Crimes against Humanity in Kenya's Post-2007 Conflicts:

A Jurisprudential Interpretation

Charles Alenga Khamala

Crimes against Humanity in Kenya's Post-2007 Conflicts:
A Jurisprudential Interpretation

Charles Alenga Khamala

ISBN: 9789462403628

Published by:
Wolf Legal Publishers (WLP),
PO Box 313,
5060 AH Oisterwijk,
The Netherlands,
E-Mail: info@wolfpublishers.nl
www.wolfpublishers.com

Crimes against Humanity in Kenya's Post-2007 Conflicts:

A Jurisprudential Interpretation

Charles Alenga Khamala

FOREWORD

Charles Khamala prepared, under my direction, in collaboration with a colleague at *L'Université de Pau et des Pays de l'Adour* and support from the French Embassy in Kenya, his Ph.D. thesis which is published as this book. It concerns the International Criminal Court's prosecution of mass murder, torture, rape, forcible transfer, persecution and victimization during Kenya's post-2007 conflicts.

Using restorative justice responses to mass atrocities is of contemporary controversy, but still a very rarely researched field. Restorative justice scholars have so far considered the implementation of numerous "Truth and Reconciliation Commissions" to facilitate transition to democracy. From a philosophical perspective and its penological dimensions, this book examines the limitations of using criminal prosecution, to resolve political disputes. Unlike what happened at Nuremberg following World War II, modern states require harmonious treatment of the protagonists (offenders, victims, families and communities of belonging) of ethnic violence to ensure to the fullest extent possible, reconciliation and reintegration of all in the same country. That is what the conclusion of Dr. Khamala's book shows. The purpose is to distinguish how the ICC actually decided the Kenya cases from how it should have responded to the post-conflict situation. Thus besides making a legal analysis, he endeavours to construct a theoretical framework from subjects as diverse as jurisprudence, criminal law theory, public international law, comparative criminology and political science.

The core study method compares and contrasts conflicting interpretations by the ICC and the Supreme Court of Kenya in relation to common subjects. No domestic prosecutions were initiated against persons suspected of bearing greatest responsibility for crimes against humanity. By giving weight or paying more respect to some successful non-criminal domestic dispute resolution processes – including structural reforms and also peaceful democratic elections – from which Kenya's "de facto amnesties" effectively accrued, he urges that the ICC should re-interpret its complementary jurisdiction. John Rawls' theory of cultural relativity provides the book's international relations proposition that liberal societies should tolerate well-ordered, hierarchical decent peoples. Larry May normatively terms this the "international security principle." Technically, asserting that criminal procedural standards should be sensitive to the local cultural and legal traditions, the book commends one ICC Appeals Chamber judge Anita Ušacka, for interpreting the domestic investigations as being "active." To the author, her application of a "process test," is tantamount to prioritizing the Rome Statute's article 53 "interests of justice" criteria. He draws an analogy with

that legal provision and the common law "opportunity principle" since both permit prosecutors wide discretion not to prosecute. By contrast, under civil law's procedural "legality principle," where sufficient evidence exists, prosecution is mandatory.

Restorative justice is prominent in Dr. Khamala's perception from the immediate post-conflict situation, when African Union mediators negotiated a National Accord as the foundation of a Government of National Unity pacifying Kenya's protracted "transitional justice" process. He tries to convince readers that what must prevail in a sustainable longer term, is the organization of collective life among survivors of the 2008 electoral conflict. Crimes against humanity in the Kenyan cases were allegedly perpetrated by "state-like" organizations. However in the *Kenyatta case*, Trial Chamber judge Christine Van den Wyngaert, strongly rejects a new form of characterization of international crimes called "indirect co-perpetration." The author nevertheless summarizes the ICC Pre-Trial Chamber's preliminary evidence of gross human rights violations and reviews reasons behind the majority decision in 2012, confirming four cases for trial. He shows how that decisive judgment uses a teleological, purposive interpretation to uphold the Rome Statute's mandate of promoting victim's justice by punishing perpetrators. However, the importance of the dissenting judgement of Judge Hans-Peter Kaul which adopted a literal, contextual or historical interpretation is emphasized. Dr Khamala believes that judge Kaul's decision, in light of Claus Roxin's control theory, appears as rejecting the Nuremberg Precedent of "guilt by association." Through lenses which reflect a restrained approach to judging, "the Network" in the *Ruto and Sang case* and the Mungiki in the *Kenyatta case* are seen as ordinary criminal gangs, who should ideally be pursued by the domestic authorities.

The book's hypothesis argues that while the Kenyan suspects responded to the subpoenas from The Hague through vigorous legal defences, at the same time, the Kenyan government and local leaders did everything possible politically to delegitimize the ICC. Unfortunately, in the meantime the ICC's Victims and Witnesses Unit neglected the geopolitical context which made mass atrocity witnesses vulnerable to negative interference outside the Court. Judicial activism by some ICC, supported by some scholars, terribly overestimated the Office of the Prosecutor's pre-confirmation investigations or underestimated the potential for powerful actors to adversely influence ethnic solidarity, illiteracy or poverty in fragile transition states. Ironically despite being given free bond conditions Kenyatta and Ruto won the 2013 presidential election, by depicted the ICC judges as advancing an imperialist conspiracy theory. This book suggests that one pragmatic consequence of the Kenyan Supreme Court's refusal to enlarge time for challenging that surprising victory, was to preserve the fragile peace and avert renewed ethnic chaos. Evidently, better appreciation of contextual factors which

are of great relevance to the theme of "transitional justice" in its approach, results and direction of the future of African development enlighten readers about wider social impacts obtained at the high cost of failing to prosecute the cases. Indeed, the ICC's insensitivity against incorporating local legal customs and traditions in their approach seems to aggravate complaints of biased prosecution by African countries as some reasons behind contemporaneous posturing by the AU unfortunately endorsing threats to withdraw from the Assembly of States Parties.

However, Kenya has so far refused the Sudanese option. Since the Sudanese are not signatories to the Rome Statute they reject the adoption of United Nations Security Council resolution 1593 of 2005, referring the Darfur genocide to the ICC's jurisdiction. Their president Omar Al Bashir is threatened with arrest whenever he travels outside his country's territorial borders. Similarly, so far the Namibian Cabinet and in 2016 the Burundian, South African and the Gambian governments have announced their plans to withdraw from the Rome Statute. While the exodus unfolds, besides the European Union's expression of regret, Botswana and Senegal also dissociate from such withdrawal requests.

In this respect, the book highlights how Kenya's leaders despite standing trial, simultaneously refrained from isolating their country from the international community. They used skillful legal argumentation in the ICC and domestic courts, combined with political campaigns. However, the author pays lesser attention to their international lobbying for popular support against The Hague process. For example, little analysis is made concerning Ugandan President Yoweri Museveni's contradictory proclamations, sometimes preferring for African states to exit from the Rome Statute. On other occasions he insists that the ICC is a most convenient ally in his battle with the Lord's Resistance Army as well as in an apparent desire to delegitimize political opponents. The book briefly notes how even prior to the Rome Conference in 1998, many skeptics expressed apprehension about conferring an international prosecutor with wide discretionary powers. Perhaps the need to control potential "overcriminalization" explains why the ICC remains constrained by a meagre financial budget. Nevertheless, the Kenya cases revive the deep ideological debate between civil law and common law concerning a judge's appropriate role in addressing political conflicts. The book's introduction discusses how optimists prefer relentless prosecution of mass atrocity perpetrators by dispensing retributive justice even-handedly, irrespective of political consequences. Alternatively, skeptics rather that judges had better consider wider political interests of various stakeholders and balance these to accommodate "limited sanctions." International criminal justice may, for example, redress historical injustices through inclusive victim participation so as to record collective memories. Indirect tertiary impacts from criminal proceedings may also pressure warlords to preserve minimalist peace through structural reforms and building memorials. The book's thread emphasizes

this third way given that peculiar features in Kenya's post-conflict situation frustrate the ICC prosecutor's use of the "*proprio motu*" power from attaining maximalist retributive justice. In the final analysis, failure of the Kenya cases has resulted so far because the very individuals selected for prosecution continued to hold both *de facto* and *de jure* state power. Ethnic bonds are strong, their political power manifested itself beyond non-legal spheres and this presented the ICC with insurmountable difficulties in enforcing co-operation. Kenya even sponsored a political resolution which is currently pending before the ASP, seeking immunity for siting Heads of State and other high officials, from international criminal prosecution.

The penultimate chapter reminds us about international law's both practical and political limits. The ICC has diverted its focus away from the suspects and directed orders towards the state for failing to co-operate with investigations. In 2014, the Ruto Trial Chamber's majority judges ordered Kenya to compel attendance by non-voluntary witnesses. However, the government replied that its domestic law ousts ICC's jurisdiction. Dissenting judge Olga Herrera Carbuccia insisted instead that the VWU should guarantee non-voluntary witnesses sufficient security as a pre-condition for attendance. The author vividly concurs that this exposure of potential witnesses to high physical risks may trigger circumstances of dying, disappearing or succumbing to bribery or intimidation and inevitably to termination of the ICC cases. Indeed, after the thesis was compete all charges were dropped while the ICC prosecutor complained of political interference. The government had rejected what it claimed were the prosecution's vague requests to produce an accused person's official records. For purposes of enforcing co-operation, the book charts four avenues available under the Rome Statute. Now the judges have referred the Member State Party to the ASP. However on a consequentialist interpretation, criminal trial responses, if the book's argument is to be followed, are not an appropriate recourse to Kenya's post-2007 conflicts. In recompense, the author to maintains that failure by domestic authorities to provide post-election violence victims, or even witnesses, with sufficient security and to prosecute mass atrocity suspects should obligate the state to compensate victims. Some notable activist decisions by the European Court of Human Rights provide persuasive precedents.

The arguments developed above with respect to the potential for restorative justice to impact as a more effective alternative than criminal prosecutions applied to Kenya's mass atrocities in an ongoing political contest, contingent on mitigating losses in that prevailing situation. Not only does this make the definition of what comprises a crime against humanity politically charged, but more importantly the author is concerned that the Kenyan prosecutions were built on hearsay evidence disclosing *subjective*, rather than *manifest*, *criminality*. Perhaps other global

situations of clear criminality perhaps and non-political cases may justify retribution. It is the troubling socio-economic and political aspects concerning the ethnic, religious, and racial or even regional instability in transitional societies which generate urgent questions for international criminal lawyers, criminologists, policymakers and academics, demanding both legal and non-legal responses. However, judges are hardly trained to imagine alternative social realities or evaluate political settlements. The idea of sequencing of criminal prosecutions after conclusion of political disputes may allow for warnings to perpetrators to minimize ongoing violence. Some "second best" solutions recommended are involvement by actors from the diplomatic domain of mediators and negotiators. These recommendations suggest that unless the stakeholder community considers restorative justice processes alongside formal punishments in response to certain atrocities, criminal courts may stand accused of increasing rather than resolving conflict. Whether or not the ICC shall survive this legitimacy crisis, and if so how or in what form, depends on clarification of its policies, rules or guidelines which may necessitate amendment or reform. This book offers limited discussion about a relatively small sample of the ICC's judgments in the Kenya cases to provide an insight into contradictory decisions and social impacts emerging in the situation country.

