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DECLARATION

I, Erastus Kyania Musyimi, declare that this thesis is a result of my research investigations and findings. Sources of information other than my own have been acknowledged and a reference list has been appended. This work has not been previously submitted to any other university for award of any type of academic degree.

Signature.....

Date.....

DEDICATION

This work is dedicated to the internally displaced persons living in camps as a result of political violence.

ACKNOWLEDGEMENTS

The study would not have been possible without the assistance and cooperation of the many people involved in the whole process. To start with, I extend my heartfelt gratitude to my two supervisors; Stig Jarle Hansen and Nadarajah Shanmugaratnam, for the support they offered me right from the outset of the study to the very last point. I do appreciate their prudent contribution and the guidance they offered me all along.

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ABSTRACT

In their endeavor to pursue justice in the post-conflict period, the ICC operations in Africa have been met with significant challenges. While it has been acknowledged in some quarters that the ICC can excel in curbing the problems of violence stemming from a culture of impunity, the court has attracted immense and tremendous controversy especially in its propensity for prolonging conflict and undermining peace deals and reconciliation processes that have proved imperative in a society emerging from a period of gross human rights violations.

Taking the Kenyan post-election violence of 2007/2008 as the case study, the study explores whether the ICC can promote reconciliation and an inclusive political community through retributive justice. The study further seeks the opinions of direct victims of the post election violence on the role of the ICC in administering transitional justice through punitive measures. Included as well are the views of various stakeholders, mostly in Nairobi and Oslo, on the ICC's mandate to end the culture of impunity and its impact on reconciliation process in Kenya. The qualitative case study employs interviews and focus group discussions as the data collection tools to obtain the opinions and views of these respondents.

I argue that despite the ICC being considered as a legitimate and necessary institution to fight impunity, it falls short of realizing its full potential to progressively promote reconciliation, peace and stability in the country. This is seen as a result of local and international politics engulfing the court, its structural make-up, and its emphasis on retributive justice which pays little regard to the national healing and reconciliation.

The study is quite timely considering that, at the time of writing (November 2012), Kenya is about to go to the polls and some of the presidential candidates are waiting for their trials at almost the same time as the election period. The coincidence of the two crucial events is evidently going to generate anxiety and thus it requires a mechanism that would ensure the fragile peace currently being enjoyed is not jeopardized.

90 Pages (31,424 words)

Supervisors: Stig Jarle Hansen and Nadarajah Shanmugaratnam

LIST OF DIAGRAMS

Figure 1. The Republic of Kenya



Taken from Global Literacy Project, Inc. website

LIST OF ABBREVIATIONS

AU – African Union

AUHIP – AU High-Level Implementation Panel

BBC – British Broadcasting Corporation

CID – Criminal Investigation Department

CIPEV – Commission of Inquiry on Post Election Violence

CMD – Centre for Multiparty Democracy

DRC – Democratic Republic of Congo

ICC – International Criminal Court

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

IDP – Internally Displaced Person

HRW – Human Rights Watch

KANU – Kenya African National Union

KLA – Kenya Land Alliance

KLR – Kenya Law Reports

KNCHR – Kenya National Commission on Human Rights

KNCST – Kenya National Council for Science and Technology

LRA – Lord’s Resistance Army

NARC – National Alliance of Rainbow Coalition

NGO – Non Governmental Organization

ODM – Orange Democratic Movement

PNU – Party of National Unity

TRC – Truth and Reconciliation Commission

TJRC – Truth, Justice and Reconciliation commission

UN – United Nations

UNDP – United Nations Development Programme

UNSC – United Nations Security Council

Table of Contents

CREDIT PAGE..... i

DECLARATION..... ii

DEDICATION iii

ACKNOWLEDGEMENTS iv

ABSTRACTv

LIST OF DIAGRAMS vi

LIST OF ABBREVIATIONS vii

CHAPTER 1 1

 1.0 General Introduction1

 1.1 Background to the violence and international intervention.....2

 1.2 The Gravity of the post election crimes i Kenya4

 1.3 Statement of problem6

 1.4 Objective and rationale of the study.....7

 1.5 Research questions7

 1.6 Historical land disputes, ethnicity and post election violence8

 1.7 The ICC’s mandate to fight impunity11

 1.8 Conceptualizing impunity in Kenya.....12

 1.9 Kenya’s options to fight impunity after the election violence.....13

CHAPTER II: RESEARCH METHODOLOGY 15

 2.1 Research Design.....15

 2.2 Data collection techniques16

 2.2.2 Focus groups17

 2.3 Reliability in qualitative research18

 2.4 Study area19

 2.5 Research Ethics19

 2.6 Data Analysis20

2.7 Delimitation and Limitations	21
CHAPTER III: THEORETICAL FRAMEWORK AND LITERATURE REVIEW	22
3.1 Theoretical framework of the study	22
3.1.1 Trials and prosecutions	22
3.1.2 Truth and Reconciliation Commission	23
3.1.3 Transitional Justice and Reconciliation	25
3.1.4 Reconciliation and peacebuilding in Kenya.....	28
3.1.5 Retributive justice and its impact on reconciliation	29
3.1.6 To prosecute or not to prosecute	30
3.1.7 In the wake of criminal trials.....	31
3.1.8 The International Crimes Act and Kenyan crimes	32
3.1.9 Restorative justice and reconciliation	33
3.1.10 The plight of IDPs and reconciliatory measures	34
3.2 Literature review	36
3.2.1 ICC intervention in African Countries and its impact on reconciliation	37
3.2.2 ICC's agenda on justice versus peace.....	41
3.2.3 ICC process and its effect on stability in Kenya	44
CHAPTER IV: DATA ANALYSIS.....	46
4.1 How do IDPs view the ICC activities in Kenya?.....	46
4.2 ICC retributive justice versus reconciliation	51
4.3 Views on accountability and reconciliation.....	52
4.4 The impact of the ICC on political stability	55
4.5 Fighting impunity and promoting stability in Kenya	58
4.6 How can the ICC affect reconciliation by deterrence?	59
4.7 Views on peace versus justice	60
4.8 What are the implications of Kenyan's New Political Order on peace?	61
CHAPTER 5: CONCLUSION.....	63

References.....	68
Appendices.....	77
Appendix 1: Interview guide for the IDPs	77
Appendix 2: Interview Guide for KNHRC, NGOs, church leaders, political class and scholars.....	78
Appendix 3: Informed consent to participate in the research.....	79

CHAPTER 1

1.0 General Introduction

Since the 1990s Africa in general has witnessed some of the most brutal wars in history; the Rwandan genocide, the Congo massacre, ethnic cleansing in Sierra Leone, the Liberian civil war, Algerian mass killings and Somalia's long-term war. This description seems to resonate well with Kofi Annan's view that African conflicts aim at destruction not only of armies but also of civilians and entire ethnic groups. Preventing African conflicts is a matter of defending humanity more than anything else (Annan, 1997).

Kenya in particular fits well as a country that has experienced violence of this kind before. The Kenyan violence has had both ethnic and political dimensions highly marked with the struggle to gain power and to control state resources. Leaders have continued to use creed, greed and need to advance their ill-fated agenda (Butler, 2010). This has been evident since the 1992 general election, where the divide-and-rule approach has been the order of local politics resulting in the deaths of thousands, displacement, and vandalism or looting of property among other crimes against humanity (ibid.).

Modi and Shekhawal (2008) observe that, before the 2007/08 post election violence, Kenya was considered a model of stability and democracy for other African countries to emulate. The turmoil cast the country in a bad light and tarnished its image internationally. It also opened a debate on whether Kenya had achieved the political stability it had prior to the chaos. The mayhem also raised several challenges for the issues touching on democracy, constitutionalism, governance and respect for human rights (ibid.).

Kenyan post election violence produced human tragedies, suffering and property destruction on a colossal scale. The violence led to an acute state of humanitarian crisis and threatened the regional security and economic progress that had been enjoyed before.

The enhanced development of the international criminal law and the need to end the culture of impunity in most parts of the world has led to more prosecution of international crimes. These prosecutions have been carried out by hybrid tribunals, special courts, and international criminal courts, and in some countries through national courts (Sriram and Pillay, 2009). Immediately after the Nuremberg Trials, the international community formulated treaties aimed at prohibiting or punishing international crimes namely genocide, crimes against

humanity and war crimes. States parties to these treaties are obliged to prosecute or extradite individuals alleged to have perpetrated these crimes (ibid.).

Kenya in particular is currently struggling with international criminal cases, emanating from the violence that rocked the country following the 2007 general election. Impunity remains a primary source of gross human rights violation in the world, particularly in the developing countries. In Kenya, impunity has a long history related to electioneering processes that are hinged on tribal affiliations and corruption by politicians and senior government officials (Human Rights Watch, 2008).

This study obtained the opinions of various respondents across the country on the intervention of the International Criminal Court (ICC) in dealing with the post election violence in Kenya and the impact on the reconciliation process and ultimately the peace and stability of the nation. The involvement of the ICC in the Kenyan case has been met with mixed reactions, and thus it merits an investigation to determine its influence on the political landscape particularly in its mandate to end impunity.

1.1 Background to the violence and international intervention

The announcement of the results of the presidential election in Kenya on 30 December 2007 sparked off severe political violence across the country. The Electoral Commission of Kenya (ECK) had declared President Mwai Kibaki of the Party of National Unity (PNU) the winner against Raila Odinga of the Orange Democratic Movement (ODM). Two months of civil unrest resulted in the deaths of 1,333 people and over 650,000 internally displaced persons (IDPs) making it the deadliest ethno-political unrest since the introduction of multipartyism in 1991 (Dagne, 2008).

Reportedly, there were four forms of violence witnessed in connection with the election results. Firstly, there was a spontaneous uprising of mobs protesting against the irregularities of the presidential election. Violence erupted throughout the Rift Valley and the western parts of Kenya whereby the supporters of Odinga took to the streets, burnt, raped and looted, vandalized properties and killed supporters of Kibaki, who were mainly of the Kikuyu community. Secondly, there was violence organized by the ODM supporting militia in the Rift Valley with the aim of attacking their political opponents. Thirdly, excessive use of force by the police coupled with 'shoot to kill' orders was evident in most parts of the country that were ODM strongholds. The police were perceived to be in support of the PNU to attack the

ODM supporters. Fourthly, local militia from predominantly PNU areas mobilized to carry out counter attacks against the ODM for allegedly killing and displacing their people (Kiai, 2008). The situation grew worse each passing day. This was the worst level of violence the country witnessed since independence (Modi and Shekhawal, 2012).

The magnitude and the speed of the unrest shocked the international community, and severely embarrassed Kenya and reduced its prestige among the nations. In a move to salvage the alarming situation, the African Union (AU) intervened and appointed a mediation team composed of eminent African personalities led by the former UN Secretary General, Kofi Annan that was mandated to reconcile the warring parties and restore the rule of law (Andreassen et al., 2008). A national Accord and Reconciliation Committee was established and mandated to find a solution. After extensive deliberations, the Committee proposed the formation of a grand coalition of government led by President Mwai Kibaki and the opposition leader Raila Odinga in the official capacity of Prime Minister (Okuta, 2009). The committee set up a Commission of Inquiry into the Post Election Violence (CIPEV) which was tasked to find the issues connected with the violence and ultimately make recommendations to that effect (ibid.). The committee further resolved on a need to set up a Truth, Justice and Reconciliation Commission that was supposed to carry out the mandate of reconciling those involved in atrocities (ibid.).

CIPEV was chaired by a judge of the Court of Appeal, Justice Phillip Waki, and after gathering its findings about the violence it issued a report (The Waki Report, as it became to be known) in October 2008 (Nmaju, 2009). The Waki report identified the perpetrators who bore the highest responsibility for the violence and suggested the establishment of a Special Tribunal for Kenya to prosecute them within a stipulated period of time. Further, the Waki report recommended that if the Special Tribunal failed to carry out its mandate then a list of names and other relevant information of the individuals alleged to have been perpetrators the violence would be forwarded to the International Criminal Court (ICC) since Kenya has ratified the Rome Statute within which the ICC operates (Nmaju, 2009).

The Waki commission handed over a list of names in a sealed envelope to Kofi Annan to wait and see if Kenya would establish the Special Tribunal. Upon its failure do so, Annan would be mandated to hand it in to the ICC prosecutor for the purpose of initiating investigations. The mandate of the Special Tribunal was directed to the local legislation and its capacity to handle the investigation and prosecution of crimes of an international nature (Okuta, 2009).

Initially, the country did not have laws that would see international crimes prosecuted accordingly. This was due to the fact that implementation of the Rome Statute had not been fully passed into law. Additionally, the Kenyan Penal Code which creates offences in Kenyan law and prescribes punishment for the offences, lacked provisions that explained or contained punishments or penalties concerning offences in the nature of international crimes (Okuta, 2009). The Geneva Conventions Act has incorporated into Kenyan law some guidelines on how to deal with criminalization and punishment of grave breaches. However the Geneva Conventions Act was not relevant to the 2007 post election violence because the atrocities were not committed in the context of international armed conflict hence they fell short of qualifying as grave breaches (Okuta, 2009).

The Kenyan government failed to establish the domestic Special Tribunal as stipulated by the Waki commission, hence paving way for the ICC to commence investigation and prosecution. The ICC chief prosecutor had first to seek permission from the UN Security Council to open a case on the Kenyan post election violence (Nmaju, 2009).

The ICC named six prime suspects with respect to the violence, who were subjected through the pre-trial chamber and out of these six, two were exonerated in the pre-trial chamber leaving the remaining four to go to full trials. These four are currently awaiting trial for allegedly having contributed to murder, deportation or forcible transfer, rape, persecution and other inhumane acts.

1.2 The Gravity of the post election crimes i Kenya

Article 17 (1) of the Rome Statute enables the ICC to make a determination that a case is inadmissible if it is not of sufficient gravity that would warrant the court taking action on such a case¹. Whereas the Statute does not specifically define ‘sufficient gravity’, it does offer factors that can be taken into consideration in ascertaining if a case is admissible. Such considerations are, for example, if the crimes reflect a general policy, the degree of harm inflicted on people and the destruction of infrastructure, among other things. With this kind of clarification, it means that it is within the jurisdiction of the ICC to determine which cases require action by the court and which ones do not. Furthermore the same Article 17 (1) demystifies the different levels of crimes even though the crimes are categorized as of an international nature. The availability of such a criterion helps to avoid the court being

¹ Rome Statute of the International Criminal Court. (2012). *Issues of Admissibility*. <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> 12 June 2012.

congested with cases and allows the court control of determining which cases will be admitted (Rome Statute of the ICC, 2012).

With regard to the case of the Kenyan post election violence, it seems that there are reasonable grounds to believe that the gravity of the crimes committed warrants the intervention of the ICC (Sing'Oei, 2010). As discussed earlier in this study, the 2007/8 disorder left 1,333 people dead and over 650,000 uprooted from their homes (Dagne, 2008). There were over 900 reported cases of rape and destruction of public property of immense value. The killings and rape crimes were carried out on the basis of ethnicity and political affiliation. Either militants leaning towards a particular party executed the crimes to vent their anger on the opponent or they did so as retaliatory attack after crimes had been committed against them (Dagne, 2008).

Even though the gravity of the crimes committed could not match the Rwandan genocide of 1994, they did evoke memories of Rwanda's darkest moment in history. It was the culmination of these gross offences that elicited a strong desire to see justice prevail and ensure sanity in the local political landscape (Sing'Oei, 2010).

Although the violence suddenly hit the country in a spontaneous manner minutes after President Kibaki was declared the winner and sworn in, the investigation of the root cause of the turmoil revealed that the violence was premeditated, organized and executed with the backing of some powerful politicians, businessmen and security organs of the nation (ibid.).

As provided by the Rome Statute in article 5, the ICC is mandated to intervene in cases of genocide, wars crimes and crimes against humanity. The controversy surrounding the intervention of the ICC in the Kenyan case is grounded on the claims that the mayhem witnessed could not be categorized as crimes against humanity despite its enormous gravity. The Commission of Inquiry into the Post Election Violence (CIPEV) compiled a report about the violence in which it could not decide if the disorder amounted to crimes against humanity (CIPEV, 2008). However, CIPEV maintained that if it were allowed more time to collect evidence it would make such determination. The Kenyan National Commission on Human Rights (KNCHR) in its report claimed that the murders, rapes and destruction of property amounted to crimes against humanity. The findings in these reports have been contested in various quarters. CIPEV made the recommendation for the creation of a Special Tribunal to ensure accountability against the individuals who perpetrated the violence, and if it failed to do so the case would be referred to the ICC (Sing'Oei, 2010).

1.3 Statement of problem

Immediately after the results of the 2007 presidential election were announced and the president sworn in, violence erupted in Kenya resulting in the deaths of over one thousand people, and some hundreds of thousands more being evicted from their homes. Together with this, the country lost a considerable amount of property through vandalism and looting. Other heinous crimes related to the violence were witnessed across the entire nation over a period of two months.

