions of power and are therefore central in reinstating the rule of law. Moreover, prosecutions have some intrinsic limitations. They are perpetrator-oriented and do not give victims the full attention they are entitled to in order to be healed of the injustices they suffered. Societies emerging from conflicts employ different transitional justice mechanisms[233], depending on their needs and context, while trying to respond to the seemingly irreconcilable notions of justice and political demands[234]. However, despite the different contexts, truth commissions have become popular and have achieved almost a universal acceptance, especially in the last two decades. This is because such commissions have been felt to satisfy, at least to some degree, the demand for justice and the ending of impunity while encouraging societal healing and reconciliation.

This thesis concludes that truth commissions are officially sanctioned and are granted a relatively short period to carry out statement-taking, investigations, research and public hearings before completing their work with a final public report. Truth commissions are established to investigate human rights abuses, perpetrated in a specific period, usually during times of conflict and civil unrest. The human rights abuses that are investigated vary in range from assault to mass killings. Usually, they investigate abuses perpetrated by military, government, or other state institutions. While they do not have the authority of the courts and

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[233] Daly, E. and Sarkin, J. (2007) *Reconciliation in Divided Societies: Finding Common Ground.* Philadelphia: University of Philadelphia Press.

[234] International Center for Transitional Justice (2008) *A Truth Commission for Kenya? Incorporating International Standards and Best Practices.* New York.

cannot therefore punish, they do give recommendations for prosecution[235]. Whether or not these are implemented is entirely dependent on political will. Truth commissions allow victims and their relatives to disclose human rights abuses while others even allow the perpetrators to give their account of events. They are established and given authority by the local governments or international organisations, in some cases by both. In their operations generally, truth commissions have several core goals. These include compiling a comprehensive record of human rights violations; providing suitable platform for victims to share their suffering and experiences; providing an official acknowledgement and condemnation of violations; identifying root causes and the institutions responsible for violations; making recommendations for further measures related to, for example, prevention of further violations, accountability, justice, reparations or institutional reform and the promotion of respect for human rights[236]. Several benefits are associated with truth commissions as tools for transitional justice.

This thesis determined that despite these numerous advantages, the truth commissions suffer from various shortcomings. Due to their victim-centred focus and lack of any legal power to ensure compliance with their mandates, they are often unable to glean a comprehensive accounting of previous atrocities. The perpetrators of past crimes, more so those perhaps most knowledgeable about how and why violence occurred, are seldom inclined to come forward autonomously to relate their experiences, for fear of public "shaming" or future incrimination for their actions. Truth commissions are reliant on other institutions to implement their various recommendations. This means that their longer-term impact is determined largely by

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[235] Arbour, L. (2006) Economic and Social Justice for Societies in Transition. In: *Annual Lecture on Transitional Justice. New York University, School of Law, October 2006.* New York: United Nations High Commission for Refugees.

[236] (Alexander, 2003).

the political context. In many cases, the recommendations made by the truth commissions to governments, particularly on reparations, are not implemented. The psychological healing or "cathartic" effect of truth- telling for victims and perpetrators has also been questioned[237]; they offer a one-time opportunity for individuals to tell their story, often to a staff member that they will never see again. Evidence shows that while some individuals may have a positive experience, in many cases further trauma could result. Truth commissions generally do not have the capacity to provide long-term trauma counselling. Further, the broadened mandates of recent truth commissions lead to raised expectations that might not be realistically achieved by a single institution operating within the constraints of time and resources. To achieve their objectives, most truth commissions place primacy on unveiling the past. What, however, society chooses to do with that past vary depending on different political contexts. In general, though, the truth about the past is then used to determine what justice is to be meted out and the two components are ideally expected to lead to reconciliation. In the past, most of the truth commissions have not emphasised the component of justice as their titles 'truth commissions' suggest. As a result, they have been criticised as being too perpetrator- oriented and ignoring the expectations of the victims.