If Dr. Khamala's tone seems openly hostile to the rule of international law, or defensive concerning domestic processes, then perhaps it may be because he thinks that international criminal justice permits collaborative, conceptual or explanatory interpretations depending on someone's perspective. In an increasingly multipolar world, the values, goals or visions of non-Western legal traditions are claiming inclusion. Victim's rights must be accounted for. Impunity is unacceptable. But then for deterrence goals to be expressive the protective agencies must avoid increasing the prospect of renewed conflicts. The argument that courts should not be perceived as instruments for triggering regime change is valid where continuing criminal proceedings threaten regional peace and security. In such circumstances, the Security Council is empowered to make decisions of deferral, but prosecutors and judges are not prevented from considering these elements either. International criminal lawyers can no longer shy away from sequencing of procedural interventions. So the author grapples with the larger issue of whether democratization should precede the rule of law in transitional contexts. Frankly, the key to this dilemma delves beyond the dichotomy between Universalist justice for victims or promoting realism which suits offenders. With the limited evidence available, this book creatively challenges international relations paradigms to explore social constructivism, communitarianism, reasonable or cosmopolitan pluralism to analyze and explain how international law can help the ICC to aspire to achieve rectificatory justice among post-conflict survivors in his country, while at the same time, sustaining fragile peace and

security. It makes for a pioneering contribution by a legal practitioner from the perspective of the affected population. The jurisprudential interpretative approach bears rigorous academic scholarship which merits close readership and critical attention.

Prof. Dr. Dr. Robert Cario,
Founder and Chair,
The French Institute for Restorative Justice (IFJR)

Dedication

For the witnesses of mass atrocities

Crimes Against Humanity in Kenya's Post-2007 Election Violence:

A Jurisprudential Interpretation

Widespread economic disparities under Kenya's post-independence constitution generated revolutionary pressures to transform authoritarian rule of sectional governance. Amid ethnic conflicts protesting President Kibaki's 2007 re-election, mass atrocities were committed. A 2008 National Accord brokered power-sharing between Kibaki's PNU and Prime Minister Odinga's ODM. In 2010 the Government of National Unity promulgated a new constitution. Nonetheless, in exercise of its complementary jurisdiction, the International Criminal Court expeditiously authorized six investigative warrants, confirming charges against four suspects alleged to be indirect co-perpetrators bearing the greatest responsibility for crimes against humanity. However, in 2013, a "coalition-of-the-accused" between Uhuru Kenyatta and William Ruto, won the presidency. Numerous witnesses subsequently disappeared, died or withdrew. Consequently, the judges compelled the Jubilee government – in *Ruto's case* to facilitate attendance by non-voluntary witnesses – and in *Kenyatta's case* to produce his financial and other records. Judicial activism is justified, if the ICC is to effectively protect victims. However, without state co-operation, the ICC can neither investigate nor enforce these orders. This book evaluates conflicting interpretations of the Rome Statute in search of judicial creativity, amid ICC's declining legitimacy. Unless safeguarded by the Victims and Witnesses Unit, activist judgments prioritizing victim's rights to retributive justice can jeopardize the rights of witnesses.

Key Words
Capacity - Constitutional Sovereignty - Complementarity - Conflicts - Control - Criminal Law – post-conflict - Ethnic - Elections - Humanity -International Law - Kenya - Justification - Necessity - Peoples - Perpetration - Procedural - Punishment – individual criminal responsibility - Suspects -Transitional Justice - Violence – Victims

About Author

Dr. Charles A. Khamala was Andrew W. Mellon Post-Doctoral Fellow at Rhodes University, 2016 and Short-Stay Visiting Scholar KU Leuven, 2018. He earned his Ph.D. in Droit Privé (Sciences Criminelles) from *L'Université de Pau et des Pays de l'Adour*, LL.M. (University of London) and LL.B. (University of Nairobi). For over 20 years he has practiced as an advocate of the High Court of Kenya, and is on the List of Counsel of the International Criminal Court, the United Nations Mechanism for International Criminal Tribunals and the Legal Aid Scheme of the African Court of Justice and Human Rights.

He is a member of the Law Society of Kenya, ICC Bar Association, Association of Defence Counsel Practising before International Courts and Tribunals, International Law Association, World Society of Victimology, International Commission of Jurists (Kenya) and the East African Law Society. He currently teaches as a Senior Lecturer at Africa Nazarene University Law School. His publications include peer-reviewed articles and book chapters on international criminal law, criminal law and procedure, theoretical criminology, human rights and law and development.

ACKNOWLEDGEMENTS

Without the generous and sustained support of the French Embassy at Nairobi, this book would neither have been completed in a timely manner nor have attained its depth and scope. In 2008, they awarded me a prestigious scholarship to travel, inscribe and live at the *Université de Pau et des Pays de l'Adour*. Successive Co-operation Attachés encouraged and prompted its continuation until completion. Additionally, for the 2011/2012 academic year, I won the ambassador's prize for fieldwork – open to scholarship holders enrolled in their Ph.D., staff members of higher education and research institutions and members of the Association of France Alumni in Kenya (AFRAKEN). In my final year, IFRA Nairobi supported its corrections and defence.

Profound thanks are extended to, first and foremost, Prof. Robert Cario from whose thorough direction I benefitted enormously, not limited to his wealth of knowledge, resources, vast networks and wit, but also from his accessibility, amiability and authoritativeness. His nobility and wisdom are amplified by penning the foreword. Dr. Hervé Maupeu deserves equal recognition for, not only co-directing with fastidiousness, but also for penetrating insurmountable language barriers while graciously welcoming me to his home university. The *Centre de Recherche et d'Analyse Juridiques* assembled outstanding rapporteurs to preside over the jury panel which reviewed the thesis with strong compliments and stinging criticism. Both directors, serving as panelists alongside Professors José Luis de la Cuesta, Stephan Parmentier and Christian Thibon, imposed stringent international standards which inspired postdoctoral progression.

Fieldwork was enjoyable. I viewed live broadcasts of the Kenya cases before the International Criminal Court as well as the coverage of presidential election petition in the Kenyan Supreme Court. Observing proceedings in action significantly eased my analysis of sophisticated reasoning from their primary judgments. Countless hours were thereafter spent comparing ideological standpoints of judges and different commentators after perusing legal instruments and secondary documents. I studied at the Parklands, Jomo Kenyatta Memorial, and the Kenya National libraries among others, whose accommodation supplemented Mr. Patrick Simonetti's inter-library facilities at Pau. The latter's flexible and pleasant staff and whose unrivalled academic environment incubated creative thinking for excavating, laying a formidable foundation and crafting the book's ideas.

For launching me into a lecturing career Kabarak University's undergraduate law degree programme, has my deep gratitude. Meanwhile, a semester spent as an

adjunct at the United States International University's Comparative Criminal Justice course provided welcome diversification. My employers generously responded to study leave requests, during which absence overburdened colleagues never complained. Absconding from my law firm, clientele and friends has accumulated more severe collegial debt. Besides holding my brief often at short notice, I occasionally perched in the good offices of many an advocate where I derived as much as from informal discourse – as I did from formal seminars with doctoral students and staff at Pau – who sounded the work-in-progress. I commend my colleagues who made valuable journey allies, from Ken Akide S.C. whose chambers were always open, to the late Xavier Fonseca while industriously engaged with his own doctorate, and even technical indexing skills of librarian Evans Ogeto towards the end. *Asante sana* and *merci beaucoup*.

Graduation earned a new position at the Africa Nazarene University Law School which unprecedentedly released me on instantaneous leave of absence to assume an Andrew W. Mellon Fellowship hosted by Prof. Laurence Juma, the Deputy Dean, Faculty of Law at Rhodes University. Office facilities and comforts apart, numerous conversations in congenial company over refreshments at its Staff Reading Room produced significant synergy nudging tedious proof-reading along.

Further appreciation is due to Rhodes Research Office whose demanding publication requirements and commensurate financial input jolted the manuscript's reformatting and submission to a most reliable scholarly publisher. In Wolf Legal Publishers I discovered not only reputable, but indeed collaborative partnership. Arvind Rattan's patient and professional participation through copious e-correspondence was instrumental in coordinating contractual details and attending to publishing logistics. Many others freely gave of their valuable time or donated support-in-kind, not least during numerous local and international conferences and workshops. They inevitably escape specific mention. Suffice to say that their incessant cajoling necessitated constant reflection of fledgling explanations, enabling us to break imaginative barriers together. At the tail end, KU Leuven iced the cake under its Global Minds Visiting Scholarship laureate. Stephan's reinforcement deserves double accolades. Throughout its gestation, myriad topical discussions provided unique perspectives which sometimes prompted re-characterization of the premises. Earlier publication would have been possible but for the volatile Kenyan situation. Hence although the thesis was defended in early 2015, its transformation into a book has stalled by three years. Only by making public international law more accessible to local communities and offering the fruits to affected stakeholders, can I account to sponsors. I humbly hope that this book may serve not only to simulate debate by engaging international criminal law specialists, but also to spread information to general

practitioners, policymakers and encourage public interest in concepts of global norms. Needless to add, notwithstanding involvement by accomplices in its preparation and execution, they are absolutely absolved from all individual and collective intellectual responsibility regarding control over mistakes of omission and commission. These are perpetrated by intent or neglect of my own.

C.A.K.

CONTENTS PAGE

TABLE OF CONTENTS

LISTS OF TABLES AND APPENDICES

TABLES

TABLE OF STATUTES

Anti-Corruption and Economic Crimes Act No. 3 of 2003.

Attorney General's Act no. 49 of 2012.

African (Banjul) Charter on Human and Peoples' Rights, adopted 27th June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21st October 1986.

Constitution of Kenya, promulgated on 27th August, 2010 (Nairobi: The Government Printer, 2010).

Community Service Orders Act 1998.

Constitution of Kenya (Amendment) Act no. 9 of 2008 enacted on 22nd December 2008.

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12th August 1949.

Criminal Code of Germany. Strafgesetzbuch (StGB) (Criminal Code) 13thNovember, 1998, BudesgesetzblattTeil I (BGBL I) 3322 as amended by article 3 of Law of 2nd October 2009 BGBL I 3214. Trans. Michael Bohlander authorized by the Federal Ministry of Justice; Criminal Code of Germany (StGB).The Charter of the United Nations was signed on 26th June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24th October 1945. **http://www.un.org/en/documents/charter/intro.shtml** <accessed 25th September 2014>

Human Rights Watch, Turning Pebbles: Evading Accountability for Post Election Violence in Kenya (USA, HRW, December 2011) http://www.hrw.org. <accessed on 18th September 2014>

International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16th December 1966 entry into force 23rd March 1976, in accordance with Article 49.

The Kenyan International Crimes Act no. 16 of 2008.

National Accord and Reconciliation Act no. 3 of 2008.

National Assembly and Presidential Elections Act (Chapter 7 Laws of Kenya) revised edition 2009 (2008).

National Cohesion and Integration Act no. 12 of 2008.

Political Parties Act no. 10 of 2007 as amended in 2011.

Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)Geneva, Switzerland, 8th June 1977.Statute Law (Repeals and Miscellaneous Amendments) Act, 1997 Truth Justice and Reconciliation Commission Act no. 6 of 2008,Statute of the International Criminal Tribunal for the former Yugoslavia Security Council resolution 827 (1993), 25th May 1993 establishing a Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious

Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

Statute International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1st January 1994 and 31st December 1994.

The Convention on Genocide was among the first United Nations conventions addressing humanitarian issues. It was adopted on 9th December 1948 in response to the atrocities committed during World War II and followed G.A. Res. 180(II) of 21st December 1947. https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/357?OpenDocument<accessed 25th September 2014>

The Armed Forces Act (Chapter 199 Laws of Kenya).