The intervention of the ICC to investigate the post election violence was greeted with mixed reactions in different quarters of the Kenyan population. The discourse of international politics affecting the operation of the court lingered in the minds of many. But what has taken centre stage is the question of how to fight impunity in the country and the perception of the different perceptions of the legal systems by different stakeholders. Kenya has been faced with a challenging task of both ensuring that the victims of the post election violence receive justice and holding the prime and minor perpetrators of the violence to account in a manner that would ensure healing, justice and reconciliation.

What troubles the nation now is not what happened in the first two months after the general election, but how to ensure reconciliation prevails, and also how to prevent such mayhem from rocking the country in the future. To understand the election-related violence one has not only to look at the political history of the country but also other factors such as land ownership disputes and ethnic polarity among others.

The Rome Statute defines the ICC's mandate as to deal with war crimes, genocide and crimes against humanity. While many scholars concur that the Kenyan violence constituted crimes of immense gravity, there have been opposing schools of thought arguing for and against Kenyan crimes being categorized as international crimes. In the view of the ICC intervention, it is argued that the court has assumed a victor's justice approach that could be detrimental to any reconciliation process. The proponents of this claim ascertain that this form of justice further divides society by framing some as violators and others as victims. They lament that a victor's approach of justice fails to address the root causes of conflict for it is preoccupied with trials and prosecutions (Mani, 2005).

The ICC advocates the use of retributive justice as a form of transitional justice as the most appropriate tool in fighting impunity and bringing about order in any political community that

has been devastated by war and gross human rights violations. Taking into account that the ICC is instigating a process to fight impunity that for a long time has been the root cause of human rights violations in Kenya, this study therefore seeks to investigate the opinions of the victims of the post election violence on the role of the ICC in offering transitional justice against crimes committed against them during the post election violence by means of retribution.

1.4 Objective and rationale of the study

The ICC's goal in fighting impunity and restoring accountability through transitional justice in the aftermath of war is evident in its mandate. Kenyan politics has been characterized by impunity among politicians and top government officials for decades, providing a platform for individuals to commit heinous offences and evade justice. The ICC, which is perceived as an independent body free from political manipulation, was seen as an alternative means of fighting impunity in Kenyan politics. The study therefore seeks to find out if retributive justice through the ICC can attain this goal and what impact the international court will have on the reconciliation process and stability in the country. This forms the rationale of this research.

This study is founded on the presumption that a critical examination of the attitude of victims on the role of the ICC in rendering justice and exploration of the court's strengths and weaknesses in ensuring an inclusive political community can produce an understanding of the post conflict reconciliation in Kenya. It is upon such an understanding that an appropriate, viable legal system that reflects local realities and in same spirit adheres to the international standards of impartiality and fairness can be created and work to achieve the set goals. Hence the study sets out its two main objectives as; to critically examine the views and expectations of victims of the post election violence on the role of the ICC in achieving transitional justice for crimes committed against them, and to critically explore the impact of the ICC process in reconciliation, and the endeavour to create an inclusive political community in Kenya.

1.5 Research questions

My review of the literature has revealed that many Kenyans want the impunity to be ended, but most importantly they yearn for reconciliation and healing that will ensure a stable society where all Kenyans live harmoniously irrespective of their ethnic background, political affiliation and such. To end impunity would mean that the society will turn a new page where

there is respect for the rule of law by all. However, what matters is the mechanism applied to ensure such objective is achieved. It is against this backdrop of exploring the impact of the ICC on the reconciliation process in Kenya, that it requires an incisive discourse.

In this thesis I explore three interconnected research questions, as follows,

1) Can the ICC promote reconciliation and inclusive political community through retributive justice?

2) What are the opinions of victims of post election violence on the role of the ICC in meeting transitional justice through punitive measures?

3) What are the opinions of NGOs, Human Rights Commissions, government officials and other stake holders on the mandate of the ICC to fight impunity in Kenya?

1.6 Historical land disputes, ethnicity and post election violence

Reconciliation in Kenya has become a mirage due to two major factors, namely, the historical land disputes and negative ethnicity (Kanyinga, 2009). Kenya has experienced repeated electoral violence on a large scale for the last two decades. The premise upon which this form of violence occurs has been attributed to grievances that are manifested during election time. Land rights, ethnic marginalization and struggles for power have been cited as the major underlying factors contributing to electoral violence. There is a close inter-linkage between Kenyan's political violence, ethnicity and land ownership (Kanyinga, 2009). The election-related violence of 2007/2008 leading to displacement of over 650,000 people was a culmination of grievances arising from unsettled land ownership disputes and unfair distribution of resources (ibid.).

As the discussion of these factors proceeds, the study will be reflecting on the research question of whether the ICC can achieve reconciliation through retributive justice, in the context of some of these injustices. It is rather hard to engage in a discourse of ending impunity in the country without paying keen attention to the historical injustices, particularly land acquisition and how it is manifested in today's political skirmishes. Ever since the colonial era, there has been a fierce struggle for resources among different ethnicities which quite often plays out during the election times when the historical grievances of one particular ethnicity are levied against another. It is against this background that the study will profoundly address the relation between land, ethnicity and election violence and how

impunity has been entrenched in these factors. This will broaden the understating of the make-up of Kenya's political landscape and the issue of impunity that is the subject of discussion. And subsequently I will examine the role the ICC can play in ensuring an inclusive political community.

A number of studies trying to reveal what triggered the 2007/2008 post election violence seem to settle on land rights and ethnicity as the major factors. It has been argued that ethnicity and the manner in which the customary land rights have been handled has fueled the post election violence and influenced the political dispensation in the country (Kanyinga, 2009).

The current internal displacement among Kenyans has a history dating back to the colonial era. The colonial land policy was implemented in a way that it favoured the white settlers' agriculture, while depriving the indigenous people of their land. The communities most affected by the British land policy were Kalenjin, Maasai and Kikuyu living in the Rift Valley, Nyanza, Western and Central provinces, which came to be known as the White Highlands (Kanyinga, Lumumba and Amanor, 2008).

According to Kanyinga, Lumumba and Amanor (2008), it is noteworthy that some communities in Kenya have borne feelings of historical marginalization stemming from a range of inequalities in land allocation, resource distribution and government jobs. These feelings of unfairness, either perceived or actual, tend to linger in the background of people's lives all the time, and it is only during election times when communities seize the opportunity to air their grievances and vent their anger on others. For reconciliation to take place there is an inherent need to address these concerns conclusively. A mechanism that ensures justice for the past injustices as well as promoting mutual understanding and coexistence is imperative for a stable society (ibid.).

The grievances that were caused by colonialism were exacerbated by Kenya's first president, Jomo Kenyatta, and his government. Upon taking leadership of the government, Kenyatta paid no attention to how the land was acquired and neither did he do anything to compensate the displaced. Instead, the government embarked on resettlement schemes based on a market system, which favoured those who had money to purchase the land². Eventually, corruption and ethnic politics took their course and favoured certain communities, particularly the

² Kenya Land Alliance (KLA) (2004). *The national land policy in Kenya*. Addressing historical injustices. Nairobi, Issues paper No. 2/2004.

Kikuyu community, who acquired huge tracts of land in the Rift Valley at the expense of others like the Kalenjin Maasai and Luo communities (Kanyinga, Lumumba and Amanor, 2008).

The problem of land acquisition in the Kenyatta government was further aggravated by his successor, President Moi. This was particularly pronounced in the wake of the entry of multipartyism in 1992 where political leaders used ethnic schemes with the aim of controlling land (Klopp, 2006). To recover the land 'lost' by the Kalenjin, the Kikuyus were evicted from both the Rift Valley and western Kenya (Kamungi and Klopp, 2008). Ethnically motivated clashes in 1990 claimed thousands of lives and rendered over 350,000 homeless (Klopp, 2006). The violence that was witnessed in the first multiparty democracy election was viewed by some quarters as stemming from land disputes (Musila, 2009).

The Rift Valley, the 'white highlands' formally owned by the colonialists, has played a key role in much election-related violence in Kenya (Kanyinga, 2009). The issue of land rights is endemic in that region and local politicians among the Kalenjin have over a long period perfected the divisive politics characterized by hate speeches and threats, inciting their supporters against other communities residing in the region, specifically the Kikuyu, who are perceived as 'aliens' taking the land that historically belonged to the Kalenjin people (Kanyinga, 2009). The reforms that have been put in place, land purchase programmes and settlement schemes, have failed to address the core issues of land ownership. This has opened the way for political unrest which now has become predictable whenever a general election is held (ibid.).

The legacy of colonialism and immediate post-independence poor governance is the cause of the today's land disputes and historical injustices in most of the parts of the country. Most of the land, especially in the Rift Valley was owned communally before the arrival of the colonialists. After Kenya became a unitary state, it opened the doors for everyone to buy land anywhere. Land buying companies happened to benefit some communities which thus acquired land in the Rift Valley (Kanyinga, 2009).

Land ownership in Kenya serves as a clear indication of how power is held. This can be attributed to the fact that land concentration dictates economic and political influence (Njeru, 1978). In addition, rules of control and ownership of land demonstrate the power relationships in the country. In the event that these customary tenure rules are altered, it results in restructuring of power relationships (Njeru, 1978). These power relations fuelled by ethnicity

and land ownership continue to politically harm the country. As indicated before, these tribulations that spur political violence in Kenya, surface at electioneering periods because the various communities see it as prime time to air their grievances with the intentions of driving away communities perceived as aliens and acquiring the land back. This is what to some extent has formed the culture of impunity, and is what the country is trying to overcome as it seeks both a judicial mechanism (courts) and a non judicial mechanism (reconciliation) to address the endemic problem (ibid.).

The 2007 election campaign was characterized by competition between ethnic groups, with candidates mobilizing the electorate largely on the basis of ethnicity. The opposition party, the Orange Democratic Party (ODM) led by Raila Odinga, created a coalition based on the perception that President Kibaki's ruling party, the Party of National Union (PNU) was promoting tribalism and was governing in the interests of the Kikuyu at the expense of the other communities. The 2007/2008 post election violence has been described as the worst political violence in Kenya's history (Obonyo, 2008).

1.7 The ICC's mandate to fight impunity

On 11 April 2002, the Rome Statute became a binding treaty when it attained the required number of sixty countries ratifying it. On 1 July 2002 the statute legally came into full force and the ICC could prosecute crimes against humanity, war crimes and other gross human rights violations from this date³. In February 2003 the maiden bench of eighteen judges was elected by the Assembly of States Parties to be sworn in on 11 March the same year. On 8 July 2005 the court issued its first arrest warrant which was followed by the first pre-trial hearings in the following year (ibid.).

The ICC is a permanent international institution created by treaty with an aim of investigating and prosecuting individuals who commit heinous crimes against humanity as provided in Article 1 of the Rome Convention (David, 2001). It is an institution that is binding only on states that have ratified the Rome Treaty. The ICC is not a substitute for national or local criminal jurisdiction but is an extension of it. In essence, the ICC entails a collective action by member states under a treaty to form an institution with the purpose of carrying out collective justice for particular international crimes (ibid.). The court is complementary to the national judiciary in the sense that it neither infringes upon national sovereignty, nor does it replace

³ ICC official website. <http://www2.icc-cpi.int/Menus/ICC/> 24 June 2012.

national legal systems that are willing and capable of pursuing their national legal obligations (ibid.).

1.8 Conceptualizing impunity in Kenya

Kanyinga (2012) argues that Kenya is in transition without end because of the undermining of the law and promoting a culture that sets free the influential individuals who commit atrocities against the people. It is this combination of disrespect of the rule of law and failure to hold accountable the individuals who commit the crimes that forms a culture of impunity in society (ibid.).

According to Kanyinga (2012), many nations fail because impunity becomes so entrenched in the society that it becomes endemic and influences the political life of the nation. Impunity in this case becomes an important tool used by the powerful leaders from which the less powerful start to follow suit. It is a common knowledge that disrespect for the rule of the law is the major reason why the Kenya is facing poor governance and the culture of impunity. Over the last two decades, the failure by the successive governments to bring to book the politicians who perpetrate violence in electoral periods has resulted in this culture of impunity (ibid.).

The fact that influential individuals at the national level go free when they commit crimes makes other leaders seek support from them. This is how impunity trickles down to lower levels in a society and ends up creating a cycle of leadership that cannot be held accountable or leaders punished for their misdeeds. Ironically, the same crop of leaders that benefit from impunity for their acts are the same individuals the society expects to create stable institutions to fight atrocities and champion the respect of human rights. Many political leaders in varying levels indulge in malpractices without facing the law for their actions (Kanyinga, 2012).

Political leaders are not the only people who should bear blame for the persistence of malpractices in the country, however. The Kenyan people do not seem to take a keen interest in scrutinizing the kind of leaders they put in public offices. This failure of Kenyans to subject their leadership to a thorough scrutiny before elected them has served to continue promoting impunity in the country. The public has been reluctant in demanding accountability from the elected leaders because their demands are never attended to or the response to them is stalled (CIPEV, 2008). This failing is attributed to lack of awareness of what is expected of their political leaders.

The culture of impunity paves the way for increased corruption. Worse still, some aspects of theft of public resources have become so institutionalized that they are no longer perceived as abuse of office. Kenya's perceived tolerance of impunity has become an impediment to realizing full democratization and has suppressed the spirit of a nation built on the pillars of justice, equality and adherence to the rule of law. The top political leaders abuse the laws and act inappropriately because it has become the order of the day to do so (Kanyinga, 2012).

Kanyinga (2012) argues that impunity has made inroads into political parties, thus today ethnically based coalitions dominate local politics. This has led to low levels of public confidence in leadership. However, institutions like the judiciary have regained some credibility and Kenyans are starting to have some faith in it. Impunity has polarized the country along ethnic lines. Leaders resort to mobilizing communities for their own selfish reasons, and create community paranoia about other leaders which further disintegrates the society and elicits tensions among the different peoples living in the same region (ibid.).

Lack of good governance and a crop of bad leaders that condone impunity have slowed the pace of transition to a democratic country where all rights and privileges are safeguarded.

1.9 Kenya's options to fight impunity after the election violence

“The primary mission of the International Criminal Court is to help put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes.”⁴.

Following the 2007/2008 election violence, the Kenyan authorities were faced with two options to fight the culture of impunity in the country. Kenya had become party to the Rome Statute in March 2005 and hence was obligated by international law to try international crimes committed on its own territory or by its nationals. Upon becoming a party to the Rome Statute, a country is required by the international law to exercise its criminal jurisdiction over individuals responsible for international crimes. It is against this backdrop, and in accordance with the national laws, that the Kenyan judiciary should investigate and prosecute international crimes committed in the country or elsewhere by a Kenyan in any place. The prosecution of such crimes was made possible in December 2008 when the Kenyan

⁴ ICC, *Understanding the International Criminal Court*. Official Report pg 1, Hague <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> 28 June 2012

parliament adopted the International Crimes Bill that in principle defines and incorporates war crimes, genocide, crimes against humanity to the national laws (KNHCR, 2009).

Kenya had another option, establishing a Special Tribunal to prosecute the election-related crimes. It was an option that would see crimes defined by the Rome Statute and others not in that category be given an ultimate consideration. The Special Tribunal would avoid the setbacks that affect other local tribunals like immunities for the power and wealthy individuals (Okuta, 2009). The establishment of such a tribunal would have required a specific Bill to be adopted by the Kenyan parliament. As mentioned before, the parliament failed to come to a consensus on the establishment of the Special Tribunal, and failed again to beat the deadline that was set for the creation of the tribunal. If the Special Tribunal were established then the ICC would have been barred by law and the complementarity criteria from launching any investigation or prosecution on the Kenyan cases (ibid.). The criteria stipulate that the ICC only intervenes when a country is unable or unwilling to undertake investigations or prosecutions.

Both options could be used together with the ICC investigating the prime suspects and serious crimes, and a Special Tribunal going after the low-level perpetrators with a Truth and Reconciliation Commission working to unveil some of the historical injustices (KNHCR, 2009).

CHAPTER II: RESEARCH METHODOLOGY

In this study qualitative research method was used. Qualitative research enables deeper understanding of the subjects being studied by providing more answers to questions put to them by the researcher as well as valuable information (Bryman, 2008). In addition qualitative methodology involves broadly stated questions about human experiences and realities, studied through sustained contact with people in their natural environments and hence allows for the generation of rich descriptive data that helps in understanding peoples' experiences and attitudes (Rees, 1997). Rees (1997) argues that qualitative research generates words in the form of comments and statements as opposed to quantitative research that presents the findings in the form of numbers or statistics.

The qualitative approach allowed the victims of the post election violence to present their opinions and views on the impact of the ICC on the reconciliation process with the application of retributive justice as a form of transitional justice. In this study I sought to gain thick description of the phenomenon under investigation with a view to attaining in-depth understanding of the respondents' opinions (Gall, Gall and Borg, 2007). The research has a descriptive and analytical character. It describes the inner feelings and attitudes of victims of post election violence, and how they perceive justice in their settings. Additionally, it does analytical work to critically reveal the nature of the respondents' attitudes and behaviour. Qualitative research, in contrast to quantitative, does not quantify the results, but provides deep, phenomenological explanations of the area being investigated (ibid.).