This thesis concludes that, Kenya and Togo have recently added the component of Justice to their commissions to read as "truth, justice and reconciliation commission.' This is in a bid to emphasize the justice component of their commissions. However, nothing so far in their mandates indicates that they are any different from the truth commissions[238].

Therefore, this thesis attempts to share some thoughts on that question and also discuss future ways in order to build a bridge across trials, prosecutions (retributive justice) and truth

[237] Ibid 45

[238] Department for International Development (DFID) (2003) *A Scoping Study of Transitional Justice and Poverty Reduction*. London.

commissions (restorative justice). Considering that very often, when a country wish to move from dictatorship to democracy or from war to peace various ways may be tried and those includes trials in an international or national court of law and truth commissions as in the case of Kenya.

Thus, a country's decisions about how to deal with its past should depend on many things: the type of dictatorship or war/ conflict endured, the type of crimes committed, the level of societal complicity, the nation's political culture and history, the abruptness of the transition, and the new democratic government's power and resources. Different countries have chosen widely different strategies to deal with the past and may be classified in retributive justice (prosecutions, trials) and restorative Justice (truth commissions). Although justice is crucial after violations of human rights, it may not be possible or practical. International tribunals are useful, but they are not the full solution as seen in the situation in Kenya. They are hugely expensive and can try only a small group of perpetrators, the most "responsible". Ironically, many times, those who are tried are not the most responsible but the most "available" in the country.

This thesis observes that, the use of International court results to justice being extremely selective and seems to be the way of granting *de facto* amnesty to those responsible. Then comes the necessity of truth commissions not as a panacea for all the challenges of transition, or an alternative, but as a complement way to be used by broken societies, in order to bring the benefits of justice to the victims and to the political culture. However, this is challenging and there are always tensions between the requirements of the criminal justice system and those of non-punitive approaches to gross and systematic human rights violations. The tension between justice and reconciliation and revenge, prosecution and amnesty is grounded as much in principled debate as in a tug-of-war between deep emotions, unresolved memories and

uncertain futures it is a tension that is best not collapsed into an attempted neat synthesis of a complex set of contradictions[239]. The contradictions need to be sustained. The demands of the one side need to impact on the other.

This thesis further observes that it is through honest encounter that opposing groups stand the best chance of knowing that truth commissions and the international court need each other. It is then that new possibilities begin to be imagined and sometimes realised as in the case of Kenya. This theseis concludes that there is need to draw a line of collaboration, complementarity, between trials and truth commissions. It further concludes that all are two sides of the same coin: transitional justice mechanisms. In practical terms, dealing with atrocities many countries in the world have started to look more for mechanisms which deals with acknowledgement, forgiveness and reparation or/and reconciliation. The problem actually is how the ICC will deal with those other mechanisms. Are they complimentary or contradictory? We observe that complementarity of the ICC could cover internal processes, which do not necessarily involve prosecutions of individuals like Truth Commissions. However, this thesis may not be able to cover all the questions.

Retributive Justice is essentially concerned with crime as a violation of the law[240]. It administers justice primarily as a corrective due to the state as the custodian of the rights of its citizens. It seeks to apply the established law as a basis for reaffirming the legal basis for human decency. It is concerned with punishment for an infraction or abuse of law and largely focuses upon the treatment that should be given to the offender or perpetrator. It is a retroactive approach in which legal proceedings play a central role and is based upon the

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[239] United States Institute of Peace (2005) *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*. Washington DC.

[240] Villa-Vincencio, C. (2004) 'Reconciliation.' In Villa-Vicencio, C. and Doxtader, E. (eds) *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*. Cape Town; Institute for Justice and Reconciliation

contention that mechanisms such as courts, national criminal laws and international criminal tribunals are essential for dismantling impunity and for putting in place measures for the non-repetition of rights abuses in the future. In the Kenyan situation, the four Kenyans facing charges at the International Criminal Court can be termed as facing retributive justice.