The International Crime Act. The National Cohesion and Reconciliation Act (2008).

The Penal Code (Chapter 63 Laws of Kenya).

The Special Tribunal for Kenya Bill 2009 Kenya Gazette Supplement No. 7 (Bills No. 2).

The Supreme Court (Presidential Election Petition) Rules 2013.

The Universal Declaration of Human Rights is a declaration adopted by the United Nations General Assembly as Resolution 217A (III) (Palais de Chaillot, Paris,10th December 1948).

The US Alien Tort Statute (28 U.S.C. § 1350; ATS)

Truth Justice and Reconciliation Commission Act no. 6 of 2008.

United Nations Convention on the Law of Treaties Signed at Vienna 23rd May 1969, Entry into Force: 27th January 1980.
http://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/ <accessed 21st October 2013>18 US Penal Code.

Wako, Amos, The Attorney General, Kenya Gazette Supplement no. 63 (Nairobi, Government Printer, 22 August 2004) (the Wako "2005 Proposed Draft New Constitution").

US Penal Code.

TABLE OF CASES

European Court of Human Rights
A v The United Kingdom European Court of Human Rights 3455/05.
M.C. v Bulgaria Eur. Ct. H.R., 39272/98 (2003).
Osman v UK [1998] EHRR 101.
X & Y v The Netherlands, App. No. 8978/80 (28th February 1985).

France
Barbie case, Chambre criminelle de la Cour de Cassation, *jugement* of 20th *Décembre* 1985.

Ghana
Addo and two others v Mahama and two others 29th August 2013, Superior Court of Judicature in the Supreme Court Accra.

India
Shri Kirpal Singh v. Shri V.V. Giri [1970] INSC 191: AIR [1970] SC 2097; [1971](2) SCR 197; [1970](2) SCC 567.

International Criminal Court
Dissenting Opinion of Judge Herrera Carbuccia on the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation"
http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/chambers/tcVa/Pages/1274.aspx <accessed 15th July 2014>
ICC Trial Chamber I, "*Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*" 13th December 2007, ICC-01/04-01/06-1084.
"*Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*", 14th July 2009, ICC-01/04-01/06-2049.
Kenyatta Pre-Trial Chamber, Confirmation of Charges decision, 23rd January 2012, dissenting Judge Hans-Peter Kaul.
Warrants Authorization 31st March 2011. Kenyatta Trial Chamber, Majority Judges Kuniko Ozaki and Chile Eboe-Osuji
The Situation in the Republic of Kenya, In the Case of The Prosecutor v Uhuru Muigai Kenyatta the Kenyatta Case. ICC-01/09-02/11, Public Redacted Version of "Defence Application Pursuant to Article 64(4) for an Order to Refer Back to Pre-Trial Chamber II or a Judge of the Pre Trial Division the Preliminary Issue of the Validity of the Decision on the Confirmation of Charges or for an Order Striking Out New Facts Alleged in the Prosecution's Pre-Trial Brief and Request for an Extension of the Page Limit Pursuant to Regulation 37(2)," 7th February 2013; (hereafter Decision on Defence Application pursuant to Article 64(4) and Related Requests 26th April 2013). http://www.icc-cpi.int/iccdocs/doc/doc1585619.pdf <accessed 8th July 2014>
Kenyatta Trial Chamber, Order Compelling Kenya Government to Co-Operate with Prosecutor by Producing Records, unanimous judges Kuniko Ozaki, Robert Fremr and Geoffrey Henderson.
Kenya Situation Second Decision on Application of Nine Persons to be Questioned by the Office of the Prosecutor, 31st January 2011, ICC-01/09-39.Kenyatta Appeals Chamber, Kenya Challenge Against Jurisdiction.
Situation in Darfur, Prosecutor v Harun and Kashayla, 27th April 2007 Prosecutor v Lubanga Decision on Prosecutor's Application for a Warrant of Arrest Art 58, 10th February 2006.

Kenyatta Pre-Trial Chamber, Confirmation of Charges Judgment, 23rd January 2012, majority judges Ekaterina Trendafilova and Cuno Tarfusser.
Ruto Pre-Trial Chamber, Confirmation of Charges Judgment, 23rd January 2012, majority judges Ekaterina Trendafilova and Cuno Tarfusser, Ruto Pre-Trial Chamber, Confirmation of Charges decision, 23rd January 2012, dissenting Judge Hans-Peter Kaul.
Ruto Pre-Trial Chamber, Warrants Authorization judgment 31st March 2011, majority judges Ekaterina Trendafilova and CunoTarfusser,
The International Centre for Policy and Conflict and 5 others v Attorney General and 4 others [2013] eKLR http://www.kenyalaw.org/newsletter1/Issue072013.php <accessed 8th September 2014> Nairobi High Court Petition 552 of 2012.
The ICC Prosecutor v. Omar Hassan Ahmad Al Bashir case no. ICC-02/05-01/09 International Criminal Court, Pre-Trial Chamber I.
http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx <accessed 25th September 2014>
The Concurring Opinion of Judge Christine Van den Wyngaert "Decision on Defence Application Pursuant to Article 64(4) and Related Requests" 26th April 2013.
http://jurist.org/paperchase/138245541-International-Criminal-Court-Annex-2-Decision-on-Defence-Application-Pursuant-to-Article-64-4-and-Related-Requests.pdf <accessed 10th July 2014>
The ICC Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12th June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497.
The ICC Prosecutor v Germain Katanga, The Katanga Trial Judgment, Dissenting minority opinion of Judge Christine Van Den Wyngaert, **www.icc-cpi.int/iccdocs/doc/doc1783397.pdf** <accessed 24th June 2014>
The ICC Prosecutor v Germain Katanga, The Katanga Trial Judgment, Majority Katanga Trial Judgment by Judge Bruno Cotte (Presiding) and Judge Fatoumata Dembele Diarra.
Katanga Trial Chamber 25(3)(D) Notice Decision Dissenting Opinion of Judge Christine Van Den Wyngaert, 7th March, 2014 **www.icc-cpi.int/iccdocs/doc/doc1744372.pdf** <accessed 16th July 2014>
The ICC Prosecutor v Germain Katanga and Mathieu Ngudjulo Chui, Case No. ICC-01/04-01/07 International Criminal Court, Pre-Trial Chamber I, 25th March, 2008.
The ICC Prosecutor v Germain Katanga and Mathieu Ngudjulo Chui, Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717.
The ICC Prosecutor v Jean Pierre Bemba Gombo, case no. ICC-01/05-01/08-803 International Criminal Court, Pre-Trial Chamber II, 15th June, 2009.
The ICC Prosecutor v Jean Pierre Bemba Gombo, Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01/08-424.
The ICC Prosecutor v Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842 14-03-2012 1/624 5 International Criminal Court, Trial Chamber I, 14th March 2012.
The ICC Prosecutor v Thomas Lubanga Dyilo, ICC-01/01-01/06-2842, TC I, ICC, 14th March 2012 ("Separate Opinion of Judge Fulford, Lubanga Trial Judgment").
The ICC Prosecutor v Lubanga, Decision on the Confirmation of Charges 29th January 2007 http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF<accessed 8th July 2014>paras 200, 220 and 227-229.
The ICC Prosecutor v. Thomas Lubanga Dyilo, Pre-Trial Chamber I, "Decision on the Prosecution's Application under Article 58(7) of the Statute," ICC-02/05-01/07-l-Corr.The ICC Prosecutor Lubanga, Transcript of 20th May 2011 ICC601/04-01/06-T-335-ENG ET.
The ICC Prosecutor v William Samoei Ruto and Joshua Arap Sang, CC-01:09-01/11 (Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation) 17th April 2014 **http://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf** <accessed 12th July 2014> (Ruto Trial Chamber, Order Compelling Kenya Government Cooperation, majority judges Chile Eboe-Osuji and Robert Fremr).

The ICC Prosecutor v William SamoeiRuto, Henry Kiprono Kosgey and Joshua Arap Sang alleging crimes contrary to Article 7 (1)(a),(d) and (h) of the ICC Statute (*the Ruto case*).The ICC Prosecutor William Ruto and Joshua Sang, "Decision on the schedule leading up to trial" 9th July 2012, ICC-01/09-01/11-440
The ICC Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Hussein Ali, Judgment on Government of Kenya Challenging Admissibility of Case 30th August 2011 (herein Kenyatta Appeals Chamber, Kenya Challenge Against Jurisdiction) majority judges Daniel David Ntanda (presiding), Sang-Hyun Song, Akua Kuenyehia and Erkki Kourula.
The ICC Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta ICC-01/09-02/11 11th March 2013. Prosecution notification of withdrawal of the charges against Francis Kirimi.http://www.icc-cpi.int/iccdocs/doc/ICC-01-09-02-11-687.pdf <accessed 8th July 2014>
The ICC Prosecutor v Uhuru Muigai Kenyatta, Francis Kirimi Muthaura and Mohamed Hussein Ali alleging crimes contrary to not only Arts 7(1)(a), (d) and (h), but also (g) and (k) of the Rome Statute (*the Kenyatta case*).
The ICC Prosecutor v Uhuru Muigai Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial) 18th October 2013, [Trial Chamber V(B)] (the Kenyatta Excusal Decision), ICC-01/09-02/11-830
The ICC Prosecutor v Uhuru Muigai Kenyatta, Kenyatta Trial Chamber, Judges Kuniko Ozaki (Presiding Judge), Robert Fremr and Geoffrey A. Henderson, Decision of 31st March 2014 Chamber V(B) "Decision on Prosecution's Applications for a Finding of Non-Compliance Pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date." www.icc-cpi.int/iccdocs/doc/doc1755190.pdf<accessed 27th September 2014>
The Situation in the Democratic Republic of Congo: Prosecutor v Mbarushimana (Decision on the Prosecutor's Application for an Arrest Warrant, Article 58) 10th February 2006.
The Situation in the Republic of Kenya: Prosecutor v Ruto, Kosgey and Sang [The Decision in the Admissibility Challenge pursuant to Article 19(2)(b)] 30th May 2011. http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf<accessed 8th July 2014>

International Court of Justice
Nuclear Tests Case (Australia v France) (Judgment) [1974] International Court of Justice Reports 253.
Nuclear Tests Case (New Zealand v France) (Judgment) (1974) ICJ Reports 457 (International Court of Justice).
Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] International Court of Justice Reports 174.

International Criminal Tribunal on Rwanda
The ICTR Prosecutor v. Kayishema and Ruzidana, Trial Chamber, Case No. ICTR-95-1-T.
The ICTR Prosecutor v. Nyiramasuhuko et al., the "Butare Trial" Case No. ICTR-98-42-T Trial Chamber II of the International Criminal Tribunal on Rwanda Judgment dated 24th June 2011.
The ICTR Prosecutor v Rutaganda, case no. ICTR-96-3, Trial Chamber, 6th December, 1999.
The ICTR Prosecutor v Semanza, case no. ICTR-97-20, Trial Chamber, 15th May 2003.
The ICTR Prosecutor v Serushago, case no. ICTR-98-39, Trial Chamber, 5th February, 1999.

International Criminal Tribunal on Former Yugoslavia
The ICTY Prosecutor v Brđanin, case no. IT-99-36-A, ICTY Appeals Chamber Judgment 3rd April 2007;
http://en.wikipedia.org/wiki/Radoslav_Br%C4%91anin <accessed on 26th October 2013>
The ICTY Prosecutor v Blaškić (Judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997) 29th October 1997, (ICTY Appeals Chamber), IT-95-14-
The ICTY Prosecutor v Dragoljub Ojdanić, Appeals Chamber Decision on motion Challenging Jurisdiction – Joint Criminal Enterprise Case No. IT-99-37-A, 21st May 2003.