2.1 Research Design

To be able to meet the goals of this study, a case study was used as the research design. A case study was used in this research because it provides an empirical inquiry that investigates a contemporary phenomenon within its real-life context (Yin, 1994), which in this case was the perceptions and opinions of respondents with respect to the ICC in Kenya.

Since the study sought to understand complex social phenomena among individuals in different sectors, case study is therefore an appropriate design to be used. Additionally, it is argued by Yin (2009) that case study is a good design to challenge theoretical assumptions, and a good source of ideas about a behavior. It is against this backdrop that I was obliged to embrace case study as the appropriate research design for this study.

In this study an exploratory case study was applied since it will be mainly focused on “what” questions. Case studies are useful for the researchers working on exploration studies (Yin, 2009).

This study on the ICC and the fight against impunity in Kenya was carried out to help people gain an understanding of the situation. Since the study was aimed at helping the audience understand the social problems, case study was the prominent design (Stake, 1978).

2.2 Data collection techniques

In choosing the techniques suited for obtaining the data for this study, I was guided by four of the five criteria provided by Bulmer and Warwick (1993): (a) Appropriateness of the research objective; whether the method chosen was capable of reproducing the kinds of data needed to answer the question posed in the study; (b) Administrative convenience; which entails consideration of cost, time and speed of obtaining information for the study; (c) Validity of the data collection methods; whether the researcher was able to obtain measurements of what was really intended to be measure; (d) Reliability; whether the method, if repeated by a different person at the same time, or the same person at a later point in time, would yield the same results on the second occasion. Reliability in qualitative research, which is in the interest of this study, has the purpose of “generating understanding” (Bulmer and Warwick, 1993). The fifth criterion, of representativeness/generalizability, is not applicable since the research is a qualitative one. Interviews and focus groups were used as the collection tools.

2.2.1 Interviews

In-depth interviews were used as the major data collection tool. Qualitative in-depth interviews were used for this study. One advantage of employing in-depth interviews is that they are very effective in giving a human face to research problems. Conducting and participating in interviews can be a rewarding experience for both participants and interviewers alike (Rubin and Rubin, 2004). Additionally in-depth interviews offer a good opportunity for participants to express themselves in a way ordinary life seldom affords them (Kvale, 1996). There are usually two ways of carrying out in-depth interviews, namely by phone and face-to-face. In this study, face-to-face interviews were conducted with eighteen respondents. Each interview lasted between 15 and 20 minutes. The majority of the interviews were conducted in refugee camps and others were conducted in offices due to lack of spare time by most of the respondents.

Through the interviews I was able to collect data needed for answer the research questions. As mentioned above, the study was an exploratory one with the intention of finding out the opinions and perceptions of ICC, its impact on reconciliation, and its role in fighting impunity and restoring the political order after a cycle of political violence in Kenya. Interviews were meant to obtain the deeper meaning of the issues concerning the involvement of the ICC to address atrocities committed in 2007/2008. The interviews were unstructured and questions asked were open ended in order to allow the respondents freedom to elaborate their opinions and encourage deeper expressions. The in-depth interviews will give a better and clearer picture of what the reality of the respondents is like (Neuman, 2006). Additionally, open-ended questions asked in the course of the interview prompted the respondents to talk about the issues they considered paramount and core in their lives with respect to the role of the ICC in the fight against impunity.

The interviews were divided into two main groups. First group was made up of eight IDPs who were victims of post election violence, living in two major camps; one in Nakuru and another in Nyandarua district. While selecting the respondents to interview, the researcher considered gender, age and district or origin of the respondents. The second group was comprised of ten respondents drawn from academia, NGOs, church leadership and government sectors, living in the cities of Nairobi and Oslo. This group of respondents was interviewed with the aim of obtaining the views and opinions of the people who were not directly affected by the violence but whose role mattered in realizing the goal of this study.

2.2.2 Focus groups

According to Berger (2000), focus groups are a free form of discussion by a group of respondents led by a moderator designed to get information about some issue or topic. It is a crucial method for data collection because it entails exploring a wide range of issues.

The study also employed the use of two focus groups as the other data collection tool. Each IDP camp provided respondents for a focus group. The discussions among the member groups were aimed at bringing out the underlying opinions and better understanding of the phenomena surrounding the study. The focus groups were made up six respondents in each group. The focus groups were comprised in a way that they included respondents displaced from different districts, and currently residing in the refugee camps. This enabled me to explore the diverse opinions from different respondents from different areas of the country. In composition of the focus groups, I ensured gender balance and fair representation.

The issue of subjectivity is common in focus groups where the facilitators inject their personal biases into the participants' exchange of ideas. Moderators can have influence in suggesting the direction for the respondents toward reaching particular assumptions or conclusions on certain issues. Respondents may feel coerced into making certain determinations, or choose to give certain conclusions in order not to be seen to oppose the moderator's presumed stand on an issue. This is most likely to give inaccurate results, and thus I decided to play a neutral role of facilitating and moderating the discussions.

2.3 Reliability in qualitative research

Reliability is the extent to which the results of the study are consistent over time and an accurate representation of the total population. It determines whether the method if repeated by a different researcher at the same time or same researcher at later point would give similar results on the second occasion (Bulmer and Warwick, 1993). Even though the term "reliability" has been widely used in testing and evaluating quantitative research, the idea resonates well with qualitative research as well. Reliability is primarily focused on testing the quality of any qualitative research. Additionally, a good qualitative study can help the researcher understand a situation that otherwise would be ambiguous or confusing. In qualitative research the concept of a good researcher will have the aim of "generating understanding" (Eisner, 1991).

Neuman (2006) notes that reliability is usually unachievable in qualitative research since working environments are dynamic and constantly changing, posing difficulties in getting similar results when research is done again. Most of the respondents interviewed in the study were IDPs in the camps. When they are resettled and return to their normal lives, and some form of justice like compensation is given to them, this might change their perception of the scenario and they would probably give different opinions to similar questions if asked at a later date. Among the IDPs interviewed, it was evident that there was a varying level of understanding of legal terminologies like transitional justice, reconciliation and impunity, even though the terms were translated into the respondent's first language. This may lead to respondents replying according to whatever they perceive these terminologies to mean, hence challenging reliability. The researcher was alive to these perceived and actual dynamics.

2.4 Study area

The research was carried out at Mawingo IDP camp and Pipeline IDP camp in Nyandarua and Nakuru districts respectively. As indicated in my proposal, the research was to be carried out in Uasin Gishu district but owing to security reasons and high tension among the residents of Uasin Gishu, I opted for plan B which was Nakuru and Nyandarua districts. I chose Mawingo and Pipeline IDP camps for two major reasons. Mawingo IDP camp is the largest camp in the country with over 16,000 refugees. Both Mawingo and Pipeline have IDPs drawn from more than five districts which were devastatingly hit by the post election violence. The five represented districts also entail that the IDPs were from five different ethnic backgrounds. When selecting the respondents for interview issues of ethnic and gender balance were put into consideration. The first part of the study will focus on the IDPs living in the camps. Additionally, data was gathered in Nairobi and Oslo, targeting various stakeholders other than the direct victims of the post election violence in the camps.

2.5 Research Ethics

Research clearance was sought from the Kenya National Council for Science and Technology (KNCST). KNCST is the institution mandated with issuance of research permits in Kenya after one has met certain criteria and requirements. The institution strives to achieve the goal of maintaining the participants' anonymity, rights as participants and respect towards the participants.

In this study, I maintained confidentiality at all the times while carrying out the research. This basically involved keeping the identity of participants anonymous. By so doing I could avoid the invasion of my participants' privacy. I was fully prepared to take full responsibility for the research work and the contribution to the study. In essence, this included the responsibility of the consequences of the study. I strove to obtain informed consent from the respondents used in the study and also ensured that the individuals participated voluntarily.

The study demanded that I be open and honest in dealing with the participants and ultimately observe the agreements with care and ensure no exploitation of the participants and ensure I gained their informed consent to the letter. If new subjects came up during the data collection and I saw the need for them to be addressed or investigated, then first I would be obliged to seek and obtain the informed consent of the participants.

The researcher employed the necessary measures to protect the participants from any physical or psychological harm. This was aimed at ensuring that the safety of the participants and their families or friends is guaranteed. Harm could include loss of esteem, stress or inducing participants to perform unacceptable acts (Diener and Grandall, 1978). The participants need to have the aim of the study fully explained to them prior to interviewing. I made it clear to the participants that they will know of the results of the research. If needed, participants will be emailed the findings of the study once the research is completed.

The researcher will thus be obliged to report back the findings to the respondents and other participating groups. The National Council for Science and Technology will receive a copy of this thesis as a final research report. It is my aspiration and hope that this study can be used as an aid to benefit the local community, scholars and other international relations practitioners in the arena of transitional justice and the ICC.

2.6 Data Analysis

In this study, both primary and secondary data was collected, and my objective and focus was to come up with a data that would be easy to analyse. The format was drawn from a wide range of individual interviews and focus group discussions, which were both audio recorded and noted down. A similar format was extended to other stakeholders in the study, namely: politicians, scholars, NGOs, government officials and church members. By following the interview guide, which was developed to answer the research questions sufficiently, I was obliged to stay focused on the themes that were coming up in the period of interviews and focus group discussions. The emerging themes were noted on a notebook and captured in the audio recording to be transcribed later in analysis.

Other than obtaining primary data through interviews and focus groups, I employed secondary data mostly from books, journals, articles and research reports to validate the primary data. The study, to a great extent employs thematic analysis to analyse the data especially that obtained from primary data sources. However, data from other supplementary data sources, for instance, published sources, was analysed using content analysis. The study also used some of discourse analysis to examine the pattern of speeches, metaphors employed and how respondents talked about certain issues, especially in discussions.

Data coding was done thematically. Themes were realized through noting the issues that frequently surfaced in the course of interviews and focus group discussions. These were coded and formatted ready for analysis.

With regard to ethical considerations and the anonymity pact the research made with the respondents, the identities of the respondents were not disclosed. However for the purpose of this study I gave nicknames to some respondents, so the names appearing on interviews in the analysis chapter are not the real names of the participants but just invented names. Owing to complexity in determining the overlapping voices and identifying who said what in focus groups, I resolved to designate respondents (for instance as *respondent 1, in focus group 2*) without using any given names.

Admittedly, transcribing data from focus group discussions proved to be more challenging compared with individual interviews. This is due to the overlapping voices in the conversations as well as the difficulties in attempting to extract the points from both the silent and salient voices of respondents. However I successfully managed to transcribe and analyse all the data sufficiently.

2.7 Delimitation and Limitations

Although the research has achieved its aims, there were some limitations and shortcomings that the researcher experienced and took notice of. The research was assumed to take an explorative approach and by so doing did not emphasize the normative format. The study was also limited in terms of data collection in the IDP camps in that I only visited two camps. It is also noteworthy that the post election cases are still going at the ICC in The Hague, and as new developments are made, this may result in some changes in the information as presented this in research. I take this scenario into consideration.

Subjectivity could be another limitation. Intensive qualitative research is a reflexive process, where the researcher's opinions and experiences may introduce bias to data collection and analysis (Creswell, 2007). The interview guide, the data collection process and analysis were carried out by me personally, and this can lead to a certain degree of subjectivity.

CHAPTER III: THEORETICAL FRAMEWORK AND LITERATURE

REVIEW

3.1 Theoretical framework of the study

Transitional justice is defined as that conception of justice associated with periods of radical political change following past oppressive rule (Teitel, 2005). Transitional justice evokes many aspirations which include legitimacy, liberation, nation building, reconciliation and conflict resolution (ibid.). Additionally, transitional justice is inclined to issues of accountability versus impunity, the dedication of institutions to prosecution, truth seeking and restoration of rule of law (ibid.). Transitional justice involves bringing to account the individuals who have grossly violated human rights or committed crimes against humanity. It advocates for trials and truth commissions (Mani, 2005). The ICC mandate seems to have a propensity towards this form of justice. Transitional justice can be approached in different concepts namely; trials, truth commissions, non-legal measures and institutional reforms (ibid.).

3.1.1 Trials and prosecutions

The trials of Nazi war criminals at Nuremburg from October 1945 constitute a great step forward towards enforcing accountability for crimes and gross human rights violations. Since then, individuals have been held responsible for their actions and could no longer escape the full force of the law on the claim that they were only following orders (Ratner and Adams, 2001). Equally, heads of state cannot commit such atrocities with the comfort of a get-out-of-jail-free card or rely ultimately on the immunity accorded to all incumbent heads of state (ibid.).

In most cases where transitional justice is pursued, the demand for accountability is formulated by the external actors even though local mechanisms seem to be behind the calls for individuals to take political and personal responsibilities. Too much emphasis on legal accountability may result in transitional justice programmes that are not appropriate to the political and legal cultures in which they are being applied (Sriram, 2007).

Trials have been an established concept in pursuing and achieving the goal of transitional justice. In the Kenyan case, prosecution of the individuals behind the 2007/2008 post election violence will seek to purge the leaders with the potential of orchestrating such violence in the future (Okuta, 2009). The trials may serve to end the political impunity in the country by subjecting the political leaders to due process of law where accountability will be emphasized (Gary, 2000).

However, tribunals have come under fierce criticism for promoting ‘victors’ justice’. For instance, the Liberian president Ellen Johnson-Sirleaf used the platform to ensure her predecessor Charles Taylor was arrested. Additionally, these tribunals have been discredited for overlooking the victims’ interests and needs, especially on matters pertaining to reconciliation and peace building. Sriram (2007) asserts that this was highlighted in the case of Rwandan tribunals where too many resources were used to establish and run these tribunals, whereas such funds could have been channelled to rebuilding national judicial capacity. The ICC has been criticized for unfairly focusing excessively on African cases (ibid.).

3.1.2 Truth and Reconciliation Commission

The truth commission has been recognized as an alternative mechanism to compensate for the shortcomings of trials. The concept of truth commissions has established itself strongly in the realm of transitional justice (Mani, 2005). The South African Truth and Reconciliation Commission (TRC) has been used all over the world as a model for how this aspect of transitional justice can be emulated by countries that have been hit by conflicts and estrangement of communities (Sriram, 2007).

Priscilla Hayner is critical of truth commissions. She argues that the aim of the truth commission is to reveal and establish offences by the government of the day in order to resolve comprehensively and conclusively recent and historical conflicts. Although the truth commissions have achieved their goals (as in the case of South Africa) they have also come under criticism for letting crimes go unpunished and thus encouraging impunity in the societies concerned. Hayner further observes that unless there is political will during and after the enquiry to ensure reforms and implement the recommendations then the commissions will fall short of achieving their goals (Hayner, 2002). This was evident in Haiti’s Truth and Justice Commission in 1994, and in El Salvador and Guatemala where due to lack of political

will to carry out reforms and fund the process the commissions became incapacitated and unable to deliver their mandate (ibid.).

Mamdani seeks to establish whether truth can promote reconciliation. The desire to forgive and reconcile with the offender is solely at individual level and it cannot in any case be preached or imposed, thus one cannot to maintain conclusively that truth commissions can guarantee reconciliatory effect (Mamdani, 2006).

In the aftermath of the post election violence in Kenya, mediated talks led by the former UN Secretary General, Kofi Annan, led to agreement between the two major political parties, the ODM and PNU, to establish a Truth, Justice and Reconciliation Commission (TJRC) to find out the truth behind the violence (Hayner, 2011). The draft legislation to establish the TJRC, put forward by the Ministry of Justice and Constitutional Affairs, came under fierce criticism by rights advocates, arguing that it contained confused language in relation to amnesty and power to recommend amnesty without stating explicitly which crimes were excluded. The other issue of concern was the independence and autonomy of the TJRC. Some members of parliament resisted its establishment ostensibly to discourage probing into historical crimes (Hayner, 2011).

In the case of Mozambique, Zorbas underscores in a very critical way that full truth cannot be said to be ubiquitous, and the desire to remember was not so paramount. The people of Mozambique wanted to just to forgive and carry on. In Rwanda, a similar scenario was experienced with the greater public wishing to pursue national reconciliation without having to seek out the truth (Zorbas, 2004).

The Act creating the TJRC was passed into law in November 2008. The TJRC was established and bestowed with the chief mandate of investigating and compiling human rights violations and economic crimes dating back to 1963 when the country attained independence. The commission was tasked to investigation illegal public land acquisition, marginalization of certain tribes, ethnic tensions, state repression and abuses of office (TJRC Act, 2008).

One of the major undertakings expected of the TJRC was to look conclusively into political violence before and during elections. The commission was to investigate all political violence since 1963, and not exclusively the 2007/8 election violence (Okuta, 2009). Some observers noted that, based on the structural and legal formation of the TJRC, it would be difficult for the government to deal with the suspects in the 2007/8 post-election violence through the

commission. This argument is grounded on the view that the TJRC's objectives were different from that of the Special Tribunal, which in this sense would mean that it lacked the mechanism to deal with the suspects. Additionally, the TJRC could only recommend trials, and this was already done by the Waki Report, hence rendering the TJRC superfluous with respect to prosecuting the suspects (Okuta, 2009).