On the other hand, restorative Justice views crime essentially as a violation of people and relationships between people. Its primary objective is to correct such violations and to restore relationships. The case of The Truth Justice and Reconcilliation commission in Kenya. As such, it necessarily involves victims and survivors, perpetrators and the community in the quest for a level of justice that promotes repair, trust-building and reconciliation. It draws attention to the need to create a milieu within which all those implicated in crime come to realise the need to uphold the principles of the law, co-operating in an endeavour to discern the best way to achieve this. To sum up, it is concerned with resolving crime and conflicts. It focuses upon the end result (harmonious community relations) and its characterised by community participation that involves both the victim and the perpetrator, with a view to restoring rights that have been abused. Moreover, its employ integral responses that focuses upon redressing the harm to the victims, holding perpetrators accountable for their actions and engaging the community in a conflict resolution process. It is highly participative, is forward-looking and is based on values of respect for all participants and community empowerment.

This thesis observes that there is need to be careful to counter attempts to disguise impunity with fanciful adjectives. Restorative justice, for example, is a concept that in its proper setting is valuable and does have its place in a transitional justice policy. Often, however, the term restorative justice is used to advocate some alternative to criminal justice, to honest truth telling and full investigation of abuses. When used in such a way it is no more than an attempt to justify or disguise impunity.

5.2 The International Criminal Court (ICC) and its complementary nature

The adoption of the treaty establishing the permanent International Criminal Court has been characterised as a giant step in the history of mankind[241]. The ICC is expected to play an important role in the future in the battle against impunity and it has jurisdiction over war crimes, crimes against humanity and genocide.

This thesis concludes that the principle of complementarity defines the relationship between the ICC and truth commission as in the case of Kenya and this helps determine who should have jurisdiction in a particular case. Under this principle, international proceedings will co-exist with, rather than pre-empt, national mechanisms already in existence. Unlike its predecessors, i.e. the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, the ICC does not assert its Victims have a right to seek reparations under Article 75 of the Statute and the Trust Fund for Victims will implement such awards[242].

The adoption of complementarity is regarded as a product of a compromise which emerged in the negotiations for the ICC and serves the delicate balance between the competing interests of state sovereignty and judicial independence[243]. Thus, the complementary nature of the ICC is one of the central features of the Rome Statute, which is of fundamental importance to the overall functioning of the ICC and is likely to have implications beyond the Statute. There have been many researches on the aspects of the principle of complementarity in different parts of the world.

Truth commissions have been multiplying rapidly around the world and gaining increasing

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[241] Nairobi Peace Initiative-Africa (NPI-A) and West Africa Network for Peacebuilding (WANEP) (2010) *Guide to Transitional Justice and Truth Commissions*. Nairobi

[242] Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF).Truth, Justice and Reconciliation

[243] Roht, A. and Javier, M. (2006) *Transitional Justice in the twenty first Century*. Cambridge: Cambridge University Press.

attention in recent years. They are established to officially investigate and provide an accurate record of the broader pattern of abuses committed during repression and civil war..

Truth commissions today as observed in this thesis are inescapable tools in establishing the truth of past crimes and a means for victim recompense and instruments to promote peace and reconciliation. Most recently, the United Nations Secretary-General's report on "The rule of law and transitional justice in conflict and post-conflict societies" praised truth commission as a potentially valuable complementary tool in the quest for justice and reconciliation and in "restoring public trust in national institutions of governance". The increased interest in truth commissions is, in part, a reflection of the limited success in judicial approaches to accountability, and the obvious need or other measures to recognise past wrongs and confront, punish or reform those persons and institutions that were responsible for violations. Successful prosecutions of perpetrators of massive atrocities have been few, as under-resourced and often politically compromised judicial systems struggle to confront politically contentious crimes. With an eye on building a human rights culture for the future, many new governments have turned to mechanisms outside the judicial system to confront, as well as learn from the horrific crimes of the past. However, a truth commission should at the same time never be allowed to circumvent international human rights law or, more specifically, to ignore the punitive demands of the ICC.