The ICTY Prosecutor v Dusko Tadić, Appeal Judgment, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15th July 1999.
Yugoslavia (ICTY), 15th March 2002.The ICTY Prosecutor v Krstić, Case No.IT-98-33, Trial Chamber, 2nd August, 2001.
The ICTY Prosecutor v Krstić, Trial Chamber, Case No.IT-98-33
The ICTY Prosecutor v Kvočka, Trial Chamber Judgment Case No. IT-98-30/T, ICTY 2nd November 2001.
The ICTY Prosecutor v Milroad Krnojelac, Trial Judgment, Case No. IT-97-25-T, International Criminal Tribunal for the former
The ICTY Prosecutor v Mitar Vasiljević, Appeal Judgment, IT-98-32-A, International Criminal Tribunal for the former Yugoslavia (ICTY) 25th February 2004
The ICTY Prosecutor v Plavsić, Case No.IT-00-39 & 40/1, Trial Chamber, 27th February 2003.
The ICTY Prosecutor v. Slobodan Milošević IT-02-54 Trial Chamber International Criminal Tribunal on Former Yugoslavia.

Israel
AG of Israel v Eichmann (Israel Supreme Court case no. 40/61) decision on 12th December 1961.

Kenya
Barasa v Cabinet Secretary of the Ministry of Interior and National Coordination & Ors, Petition No. 288 of 2013, judgment delivered on 31st January 2014 (High Court of Kenya).
Jomo Kenyatta and five others v R [1953] 20 E.A.C.A. 339.
Kibaki v Moi & 2 others (no. 3) [2000] 1 EA 115, dated 10th December 1999; [2008] 2 KLR (EP) 351.
Okunda v Republic [1970] EA 453.
Orengo v Moi and 12 others (No. 3) [2008] 1 KLR (EP) 715; Election Petition no. 8 of 1993.
R v A.R. Kapila (1978) (unreported)
R v Attorney General exparte Herma Muge [1991]eKLR (Civil Application No. Nai, 77 of 1990).
R v Jomo Kenyatta and Five Others; See also the verbatim Transcript, Volume 1.
Raila Odinga v the Independent Electoral and Boundaries Commission, Isaac Hassan, Uhuru Kenyatta and William Ruto. Petition no. 5 of 2013, Supreme Court of Kenya Judgment dated 16th April 2013.
Republic v Director of Public Prosecutions and the Chief Magistrate's Court, Nairobi ex parte Henry Kiprono Kosgey and Patrick Omwenga Kiage (interested party); **http://kenyalaw.org/caselaw/cases/view/81022** <18th September 2014>High Court of Kenya, Nairobi, Criminal Miscellaneous Application no. 435 of 2011.
Republic v Charles Kipkumi Chepkwony Kericho Magistrate's Court CR 101/08 appealed at Nakuru Appeals Court as HC.CR. A. 30/09.
Republic v Charles Kipkumi Chepkwony Naivasha Magistrate's Court, police file 764/44/08.
Republic v Edward Kirui, Nairobi High Court HCCR 9/08.
Republic v Francis Kipn'geno and Others: The Killing of an Administration Police Officer Hassan Omar Dado, Kericho High Court, HCCR 24/08 subsequently filed as Appeal 310/09 at Nakuru Court of Appeals.
Republic v Henry Kiprono Kosgey, Chief Magistrate's Court Criminal Case No. ACC 1/201.
Republic v Hosea Waweru & Joram Mwenda Guntai and the Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003, Court of Appeal.
Republic v Jackson Kibor, Nakuru Magistrate's Court CR 96/08Republic v James Omondi Odera and three others Nairobi High Court HCCR 57/08.
Republic v Joseph Lokuret Nabanyi, Nakuru High Court HCCR 40/08.
Republic v Paul Kiptoo Barno James Yator Korir and Isiah Kipkorir Leting: The Killing of Benedict Omolo and Elias Wafula Wakhungu, Eldoret Magistrate's Court, CR 387/08.
Republic v Paul Mungai Mwihia, Nakuru Magistrate's Court, CF 7202/08.

Republic v Peter Kepkemoi (the Peter Ruto Case).
Republic v Peter Ochieng, Nakuru Magistrate's Court, CR 4001/08.
Republic v Robert Kipgetich Kemboi and Kirkland Kipngeno Langat: The killing of police officers Peter Githinji and David Odhiambo, Kericho High Court HCCR 24/08.
Republic v Stephen Kiprotich Leting and Three Others (the Kiambaa Church Burning) Nakuru High Court HCCR 34/2008.
Republic v Willy Kipng'eno Rotich and Seven Others, Sotik Magistrate's Court CR 4001/08.
Rodhanali Karmali Khimji Pradhan v The Attorney General & Another Republic of Kenya, [2004] eKLR High Court of Kenya (Mombasa) Misc. Civil App. No. 1216 of 2000.
The International Centre for Policy and Conflict and 5 others v Attorney General and 4 others [2013] eKLR; Nairobi High Court Petition 552 of 2012. http://www.kenyalaw.org/newsletter1/Issue072013.php <accessed 8th September 2014>
Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR HCA No. 116 of 2007.

Solomon Islands
Evo v Supa [1986] LRC (Const.) 18 (Sol Is HC).

South Africa
Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and Others (CCT17/96) [1996] ZACC 16.

United Kingdom
Barnard v National Dock Labour Board [1953] 2 Q.B. 18; [1953] 2 W.L.R. 995; 97 S.J. 331; [1953] 1 All E.R. 1113; [1953] 1 Lloyd's Rep.
Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2) [1999] 2 W.L.R. 272 (HL) (usually referred to as "Pinochet II").
Lever Finance Ltd v Westminster (City) London Borough Council [1971] 1 QB 222.
Norfolk County Council v Secretary of State for the Environment [1973] 3 All ER 673; [1973]1 WLR 1400; 72 LGR 44.
Pyx Granite Co. Ltd v Ministry of Housing and Local Government [I960] A.C. 260.
R v Leicester City Council exparte Powergen U.K. Ltd. [2000] JPL 629.
R v Secretary of State for the Environment, Food and Rural Affairs [2004] ICR 1289; [2005] EWCA Civ. 138.
R v Tower Hawkes of London Borough exparte Chetnick Developments Ltd. [1988] 1 ALL ER 961, 965-66; AC 858, 862; 2 WLR 654.
R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256; [1923] All ER Rep 233.
Regina v East Sussex County Council (Appellants) ex parte Reprotech (Pebsham) Ltd. (Respondents) and One Other Actions [2002] UKHL 8, 28th February 2002.
Regina v Powell (Anthony) and English [1996] 2 WLR 1195 (UK); [1999] 1 AC (HL).
Regina v Swindal and Osborne [1846] 2 Car & K 703.
Regina v Wesley [1963] 1WLR 1200.
Secretary of State for the Home Department v Rehman [2001] UKHL 47; [2003] 1 AC 153; [2002] 1 All ER 122; [2001] 3 WLR 877; [2002] Imm AR 98.
Tesco Supermarket v Nattrass [1972] AC 153.
The Belmarsh case [2005] UKHL 71.

United States
Bush v Gore, 531 U.S. 98 (2000).
Gibbons v Ogden, U.S. (9 Wheat.) 1.
H.L. Pinkerton v the United States, 328 US 640 (1946).
Judgment of the US Military Commission, Manila, 8th October 1945-7 Dec 1945, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. IV (London: HMSO, 1948) 1.
Luther v Borden, 48 U.S. 1 (1849).

OFFICIAL REPORTS

Ad hoc Committee on the Establishment of an International Criminal Court, *Draft Report of the ad hoc Committee*, 22 August 1995, A/AC.244/CRP.5.

Cassese, Antonio, *Report of the International Criminal Tribunal* (Washington: ICTY, 1997).

Committee of Experts on Constitutional Review, *Reviewed Harmonized new Constitution of Kenya* (Nairobi: The Government Printer, 23rd February 2010).

Crimes Against Humanity Initiative, launched in 2008.

Encyclopedia Britannica

http://www.britannica.com/EBchecked/topic/373362/Mein-Kampf <accessed on 19th September 2014>

Final Report of The Truth Justice and Reconciliation Commission of Kenya (TJRC Report) **http://www.kenya-today.com/wp-content/uploads/2013/05/TJRC_report_Volume_1.pdf** <accessed 19th October 2013>

Human Rights Watch (December 2011). http://www.hrw.org/reports/1990/WR90/AFRICA.BOU-03.htm<accessed 27th September 2014>

Human Rights Watch, *The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute* (HRW, June 2005) http://www.hrw.org/node/83018<accessed on 20th October 2013>

International Commission on Intervention and State Sovereignty, *The Responsibility to Protect Report* (Ottawa: International Development Research Centre for ICISS, 2001).

International Law Commission Draft Code of Crimes against the Peace and Security of Mankind: Titles and Texts of Articles on the Draft Code of Crimes against the Peace and Security of Mankind Adopted by the International law Commission at its Forty-Eighth Session (1996) UN GAOR Int. Law Comm., 48th Sess., UN Doc A/CN.4/L.532.

Ipsos Synovate, **http://www.nairobiexposed.com** <accessed 20th July 2013>

Kenya National Commission on Human Rights Report, *The Cry of Blood: Report on Extra-Judicial Killings and Disappearances*, September 2008 downloads.wikileaks-press.org/.../kenya...cry-of-blood/crimes-against-hu <accessed 29th March 2012>

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: summary records of the plenary meetings and of the meetings of the Committee of the Whole (U.N. Diplomatic Conference) 379, A/CONF.183/13 (Vol. II) (1998).

Liban, Guyo, "Kenyan Elections within a Reconciliation Framework" (January 2013) Policy Brief, No. 2 (Institute for Justice and Reconciliation).

Office of the ICC Prosecutor, *Policy Paper on the Interests of Justice* (September 2007) available online.

The Blair Report, Our Common Interest (Report of the Commission for Africa: 2005).

The Judicial Commission of Inquiry into Post-Election Violence (The Government Printer, Nairobi, 2008).(The Waki Report).

The National Council for Law Reporting, *Waki Report: An Abridged Version* (Nairobi: NCLR supported by German Technical Cooperation, 2008).

The Outcome Document of the 2005 United Nations World Summit (A/RES/60/1, para. 138-140) and formulated in the Secretary-General's 2009 Report (A/63/677) on Implementing the Responsibility to Protect.
http://www.un.org/en/preventgenocide/adviser/responsibility.shtml <accessed on 18th September 2014>

The Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007 (The Government Printer, Nairobi, 2008)(20th October 2008)(The Kriegler Report).

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the 1998 Diplomatic Conference, 11th meeting, 22nd June 1998, A/CONF.183/C.1/SR11. See also 12th meeting, 23rd June 1998, A/CONF.183/C.1/SR.12.United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: summary records of the plenary meetings and of the meetings of the Committee of the Whole (U.N. Diplomatic Conference) 379, A/CONF.183/13 (Vol. II) (1998).WORLD BANK, Sub-Saharan Africa: From Crisis to Sustainable Development (Washington, DC: World Bank, 1989).