The government is on record requesting some crucial amendments to be made to the TJRC Act to make it more representative and effective in terms of handling suspects of the 2007/8 post election violence. All in all, the commission will be bound to face some serious challenges as it seeks to address the post election violence effectively together with all past human rights violations and economic crimes since 1963 (Okuta, 2009).

Eventually, the Kenyan political class was taken by a surprise by the likelihood that the ICC would become involved in probing the post election violence. In regard to this, the government suggested that the TJRC would offer an alternative role, which would ultimately include prosecutorial powers though an expanded membership and mandate. The TJRC rejected any attempt by the government to reconstruct it to handle criminal justice. The government gave in and accepted that the commission will have its mandate intact and would not be altered (Hayner, 2002).

3.1.3 Transitional Justice and Reconciliation

According to Mani (2005), reconciliation is a process of restoring a relationship after estrangement or conflict. This aspect can be viewed in two main levels, namely individual and national reconciliation. In most politically motivated violence the emphasis is put on national reconciliation. However the unity of a society and reconciliation is dependent on individuals' efforts and will to reconcile with others and build a peaceful state they can trust (Mani, 2005). On many occasions the goal of reconciliation after a political violence is not achieved, which could be attributed to the idea of pursuing reconciliation in the lens of retributive justice as a component of transitional justice (ibid.). In order to underscore the inter-linkages between transitional justice and reconciliation, this study opts to analyse peace versus justice and ultimately transitional justice versus reparative justice;

The peace versus justice dilemma emerges as a result of violent conflict in which victims demand some form of accountability be imposed on the masterminds of war crimes (Sriram, 2007). Those advocating accountability argue that it must be pursued in order to serve justice

to the victims, survivors and the society as a whole. The proponents of peace building, although they admit the significance of accountability, often lament that it may destabilize a society that has been devastated by violence (ibid.).

The Kenyan case clearly illustrates the challenges between transitional justice efforts in pursuance of accountability for gross human rights violations and reforms in the national political institutions (Musila, 2009). In striving to achieve a full transformation of Kenyan politics, the question of whether the time is due for accountability surfaces quite often, however, Musila (2009) argues that there is an inherent need to put in place credible institutions that will help delink the past violations from the future aspirations for sustainable peace, national healing and full respect for the rule of law.

Reparative justice entails numerous dimensions and forms which include reparations, restitution, redress, compensation and rehabilitation, among others (Teitel, 2000). This form of justice advocates the repair of victims and communities, mediates between past and present, and lays a basis for redistributive policies that ensure radical transformation of a society that had been faced with gross human rights violations (ibid.). Retributive as a form transitional justice is concerned with injustices caused by a conflict and its main aim is the punishment of perpetrators (Elster, 2010).

Restorative justice is usually focused on restoring relationships rather than punishing the perpetrators of abuse or violators of human rights. Restorative justice has over the past decades assumed a place as the second-best alternative, particularly when it is not possible to prosecute, or as the morally superior alternative to penal and retributive forms of justice (Minow, 2000).

According to Kiss (2000), restorative justice can be characterized as a threefold commitment: namely, (i) to affirm and restore the dignity of those whose human rights have been violated; (ii) to hold perpetrators accountable, emphasizing the harm they have done to fellow human beings; and (iii) create social conditions in which human rights will be respected by all. The approach of restorative justice is ideally meant to give respect to the victims, to allow them to tell their side of story to the rest. This victim-centred approach is seen as a significant break from the retributive approach where the court puts the suspects on trial, and the law punishes them accordingly if found guilty (Kiss, 2000). The proper reconciliation and healing can be achieved through non-judicial mechanisms, and thus the ICC has no more than a remote chance of attaining reconciliation through retribution.

Instead of placing much focus on the crime itself, or even the perpetrator, restorative justice has offered a different approach, that is, the healing of the victim and the society at large (Kiss, 2000). Truth commissions have been utilised as a better mechanism and avenue than the courtroom for victims to tell their side of story. In this context, the victims need respect and dignity and this is not likely to be achieved by withstanding cross-examination by an experienced professional lawyer defending a person who tortured them many years ago. This shows why the trial process is not likely to lead to the conviction of many suspects who are being prosecuted. Some atrocities might have taken place many years ago, and even committed in secrecy, which leaves the fate of the accused to the word of one person against another. In the binary world of law that only filters ‘guilty’ from ‘not guilty’, the process can be depriving, devastating and even limiting for a victim who has been yearning to tell his or her side of the story (Kiss, 2000).

Restorative justice is a process by which individuals who are victims of a certain offence can jointly identify, redress the violations and seek common solution to the problems of the past (Zehr, 2002). This kind of justice is community based, which serves to bring the stakeholders to repair broken relationships and chart the way to obtain sustainable peace without blaming or shaming the offenders (ibid.). In the Kenyan case, for reconciliation to take place, both victims and offenders must be engaged in a process that addresses the past crimes, but most importantly repairs the already strained relationships through restorative justice.

Rwanda embraced restorative justice after the 1994 genocide through the establishment of *Gacaca* local courts. Kenyans would do well to learn a similar system (Dennis, 2010). *Gacaca* was created to speed up trials, to reconcile Rwandans and to put to rest the culture of impunity through the use of a traditional dispute mechanism to search for solutions (Mamdani, 2001). *Gacaca* and reparative justice are considered more effective in reconciliation than the ICC and transitional justice because they focus on forgiveness and the establishment of a conducive environment for both offenders and victims to cooperate and rebuild the society (Dennis, 2010). Restorative justice involves victims participating in the justice system through decision making and offenders being ready to take responsibility for their misdeeds (Zehr, 2002). Kenyans can also build broken relations through storytelling about past experiences and active participation in the search for all inclusive solutions (Dennis, 2010).

Local tribunals may not meet the victims' needs in total, but they can bring about reconciliation and peace faster than the ICC and its transitional justice (Zehr, 2002). Local tribunals should put emphasis on a psychological healing process which should stem out of shame among the offenders and help them to co-exist peacefully with the victims (ibid.). On the other hand, the culture of impunity has existed in Kenya because the suspects are left unprosecuted, and have in the past intimidated their victims. This probably explains why some Kenyans consider retributive justice by the ICC as the better option (Dennis, 2010).

According to Dennis (2010), truth telling serves as a prerequisite to the attainment of reconciliation. The search for the truth, however, cannot be imposed on Kenyans by an international body, it has to be intrinsic and community based. This will enable the offenders to feel relieved from the historical shame of the events of 2007/8, and hence build a society free from culture of impunity (Dennis, 2010). Truth, justice and reconciliation must be conscious of the existence of the wide gap between the rich and poor in Kenya, and must put forward an agenda that works to bridge the divide. Kenya is more likely to attain reconciliation in local justice than by subscribing to transitional justice and the ICC (ibid.).

3.1.4 Reconciliation and peacebuilding in Kenya

The litmus test of the effectiveness of the ICC through prosecutions and trials relies on the question whether the process will contribute to national healing, political reconciliation and peacebuilding. In the event that the political reconciliation does not take place coupled with social cohesion and institutional reforms failing to stem the abuse of power and social polarity, then the goal of applying transitional justice lacks any reasonable significance (Sriram and Pillay, 2009).

At the height of the post election skirmishes the Kenyan authorities sought a national dialogue and reconciliation to calm a country that was on fire. The process resulted in a power sharing arrangement and a national accord in the government (Okuta, 2009). The accord stipulated four crucial agenda that were meant to provide a road map for both short- and long-term changes in order to protect the occurrence of such violence in the future. The fundamental changes put in place were expected first and foremost to resolve the humanitarian crises and acute problems, and secondly to deal with the culture of impunity and promote stable and efficient national institutions. This is how the national accord represented the official consensus on a national strategy for ensuring that the country achieved the desired reconciliation and peacebuilding (ibid.).

3.1.5 Retributive justice and its impact on reconciliation

Immanuel Kant (1724–1804) observed that punishment's primary objective is retaliation. He argued that in order to restore a natural balance of justice, an offence must be parried by a just punishment. He further lamented that even the last murderer remaining in prison would have to be executed just to reciprocate what his deeds deserve. Failure to do so, he argues, means justice will not be effectively rendered (Zedner, 2004). This kind of emphasis on retributive justice has impacted negatively on the reconciliation efforts that are usually crucial for a society emerging from a gross violation of human rights (Teitel, 2005).

According to Nowak (2003), some of the long lasting human rights abuses are indeed the crimes against humanity. The emergence of an international prosecuting mechanism was founded on the basis that national tribunals lacked the capacity to prosecute human rights violations successfully. The ICC was preceded by ad-hoc tribunals for Yugoslavia and Rwanda, whereby state parties were obligated to bring suspects before the criminal court. This was in line with the Rome Statute which championed the fight against impunity and restoration of order in conflict-torn zones (Nowak, 2003). Retributive justice is punitive, and sets its main focus on the defendant and the adversarial relationship between defence and prosecution (Teitel, 2005). In retributive justice success is measured by the fairness with which the process is carried out coupled with determination to ascertain the compensation of the victims and punishment of the offenders (ibid.).

Murithi and Ngari (2011) argue that the ICC took over the Kenyan case because it believed that Kenya did not have both the capacity and political will to bring to book all the human rights violators involved in the 2007/8 violence. The office of the ICC's chief prosecutor came up with names of six individuals were bound to face justice. Two of the six suspects were however exonerated at the pre-trial chamber (Murithi and Ngari, 2011). The Director of Public Prosecutions has compiled cases touching on 5000 individuals in relation to the violence (*The Daily Nation*, 2012). The ICC began to investigate Kenyan suspects before Kenya's new constitution came into effect. There were reasonable grounds to believe that, with the old constitution, the local judicial mechanisms should be deemed unfit to administer justice to all.

The Washington Post pointed out that the former chief prosecutor inserted the ICC into a delicate situation, referring to the court's proceedings on the Kenyan case. Mr Ocampo diplomatically singled out three leaders from each of the two warring political parties, while

leaving out the two principals, President Mwai Kibaki and Prime Minister Raila Odinga. Instead of seeking to obtain arrest warrants from the court, the prosecutor sought to issue summonses, which in essence does not require the Kenyan government to detain the suspects (*The Washington Post*, 2010). The reaction of the Kenyan parliament to the indictment of the suspects was unsupportive. The parliament passed the resolution with the aim of persuading the government to withdraw from the Rome Treaty and not to be party to the ICC. The government's wish was for Kenya to conduct its own trials, although initially the resolution seemed divided between the coalition sides of the government. The proponents of domestic trials argued that it was the right move for Kenya since it would ensure speedy trials for many suspects. The negative aspect of having the ICC carry out retributive justice against the Kenyan suspects is the high propensity for dragging the country back toward civil war instead of helping consolidate the fragile new political order (*The Washington Post*, 2010). 'Justice for human rights crimes is important; but Kenya's continued peace and democratic progress is of greater value than another endless prosecution in The Hague' (*The Washington Post*, 2010).

3.1.6 To prosecute or not to prosecute

Sriram and Pillay (2009) critically observe that there is no clear answer to the question of whether individuals breaching international law should be prosecuted or pardoned, especially when the prosecution of such individuals can lead to more conflict and unrest in the society. The use of pardon for political leaders especially in the quest for peace and order has been used in the past and has achieved the desired goals (ibid.). But in the attempt to bring sanity and promote a politically inclusive society after gross violations of human rights, an incisive question has to be posed: Does pardon promote order and peace or does it promote the culture of impunity?

On one hand, to argue that the perpetrators of crimes against humanity, genocide, and war crimes should be pardoned is to promote a perspective that denies the evolution of international society and negates accountability. On the other hand, to say that all the violators of human rights have to be subjected to the full force of the law through trials and prosecutions is to fail to take into account fundamental factors that present a dilemma in the quest for a transformed peaceful, stable society and strong platform for reconciliation to take place. This would serve to promote the assumption that the world has entered a Kantian age of universal justice, which is not the case (Sriram and Pillay, 2009).

According to the realist perspective, the question of what should be done with leaders with blood in their hands after the transition has taken place is a problem that can be best addressed by political settlement as opposed to law courts. Insisting on prosecutions has a high propensity of triggering a breakdown of settlement negotiations and further escalating a conflict that could have been resolved more promptly and effectively. Additionally, if only the exit from conflict is prosecutions, it may give defeated parties a reason to continue a war, which in essence leads to lack of accountability (Sriram and Pillay, 2009). Further both Sriram and Pillay argue that for the sake of peace in the society during the transition time, it may be prudent to make a sacrifice for the future by focusing on mechanisms that ensure peace and stability and deliberately choosing to go the international humanitarian law way.

The supporters of international justice view trials and the prosecution of perpetrators of egregious crimes as an end of impunity and restoration of the rule of law. Those opposed to retributive justice as a means of bringing order to a society argue that international prosecution is a manifestation of power politics at the expense of justice (Sriram and Pillay, 2009).

3.1.7 In the wake of criminal trials

Although it is hard to determine a perfect option to end impunity in a society recovering from gross human rights abuses, criminal trials faces tough challenges in achieving a significant degree of peace, stability and reconciliation in society (Sriram and Pillay, 2009). This is not to discredit the role of criminal justice in ensuring accountability for the individuals alleged to have been the perpetrators of crimes. My argument is specifically in line with one of my research questions on the possibility of the trials ensuring a reconciled society. Both Sriram and Pillay (2009) lament that trials in courts of law to prosecute individuals who have committed politically related atrocities stand no chance of promoting a reconciliation process. However the trials do provide an appropriate background for alternative processes to address grave issues in a post-conflict period. The problem with trials is that they are seen as vengeance by the weak parties or those individuals they seek to have tried, thus making it rather difficult to have a stable society with peaceful co-existence (Sriram and Pillay, 2009). In the event of ethnic conflicts like those witnessed in Kenya in 2007/8, a political dialogue is required that brings together the groups involved to ensure effective post-conflict peace processes.

According to Archbishop Desmond Tutu, a formidable character in bringing order and peace to the South African political landscape after apartheid, trials may be instrumental in fighting impunity but they cannot contribute to reconciliation. In Rwanda, the Tutsis instigated trials against the Hutus through the International Criminal Tribunal for Rwanda (ICTR), which proved to be a cumbersome task when it came to promoting peaceful co-existence (Tutu, 2008).

In any given society where atrocities have been committed, there are large numbers of people who get victimized because of their identity. With reference to the Kenyan post election violence, many people became subjects of victimization on account of belonging to a particular ethnic group and so were perceived to have voted for a candidate from their community (Moghalu, 2009). Trials in that context may fail to serve the intended purpose. This is because the group factor is perceived as a form of conspiracy whereby many are labelled as wronged. This gives a certain ethnic group a sense of collective guilt and the other institutions what could be perceived as ‘the Nuremberg paradigm’ when all the members labelled as violators are subjected to a collective retribution (Moghalu, 2009).

Justice is considered complete if it addresses the needs of victims in the form of compensation, which in this case means that restorative justice has to be taken into account since it ultimately focuses on victims as the target group (Arendt, 1977). Moghalu’s (2009) argument discredits the possibility of a society achieving reconciliation through trials. He observes that there is no empirical proof that either of the Nuremberg and ICTR trials delivered reconciliation.

3.1.8 The International Crimes Act and Kenyan crimes

Before Kenya ratified the Rome Statute of the ICC on 15 March 2005, international crimes were not legally recognized by the national laws (Okuta, 2009). In particular, war crimes, genocide and crimes against humanity were not known to Kenyan law. Upon ratifying the statute, Kenya was now obligated to adhere to both national and international laws. The ICC had in principle gained the mandate to stamp its authority on Kenyan soil when it concerns international crimes. Even if the ICC had legally gained the mandate to investigate crimes of an international nature, Kenya did not have appropriate laws that could define such crimes (ibid.).

In order to be able to deal with crimes of an international nature, Kenya passed legislation that was meant to erase the obstacles and challenges that had been witnessed in the 2007 post election violence. The International Crimes Act 2009 was passed into law in January 2009, proceeded by the release of the Waki report⁵.

The International Crimes Act has integrated most of the provisions of the ICC Statute into Kenyan domestic law. It is designed to incorporate the punishment of international crimes such as genocide, crimes against humanity and war crimes. This is seen as a step towards making Kenya legally viable in cooperating with the ICC's processes and functions (ibid.).

Although the Act does not seek to define international crimes, it does refer to the ICC Statute for the ultimate definition of these crimes. It is emphasize that, in interpreting and applying the definition of international crimes, the Kenyan local judiciary is obliged to abide by the elements of international crimes entrenched in Article 9 of the ICC Statute. This is a formidable move that seeks to bring Kenyan criminal law into uniformity with international law, ultimately enabling Kenyan courts to interpret international criminal law in accordance with the Rome Statute. This also serves to reinforce the changing view that international law is superior to the domestic provisions⁶.