The twin processes of politicization of ethnicity and ethnicisation of politics have plagued the Kenyan political sphere throughout its colonial and post colonial history. Linked to this process of ethnic manipulation is the instrumentalisation of political power to access economic power. The post- independent quest for political power has become a zero sum game with clients of those ethnic groups lucky enough to produce presidents enjoying the

trappings of power to the detriment of other ethnic groups. This is achieved through complex and reciprocal networks of patron-client patronage. The subsequent institution of near imperial presidency has over the years stood in contrast to the expanding political space accorded civil society, especially since the early 1990s. It therefore came as no surprise when governance and political institutions clashed with the aspirations and expectations of the wider civic public in the arena of the disputed presidential election of 2007 and the resultant violence. In the wake of this violence, the Government of Kenya has instituted various mechanisms to match and harmonize governance to the aspirations and realities of the wider public. It is within this context that various instruments of transitional justice have been put in place, including the TJRC. But change does not happen overnight and it is always a contested process between reformers and beneficiaries of the status quo.

In the formation of the TJRC, Kenya's absolutist political culture seems to have influenced its composition and mandate, once again standing in contradiction with public expectations. Partly as a result of this, the TJRC currently faces innumerable challenges including: its mandate is overloaded in dealing with all the past human rights violations, yet it has a life time of only two and a half years and a paltry nine commissioners. It is also hampered by ambiguous and limited definitions of concepts like compensation, restitution, gender- based injustices, perpetrators and economic and international crimes all of which limit the extent of application of these concepts for the benefit of victims and survivors. Other challenges include lack of emphasis on reconciliation; lack of proper mechanisms for witness protection; potential mandate overlaps with other Agenda Four reform instruments especially those on land and post- election violence (KHRC, 2010). These are challenges that could have been avoided or corrected through the proper processes of public participation in the formation and review of the Commission. From the study, truth as narrated by the respondents is largely

based on how the narrator defines their level and position of land dispossession: those that have been historically dispossessed first through colonialism and later through 'outsider' settlements, and the latter victims who were dispossessed, by the successive violence of the 1990s and beyond. Through this prism, one narrative acquires different meanings and interpretations. The gathering of truth poses several challenges for the Commission, not least because the target communities do not place much currency on testimony and the fact that the tools of collecting truth, especially the public hearings, are received with mixed feelings by these communities. Justice is partly tied to land.

Most respondents viewed reconciliation as arising from the proper administration of justice. While viewed as a preferred outcome, most of the respondents were not very optimistic of its achievement, more so the victims of multiple violations. Even less popular was the reconciliation role that the Commission and Government at large would play. Respondents instead, preferred undertaking reconciliation at personal and community levels, outside the realm of government and government assisted processes. Owing to the general lack of faith in the Commission and also the reality that its methodology and tools of establishing truth, justice and reconciliation seemed to deviate from the time-honoured values and practices of the communities, the work of the TJRC as presently constituted would largely not serve the needs of the communities affected by the post- election violence. It therefore is not the communities' truth, justice, and reconciliation that the Commission has established.

Public participation in the processes of transitional justice is paramount as it grants institutional legitimacy and confirms to the public that the Government is serious about breaking with the past. For the TJRC, there should have been wider consultations with the civil society on the TJRC Act to avoid some of the flaws impacting negatively on its work. Civic education is core in facilitating public engagement and participation in these processes.

The Government needs to manage expectations of the public concerning these processes to avoid disillusionment. This can be done through disseminating proper information to all citizens and relevant civic engagement. Kenyans, especially those who feel that they have been victimised in the past, expect the TJRC to address poverty and inequality and to prosecute perpetrators of the post- election violence among others.

The transitional justice processes and mechanisms are closely related and therefore the success or failure of one will intimately affect the others. The current challenges facing the TJRC therefore have implications for the achievement of other goals in Agenda Four such as land reforms.