ABBREVIATIONS

AC ..... (ICC) Appeals Chamber

ACPHR ..... African Charter of Peoples' and Human Rights

AfriCog ..... African Centre for Open Governance

AG ..... Attorney General

AIDP/IAPL ..... *Association Internationale De Droit Pénal*

ARK ..... Autonomous Region of Krajina

ASP ..... Assembly of States Parties

AU ..... African Union

BVR ..... Biometric Voter Registration

CIPEV ..... Commission of Inquiry into Post Election Violence

CA ..... Court of Appeal

CIL ..... Customary International Law

CJ ..... Chief Justice

CAT ..... Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

CODESA ..... Convention for a Democratic South Africa

CORD ..... Coalition for Reform and Democracy

COTU ..... Central Organisation of Trade Unions

CR ..... cosmopolitan rights

DPP ..... Director of Public Prosecutions

DTL ..... Domestic Tort Law

EA ..... East Africa

EAC ..... East African Cooperation

ECK ..... Electoral Commission of Kenya

EHCR ..... European Court of Human Rights

EU ..... European Union

EVID ..... Electronic Voter Identification system

FE ..... The Far East

FRPI ..... Patriotic Resistance Force in Ituri

GEMA ..... Gikuyu, Embu and Meru Association
GNU ..... Government of National Unity
HC ..... High Court
HL ..... House of Lords (UK)
HR ..... human rights
HRW ..... Human Rights Watch
Ibid ..... *ibidem*, the same place
ICA ..... International Crimes Act
ICC ..... International Criminal Court
ICCPR ..... International Covenant on Civil and Political Rights
ICESCR ..... International Covenant on Economic Social and Cultural Rights
ICJ (K) ..... International Commission of Jurists (Kenya Section)
ICT ..... information communications technology
ICTY ..... International Criminal Tribunal for the former Yugoslavia
ICTR ..... International Criminal Tribunal for Rwanda
IDP ..... internally displaced person
IEBC ..... Independent Electoral and Boundaries Commission
IFA ..... Inform Action
IFJR ..... Institut Français pour la Justice Restaurative
IGAD ..... The Intergovernmental Authority on Development
IHL ..... International Humanitarian Law
ILC ..... International Law Commission
IMT ..... International Military Tribunal
IPPG ..... Inter Parties Parliamentary Group
JCE ..... joint criminal enterprise
JSC ..... Judge of Supreme Court
JA ..... Judge of Appeal
JJA ..... Judges of the Court of Appeal
KANU ..... Kenya African National Union
KADU ..... Kenya African Democratic Union
Kenya 4C's ..... Kenya Citizen's Coalition for Constitutional Change

KPTJ ..... Kenyans for Peace, Truth and Justice
KNCHR ..... Kenya National Commission of Human Rights
Ksh(s) ..... Kenya shillings
LDP ..... Liberal Democratic Party
LSK ..... Law Society of Kenya
MP ..... Member of Parliament
MoU ..... memorandum of understanding
NAK ..... National Alliance of Kenya
NARC ..... National Alliance Rainbow Coalition
NCIC ..... National Cohesion Integration Commission
NCEC ..... National Convention Executive Council
FNI ..... National Integrationist Front
NSIS ..... National Security Intelligence Services
ODM ..... Orange Democratic Party
ODM-K ..... Orange Democratic Party-Kenya
OSP ..... Organized Structure of Power
OTP ..... Office of the Prosecutor
OPCV ..... Office of Public Counsel for Victims
PEV ..... post-election violence
PNU ..... Party of National Unity
PTC ..... Pre-Trial Chamber
TFV ..... Trust Fund for Victims
TJRC ..... Truth, Justice and Reconciliation Commission
TNA ..... The National Alliance
UK ..... United Kingdom
UNSC ..... United Nations Security Council
UN ..... United Nations
UNDHR ..... United Nations Declaration of Human Rights
US ..... United States
VWU ..... Victims and Witnesses Unit

INTRODUCTION

KENYA'S POST-CONFLICT JURISPRUDENCE

0.1. Transitional Justice and Ethnic Conflicts

0.1.1. Can Judicial Processes be used to Resolve Political Disputes?

Kenya's 27th December 2007 presidential elections were closely-contested. In controversial results, the Electoral Commission of Kenya (ECK) declared that the Party of National Unity's (PNU's) Mwai Kibaki received 4,584,721 votes against his main opposition candidate, the Orange Democratic Movement's (ODM's) Raila Odinga who received 4,352,993.[1] At twilight on 30th December, in State House, Nairobi, Kibaki was hurriedly sworn in for a second term. However, Odinga instantly alleged that the ECK had rigged Kibaki's re-election. During the delay preceding the declaration of results, ECK's Chairman, Samuel Kivuitu himself suspected that "the results were being cooked."[2] Although he "did not have the original Forms 16, 16A and 17A from each constituency, he refused to allow the 24-hour period for candidates to lodge complaints and declined to allow retallying."[3] Soon after pronouncing Kibaki's win, Kivuitu even conceded not knowing whether Kibaki won the election "fairly."[4] Amid tension, on 30th December widespread violence erupted at two levels. Initially, ODM's protesters appeared aggrieved by the ECK's verdict and its leaders demanded an electoral re-run. Subsequently, as violence escalated, the opposition's demands transformed from a goal of seizing immediate political power into one of embracing additional demands ranging from correcting constitutional anomalies to compensating historical injustices. Significantly, ODM not only called for external economic pressure against the government:[5] Since "'Sanctions at this point of time are necessary...it would be irresponsible to trust this government with a single cent' the ODM secretary general, Anyang'

---

[1] Makumi Mwagiru, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya* (Nairobi: Institute of Diplomacy and International Studies, 2008) p 9, citing results of Kenya's 2007 presidential election, see Appendix 2A.

[2] Pheroze Nowrojee, "Kivuitu Responsible for Post-Election Violence," *The Nairobi Star*, 21st September 2011.

[3] Donald B. Kipkorir, "Why Kivuitu must be Held Accountable for Polls Chaos," *Daily Nation*, 5th January 2008.

[4] Koki Muli, "Reflections about the Events at Kenyatta International Conference Centre (KICC) on 27th-31st December 2007" in Kimani Njogu (ed.) *Defining Moments: Reflections on Citizenship Violence and the 2007 General Elections in Kenya* (Nairobi: Twaweza Communications, 2011) 3-39.

[5] "ODM Sues Kibaki in the Hague" *The East African Standard*, 22nd January, 2008, *African Press International* http://africanpress.me/2008/01/22/<accessed 19th July 2014>

Nyong'o, told reporters,"[6] even as former UN Secretary General Kofi Annan – leading the African Union's Panel of Eminent Personalities – arrived in Kenya to broker peace talks,[7] but also for prosecution at The Hague.

The AU Panel successfully negotiated a ceasefire which culminated into a PNU-ODM power-sharing agreement. A National Accord[8] was signed on 28th February, 2008 which accommodated Odinga as Prime Minister, while leaving Kibaki as President. Earlier installments of the National Accord provided for humanitarian assistance to victims of the post-2007 conflicts – including internally displaced persons – then estimated at 350,000. Prospective "Agenda 4" commissions of inquiry were to be established to resolve a variety of pending issues. "Agenda 4" ranged from determining the outcome of the disputed elections,[9] resolving causes of historical injustices,[10] and most relevant for purposes of this book, kick-starting the stalled constitutional review process[11] plus a Commission of Inquiry into the Causes of Post-Election Violence,[12] chaired by Court of Appeal judge Philip Waki. According to the Waki Report, amid the post-2007 conflicts – in addition to the estimated 350,000 forcibly displaced – approximately 1,133 people were killed, hundreds of thousands physically assaulted, 900 women sexually violated and property worth billions of shillings, was destroyed. However – rather than establishing Waki's recommended special tribunal to investigate and prosecute the suspected perpetrators of post-2007 mass atrocities – on 27th August 2010, the Government of National Unity prioritized promulgation of a new constitution[13] to facilitate transitional justice.

[6] Xan Rice and David Batty *et al*., "Opposition to Resume Protests after Kenya Talks Fail," *The Guardian* 11th January 2008.
[7] "Kenya's Reality Check as Annan Jets in," *The East African Standard*, 23rd January, 2008; see also *KTN Jioni*, *post* p 68.
allafrica.com/stories/200801221259.html <accessed 14th September 2014>
[8] National Accord and Reconciliation Act no. 3 of 2008.
[9] *The Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007* (The Government Printer, Nairobi, 2008)(20th October 2008)(Hereafter *the Kriegler Report*); See Appendix IV.
[10] Truth, Justice and Reconciliation Commission Act no. 6 of 2008, to investigate historical injustices, including gross human rights violations, in Kenya between 12th December 1963 and 28th February 2008 *supra* note 10.
[11] Constitution of Kenya (Amendment) Act no. 9 of 2008 enacted on 22nd December 2008.
[12] *The Judicial Commission of Inquiry into Post-Election Violence* (The Government Printer, Nairobi, 2008). (Hereafter *the Waki Report*).
[13] *Constitution of Kenya*, promulgated on 27th August 2010 (Nairobi: The Government Printer, 2010).

On 11th August 1999, Kenya had signed the Rome Statute[14] recognizing "such grave crimes (as) threaten the peace, security and well-being of the world" and on 15th March 2005, ratified it. The Statute establishes a permanent International Criminal Court,[15] based at The Hague. It entered into force on 1st July 2002. Ironically, George Fletcher[16] explains that while prosecution is an option available in post-conflict situations, its exclusive use may not necessarily "put an end to impunity for the perpetrators of these crimes" by increasing democracy, or "contribute to the prevention of such crimes" by reducing future human rights violations. Rather, if the Rome Statute is indeed concerned to preserve the "delicate mosaic"[17] and peoples' "common bonds, their cultures pieced together in a shared heritage"[18] as paragraph one of the Statute's preamble suggests, then the commitment should not only protect against it being "shattered at any time,"[19] but also promote its restoration, particularly for victims.

In 2014, immediate former South African President Thabo Mbeki and Columbia/Makerere University political scientist Mahmood Mamdani strongly criticized "international criminal trials a(s) the preferred response" to "extreme violence" which approach, they argue, is based on "the Nuremberg model."[20] The Mbeki-Mamdani thesis opposes the Rome Statute's mandatory preambular assertion that "the most serious crimes of concern to the international community as a whole *must* not go unpunished and that their effective prosecution must be ensured"[21] (emphasis added). They assert that the use of the word "must" appears too extreme. The essence of their argument is that following World War II – by displacing millions across borders to create "a safe home for survivors," – "the Allies carried out the most far-reaching ethnic cleansing in the history of Europe."[22] Physical segregation of populations was based on the "assumption...that victims' interests must always be put first in the

[14] International Criminal Court Statute of Rome 1998, the text of the Rome Statute circulated as document A/CONF.183/9 of 17th July 1998 and corrected by *process-verbaux* of 10th November 1998, 12th July 1999, 30th November1999, 8th May 2000, 17th January 2001 and 16th January 2002. The Statute entered into force on 1st July 2002. http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
[15] *Ibid.* article 1 <accessed 9th February 2013> (hereafter Rome Statute).
[16] George P. Fletcher, "Justice and Fairness in the Protection of Crime Victims," in Christopher Russell (ed.) *George Fletcher's Essays on Criminal Law* (New York: Oxford University Press, 2013) 254-263.
[17] Fourth paragraph of the Rome Statute, *supra* note 14.
[18] *Ibid.*
[19] *Ibid.*
[20] Thabo Mbeki and Mahmood Mamdani, "Courts Can't End Civil Wars," *New York Times*, 5th February, 2014 (hereafter the Mbeki-Mamdani thesis).
[21] First paragraph, Rome Statute, *supra* note 14.
[22] Mbeki and Mamdani, "Courts Can't End," *supra* note 20.

new political order."[23] The Nuremberg criminal trials ended in 1949. Yet: "Because criminal trials are driven by a winner-takes-all logic – you are either innocent or guilty – those found guilty and punished as perpetrators are denied a life in the new political order."[24] Conversely, Mbeki and Mamdani argue that: "In civil wars, no one is wholly innocent and no one wholly guilty." Rather: "Victims and perpetrators often trade places, and each side has a narrative of violence." Significantly, because "political violence has a constituency and is driven by issues, not just perpetrators" and further because "human wrongs are specific" therefore they warn that: "To call simply for victims' justice, as the I.C.C. does, is to risk a continuation of civil war."[25] Mbeki and Mamdani conclude that: "Instead, there must be a political process where all citizens – yesterday's victims, perpetrators and bystanders – may face one another as today's survivors." In sum, their thesis rejects the increasing international internalization of criminal trials responses, which Kathryn Sikkink terms, the "justice cascade."[26] Her thesis attributes the global spread of a maximalist approach through exclusive retributive justice for just deserts.