Having imported crucial principles of international criminal law as provided for by the Rome Statute, the Act allows the Kenyan courts to investigate and prosecute international crimes conclusively and legally, and respond effectively to the requests made by the ICC. The Act would provide a forum to address international crimes without any geographical or temporal shortcomings. However, the Act is not applicable in the context of the 2007/8 post election violence since it was passed more than one year after the atrocities had been committed, and it is not retroactive. Nevertheless, the Act offers a crucial mechanism for dealing with future international crimes (ibid.).

3.1.9 Restorative justice and reconciliation

As argued by Teitel (2005), the goals of restorative justice are to repair harm, heal the victims and community, and most importantly restore the perpetrators to a cordial relationship with the victims and society at large. Restorative justice is the alternative to retributive justice for it

⁵ Kenya Law Reports (KLR) (2009). *The International Crimes Act*.
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

⁶ Kenya Law Reports (KLR) (2009). *The International Crimes Act*.
http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

seeks to bring together both offenders and victims to reconcile and gain mutual understanding of each other's actions and reactions. Success in restorative justice is usually determined by measuring the value of the offender to the society and level of emotional restitution for the victims. Unlike retributive justice, restorative justice does not focus on reintegrative shaming over guilt. It is however very rich in ensuring reconciliation and peacebuilding in the post conflict period (ibid.).

By and large, the demand for punishment is likely to affect any reasonable negotiations aimed at bringing conflict to an end. This does not mean that a peace process should on focus on ending the conflict for this may compromise the rights of those were directly affected by the conflict and hence fail to address the deep seated grievances that time and again spur the conflict (Sriram and Pillay, 2009).

3.1.10 The plight of IDPs and reconciliatory measures

The 2007/8 post election violence led to the massive forceful transfer of population within the country, resulting in alarming numbers of people without a place to settle (Hayner, 2011). Many of the dislodged persons sought refuge in safer parts of the country where they became IDPs and others fled to Uganda where they became refugees. The first phase of forceful transfer of people emanated from the Rift Valley, Western Kenya and Nyanza where scores of mainly Kikuyu people became the victims of circumstances (Modi and Shekhawal 2008). These individuals were ejected on the basis that they were perceived to have voted for Kibaki whose victory and swearing in as president was highly contested. The second phase of displacement began as a retaliatory attack by the Kikuyu, targeting the Luos, Luhyas and Kalenjins from the places where they dominated (ibid.)

The issue of resettlement of the IDPs has stretched on for over four years now, and the individuals continue to struggle with meagre housing. This condition has revealed some critical unresolved issues around the displacement and reconciliation (Hayner, 2011). Politically orchestrated violence, usually viewed as ethnic clashes or land clashes, has continued to tear the country apart as political figures engage in cut-throat contests of power (UNDP, 2011). Little has been done to promote cohesive and mutual understanding among different communities. The much needed reconciliation process in the society seems to hit deadlock time and again partly because the government has slowed down on implementing policy on the IDPs or just because the IDPs are being used as political tool to gain power in the forthcoming general elections. However, some measures have been put in place to address

the plight of the IDPs (*ibid.*). The measures are seen as the better option to deliver what the ICC is incapable of addressing.

According to Hayner (2011), the TJRC was an institution established to look into the predicament of the IDPs with the motive of not only documenting the historical injustices but also championing the reconciliation process and promoting peaceful coexistence among different tribes. District Peace Committees have also played a key role in reconciliation efforts through inter-ethnic meetings and mediation of conflict. In addition to the district peace committees, the Christian church has also been in the forefront in the quest for speedy resettlement of the IDPs by the government together with spiritual guidance of attaining reconciliation (*ibid.*).

The UNDP report postulates reconciliation in three broad categories:

(i) Personal reconciliation which entails that an individual comes to terms with loss and understands the circumstances of the violation through knowing the truth and being able to move forward. With regard to this type of reconciliation, most Kenyan IDPs have not been able to come to terms with the treatment to which they were subjected at the height of the disorder and subsequently have refused to return to their respective homes. The fear of going back has greatly increased since the ICC opened the trial processes of the suspects. They fear that the tensions the ICC has created may escalate to full-scale violence. Their inability to accept their predicament makes it difficult to forgive those who inflicted suffering on them. The condition can also be attributed to insufficient counselling services or improper policies to help the IDPs cope with the situation and accept it. Additionally, any forces that act as impediments to achieving the reconciliation only increase the psychological harm to the IDPs and hence should be removed.

(ii) Interpersonal reconciliation which focuses on reconciling specific victims and perpetrators. It is common knowledge that the reason why the Kenyan IDPs have not realized full interpersonal reconciliation is the absence of spaces where the victims and perpetrators can meet to engage in dialogue, readdress and tell their sides of the story. The atrocities against them were committed in the land they had occupied for years, and they were forced to return to their ancestral areas where they live in camps. The vast distance between their current settlement area and the land from which they were evicted has rendered it difficult to initiate any kind of inter-personal reconciliation with the violators. Interviews with the IDPs illuminate this issue. They are certain of the possibility of forgiveness but also lament that for

such to happen, institutions like the TJRC must spearhead the process. They are doubtful of such a goal being realized through the involvement of the ICC in building relations with their aggressors.

(iii) Inter-community reconciliation whereby inter-ethnic turmoil and unrest heightened by the struggle to gain and retain power and resources has prompted violations of human rights. This type of reconciliation categorically involves the mending of social relations in the transition period. The goal is extended to attain a national healing outlook where restoration of social relations and dignity among warring communities is a matter of priority. Today the country is jostling with the issue of having the communities that fought bury their differences and restore cordial relations where peace and tranquillity can prevail. This has been shown by politicians from different communities extending the olive branch and giving promises that they intend to form a coalition to prevent such occurrences in the future. The two politicians among the four suspects being tried at the ICC have vowed to form a coalition in the coming general election scheduled for March 2013. This is aimed at ensuring unity and reducing tensions between the two communities that fought the most (Kikuyus and Kalenjins) after the controversial results of the presidential election in 2007.

Most IDPs say this might work but the solution is likely to be short-lived. They observe that if politicians differ it is likely to boil down to them. In a country like Kenya where ethnocentric chieftains and parochial politics dominate the country it is inadequate to have politicians as the sole champions of inter-community reconciliation. IDPs point out that if the ICC should indict a leader from a particular tribe, this may lead to a breakdown of the purported coalition and even lead to increased tensions that may spur disorder again (Hayner, 2011).

3.2 Literature review

The ICC's emphasis on retributive justice is intended to end impunity. Impunity remains the primary source of gross violation of human rights in most conflict-torn regions (Skaar, Gloppen and Suhrke, 2005). Impunity gives rise to frustrations and anguish that poses a great risk of renewed cycles of violence and estrangement. The primary goal of the ICC is to set a foundation for rebuilding society after gross violations of human rights, through prosecution of the perpetrators and reparation of the victims (Keller, 2007). Impunity means exemption from punishment or loss or escape from fines. With regard to human rights and accountability, impunity refers to the failure or inability to bring those who have committed gross violations of human rights to justice.

3.2.1 ICC intervention in African Countries and its impact on reconciliation

Of the fifty-four African countries, thirty have ratified the Rome Statute and hence fall under the ICC's jurisdiction (Sriram and Pillay, 2009). The ICC has so far opened more cases in Africa than anywhere else in the world. Twenty-five African individuals have cases pending before the ICC. They stand accused of various crimes committed in six African countries; namely, Libya, Kenya, Sudan (Darfur), Uganda (the Lord's Resistance Army), the Democratic Republic of Congo, and the Central African Republic. The ICC has commenced preliminary examinations, with the potential to turn them in to a full investigation, in Ivory Coast, Guinea and Nigeria (Arieff et al., 2011).

With regard to the research question of the impact the ICC on reconciliation process, and its ability to foster an inclusive political community through retributive justice, I intend to review the literature with a focus on the Court's intervention in African countries. This study uses three countries (Uganda, Sudan and Democratic Republic of Congo) as examples to highlight the ICC's processes in Africa with the purpose of pointing out how the court's operations in fighting impunity have been perceived and its implication for the reconciliation process and peace. This will in turn give a reflection and deeper insight into how the ICC process in the Kenyan case is likely to play out with regard to the quest for a reconciled nation.

In December 2003, the government of Uganda referred the Lord's Resistance Army (LRA) to the ICC for its atrocities committed in northern Uganda. President Museveni had advocated the military option to crush the LRA for seventeen years. The government had failed to defeat, or come to an agreement with, the LRA, escalating an already bad situation which resulted in the surge in numbers of displaced persons from around 400,000 to 1.6 million (Egeland, 2008).

The ICC had an adverse impact on the community-level reconciliation. The intervention by the court elicited a considerable polarization of the peaceful condition that had been established prior to the coming of the international court. Even though there were various calls to have the individuals behind the atrocities in northern Uganda tried, there was also the desire that the ICC should refrain from prosecutions on the ground that it would negatively impact on the reconciliation efforts that were being pursued (Murithi and Ngari, 2011).

The ICC in Uganda generated controversy in the northern part of the country where the local leaders had laid the ground for peace negotiations with the LRA. The determination to have

the leaders of the LRA face retributive justice undermined the peace deals that had been initiated (McGreal, 2007). The issuance of the warrants of arrest against the LRA drove them away from the negotiating table and further rendered peace elusive in that troubled zone. Trials against the leaders of the LRA would have ensured individual criminal responsibility against the perpetrators of the heinous crimes. However, the same prosecutions would have been a setback with regard to peacebuilding, healing and reconciliation on the war-torn region. In ensuring retributive justice to the concerned individuals, the ICC paid no attention to the ongoing peace processes and the risk of a backlash upon its intervention (Murithi, 2010).

Uganda sought traditional mechanisms in order to ensure that harmony was restored, peace prevailed and reconciliation goals were attained. Traditional systems stood a chance of promoting restorative justice among the members of a community. However, it was noted that crimes committed by the LRA were of huge gravity and therefore traditional systems would not have been capable of pursuing justice. All in all, there was general acknowledgement of the role played by traditional mechanisms in a wider transitional justice architecture and how they can be admitted to ensure good results (Murithi and Ngari, 2011).

The crimes against humanity had been committed by all sides, including by the Ugandan People's Defence Forces (UPDF). However, the court's impartiality in carrying out its mandate has been contested, since only members of the LRA rebels were targeted, hence opening claims that the ICC sought to dispose of the LRA rebels instead of prosecuting crimes. All in all, it has been reported that worse violence, including murder, abduction, sexual enslavement, mutilation and forced conscription of Acholi young people, have been committed by the rebels, hence these militants should bear the greatest responsibility for the mayhem (Human Rights Watch, 2005).

Since the prosecutor started investigation into the situation in northern Uganda, five arrest warrants have been issued for the top-ranking individuals of the LRA, including its leader Joseph Kony. These arrest warrants were issued in 2005 and to date no one has faced justice (Ambos, Large and Wierda, 2009).

In May 2007, the ICC issued arrest warrants for former Interior Minister Ahmad Muhammad Harun and a former Janjaweed leader in Darfur, Ali Muhammad Ali Abd-Al-Rahman. They were accused of war crimes and crimes against humanity committed in Darfur between 2003 and 2004. This did not go down well with the Sudanese authorities, which hence refused to comply with the ICC's demands. In March 2009, the ICC Pre-Trial Chamber issued a warrant

for the arrest of the Sudanese president, Omar al-Bashir, for war crimes (Dagne, 2010). Many observers have pointed out that such a warrant of arrest would be an impediment to peace negotiations that are underway, and may also frustrate efforts for achieving sustainable stability in the region⁷.

Even though many local legal systems grant sitting heads of state immunity from criminal prosecution, it is the prerogative of the Rome Statute to grant the ICC jurisdiction regardless of the official capacity of the accused (Dagne, 2010). A number of human rights organizations praised the issuance of the warrant against a sitting head of state. They argued that the ICC had made the right step towards ending the impunity associated with abuse of office and power (ibid.).

The Sudanese government has dismissed the UN Security Council's referral to the ICC as just a political tool to brand it as an enemy of the international community and find an excuse to impose UN peacekeepers in Darfur (Nouwen and Werner, 2011). This came barely two months after the Sudanese government had reached concessions in internationally mediated peace negotiations with the Sudan People's Liberation Movement (SPLM), which fought to secede from Sudan in order to form the independent state of Southern Sudan (ibid.)

The referral by the UN Security Council of the Darfur situation to the ICC elicited unprecedented controversy concerning peace and justice in the region (Murithi and Ngari, 2011). This was a result of the ICC issuing an arrest warrant against President Omar Al-Bashir for allegedly being responsible for war crimes, crimes against humanity and genocide in Darfur. The AU was categorical in opposing the issuance of the warrants or arrests on the grounds that they undermined regional efforts to bring peace in Darfur and the rest of Sudan in general (ibid.).

The misperceptions between the AU and the ICC on the issues of peace and justice led to a decision by the AU Summit of Heads of State not to cooperate with the court with regard to enforcing the arrest warrants against the president of Sudan (Murithi and Ngari, 2011). The ICC arrest warrants for Al-Bashir played a role in derailing the recommendations of peacebuilding as outlined in the report of AU High-Level Implementation Panel (AUHIP) on the Darfur situation (ibid.).

⁷ ICC press release, 'Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a Leader of the Militia/Janjaweed', 2 May 2007.

Murithi and Ngari (2011) argue that the ICC disregarded the historical effects of marginalization, ethnic diversity and government oppression when it viewed contemporary crises. The prosecution of a few individuals does not address the much deeper structural and socio-economic concerns which are the major pillars upon which violence erupts. In order to ensure stability and reconciliation, a society should be willing to confront violent crimes that are linked to a history of violence (ibid.).

By the end of 2002 peace negotiations between the government of the DRC and the rebels had started bearing fruits with much focus and efforts to ensure peace prevailed in the region. In order to ensure concrete treaties, the National Assembly of the DRC passed laws that granted amnesty to the armed militia groups to cease fire and embrace peace talks. However, some militia groups rejected the peace talks and continued with attacks on civilians (Murithi and Ngari, 2011).

Upon the intervention of the ICC, the government of DRC cooperated with the court to issue arrest warrants against the deviant rebel groups, particularly their leaders. The ICC has widely been viewed as politically motivated to go after the enemies of the government. But what is a great concern is that the kind of selective approach to pursue justice against the militia has undermined any effort for the rebels and the government to return to peace talks. This has been an impediment to peacebuilding and reconciliation processes in the region (Murithi and Ngari, 2011).

Former Congolese warlord Thomas Lubanga, who in March 2006 became the first individual to be arrested under a ICC warrant, was detained for three years before his trial started in 2009 (Mendes, 2010). Lubanga would be found guilty by the court in March 2012. His verdict was seen a small development in the slow emergence of international justice. Amnesty International lauded the conviction, praising the court as capable of bringing the worst offenders to justice and ending impunity (BBC, 2012). The goal of achieving reconciliation and ensuring peaceful and stable region has however continued to be elusive in the region.

The former ICC chief Luis Moreno-Ocampo, speaking in Cape Town, argued that there is an element in African peacebuilding that does not focus on retribution, as is the case in Europe and America. He lamented that this element is inconceivable in Western society because the Western view justice is focused on retribution (Sriram and Pillay, 2009). The prosecutor's 'zero sum case load' as prescribed by the West maybe hard to apply in an African setting. On the same note, Archbishop Desmond Tutu, who played a key role in the success of the South

African Truth and Reconciliation Commission, observed that ‘the retributive justice is largely western. The African understanding is far more restorative – not so much to punish or redress or restore a balance that has been knocked askew. The justice we hope for is a restorative of the dignity of people’ (Minow, 1998).

With reference to the research question on reconciliation and retributive justice, some analysts are not convinced that the ICC will foster any stability in Kenya. However, they concur that it is bound to offer justice to the victims of the post election violence, which was unachievable under the current arrangements of the local judicial system. The prosecutions of the suspects at The Hague have a high likelihood of spurring chaos locally, hence the process ought to be treated sensitively. The PNU side of the coalition government had sought the cases at The Hague to be deferred. Article 19 of the Rome Statute allows the UN to defer the ICC cases only when there is a threat to international peace and security. Since the ICC process in Kenya does not in any case pose threat to international peace the petition was unsuccessful. As a matter of fact the ODM side of the coalition government opined that failure to bring to justice the perpetrators of post election violence poses grave danger to Kenya’s internal peace and security (Musila, 2009).

3.2.2 ICC’s agenda on justice versus peace

According to Sriram and Pillay (2009), peace and justice are inextricably interrelated. In most countries that are emerging from conflict, the issue of striking the balance between peace and justice has always been sensitive and paramount. The sensitivity of the matter is rather aggravated when in the search for justice the peace is threatened, or even the fragile peaceful environment acts as an impediment to achieving the desired justice (Clara, 2012). Kenya is still grappling with this kind of situation as are many other states that are emerging from conflict. The ICC’s presence in Kenya has been viewed by some analysts as the right tool to bring an end to societal ills and render justice to the victims. This view has however been challenged by those who assert the likelihood of the ICC sparking new chaos, threatening the prevailing peace Kenya has achieved since the chaos, and frustrating the nationwide reconciliation process that has been initiated (Clara, 2012).