Not everybody shares the view that truth- telling brings about emotional relief (catharsis). Some victims believe that narrating the ordeals they underwent will amount to reliving the horrors and they would rather leave the past buried. Therefore, alternative methodologies of collecting their stories will have to be employed. Reconciliation, like mediation, is based on trust of institutions and personalities within those institutions. The Government cannot therefore ignore the public's sentiments regarding the composition of the TJRC if it expects the Commission to fulfil its mandate. The TJRC must build upon established practices of healing and reconciliation for it to be relevant and legitimate to communities. For this to happen, there should be wider consultations with communities on what practices and methodologies would be best suited to their situation and circumstances. The Commission also needs to create linkages and synergy with other ongoing community-based healing actions and reconciliation processes. TJRC needs to develop benchmarks upon which it gauges its success or otherwise. While it is not possible to develop processes that are agreeable with everybody, it is important that the Commission ensures that it has been able to satisfy a majority of Kenyans. Only then, can its work stand the test of time and occupy the

reconstruction and reconciliation space as it was envisaged.

It is essential that the public be actively engaged throughout the duration of these processes. Together with organised civil society, the public must advocate for their interests because if left to government alone political will may be lacking or there could be other competing interests which may abort these processes prematurely. The public needs to be alive to the fact that just as these violations have not been committed overnight; in Kenya, they span from the colonial era, and consequently, it will take some time to unearth the truth and apply corrective measures. Therefore, the public needs to exercise patience, as justice will not happen overnight.

The TJRC is not a judicial body. While it will investigate human rights violations, it cannot prosecute, but can only make recommendations for prosecutions. In order to be actively engaged, Kenyans must change their political culture. Since the colonial era and even earlier for some communities, when the public came face to face with formal authority, they chose the "exit option" for the authority to "leave them alone" rather than face the consequences of a confrontation. This is largely what gave rise to the prevailing culture of impunity as the Government could do virtually as it pleased without any public oversight.

All the work of redressing the past and achieving reconciliation cannot be left to government alone. There must be parallel individual and community processes that complement government processes to achieve holistic reconciliation. The past is just that - the past and therefore not all of it can be redressed or compensated. Some of the brutalities that took place should be left in the past and people must move on with life rather than remain enslaved in the past.

Just as in other processes, there is no ultimate truth and truth is conditional to the context, narrator, and expectations. Indeed, multiple versions of the same story will be told but it does

not necessarily mean one version is right or wrong.

In situations like those facing most post- conflict countries of Eastern Africa where there have been gross violations of human rights over an extended period, the TJRC and the International Court alone is not enough to address all the past violations. Indeed, a truth commission does not work in all circumstances. Therefore, before post- conflict countries institute one, there should be rigorous consultations on its relevance to the specific circumstances of the particular country. The push to institute a truth commission and invoke the International Court may be internal, emanating from citizens of the country concerned or it could be external, from the international community like in the Kenyan situation. This thesis recommends that where the source is largely external, governments must strive to engage the wider public on the actual implementation of the process, otherwise, it may remain abstract and therefore irrelevant to the very people it was meant to serve. Even where the push is internal, the government must engage the public throughout the life span of the Commission to sustain its legitimacy in the eyes of the citizens. It must at all times strive for transparency in the functioning of such a commission and other transitional justice instruments, more so because they function at a time of fragility. While there are definitely lessons that can be learnt from other countries, especially in Africa, that have undertaken similar processes, no two situations are similar. Therefore, a truth commission must be alive to the specificities and peculiarities of each country and as much as possible avoid blind borrowing from success cases, such as the South African model.

The totality of transitional justice mechanisms established in post conflict countries all have the aim of addressing the human rights violations of the past while laying a firm base for democracy. As such, all these mechanisms must be harmonised so that they can support each other and conflicts in their mandates and applications ironed out. While political will is

important in establishing truth commissions, it is even more crucial when it comes to implementing the recommendations arising from this process. Otherwise, a truth commission may become one more diversionary academic exercise that leaves people more disillusioned about the prospects for a sustainable peace.

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