Peter Kagwanja recognized an important qualification to the Mbeki-Mamdani thesis, to wit: "Courts can only come into the picture *after* such a new order is already in place" (emphasis added). Consequently, the Mbeki-Mamdani thesis particularly addresses the question as to whether or not "a careful sequencing of peace and justice"[27] is required. Mbeki and Mamdani conclude that judicial solutions cannot be used to resolve political disputes. They complement the American founding fathers' wisdom to "rule out court trials for the defeated at the end of the Civil War and instead opt for Reconstruction." Consequently for Kagwanja, "African states deserve to be shielded from the judicial extremism of the current international criminal justice system."[28] He opines, *inter alia*, that "Africa is still on the cusp of state formation which, like other colonized societies, is prone to civil wars often over questions of identity and citizenship." Taken to such an extreme, since pure retribution in post-conflict situations may aggravate simmering tensions and risk re-activating hostilities which may sunder the fragile peace, minimalists[29] advocate a "do nothing" approach of

[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton and Company, 2011).
[27] Peter Kagwanja, "Why Courts Should Steer Clear of African Civil Wars: The ICC Should be Guided by a Clear Grasp of the Changing Character of Warfare in Africa" *Daily Nation*, 22nd February, 2014, citing Mbeki and Mamdani, "Courts Can't," *supra* note 20.
[28] *Ibid.*
[29] Tricia D. Olsen and Leigh A. Payne and Andrew Reiter, *Transitional Justice in the Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: United States Institute of Peace Press, 2010).

granting blanket amnesties to atrocity suspects. They prefer to let the losses lie where they fall. Tricia Olsen, Leigh Payne and Andrew Reiter recognize the benefits of an holistic approach similar to Ruti Teitel[30] who distinguishes pure amnesties from conditional or "limited criminal sanctions." Conversely, by recommending "sequenced" limited criminal sanctions, the Mbeki-Mamdani thesis is different. Their recommendation to sequence peace and justice – by postponing criminal trials until after resolution of political disputes – neither unequivocally commends nor condemns blanket amnesties for perpetrators. Instead, they argue that in response to certain post-conflict situations, criminal trials must await, and are therefore contingent, upon the outcome of the political dispute resolution process. This book – by hypothesizing that the timing of the international criminal trials initiated in Kenya's post-2007 situation, *proprio motu* by the ICC prosecutor in 2011, was not a justifiable response – therefore applies the Mbeki-Mamdani thesis.

0.1.2. The Rome Statute's Complementary Role

Maximalists propose that criminal trials should be exclusively deployed so as to achieve the goals of retributive justice and deterrence in response to mass atrocities.[31] The first ICC Chief Prosecutor, Luis Moreno-Ocampo has defended his decision to use criminal trials in *the Kenya cases*. Curiously, Ocampo wrote an earlier position paper where he interpreted the ICC prosecutor's mandate as commencing with *positive* complementarity – which endorses supporting domestic criminal justice systems to investigate and prosecute suspects – before resorting to *negative* complementarity only as a final resort.[32] Nonetheless, Ocampo's subsequent opinion about *the Kenya cases* attributes the surprising peace – at the closely-contested 2013 presidential elections – directly to the ICC Pre-Trial Chamber's confirmation of charges against four suspects, for allegedly perpetrating crimes against humanity arising from the post-2007 conflicts. In his recent evaluation, it was *negative* complementarity which "helped Kenyans to have peaceful elections in 2013, mostly peaceful."[33] Indeed, Nic Cheeseman, Gabrielle Lynch and Justin Willis report that Kenyatta told one rally: "Our union

[30] Ruti G. Teitel, *Transitional Justice* (Oxford University Press, New York, 2000); See also Thomas Obel Hansen, "Transitional Justice: Toward a Differentiated Theory" (2011) *Oregon Review of International Law*, 13, 1-46.
[31] Sikkink, *The Justice Cascade*, supra note 26; See also Olsen, Payne and Reiter, *Transitional Justice, supra* note 29.
[32] Jens David Ohlin, "Peace, Security, and Prosecutorial Discretion" in Carsten Stahn and Göran Sluiter (eds.) *Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff, 2007) 185-207.
[33] Luis Moreno-Ocampo, *The Nairobi Star* April 2013; See also Michela Wrong, "Indictee for President!" 11th March 2013, http://latitude.blogs.nytimes.com/2013/03/11/being-prosecuted-by-the-i-c-c-helped-uhuru-kenyattas-chances-in-kenyas-election/<accessed 25th September 2014>

with Ruto is informed by the need to preserve peace in the country."[34] They infer that:

> the decision of the International Criminal Court (ICC) to prosecute Kenyatta and William Ruto for crimes against humanity for their alleged role in the post-election violence of 2007/2008 had the unexpected effect of bringing these former rivals together in a Jubilee Alliance, which reduced the prospect for violence between their respective Kikuyu and Kalenjin communities.[35]

According to Suzanne Mueller, Kenyatta and Ruto were united by mutual self interest in defending ICC charges. Hence: "The result was another display of 'exclusionary ethnicity': voting against the other, in part out of fear, more than for one's own."[36] However, for Stephen Brown and Rosalind Raddatz: "one diplomat…thought (Kenyatta) just had deep pockets and was a playboy. He surprised us with the deal with Ruto. Not many saw that coming. No one really thought his candidacy was serious.' "[37]

The use of criminal trials in isolation of other approaches is problematic. Tom Wolf accounts for the *de facto* amnesty to Kenya's former president for any repression allegedly committed during *the culture of resistance* to two reasons. First, "increasing goodwill towards Moi…(in) gratitude for having presided over a peaceful transfer of power"[38] from KANU to NARC. Second, because: "In Africa elders are respected." This book argues that, similarly, because in 2013, Kenyatta and Ruto submitted themselves to democratic electoral competition, therefore, they effectively earned domestic absolution – through the peoples' sovereign power to "withdraw" the charges being leveled against them in the court of public opinion. Furthermore, because the post-2007 atrocities were committed in the political sub-system therefore the legal sub-system may resolve them only if the political sub-system, fails to do so.[39] This argument

[34] *Ibid*. p. 7
[35] N. Cheeseman, G. Lynch and J. Willis (2014) "Democracy and its Discontents: Understanding Kenya's 2013 Elections," *Journal of Eastern African Studies,* 8 (1), 2-24, pp 3-4.
[36] Suzanne Mueller, "Kenya and the International Criminal Court (ICC) Politics, the Election and the Law" (2014) *Journal of East African Studies*, 8:1, 25-42 p 35 (footnote omitted).
[37] Stephen Brown and Rosalind Raddatz, "Dire Consequences or Empty Threats? Western Pressure for Peace, Justice and Democracy in Kenya" (February 2014) *Journal of Eastern African Studies*, 8, 1, 43-62 p 52.
[38] Thomas P. Wolf, "Immunity or Accountability? Daniel Toroitich Arap Moi: Kenya's first Retired President" in Roger Southall and Henning Melber (eds.) *Legacies of Power: Leadership, Change and Former Presidents in African Politics* (Uppsala: Nordic Africa Institute, 2006) 197-232 p 207.
[39] Niklas Luhmann, *Law as a Social System*, translated by K. A. Ziegert; F. Kastner, R. Nobles, D. Schiff, and R. Ziegert (eds.) (Oxford: Oxford University Press, 2004 [1993]).

presumes the innocence of the suspects and therefore only holds as valid in the absence of *manifest criminality*.[40]

Constructively, the PNU-ODM Government of National Unity's transitional justice policy effectively conferred domestic *de facto* amnesty on senior post-2007 suspects. However, since the advent of the 21st century, international obligations have arisen. This is because the Rome Statute is "mindful of victims of unimaginable atrocities that deeply shock the conscience of humanity"[41] and therefore "the most serious crimes of concern to the international community as a whole must not go unpunished."[42] While the Statute provides that "their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,"[43] however, the ICC remains "complementary to national criminal jurisdictions."[44] Given the potential conflict between Kenya's domestic transitional justice policy, on one hand, with its international criminal justice treaty obligations on the other hand, and further in light of the Mbeki-Mamdani thesis which prioritizes peace before justice, therefore, this book proposes to evaluate the extent, scope and operation of the ICC's complementarity doctrine in relation to the crimes against humanity allegedly perpetrated during Kenya's post-2007 conflicts.

0.2. Balancing Peace and Justice

Divergent legal theories evidently inspire different judicial interpretations – not only of the Rome Statute, but particularly of its application to the complex facts in *the Kenya cases*. Therefore the question arises as to whether or not both interpretations can be correct. Some scholars, like Ronald Dworkin argue that legal problems have "one right answer."[45] One interpretation of the Rome Statute must be more persuasive – "all-things-considered" – than the other. Conversely scholars like Githu Muigai argue that – transcending the progressives and conservatives dichotomy – all decisions express value judgments and therefore *legitimate* judgments[46] reflect coherent use of various constitutional interpretive arguments. Yet – as illustrated by the Mbeki-Mamdani thesis – a third constituency arises. By introducing a third variable of "bystanders" – neutrals who must co-exist with both victims and perpetrators so

[40] George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Co., 1978).
[41] Preamble, Rome Statute, *supra* note 14.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] Ronald Dworkin, "Hard Cases" (1975) *Harvard Law Review* (88) 1057-1109 reprinted in *Taking Rights Seriously* (London: Duckworth, 1977) chapter 4.
[46] Githu Muigai, "Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation" (2004) *East African Law Journal*, Vol. 1, 1-20.

as to stabilize a post-conflict survivor society – the appropriate response to certain ethnic conflicts may not merely be a "difficult" or "hard," but a "crazy," case. The general problem which this book seeks to address is to evaluate the extent to which the advantages of social control accruing from using criminal trials for transitional justice are justifiable by a clear theory of legal interpretation. Particularly, whether or not the ICC's criminalization of Kenya's post-2007 conflicts was justified. To demonstrate that only outlaw states necessarily warrant the international community's intervention under the "responsibility to protect,"[47] John Rawls's *Law of Peoples*[48] shall be relied upon. Kenya is not an outlaw state. Instead, emerging contextual and consequential factors in the Kenyan situation – as evidenced by the Supreme Court's 2013 election petition judgment upholding the election of two key Hague suspects, President Uhuru Kenyatta and Deputy President William Ruto – are relevant to the ICC process. Consequentialists interpret rules by choosing from among the best alternative social impacts of criminal trials. The book thus argues that, as opposed to – either making an exclusively teleological interpretation of the Rome Statute based on its preambular mandate to punish crimes against humanity, or making a literal or even historical analysis of the Statute's individual criminal responsibility provisions as applied to the material facts in *the Kenya cases* – the ICC judges should evaluate country-specific consequential impacts which are likely to arise from their decisions. The costs and benefits upon ICC judges making "political decisions" rather than the Security Council, shall be evaluated in the book.