The ICC has come under fierce criticism for its actions in Africa and its impediment to reconciliation. Chief among these criticisms is that by prosecuting suspects in ongoing or recently settled conflicts, the ICC treads on dangerous ground, risking triggering tensions that would escalate into renewed violence and endanger fragile peace negotiation processes

(Grono and O'Brien, 2008). By not allowing the bargaining chip of amnesty from the negotiations, the critics of the ICC argue that the court tampers with incentives that are paramount to achieving peace, and also makes the perpetrators remain in power for fear of being prosecuted once they leave office. Some analysts allege that it not convincing to tell the victims of such conflicts that the prosecution of a few individuals would secure the peace that could end the frightful conditions and risks they face on a daily basis (Grono and O'Brien, 2008).

The debate pitting justice against peace has been particularly emphasized with respect to Sudan, Kenya and northern Uganda. Similar serious concerns have been also been raised with regard to Libya, where its leader, the late Muhamar Qadhafi, had declined to cede power to the opposition. By and large, the attempt to prosecute President Bashir in Sudan has hardened his resolve to cling to power and hence complicated the implementation of the 2005 Comprehensive Peace Agreement with Southern Sudan and peace talks in Darfur (Arieff et al., 2011). The arrest warrants issued against LRA commanders served as an impediment to achieving a peace deal to end the conflict that had devastated the northern part of Uganda. Ugandan community elders supported the use of traditional reconciliation mechanisms instead of the retributive justice offered by the ICC (ibid).

UN Secretary-General Ban Ki-moon, who had maintained a neutral position on the ICC operations in Sudan, came out to state the inherent need for the international community to seek a balance between 'peace' and 'justice' while trying to deal with the conflict situation in Darfur⁸. He further expressed concerns about the expulsion of the aid agencies and threats to the NGOs and peacekeeping troops by the Sudanese government. He lamented that such actions were retrogressive and undermined the efforts to restore peace in the troubled region (ibid.). Some observers have maintained that the warrant against Bashir may be the first step in the journey to open up new opportunities for peace in Darfur. The prosecution of Bashir may serve to put pressure on actors to seek peace or face the full force of the law (Arieff et al., 2011).

Before the ICC chief prosecutor made public the individuals whom he wanted to appear before The Hague court with regard to the 2007 post election violence, there was a multitude of reactions from both the political class and their supporters in Kenya. The cacophony that engulfed the country was derived from the fear that ICC was going to have a huge impact on

⁸ UN News Service. 'Ban – Aid workers' expulsion impeding peacekeeping relief efforts', 22 April 2009.

the forthcoming election in March 2013 (Clara, 2012). The issuance of the summonses against the suspects could be viewed as counterproductive and retrogressive, would be tantamount to reversing the gains Kenya had achieved with respect to reconciling the country (ibid.).

A discourse that seeks to unveil the extent to which justice has to be sacrificed for the sake of peace can be rather a cumbersome one. For instance, some Kenyans in relatively stable areas may argue that they are enjoying peace, but such sentiments cannot be echoed by IDPs currently struggling to have basic needs in camps. These IDPs will likely see peace in the lens of justice, that is, they can have peace if justice prevails. To them, justice is a social necessity more than anything (Clara, 2012).

Now that it is vividly clear that justice and peace present an ambiguous approach in seeking order in the post-conflict period, it begs the question how we can strike the balance between the two. Rectificatory and restorative forms of justice have proven successful in addressing post-conflict situations. Rectificatory justice seeks to identify if a society is reckoning accordingly with the past misdeeds and in any case if it is correcting them. Rectificatory, as the terms suggests means to 'rectify' (Crocker, 2004). Restorative means to restore or bring back to order (Teitel, 2005).

Rectificatory justice is the most common type of justice and has been the main focus in various post-conflict situations (Teitel, 2005). The main focus of rectificatory justice is on human rights. The retributive justice that the ICC uses takes the form of criminal justice and entails holding accountable individuals accused of perpetrating violence, by putting them on trial and gaoling them if found guilty. As opposed to the former two forms of justice, retributive justice seeks to punish the perpetrators for their crimes (ibid.). *Gacaca* courts of Rwanda attained success by using restorative justice to render justice to the victims of the 1994 genocide. By so doing Rwanda set a good example of how community-based justice systems can be effectively used to address past crimes and restore peace in a society (Clara, 2012). Kenya will need to redefine its goals with respect the interests of the victims of post election violence. This means that if reconciliation is to be prioritized then the country has to pursue the restorative kind of justice and capitalize on its successes and strengths.

3.2.3 ICC process and its effect on stability in Kenya

In March 2010 the ICC judges approved the prosecutor's request to open an investigation into the Kenyan post election violence. This was the first time the ICC judges had authorized an investigation based on a request from the prosecutor, as opposed to a state referral or UN Security Council instruction to have investigations launched. The post election violence that led to the deaths of many, displacement and other abuses like rape and persecution, formed the basis of the investigation (Arieff et al., 2011).

The suspects in the first case are associated with Prime Minister Raila Odinga, while those in the second case are allies of President Mwai Kibaki. The ongoing trials at the ICC have prompted high tensions, making the issue very sensitive and threatening the stability and tranquillity of the country, especially now Kenya is preparing for another general election, scheduled for March 2013 (Arieff et al., 2011). The top two leaders, the prime minister and the president, have had differences on the ICC process aimed at stemming the impunity of the political class. Whereas, Raila Odinga has maintained unequivocal support for the court, President Kibaki has remained adamantly opposed to it. The president has been categorical that the domestic judicial system will restore order and ensure proper 'healing' of the country (ibid.).

The Kenyan government engaged in missions to woo support from other countries to push for a deferral of the ICC prosecutions by the UN Security Council. The government gained the support of the African Union (AU) but nevertheless the efforts bore no fruits before the UN Security Council (Arieff et al., 2011). This was followed by the government filing an application to challenge the case's admissibility, but again it did not succeed. Although majority of Kenyans have supported the involvement of the ICC, a section of population has expressed concerns that the ICC prosecution might not bring about peace in the country but stir up the same ethnic tensions that led to the post election turmoil in the first place (ibid.). Others argue in support of the ICC that a lack of proper prosecutions of the suspects could possibly lead to a repeat of similar chaos, and encourage the impunity that has been detrimental to the country's sustainable peace during election periods (Arieff et al., 2011).

The involvement of the ICC in Kenya comes amid high levels of suspicion on the part of African governments with the perception that the ICC is being used by Western countries to pursue their interests and dominate Africa. Africa's position on the ICC is paramount in that thirty-three out of fifty-four countries on the continent have ratified the Rome Statute that

established the ICC (Sing'oei, 2010). On 30 and 31 January 2011, during the African Union summit in Addis Ababa, Kenya successfully petitioned its case by rallying fellow African governments to support its request to persuade the UN Security Council to defer the proceedings in Kenya under Article 16 of the Rome Statute (Plessis, 2011).

A section of the civilian population in Kenya argue that Moreno Ocampo's allegations and summonses are an important first step in the attempt to end the era of impunity for the individuals who use ethnic conflict and unrest for selfish interests (Throup, 2010). Kenya has an unpopular tradition when it comes to impunity for violent crimes, dating back to the murders of Pio da Gama Pinto in 1965, Tom Mboya in 1969, J. M. Kariuki in 1975 and Robert Ouko in 1990 (ibid.). The ICC's success in the Kenyan case will be ultimately determined by the extent to which its probing exercises are deemed legitimate and impartial by the Kenyan people, political actors and the international community (Sing'oei, 2010).

In Kenya, there has been an ongoing debate that the ICC prosecution may destabilize the agreements that were reached by the government of national unity that was formed as a result of the 2007/8 skirmishes. Such sentiments have been criticized, with some analysts arguing that lack of accountability for human rights violations among other forms of impunity is the great threat to future stability and peace in the country (Arieff et al., 2011).

CHAPTER IV: DATA ANALYSIS

This chapter provides an analysis of the data gathered from Mawingo IDP camp in Nakuru district and Pipeline IDP camp in Nyadaurua district. More data were collected in Nairobi from different stakeholders including the Kenya National Commission on Human Rights, NGOs, religious groups (Christian church), politicians and scholars. Additionally, data were gathered in Oslo from Kenyan individuals living in Norway.

This chapter discusses the results of unstructured interviews with thirty participants. Before the commencement of the research, the rationale, purpose and significance of the study were made known to the prospective respondents. The respondents were also assured that the data was specifically meant to be used for the purpose of the research study, and that confidentiality was to be fully exercised, ensuring that their identities would be strictly held anonymous. In this section some secondary literature will also be used.

In this chapter I analyse the opinions of victims of post election violence on the role of the ICC in meeting transitional justice through punitive measures. I will further discuss the ICC's ability to promote reconciliation and inclusive political community through retributive justice. This will be coupled with an in-depth analysis of the opinions of various NGOs, members of KNCHR, political class, scholars, church leaders among other stake holders on the impact of the ICC on the reconciliation process in Kenya.

Allowing the locals to express their deep-seated thoughts and perceptions of the ICC will most likely shed some light on the line between the perceived and the actual impact of the court on reconciliation process in its quest to end the culture of impunity in the country.

I intend to analyse the findings of the research through various themes that proved significant to the study in relation to the research questions. These themes are systematically elaborated as follows:

4.1 How do IDPs view the ICC activities in Kenya?

In both IDPs camps I visited, Mawingo and Pipiline, it was clear that most of the individuals did not comprehend the functions and the objectives of the ICC. Terminologies like international justice and transitional justice, although translated into local languages, were not well understood by them. Almost all the IDPs had heard of the court through the media after the ICC had sought to intervene in the post election violence cases. The IDPs were also

uncertain on the capacity of the ICC to have a positive impact on their lives through administering international justice. However, their perceptions and opinions of the ICC could be attributed to the fact that most of them did not have any understanding of the court or lacked adequate information about the court.

My interaction with the respondents in the process of data collection also offered them an opportunity to gain some knowledge about the ICC. Although this was not my initial objective, it is noteworthy that their responses reflected on what they had either learnt from the process or from their role as respondents in the group discussions. This to some extent shaped their opinions and perceptions about the ICC.

In Mawingo, most of the respondents concurred that they learned about the court through listening to a local radio station and they were told that the ICC would arrest individuals who had planned and funded the violence to be gaoled in a prison in Europe. The reactions to the news were mixed. There were those who wondered how justice for them would be served by arresting prime suspects who, according to them, did not kill their close ones, steal their property or destroy it. Others felt that if the most powerful suspects were to be arrested it could ignite an inferno of violence.

I think if the international court arrests powerful politicians for allegedly having masterminded the violence, it may lead to balkanization of the society and likely to erupt into another violence. Supporters of particular politicians will start venting their anger on the other community blaming them for the arrest of their leader. This is unlikely to help peace and stability prevail in our country. I know what happened to us in the last general elections. Supporters of particular politicians were incited to come to attack us telling us we do not belong in that part of the country and we should go back to our ancestral areas and yet we have lived here for generations. All we want is peace and stability in the region so that we can carry on with our lives normally. (Mwangi, 12 January).

In Pipeline, some respondents hold a different view of the ICC.

Since the government failed to end the electoral violence that comes every general election, then it would be wise to try a different mechanism and see how the results will be. If the individuals who fund and plan violence are arrested and taken away from society, then there is a likelihood that violence will not recur. The source of funds will come to an end and

attackers will not be willing to go to war for no pay so I think this might be the solution to our problems. (Margaret, 8 January).

In focus group discussions, various views were given on the ICC involvement in Kenya. They refuted the claim that justice by the ICC was going to normalize the political landscape in Kenya. They seemed to concur in the opinion that if the ICC did not protect them from the backlash of political incitement followed by the arrest of the powerful individuals, then it would not solve their problems.

The ICC certainly fails to address the immediate needs of our people which are basic human needs and security. It can further complicate the whole matter if it is going to threaten the fragile peace that we have at the moment. (Respondent 1 [focus group1]).

Another respondent delinks the ICC activities from the highly sought-after reconciliation, he points out that the reconciliation is a long but noble process that needs to be explored.

(...) It is true that reconciliation takes a long time but once its goal is attained then peace can prevail among members who once went to war, this however does not require jurisdiction by the ICC to happen. Meanwhile there is a need to first understand the cause and reason for the violence so as to plan how to prevent it next time, but more importantly to seek national healing and reconciliation. (Respondent 2 [focus group1]).

A respondent in the same focus group does not think the involvement of the ICC in the Kenyan case spells doom.

The ICC has a role to play to unlock the stalemate of the cycle of electoral violence in Kenya. The court should be given a chance to prosecute the individuals alleged to bear the greatest responsibility with regard to the post election violence. (Respondent 3[focus group1]).

In Mawingo IDP camp there is evident lack of understanding of how the ICC will administer justice, but more importantly how they will carry out the arrest. Questions of whether the ICC will deploy its police force in the country to conduct the arrests were posed in the focus group.

(...) I do not know how the ICC will determine the real offenders since it is an international court. How are they going to know who killed, stole, raped and maimed? I heard through the radio that the ICC came to the country to collect evidence but nobody came to the camp to ask us if we know the individuals who were responsible for the crimes. We know some of the

offenders because we had lived with them for many years before they evicted us, but no one came for such evidence from us. (Simon, 12 January, 2012).

In a focus group at camp 2 in Pipeline, a respondent argues in favour of the ICC:

I do not know much about the ICC but I have hope in the international court to fix the problem. If a thief continues to terrorize a neighbourhood, the best way to go about is to take him out of the community and lock him up away from the society, thus the people can live in peace and harmony. Since the local judiciary has not been able to do so for a long time, then I think it would be prudent to seek the ICC intervention. (Respondent 1, [focus group2]).

A different view is noted within the course of discussion on the same topic:

I disagree with my friend. The ICC is not relevant to our problems. First, how do they know the bad people who terrorized us if they never came to ask us? The solution to any given society must be community based because it is the locals who know best where 'the shoe pinches them' but we never got involved, we were left out of the process of solution making. If the ICC is serious with this matter it should tell us who they are and what they have to offer with regard to our predicament. (Respondent 2 [focus group2]).

Another view emerged, taking rather a neutral stand point.

(...) I think today people are not concerned about the activities of ICC in the country. Much was expected and promised but [there is] nothing we can see. People are pretty much preoccupied with finding means to survive. The basic needs are what we are struggling for now and it does not matter what the ICC is doing now. (Respondent 3 [focus group2]).

In Mawingo camp, at one point in the discussion among the respondents of the focus group, they seemed to acknowledge that the ICC can only be a factor in the stability of the region if it involved the locals in seeking a solution. They lamented that both the violators and victims had to be brought together with representatives of the political parties that were angling for power in 2007, namely the ODM and PNU. They also explained the need for the ICC to look into some historical injustices and election related violence dating back to 1992 when the multiparty system was introduced. If the ICC can take this road, then it would be a major milestone to realization of justice and ensure sustainable peace.

The main issue that kept coming up in the interviews with the IDPs was about peace and tranquillity in the light of the ICC intervention.

Maybe the ICC will be a turning point to the culture of impunity in our politics. The international court will likely teach the merchants of impunity a lesson. However, as much as it is good to render justice to people and arrest the offenders, the people need more than retributive justice. Our plight is not conclusively addressed just by taking a few individuals to court. We are still suffering from the war, our property was either taken away or vandalized. I live in a tent, and cannot afford the basic human needs. My children don't go to school for lack of fees. These problems are not addressed through prosecution of those individuals. To me justice means getting back my normal life and facing my aggressors to just ask them why they did that to me. I want to hear them apologize. That is what matters to me now. (Mawasi, 8 January 2012).

The respondents who supported the ICC had expressed their dissatisfaction with the way the government handles the cases that involve the wealthy and influential persons. They cite the laid back approach by the government to ensure peace during and after election periods.

The government promises peace right before the election, but it does not commit itself to it. Maybe if the ICC takes away the 'big fish' [referring to the prime suspects] we will be able to start over again. It will not be an instant solution but we can rest assured that the cycle of electoral process has been cut and the likelihood of reoccurrence of such will be remote. (Rabongo, 8 January 2012).

Both Pipeline and Mawingo camps have elected leaders who run the camps and represent the IDPs on various forums and fight for their rights. The interview with the leaders of the two camps revealed that they are more privy to activities of the ICC than the people they represent. This could be attributed to the fact that the leaders are more learned and have access to information through interacting with other sectors in government and NGOs to air the grievances of the IDPs.

The ICC, although it may apply international law here and arrest the perpetrators, it is not going to be a recipe for peace. The ICC may evoke high tensions that can plunge the country back to chaos.' (Musa, 8 January 2012). '(...) it is too early to gauge the success of the ICC in the country. I am not so sceptical about the ICC. I just think it requires time to do its job. It might be the right thing in our society. (Francis, 12 January 2012).

Others spoke in favour of restorative justice and traditional mechanisms to ensure reconciliation and sustainable peace.

4.2 ICC retributive justice versus reconciliation

The attempt to pit justice against reconciliation does not usually come without ambiguities. The ICC, through its use of retributive justice, sanctions criminals whether or not they see the error of their conduct or misdeeds. On the other hand, reconciliation calls for the perpetrators to repent. Reconciliation in essence involves voluntary acknowledgement of misdeeds committed coupled with meaningful dialogue between the violators and the victims. Retributive justice requires the accused to be sentenced upon their guilty plea or acknowledgement of the atrocities. While the ICC is keen to pursue individual criminal responsibility and guilty individuals in the lens of justice, the national reconciliation need not determine that some persons are guilty of some atrocities for it can violate the principle of presumption of innocence and further complicate the possibilities of attaining reconciliatory processes (Skaar et al., 2005).

Although it has been explicitly clear that most IDPs want justice to be accorded to them, they are quite uncertain of the possibility of the ICC promoting reconciliation through the use of its retributive justice. The feelings about the impact of the ICC in this context are clearly portrayed through opinions given by some of the direct victims of the 2007/8 post election violence.

An IDP from one of the camps, giving his own views, acknowledges the need for the impact of the ICC to change the political landscape by ensuring some sense of accountability among the political class. He however laments his scepticism of the international court being unable to resolve the historical injustices that have been committed to them. In an interview the respondents articulates the following:

The ICC is unlikely to ensure reconciliation among the communities that fought. As much as the ICC may act to eliminate the top perpetrators of the skirmishes, I have doubt that it has the capability of ensuring peaceful co-existence among the communities that fought after the 2007 general election. Reconciliation by the affected locals coming together, engaging in a dialogue of the past crimes, and ultimately aggressors take brave steps towards seeking forgiveness from the victims. (Peter, 8 January 2012).

The ICC should not assume any role that is likely to fuel division in societies that seek healing after devastating wars and other violations of human rights. In the event that the ICC has to intervene, it must be an exemplar of justice at the core, and adherence to the criteria set out by

the Rome Statute. The supporters of the ICC have time and again argued that there cannot be peace without justice; this belief has been contested in different forums. Even though reconciliation is not a simple option, it gives the society hope of unity, healing and mutual respect (Mani, 2005). South Africa has stood out as a good example where peace has prevailed mostly by pursuing reconciliatory channels (ibid.).

In order to achieve a cohesive nation where all people of different tribes can live harmoniously, there will be need for the country to embrace healing and reconciliation. The same sentiments are lauded by a senior officer of Kenya National Commission on Human Rights in an interview:

(...) the ICC is not likely to promote reconciliation since it is only mandated to pursue justice which is not tantamount to reconciliation. In order for a nation to realize full reconciliation, some historical injustices like land acquisition and other resources have to be addressed. This mandate rests squarely on the Truth Justice and Reconciliation Commission, and not the International Criminal Court. (KNCHR senior officer 2012[interview]).

4.3 Views on accountability and reconciliation

According to Schedler (1999) accountability is perceived as the ability to ensure that officials in government are answerable for their actions. This would entail the obligation of the public officials to inform the public and explain their actions. In democracy, accountability will concern the issues like free and fair elections, where citizens have the right to choose their leaders, and where there is enforcement to make the leaders abide by the rules (ibid.).

In order to ensure political stability and peace in a country that has experienced violence, there should be respect for law and fair administration that should disallow any form of human rights violations, and most importantly act firmly on those who perpetuate such abuses. There is no society that can claim to be democratic unless it commits itself to full adherence to the rule of law (Boraine, 2004). However, in attempting to ascertain democratic institutions, it is of central importance to embrace an all inclusive form of justice that expands beyond the confinement of retributive justice. It is necessary to prosecute the offenders and make them be accountable of their misdeeds. However, too much emphasis on the punishment can be an impediment to securing sustainable peace and the stability of a troubled region. In order to build a just society, it is necessary to incorporate other components that foster faster rebuilding of a society in the post-conflict period. These components include, among others,

documenting the truth about the past, restoring dignity to victims, and embarking on a process of reconciliation (Boraine, 2004).

In an interview with a respondent at IDP camp, I sought to know how accountability and reconciliation are perceived:

It will be unlikely that pursuing accountability through The Hague court will effectively restore order and reconciliation in the country. The ICC has commenced its investigations against the prime suspects. The other hundreds of minor suspects are yet to be held accountable for their misdeeds. The individuals who robbed, raped, killed and maimed should also face the full force of the law lest they re emerge in the future. If justice has to be rendered for reconciliation to happen, how is that possible with so many offenders walking free? (Joshua, 12 January 2012).

The leader of one of the IDP camps had his views on the same matter:

Accountability also has to be sought through the local mechanism in order to try minor suspects for the atrocities they committed. To date we have not received back our stolen property. For me, these so called minor suspects are the ones who they bore a huge responsibility with regard to our suffering. This however does not have anything to do with reconciliation but justice. Reconciliation can be pursued when the dues are paid. (IDP representative 2012[interview]).

In the Kenyan case there is a need to ensure the violators of human rights are brought to book. The ICC has a role to play in the crucial process of individuals being held accountable for their actions. The presence of the ICC in Kenya is therefore likely to compel changes in domestic political behaviour by promoting local criminal accountability and reform in national institutions (Sriram and Brown, 2010). Accountability however should not be looked at from the lens of the top suspects alone. Kenya needs a three-pronged approach while handling the issue of accountability with respect to the 2007/8 violence. Other than The Hague trials of those deemed most responsible, Kenya should use a truth commission to produce a historical record of the abuses and enhance reconciliation. The other approach will entail opening trials to bring to book the thousands of other offenders that participated, financed or organized the chaos during the country's darkest hour by putting them on trial (Sriram and Brown, 2010).

According to a Kenyan newspaper, *The Daily Nation* (23 January 2012), only a small fraction of more than 6000 cases from the post election violence have been handled by the courts. The report by the Director of Public Prosecutions shows that of the 6081 cases, less than 600 have been concluded, 400 are under investigation, while more than 5000 cases have stalled. Although the report does not reveal the government's will and commitment to ensure all responsible are held accountable for the violence that claimed 1333 lives and uprooted more than 600,000 from their homes, the slow pace of prosecuting is rising eyebrows on the serious will of the government to ensure speedy investigations. The report says out of the 600 cases that have been terminated, 258 ended in convictions, 50 are pending, 138 have been withdrawn and 87 have seen suspects acquitted for lack of sufficient evidence to prosecute. Some of the cases are reported to have been withdrawn as a result of victims' choice to pursue reconciliation and forgiveness. The office of the director of public prosecutions have had been hit by wide range of setbacks hence slowing down the investigation. Lack of physical infrastructure, lack of inadequately trained personnel to investigate, limited budgetary allocation and low morale among the prosecutors have been cited as some of key challenges affecting quick resolution of the cases at the office of the DPP. However, the DPP remains optimistic that it will complete the investigation, arguing that the post election violence cases will remain a top priority of the investigative agencies of the government. Through the report published in *The Daily Nation*, the DPP recommends the setting up of a 'Multi-Sectoral Task Force' with offices drawn from the Ministry of Internal Security and Provincial Administration, the DPP and the Criminal Investigation Department (CID) to go around the country urgently and review all the pending cases and trials in order to ensure accountability for the acts of the violence (*The Daily Nation*, 2012).

A wave of criticism has been directed at the government's commitment to ensure full accountability to the election violence. A segment of the population has argued that the government never established the Special Tribunal, and its promises to reform the judiciary and have local trials were a mere pretext to evade ICC prosecutions (Sriram and Brown, 2010). These observers claim that the Truth, Justice and Reconciliation Commission was marred with controversies and questions of integrity emanating from its top leadership. They also maintain that there have been minimal domestic proceedings that could result in any meaningful accountability for the turmoil (*ibid.*).

A section of civil society activists hold the view that the prospects of having one senior politician held accountable in the ICC could constitute a very crucial step in ending the

culture of impunity that has been deep rooted in Kenya for a long time (Sriram and Brown, 2010). In Kenya, the system through which the suspects who have been indicted are asked to account for their actions is seen as a move to cool the heat that is been generated by the upcoming election (ibid.). The question is whether the process will stand the test of perennial electoral tensions evident in a multi-ethnic society like Kenya, and most importantly if prosecution will serve justice to all and promote post-conflict construction of the society.

It is not the first time that the government has promised to deal with perpetrators of violence. However, the government has failed to take severe actions against such individuals. The country is aware of the government's lack of commitment to conclusively sanitize politics in Kenya. The Kenyan parliament twice refused to establish a Special Tribunal to try suspects locally. The failure of the government to launch local investigations paved the way for the ICC to commence its activities in March 2010. Justice has to be done for there to be reconciliation and stability. (CMD officer 2012[interview]).

4.4 The impact of the ICC on political stability

The electoral violence in Kenya has been a common feature ever since the year 1992 when the country first assumed multiparty politics. However, the intensity of the violence, resulting in massive killings, forceful transfer of people and other human rights violations after the 2007 general election caught the attention of the international community. In order to provide justice to the victims and help stem the culture of impunity in the country, the ICC pursued cases of individuals who allegedly bore the greatest responsibility (Sing'Oei, 2010).

The country cannot be oblivious to the impact of the two cases on the national stability especially at this period when Kenya prepares for another general election to be held in March 2013. The proceedings and the ruling of the ICC against the accused are bound to increase communal tensions. Reactions to the ICC determination to prosecute suspects may harm the country's search for a peaceful transition. Whereas it is imperative that the ICC be allowed to exercise its mandate freely, it must do that cautiously, and the proponents of the court must explain its work and limitations better to the public (Sing'Oei, 2010).

For there to be stability, the country needs healing and reconciliation more than anything else. Based on what we know about the ICC, it is unlikely that the court will achieve this kind of healing. If anything, it is going to cause division and polarize the country. It would be prudent to embark on reparative and restorative forms of justice as opposed to the retributive

one. This would foster unity and correct the wrongs of the past without risking repeating the country's darkest moment witnessed after the controversial announcement of the presidential election results. (Church leadership 2012[interview]).

Going by the latest happenings in Kenya as reported in the newspapers and seen in political rallies, the ICC has heightened the tensions that risk causing ethnic anxieties. The ethnic polarization in the country has been so overwhelming that even national issues have to be looked at in the lens of ethnicity. This perhaps explains why the ICC ruling is likely to be perceived as being on a different mission from that of ensuring justice, especially at this electioneering period. Support for the ICC among Kenyans has been diminishing ever since the naming of the suspects. This development could be attributed to the campaign by some political leaders that the ICC intends to take out some political opponents in favour of others (Sing'Oei, 2010).

Some political leaders reacted to the ICC intervention that it was done in a manner likely to cause a rift in the country, endangering the reconciliation process that had begun nationwide. They apparently took a common stand to defend the four suspects accused by the ICC, they did so by resolving to mobilize the ethnic communities, which is likely to trigger an unnecessary backlash. Considering that most electoral violence in Kenya takes on an ethnic dimension, any kind of mobilization along tribal lines is highly likely to be a big blow to the process of restorative justice and ultimately to frustrate smooth transition in the country.

The kind of mobilization in the offing takes a similar pattern to that following the 2005 referendum on the constitution. The chaos that engulfed the nation following the controversial referendum has been one of the pillars upon which the post election violence erupted in 2007. Between the year 2005, when the country voted on the referendum, and the 2007 general election, the political class did not seek to manage the ethnic divisions. This therefore became a recipe of chaos as witnessed after the general election.

The politicization of the ICC ruling, failure to apply the law, and manipulation of the national institutions is likely to adversely affect the healing of the nation and reconciliation and smooth transition in the post-conflict period. It is the same ethnic divisions and pursuance of narrow interests that contributed to the post election violence in 2007. A repeat of such polarization would be detrimental to the welfare of the nation at large.

The political power was centred in the executive and exercised in an exclusive manner. The political parties lacked strong ideologies and instead assumed ethnic forms hence most of decisions but at national level were influenced by ethnic considerations. This promoted the culture of impunity with most of the leaders paying little regard to the rule of law. The continued conflicts among leaders have come down to the grassroots and now are antagonizing relations between communities.

A respondent from a particular NGO insisted on the need for justice for the victims of the post election violence. The respondent maintained that the ICC stands a better chance to offer such justice and confirmed fears that certain politicians are out to frustrate such efforts and was concerned that the ordinary people will be at the receiving end as the leaders use ethnic community to intimidate others or scatter the process of attaining justice for all.

The interview carried out with a representative of CMD, an NGO in Nairobi that advocates democracy in Kenya, maintains that the ICC can bring stability in the country.

There can never be stability without strict adherence to the rule of the law. The government and the local mechanisms have failed to ensure that the law is respected by all. That why we have this kind of violence in every given general election. The ICC brings discipline to the politicians to incite violence on their own peril. Someone says we should use the Rwandan traditional mechanism of Gacaca courts in the country to achieve stability. Unfortunately we do not have any established traditional channels of justice that are viable. So we have to let the ICC come in. (CMD officer 2012[interview]).

A scholar and university lecturer on conflict and peace studies has a sharply divided opinion from the CMD officer on implication of the ICC and political stability.

We are living in a defining moment where every the peace of the country is paramount in the society. The ICC may not address the underpinning issues that spur conflicts in the country. Unfortunately, we have our politics defined along ethnic lines and any move to arrest a particular presidential candidate would not go down well his community. It is likely to worsen the already fragile peace. (Scholar 2012 [interview]).

The very heated debate about the ICC among some sections of media, in political rallies and in the parliament has given limited attention to the victims of the post election violence. The IDPs spread across the nation, who include children whose future was shattered by the loss of

parents, and many others whose properties and livelihoods were destroyed, are yet to see justice (Kanyinga, 2012).

4.5 Fighting impunity and promoting stability in Kenya

An important analytical tool within critical discourse analysis is to look at the collocation of words with the aim of gaining an insight into the underlying assumptions that these connotations and associations may bring out (Hakam 2009). The choice of words, the use of positive or negative ideological references, reveals the attitude of a respondent towards the issues in question (ibid.).

With regard to data from the field, it was certain that respondents spoke of impunity with a totally negative attitude. This was revealed with the constituent reference to impunity as something that should be fought fiercely. This was also demonstrated by the respondents' choice of words, for instance, defeating, uprooting, conquering, ending and the evils of impunity. Sentiments of reconciliation were also echoed in the discourse of the fight against impunity. The respondents lamented the need to ensure that fighting impunity would not be undertaken at the price of polarizing the society. As much as it was important to end the impunity, various respondents were of the view that the country should reconcile and people live in harmony.

Whereas it is significant to note some reforms that have been adopted in the past two decades, it is vividly observable that these reforms did not hold the political elite accountable for their transgressions. The culmination of historical injustices and failure to put in place effective reforms to deal with the issue of impunity once and for all is argued to be one of the major causes of the 2007/8 post election violence (Ndungu, 2008). Consequently, this begs two big questions: How can we fight impunity and ensure a reconciled society in Kenya? And will retributive justice by the ICC achieve this goal?

Through an interview with the chairman of the Kenyan National Commission on Human Rights (KNCHR), I sought his opinion how impunity can be effectively fought and promote stability at the same time.

The new constitution has all the elements required to transform this country. It is imperative that the laws are implemented to the letter, adhere to the social justice as entrenched and in document, the Constitution also provides clear guides on how individuals implicated in malpractices are supposed to be dealt with legally. There is also inherent need for civil

education to Kenyans on their rights, peace and mutual respect and towards members of other communities. (KNCHR Chairman 2012 [interview]).

The involvement of the ICC sends a signal that wealthy and powerful politicians will not necessarily get away with any kind of human rights violations. If even the local court may not prosecute them, the ICC will eventually bring such individuals to justice. The breaking of the cycle of violence will not only have won the war on impunity but also it would have ensured sustainable peace and stability.

The ICC has been able to go after some individuals that most likely could not have been prosecuted by the local judiciary ... and this will set a good example on how law should be applied. In this sense the ICC has become a very major contributor to the fight against impunity and it is going to have a huge impact irrespective of the final verdict delivered on the accused suspects. This way, we will win the war on impunity and promote a stable Kenya. (CMD officer 2012[interview]).

This opinion is challenged by an IDP representative in Mawingo camp who opined that in order to end impunity and promote stability at the same time, a ‘bottom up approach’ was needed.

What the country needs to realize is that some of these politicians take advantage of the devastating situation of the young people, where they pay them a little to commit these crimes. If the government provides jobs for these unemployed youths and engage them in a civic education to understand their rights and the rights of the others, then the politicians will no longer get them as foot soldiers to commit the crimes. Some of the youths are forced to follow the selfish leaders because of either their economic hardships or mere ignorance. With proper programmes and projects for creation of jobs and access to education, it will be a key first step to ending impunity in Kenya. (IDP representative 2012[interview]).