0.3. Using Criminal Trials to Complement Political Responses

The overall purpose of this book is to evaluate the extent to which criminal prosecutions are useful instruments to enhance transitional justice in ethnically heterogeneous, low-income, post-conflict situations. Its subsidiary aims include distinguishing the unique role of the international criminal justice system in responding to extraordinary crimes that are perpetrated under the unique or extraordinary conditions of a transitional society. The ICC's role in the Kenyan situation is not only different from that in an exclusively post-conflict situation of a developed country, i.e. one which was not undergoing transition from authoritarianism to democracy. But more profoundly, ICC's function also differs from that of the ordinary criminal justice system in prosecuting serious ordinary crimes in a normal, stable society. It shall be argued that – assuming ideal conditions, of a homogenous, developed country, then universal liberal justice is a suitable goal for a criminal justice system to aim at in response to ordinary, or

[47] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* Report (Ottawa: International Development Research Centre for ICISS, 2001).
[48] Rawls, *Law of Peoples, post* note 55.

even extraordinary, crimes – if the benchmark of increasing democracy and reducing human rights violations is applied. Otherwise it is not.

The objective of this book is to construct a three dimensional normative framework which facilitates an *explanatory* justification. First, of certain Rome Statute provisions. Jurisdictionally, articles 5, 17 and 53 regulate the complementarity doctrine that admits situations before the ICC. Substantively, under the special part, article 7 on crimes against humanity, with particular reference to article 25, under the general part, which purports to attribute individual criminal responsibility, *inter alia*, to persons acting through "state-like organizations." Second, to describe the conflicting interpretations of the relevant provisions of the Rome Statute emanating from the ICC judges at various early stages of *the Kenya case*. The explanatory interpretation method used by this book seeks to introduce a third factor which is slightly similar to the ICC Pre-Trial Chamber's dissenting decision's allusion to the unsatisfactory prosecutions having been brought. In hindsight, the contemporaneous constitutional facts were generated – not merely by Kenyan negotiations for power-sharing under the 2008 National Accord, ratified in 2010 at the national referendum on a new constitutional dispensation – but moreso by Kenya's closely-contested, and also remarkably peacefully-conducted 2013 presidential elections, and a flawed Truth, Justice and Reconciliation process. Judicial restraint displayed in 2013 by the Supreme Court's election petition decision suggests that the post-2007 mass conflicts may have been attributable to wider, systemic causes in the old, dysfunctional constitution. In these circumstances, structural reforms for distributive justice may be a more appropriate post-conflict response, than criminal trials seeking retributive justice.

The overarching research question is: were criminal trials a justified response to alleged crimes against humanity perpetrated during Kenya's post-2007 conflicts? Six specific research sub-questions arise in relation to the interpretation of the law in this book:

One. What was the political economy in Kenya immediately prior to the post-2007 conflicts? Consideration shall also be given to the rules regulating pre-trial jurisprudence and of penal theory.

Two. What are the procedural rules concerning complementarity? When does the domestic state's jurisdiction end and ICC's begin?

Three. What are the substantive rules proscribing crimes against humanity? Particular attention shall be paid to the general part of international criminal law which attributes individual criminal responsibility for the offence of indirect co-perpetration.

Four. Does the ICC Trial Chamber possess jurisdiction to re-characterize charges at any time before judgment? This practice seems drawn from an inquisitorial approach of the civil law tradition. Does it contradict the accused's right to a fair hearing?
Five. How have reforms to Kenyan constitutional and electoral laws responded to the post-2007 conflicts?
Six. What is the rule compelling Member States Parties of the Rome Statute to co-operate with the ICC? What are the scope and limitations of state co-operation, particularly where international obligations appear to conflict with domestic laws?

0.4. The Rights of Nations

0.4.1. The Right to Self-Determination

George Fletcher and Jens David Ohlin lament the long-standing tendency within international law to focus more on states to the exclusion of *nations*.[49] For unlike the state which is a legal "person" in international law: "Nations are abstract, metaphysical entities that are difficult to ascertain. But states are easy to define – because they have nothing to do with the way the world should be organized – they deal only with how the world is actually constituted, for better or for worse."[50] Significantly, "peoples and nations that are not yet states have the right to make it happen."[51] The right to self-determination is therefore the right of a people…to be free from domination and have the necessary authority to control their own affairs.[52] Usually this means being in control of their own state, which allows them to govern themselves and organize a government around their core principles, assuming of course they respect universal human rights in the process. Of relevance to this book: "in the case of a smaller ethnic group living within a democratic state, self-determination may mean that the political structure is such that they have enough regional autonomy to organize their social and political lives."[53] Therefore Fletcher and Ohlin conclude that: "At the very least they (peoples) must have access to the political system so that they are

[49] George P. Fletcher and Jens David Ohlin, *Defending Humanity: When Force Is Justified and Why* (New York: Oxford University Press, 2008) p 136.
[50] *Ibid.*
[51] *Ibid.*
[52] Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford University Press, 1988) 55-88; See also Ian Brownlie, "An Essay in the History of the Principle of Self Determination" in C.H. Alexandrowicz (ed.) *Grotian Society Papers: Studies in the History of the of the Law of Nations* (The Hague: Martin Nijhoff, 1968); Antonio Cassese, *Self Determination of Peoples: A Legal Reappraisal* (Cambridge, New York: Cambridge University Press, 1995), cited in *ibid*.p 139 footnote 15.
[53] Gregory H. Fox, "The Right to Political Participation in International Law" (1992) *Yale Journal of International Law*, 17, 539.

adequately represented in the state's government and can use this electoral influence to press their claims. This is a right that attaches to *peoples*."[54] They decry the long-standing tendency within international law to focus more on states to the exclusion of *nations*.

0.4.2. Anti-Realism

John Rawls developed a framework for conceiving international relations which he terms the *Law of Peoples*.[55] Rawls's framework is useful because it distinguishes relations *between* peoples, from relations *within* states. To illustrate a "realistic utopia" he develops various terminologies[56] which explain how it is possible for political communities – where each possess different ideologies – to nonetheless peacefully coexist. Rawls distinguishes "the basic structure of the society of peoples"[57] between five different types of peoples according to their government types. The first two, he terms as well-ordered peoples. These include liberal peoples, on one hand, and hierarchical, decent, non-liberal peoples, on the other.[58] A third type comprises benevolent absolutisms,[59] such as the Red Cross and Red Crescent Societies and other philanthropies. A fourth type, burdened peoples, are those who are incapable of providing for their own populations. Finally, outlaw states, against which Rawls reserves the right for liberal peoples to intervene and make war. Outlaw states may either harbour expansionist tendencies or practice human rights atrocities against their own populations, or both. "In the Society of Peoples, the parallel to reasonable pluralism is the diversity among reasonable peoples with their different cultures and traditions of thought, both religious and nonreligious"[60] and: "A (reasonable) Law of Peoples must be acceptable to reasonable peoples who are thus diverse; and it must be fair between them and effective in shaping the larger scheme of their co-operation."[61]

The overall assessment of Rawls's *Law of Peoples* is that it broadly rejects the description of international criminal law as being a product of the state's right to make war. It is in this sense that Fletcher and Ohlin say that "states do not have a right to self-determination. Peoples or nations have the right, and it frequently involves the creation of their own state. A state is usually though not always a

[54] Fletcher and Ohlin, *Defending Humanity, supra* note 49 p 136.
[55] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).
[56] *Ibid.* p 11.
[57] *Ibid.* p 61-2.
[58] *Ibid.* p 63.
[59] *Ibid.* p 94-5.
[60] *Ibid.* p 11.
[61] *Ibid.* p 12.

fulfillment of that right."[62] In this respect, Rawls endorses Immanuel Kant's *Perpetual Peace*. Kant argued that reasonable and rational people have a reasonable and rational interest in entering agreements to sustain peace. Rawls concedes that:

> Here I follow Kant's lead in *Perpetual Peace* (1795) in thinking that a world government – by which I mean a unified political regime with the legal powers normally exercised by central governments – would either be a global despotism or else would rule as a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their freedom and autonomy.[63]

On Rawlsian reasoning, this book contends that, to the extent that in 2008 Kenya was not a rogue state, therefore the international community cannot legitimately intervene in Kenya's domestic affairs. Rather Kenya may be regarded as a hierarchic, decent, non-liberal people.

0.4.3. Anti-Cosmopolitanism

The ultimate concern of a cosmopolitan view is the well-being of individuals not the justice of societies. According to that view there is still a question concerning the need for further global distribution, even after each domestic society has achieved internally just institutions.[64]

Unlike Kant however, Rawls does not derive the international legal system as emerging directly out of tacit agreements among each individual on the planet. Instead, the relevant actors – for Rawls – are the recognized agents of peoples who expressly enter into agreements with agents of other peoples.[65] Thus the relations which are regulated – by the *Law of Peoples* – are limited to those between State Parties to the agreements chosen from behind a "second-order original position." Moreover, since their individual members are not privy to the agreement and are mere third parties regarding public international contractual relations – unless particular treaties expressly recognize individual actors and confer them with eligible standing to sue in their own capacity – individuals lack *locus standi* to commence international litigation. This means that victims cannot present their grievances at an international forum like the ICC – other than through its Chief Prosecutor, the UN Security Council or through a

[62] Fletcher and Ohlin, *Defending Humanity, supra* note 49 p140.
[63] Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (London; New York: Allen and Unwin; Macmillan, 1917) AK/III 367.
[64] Rawls, *Law of Peoples, supra* note 55 p 119.
[65] *Ibid.* pp 32-3, 40.

Member States Party. Thus the book contends that *peoples'* representatives *should* be the recognized repositories of the right to self-determination.