4.6 How can the ICC affect reconciliation by deterrence?

Due to the lack of capacity in the local judiciary and subsequent lack of faith by the public in the Special Tribunal to handle the issues of post election violence, the ICC was considered as a powerful mechanism that may offer the alternative of instilling discipline and sanitizing the local politics. However being a judicial mechanism that pursues retributive justice, the ICC’s intervention did not augur well with proponents of reconciliation (Musila, 2009).

The goal with the ICC will however not be so significant in terms of redressing the past atrocities or historical injustices that may have been committed against the victims. This means that any efforts to settle historical injustice and foster reconciliation will not be possible. However, the international court may offer a solution to the Kenyan election related violence by acting as a deterrent. The prosecution of prime suspects of the 2007 post election violence may instil some sense of both political accountability and responsibility, an element that some observers have argued it lacks in the local political arena. (Law lecturer and research consultant 2012[interview]).

This is likely to send a strong message to any potential perpetrators or any individual that harbours such motives that an international judicial body will be watching just in case they organize, finance or support any actions deemed as illegitimate. This means that in the long run the country will assume stability and the reconciliation can take place either through national amnesia or by design.

In concurring with this argument, a key political analyst and scholar in Kenya laments that:

(....)The ICC's involvement in the Kenyan case was the right thing because for a long this country has not been keen on taking actions against those who perpetrate violence ... and when dealing with prime suspects the ICC will be the appropriate mechanism to instil a sense of accountability in individuals who promote violence for personal gain. If the minor suspects see the prime [suspects] being tried by the ICC then they wouldn't commit the crimes. It would act as a deterrent. This will in return create a sound atmosphere for national healing and stability. (Political analyst and scholar 2012[interview]).

4.7 Views on peace versus justice

It has been argued that the intervention of the ICC in the Kenyan post election violence may pose a huge risk of fuelling divisions in a country where tribal loyalties and factionalism still take the centre stage of the local politics. Kenya, often seen as a great African success story, is now heading towards a dangerous impasse. The ICC decision to have several individuals brought to trial has to stop political opponents at logger heads, hence making the prospects of peace unattainable and volatile. One side of the coalition government (ODM) has been accused by the other (PNU) of using the ICC for its own gain by frustrating efforts to have the cases deferred until the next election is over. The involvement of the ICC has arguably driven the government and the country apart, causing unnecessary tension at a time when Kenyans

are yearning for unity. This allegation, whether it has credibility or not, is based on the perception that the ICC will be removing a political leader from one ethnic group from the scene and leaving another in office (Paisley, 2012).

The ICC has time and again been criticized for its actions, particularly in Africa where some analysts argue that its involvement risks prolonged violence and endangering fragile peace process (Grono and O'Brien, 2008). By so doing the international court has not been able foster any effort of reconciliation that is imperative in a post-conflict period.

The pursuit of justice should not antagonize or undermine the efforts underway to steer the country towards attaining national reconciliation. The fundamental question been asked in different quarters is whether the ICC process in the country will frustrate initiatives to attain peace or if it will promote them. Ultimately, justice should prevail in the society, but this must not act as an impediment to the peace process.

Initially the majority of Kenyans had faith in the ICC that it will comprehensively deal with post election violence and render justice to the victims but that faith has ever dwindled especially upon realizing that the ICC will deal with only four suspects of the post election violence. Prosecution at the ICC might lead to violence and throw the country into disarray. (Government official 2012[interview]).

The KNCHR believes the ICC will spearhead justice and peace in the country.

The issue of peace and justice is inextricably intertwined. It is not easy to address one without touching the other. The ICC can offer that much needed justice that will be tantamount to peace in the country. The peace will come through rendering of justice to the victims of the post election violence. (KNCHR officer 2012[interview]).

4.8 What are the implications of Kenyan's New Political Order on peace?

Since the 2007/8 post election violence, Kenya has made considerable steps forward towards bridging the divide that saw the country almost on the brink of collapse. One of them was enacting new laws and reforms that ensured strong mechanisms to deal with potential and actual cases of crimes (Musila, 2009).

Having passed overwhelmingly a new constitution that guarantees rights and justice for all, it will be unfair to subject [Kenya] to the ICC process like in the case of other countries that are unwilling or unable to bring justice to the concerned. The developments made in the country

are bold enough to have Kenya try the cases locally and as well as champion efforts that ensure peace, reconciliation and stability. (Scholar, [interview]).

Unlike in the present Kenya, the judiciary formerly lacked autonomy in its operations. Much of that was because the judges, including the High Court and the Court of Appeal were handpicked by the executive, which in this case was the president himself. It was unlikely that the courts would serve justice to the majority, but instead they remained partisan, being influenced and controlled by the executive (Kagwanja and Southall, 2009).

Kenya now has a revamped judiciary with a new Chief Justice, Attorney General, DPP and judges, all of whom have gone through a rigorous vetting process. Additionally, three new commissions have been established, namely, the Constitution Implementation Commission, the Commission for Revenue Allocation and the National Cohesion and Integration Commission. These crucial commissions will help steer the country towards better governance and respect for the rule of law and reduce threats to the security of the Kenyan people.

Kenya has so far made a giant step towards realizing the aspirations and dreams of the citizens. Since the chaos rocked the country in 2007 and early 2008 Kenya has come a long way and a lot of radical reforms have been instituted. This does not mean we still don't face the challenge of impunity. Impunity is still there but effective mechanisms like the passing of a new constitution and vetting of judges, restructuring of the police force, establishing a national cohesion and integration commission has been realized. It is correct to underscore that Kenya is capable of handling its challenge as a sovereign state without the help of the ICC. (Government official 2012[interview]).

These views are not shared by all, however. A respondent from an IDP camp points out that for impunity to be uprooted from the society it is not just a matter of getting a new constitution and reforming some national institutions:

I acknowledge that the constitution is good, and the few reforms being implemented are fine, but refute the claim that this is enough. For impunity to be effectively dealt with and reconciliation achieved, Kenyans also need civil education, to be well informed on matters relating to leadership, rights and welfare. Government should deal with increasing levels of unemployment for this has been a recipe of chaos in the country. This is what can shape a better political order. (Mukami, 8 January 2012).

CHAPTER 5: CONCLUSION

For the last two decades some of the sub-Saharan African countries have been striving to address past human rights violations by use of joint transitional mechanisms namely prosecutions, truth commissions, reconciliation and reparation and effective reforms (ICTJ, 2009). Following the post election violence in 2007/8 Kenya joined the list of countries with a global reputation for widespread impunity manifested mostly in the electoral violence. The issue of accountability and the creation of a stable political society has been a matter of priority. The study however reveals that lack of political will to follow through these attempts has adversely affected the attainment of the goals of transitional justice.

Most of these African countries, Kenya included, have to ensure that accountability prevails with regard to the past atrocities. They have done so ratifying the Rome Statute establishing the ICC.

Both justice and reconciliation institutions have a big stake in addressing cases of human rights violations in the post-conflict period (Skaar et al., 2005). The ICC has intensified the fight against impunity with the aim of ensuring further atrocities are not committed in the future. It has pursued retributive justice through advocating individual criminal responsibility where perpetrators of gross human rights violations are subjected to trials and prosecutions.

When it comes to local judicial mechanisms to prosecute the suspected perpetrators of crimes against humanity, genocide and war crimes, the society is faced with challenging conditions of institutional capacity, political manipulation and interference in the judicial processes. However, these challenges are not limited only to the local judicial mechanism. The ICC itself has for a long time being rocked by numerous challenges as well. Taking for instance the length at which cases get stalled in the ICC has weighed down on the mandate of the ICC to provide justice to victims. This is in line with the legal maxim that ‘justice delayed is justice denied’. The ICC has prerequisites and formalities of rules and regulations that exist between seeking justice and deliverance of justice that consume a long time making it difficult to obtain justice for the victims. The international court has also been criticized heavily for its high cost, inability to set standard rules for everyone, and lack of impartiality in the quest for justice globally.

The study has revealed that the local mechanisms would likely be more inclined to handle the post election violence cases better only if they were credible, free from political manipulation

and with firm judicial infrastructure. It is against this backdrop of not finding one single avenue that can address the issue of post election violence effectively that the study seeks the use of combined synergies from various judicial and non-judicial mechanisms.

At the beginning of this study I set out to answer the key research question: Can the ICC promote reconciliation and inclusive political community through retributive justice?

In answering this question and the other two research questions I employed the use of unstructured interviews and focus group discussions targeting the IDPs in the Mawingo and Pipeline camps of Nyandarua and Nakuru district respectively. Additionally the study sought the opinions and views of other stakeholders namely the politicians, government officials, scholars and the church.

With respect to the ICC and reconciliation, the study demonstrated that however much the international court can be instrumental in the fight to end impunity in the country, it cannot promote reconciliation and peaceful coexistence among members of different communities. Most of the respondents in the study cited concerns that due to ethnic demographic realities in the country, the ICC will polarize the society as perceptions of the court being used to settle political scores continue to emerge. They pointed out that reconciliation can be better achieved through non-judicial mechanisms that strive for restoration of victims' dignity with the violators being taken through a due process of owning their misdeeds, seeking forgiveness and compensating the victims where necessary.

The discourse on whether retributive justice has significance in achieving reconciliation revealed that the ICC was not the better option for that course. Respondents argued strongly that the court's chances of attaining this goal are ultimately remote. However, the ICC can play part in terms of deterrence by ensuring that such a cycle of electoral violence is broken. The use of retributive justice has a high likelihood of deterring future atrocities in the society but also suffers a huge risk of polarizing the society and frustrating any meaningful efforts to attain national healing, reconciliation and harmonious co-existence among members of different communities.

In addition to my main research question there are two minor ones. One is: What are the opinions of victims of post election violence on the role of the ICC in meeting transitional justice through punitive measures?

To answer this question the study relied on the opinions and views of the IDPs residing in the Mawingo and Pipeline camps. The study demonstrated that many of the IDPs did not fully understand the mandate or the involvement of the ICC in dealing with the post election violence. This affected the way they responded to the questions posed to them. As members of focus groups continued to engage in an in-depth discussion about the ICC's punitive measures, it was established that there were some conflicting views.

The IDPs were categorical, however, on what they meant by justice to them. They understood justice in the lens of compensation for what they had lost, restoration of their dignity, getting the offenders to seek forgiveness and ultimately demanding that government assures them that such atrocities will never reoccur. A number of IDPs voiced their concerns at the possibility of the non-judicial mechanisms to ensure peace. They were of the view that the ICC should apply punitive measures to curb the problem of the electoral violence once and all. However, the majority of the IDPs interviewed were wary of the ICC activities with the majority fearing a backlash and polarization of the society as the ICC goes for the major suspects who have huge political influence and fanatical following in their communities.

At the onset of this study, I determined to answer the question: What are the opinions of NGOs, Kenya National Commission on Human Rights, scholars, church, government officials and other stakeholders on the ICC's mandate to fight impunity, as well as its impact on reconciliation process in Kenya?

To respond to the question I set out to interview relevant stakeholders who represent the above named avenues. There was a general belief among the respondents in the Kenya National Commission on Human Rights that it was right for the ICC to take over the Kenyan case and that the court was performing its mandate in the right course. They maintained that prosecution of the prime suspects of the post election violence will serve as a break from the past culture of impunity where leaders could commit crimes and get away with it. Even though the Commission is doubtful about the ICC helping foster stability and promote reconciliation, it argued that justice for the victims could be realized through the ICC.

Among other NGOs there were diverse views of the mandate of the ICC from the respondents. Most of those who disapproved the ICC mandate premised their case on the structural factors arising from the international court that limit its contribution towards achieving a stable country. Those who lauded the ICC mandate in ending impunity, were

concerned about the government's reluctance in bringing to book suspects of past gross human rights violations.

The church's take on the ICC is fundamentally bold, refuting the claims that the ICC was the pertinent avenue to address past crimes against humanity. Church leaders were categorical that country needed healing and reconciliation more than anything else. The respondent here spoke in favour of reparative and restorative justice instead of retributive. The ICC was said to have a significant role in frustrating the reconciliation process taking place in the country and thus was dubbed outright wrong in its mandate.

The views from the government and politicians reflected on the country's ability to try the suspects locally. They cited significant steps the country had made since the violence, like reformed judiciary and police force, new constitution and among others to strengthen the claim that under complementarity criteria as provided for by the Rome Statute, Kenya qualifies to try the perpetrators locally. Their arguments were ultimately premised on the reforms that the country has enacted since the post election violence. They pointed out that Kenya is not a failed state as has been the case of most African countries where international judicial mechanism has been tried. They cited concerns that the ICC will reverse the reconciliatory gains and act as a stumbling block to a stable society.

When it concerns the issue of ending impunity and promoting reconciliation in the country, it is imperative to embark on be a coordinated working system with clear and precise goals upon which every mechanism can strive to achieve. As the ICC prevails in prosecuting the prime suspects, the local judiciary would try the many other minor suspects who executed crimes during the post election period. What is more crucial is also the political will to ensure necessary and pertinent reforms are successfully put in place, and local judicial mechanisms are given a free hand to exercise their mandate independently. Both judicial mechanism have elements that undermine reconciliation process hence should be handled carefully to ensure that the country's efforts to achieve national healing are not derailed.

Whereas non-judicial mechanisms offer an alternative to retributive justice, they must be carefully incorporated with other mechanism for them to realize their full potential. Justice and reconciliation need to be viewed as one coordinated effort that ensures that the truth is told, historical injustices are addressed and victims are restored and where necessary compensated (Skaar et al. 2005). Some of these historical injustices have been argued to be

land disputes dating back to the colonial and post-colonial eras, state resource distribution, and the marginalization of some communities among others.

To be able to end impunity effectively, promote reconciliation and ensure a politically stable society, it has been said that the nation requires well coordinated and organized programmes of civil education so that people can get informed on issues concerning good leadership, individual rights and their welfare in general. High levels of unemployment, especially among young people, have been termed a recipe for fuelling chaos. Creating jobs and improving young people's livelihoods can help tremendously to transform the society into a peaceful one since many young people are lured by politicians to commit violent activities either because of their current deprived economic conditions or as a way of airing past grievances.

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Appendices

Appendix 1: Interview guide for the IDPs

(Name, Gender, District of origin)

1. What are your current immediate concerns or needs? What do you want done for you as victims?
2. How do you want justice served for you? What do you want done to the people who mistreated you during the violence?
3. The government has proposed establishment of locally based mechanism (local courts) to pursue justice. What is your take on that? Between local tribunal and ICC, which one would be more appropriate for you and why?
4. What do you know about the ICC?
5. What are your views on the involvement of the International criminal court in post election skirmishes?
6. How does it affect you right now?
7. Do you think ICC will bring about reconciliation in the country?
8. What do you foresee as a problem in applying the local judicial system to the suspects?
9. What in your opinion would be the best way to fight impunity in the country?
10. What in your opinion would be the best way to ensure peaceful and stable Kenya?
11. Could you forgive and forget what happened to you in connection to the violence?
12. What is your opinion on the autonomy of the ICC?
13. Have heard of Truth and Reconciliation Commissions in other countries like South Africa and Liberia?

Appendix 2: Interview Guide for KNHRC, NGOs, church leaders, political class and scholars

(Kindly state your position and main occupation).

1. The government has proposed establishment of locally based mechanism (local courts) to pursue justice. What is your take on that? Between local tribunal and ICC, which one would be more appropriate and why?
2. What are your views on the involvement of the International criminal court in post election skirmishes?
3. Do you think ICC will bring about reconciliation in the country?
4. What do you foresee as a problem in applying the local judicial system to the suspects?
5. What in your opinion would be the best way to fight impunity in the country?
6. What in your opinion would be the best way to ensure peaceful and stable Kenya?
7. What has been Kenya's experience of transitional justice?
8. What are the challenges for nation-building posed by granting amnesty to perpetrators of crimes against humanity?
9. In your opinion, has the Truth Justice Reconciliation Commission (TJRC) been effective in addressing human rights violations in Kenya?
10. Between transitional and reparative justice, which one in your opinion, is best situated to address the culture of impunity in the country?
11. What is your opinion on the autonomy of the ICC?
12. What is your take on the claims that ICC is targeting only African Countries?

Appendix 3: Informed consent to participate in the research

Title: The UN and the Fight against Impunity

The role of the ICC in the fight against impunity: A case study of the Kenyan post election violence.

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Source of support: The study is being conducted in partial fulfilment of the requirements for the Masters in International Relations at the Norwegian University of Life Sciences (UMB).

Purpose: This seeks your consent to take part in the study that investigates if the ICC can promote reconciliation and inclusive political community through retributive justice with regard to the 2007/08 post election violence in Kenya.

Risks: The study does not pose any kind of risk. You are at liberty to give your opinions pertaining the ICC involvement in the country and its impact to the reconciliation process..

Compensation and Benefits: You are not going to receive any form of compensation. However your opinions will contribute to ensuring the goals and objectives of the study are attained and consequently benefit scholars and other practitioners in the arena of international affairs conflict resolution and peace studies.

Confidentiality: Your identity will not be revealed unless you wish it. You have the right to remain anonymous.