0.4.4. Cultural Relativity

Rawls lists human rights as those appearing in the 1948 UN Universal Declaration of Human Rights,[66] and both the 1966 Covenant on Civil and Political as well as the Covenant on Economic, Social, and Cultural Rights.[67] However, His framework rejects the primacy of international law over domestic law. Despite distinguishing liberal peoples from non-liberal, hierarchical, decent peoples, he insists that they should observe "toleration"[68] towards each other. He asserts that:

> …the law of peoples itself would not express liberalism's own principle of toleration for other reasonable ways of ordering society. A liberal society is to respect other societies organized by comprehensive doctrines, provided their political and social institutions meet certain conditions…to adhere to a reasonable law of peoples.[69]

He reasons that it would be contradictory for the former – who value liberal principles – to purport to impose their values upon the latter. Rawls describes a fictional country, Kazanistan,[70] as a model Muslim country which allows gender inequalities but is, nonetheless, eligible to membership in a secular international relations system because it qualifies as "a decent hierarchical people." At best, liberal peoples may provide civic education to enlighten citizens of hierarchical peoples to prefer liberal political values and thus choose candidates with liberal policies. The responsibility however remains upon individual members of decent, non-liberal peoples, to change their own political organizations since: "The Law of Peoples is indifferent between the two distributions."[71]

Diplomatic criticism or censure of non-liberal peoples are legitimate – as between well-ordered peoples – as a strategy of persuading policy change. As

[66] The Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10th December 1948 at the Palais de Chaillot, Paris, France, http://legal.un.org/avl/ha/udhr/udhr.html<accessed 1st May 2011>
[67] International Covenant on Civil and Political Rights, Gen Ass.res. 2200A (XXI) 16th December 1966 entry into force 23rd March 1976, in accordance with article 49, http://www1.umn.edu/humanrts/instree/b3ccpr.htm<accessed 1st May 2011> See also the International Covenant on Economic, Social and Cultural Rights, UN General Assembly, 16th December 1966, entry into force 3rd January 1976, in accordance with article 27. Kenya has ratified both.
[68] Rawls, *Law of Peoples, supra* note 55 p 59.
[69] *Ibid.* pp 67.
[70] *Ibid.* pp 75-8.
[71] *Ibid.* p 120.

regards burdened societies, however, liberal peoples have a humanitarian responsibility to alleviate the suffering of their members, positively through developmental aid and negatively, by imposing economic sanctions. This is because: "Burdened societies while they are not expansive or aggressive, lack the political and cultural traditions, the human cultural and know-how, and often the material and technological resources needed to be well-ordered."[72] However Rawls categorically rejects any mandatory redistribution of public goods from wealthy peoples to poor peoples. The international relations system is not a state which collects taxes on the utilitarian promise of promoting the greatest happiness of the greatest number. Rather, Rawls holds that it is possible for even post-colonial societies to independently construct liberal democratic political organizations which are wealth-creating and thus choose to overcome poverty themselves.

Ultimately, military intervention by liberal peoples is only justifiable in self-defence against outlaw states. "Outlaws states are aggressive and dangerous; all people are safer and more secure if such states change, or are forced to change their ways."[73] Yet, upon removing a tyrannical regime and installing a legitimately elected government, liberal peoples have no further responsibility and should withdraw to permit local social and political forces to evolve. Rawls concludes that international political and economic differences and inequalities should not be redressed through the instrumentality of a paternalistic international law.

This book additionally emphasizes the provisions under the African Charter of Human and Peoples' Rights[74] which may underscore the interpretation of the notion by the Kenyan peoples to ratify alleged offending actions or extra-legal measures attributed to their leaders during the post-2007 conflicts. It shall be argued that the ratification mechanism was by means of the new constitution as well as the 2013 presidential elections where the issue of The Hague prosecutions of a presidential and deputy presidential candidate was placed before the electorate as a "referendum" issue. One contemporaneous media commentator aptly observed as follows:

> Currently there is talk of Ruto being Uhuru's running mate. So either the opinion polls are flat out wrong and Kenyans are going to deal a decisive blow to end impunity by choosing the path of peace and prosperity and rising above ethnic politics or the popularity of Uhuru and Ruto is real. If the latter, then we are on our way to becoming a pariah state.[75]

0.4.5. Rejecting "Universal" Human Rights

Unlike at the national level in which a political society is chosen from a first order "original position," the *Law of Peoples* is chosen by agents from a second order "original position," after societies have already been established. Well-ordered peoples would not reasonably and rationally choose – at international level – the two principles which they justify in their own political society. Rawls contends that:

> An important role of a people's government, however arbitrary a society's boundaries may appear from a historical point of view, is to be the representative and effective agent of a people as they take responsibility for their territory and its environmental integrity, as well as for the size of their population.

Rawls concludes that: "It does not follow from the fact that boundaries are historically arbitrary that their role in the law of peoples cannot be justified."[76] Instead, he predicts that the following eight principles would therefore emerge to regulate international relations:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to disagreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right to self-defense, but no right to instigate war other than for reasons of self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.[77]

Rawls's first principle – on equal sovereign states – and fourth principle, on the non-intervention, together with his eighth, to assist other peoples living under unfavourable conditions, are of particular relevance for purposes of this book.

[72] *Ibid.* pp 105-6.
[73] *Ibid.* p 120.
[74] Rawls does not mention the African (Banjul) Charter on Human and Peoples' Rights, adopted 27th June, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.
[75] Nathan Wangusi, "Kenya: 2013 Election Will Be a Referendum on Integrity" *Pambazuka News*, 25th October 2012 http://allafrica.com/stories/201210260806.html<accessed on October 16th 2013>
[76] Rawls, *Law of Peoples, supra* note 55 p 39.
[77] *Ibid.* p 37.

0.4.6. Criticism of Rawls's Law of Peoples

William Twining laments that "Rawls's own attempts to transfer his theory of domestic justice to the supra-national arena were a sad failure."[78] In his trailblazing treatise *A Theory of Justice* Rawls had insisted that "underserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are somehow to be accounted for."[79] However, while accepting Rawls's earlier work, Twining thinks that: "His later works mark a retreat into a position that, from a global perspective, is a huge disappointment (that) does damage to Rawls' reputation…and is best forgotten." In Twining's scathing criticism:

> From a global perspective, it is bizarre to find a purportedly liberal theory of justice that rejects any principle of distribution, treats an out-dated conception of public international law as satisfactorily representing principles of justice in the global arena, and says almost nothing about radical poverty, the environment and increasing inequalities, American hegemony (and how it might be expressed), let alone transitional justice or the common heritage of mankind or reparations or other issues that are high on the world global agenda.[80]

Instead, Twining focuses on the work of Rawls's pupil, Thomas Pogge, who defends and refines Rawls's original theory of justice but modifies it, thus "Rescuing Rawls"[81] with his own fairly radical theme of international justice and human rights. "Pogge argues that Rawls' treatment of global justice is inconsistent with two of his core ideas: the basic structure and his conception of all human beings as free and equal moral persons." Pogge concludes that:

> …Rawls endorses double standards at three different levels: in regard to national economic regimes, the difference principle is part of Rawls' highest aspiration for justice, in regard to the global economic order, however, Rawls disavows this aspiration and even rejects the difference principle as inapplicable. Rawls suggests a weaker minimal criterion of liberal economic justice on the national level, but he holds that the global order can fully accord with liberal conceptions of justice without satisfying this criterion. And Rawls suggests an even weaker criterion of decency on the international level: but he holds that the global order cannot be merely decent, but even just, without satisfying this criterion.[82]

[78] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009) p 154.
[79] John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) p 100.
[80] Twining, *General Jurisprudence*, *supra* note 78 p 160.
[81] Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989), cited in *ibid.*
[82] Twining, *ibid.* p 164.

Pogge then proceeds to argue in favour of increased development aid. However, as stated earlier, Rawls distinguishes between causing poverty and allowing it to happen. Foreign aid, for Rawls, is a matter of charity. Therefore, both liberal and decent peoples have a duty to assist "heavily burdened societies." This is so whether or not – from an initial original position – the well-ordered peoples have caused a burdened peoples to be poor. But this responsibility is limited to enabling them to establish reasonably just or decent institutions. Hence "Rawls assumes that the Law of Peoples will make room for various forms of co-operative associations and federations among peoples but will not affirm a world state."[83]

Twining criticizes Pogge,[84] *inter alia*, for focusing on only one aspect of global justice. Pogge uses a thin interpretation of human rights for his specific purpose. Comprehensive analysis of Rawls's theorem is beyond the book's scope. Suffice to note that Pogge says very little about environmental or transitional justice.

0.5. Three Concepts of the International Relations System

0.5.1. International Realism

0.5.1.1. Legal Positivism and Legal Dualism

According to Roberto Ago, "(p)ositive law is that part of law which is laid down by the tacit and expressed consent of the different states."[85] Thus Olaoluwa Olusanya extrapolates that "(p)ositive international law is determined by the contractual will of the state, either through consent to treaty provisions or through State practice leading to preventing the development of a customary rule."[86] It is "that part of law which is laid down by the tacit and expressed consent of the different states." Therefore the realists' view advances a dualist theory which conceives of international norms as forming a distinct system from domestic law. Dualists assert that, in any municipal system, a formal procedural adoption of international norms is essential to transform them into valid norms.

[83] *Ibid.*
[84] Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002).
[85] Roberto Ago, "Positive Law and International Law" (1957) *American Journal of International Law*, 51, 691–733, p 693 quoted in Olusanya, *Double Jeopardy, supra* note 86.
[86] Olusanya, *ibid.* p 62.

0.5.1.2. The State Sovereignty Model

In the opening line of his book, Nazi lawyer Carl Schmitt claims that: "Sovereign is he who decides on the state of exception."[87] He argues that because "in abnormal times, the sovereign is legally uncontrolled"[88] and further because the primary task of the sovereign is to make the distinction between friend and enemy, therefore "the rule of law has no place in an emergency." Neither the judiciary nor parliament is capable of acting in a decisive way, leaving the executive as the only serious candidate. Invoking arguments reminiscent of Schmitt, Richard Rubenstein asserts that "in reality, there are no human rights, only political rights."[89] At international law the non-interference with internal affairs sustains international anarchy. Commenting on usurpation, Clinton Rossiter accepts the first limb of Schmitt's proposition that "(no) sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself."[90] In the UK case of *Rehman*, if in fact there is an emergency, Lord Hoffman also accepted the second limb of Schmitt's argument that the executive is entitled to decide how to respond to it. This is because:

> there is no difficulty about what 'national security' means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.[91]

Anthony D'Amato begins by recognizing that because under state sovereignty (SS) "entities such as an international criminal tribunal can get involved in a state's affairs only if that state calls for their intervention"[92] and further because "in situations of conflict between the state and a rebel group, the regime of SS

[87] Carl Schmitt, *Political Theology Four Chapters on the Theory of Sovereignty,* translated by George Schwab (Cambridge, Mass, MIT Press, 1988) p 5.
[88] *Ibid.*
[89] Darren J. O'Byrne, *Human Rights: An Introduction* (United Kingdom: Pearson Education Limited, 2003) p 325.
[90] Clinton L. Rossiter, *Constitutional Dictatorship* (Princeton: Princeton University Press, 1948) p 314.
[91] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153; [2002] 1 All ER 122; [2001] 3 WLR 877; [2002] Imm AR 98.
[92] Candace H. Blake-Amarante, "Peace v Justice: The Strategic Use of International Criminal Tribunals" draft available online *acuns.org/.../Peace-Justice-International-Criminal-Tribunals-Candace-Blake* <accessed 7thJuly 2014> p 1-24 p 9; print version in Henry F. Carey and Stacey M. Mitchell (eds.) *Trials and Tribulations of International Prosecution* (Lanham, MD: Lexington 2013) chapter 8, citing Anthony D'Amato, "Peace vs. Accountability in Bosnia" (1994) *Am. J. Int. L.,* 88, 500-506.

produces an asymmetry as only the state (G) has the right to call an international court,"[93] therefore:

> justice is one-sided and the duty to prosecute can be partially fulfilled at best. In fact, justice is likely to be fully rendered only in two circumstances: 1) in the event that the state calls the court when it is not culpable for committing international crimes but other parties to the conflict are; or 2) in the event that the state concerned is complicit and its interests are aligned with those of the international criminal tribunal, in which case it would willingly subject state officials to national or international prosecution. In all other cases, an international criminal tribunal would have its hands tied.[94]

Conversely:

> Since insurgents cannot call the court to punish the government and other states are unlikely to do so for fear of being accused of violating the principle of non-intervention in matters of civil strife, the regime of SS increases the government's incentives to go to war. In sum, peace is unlikely to occur and the commission of international crimes is likely to increase.[95]

0.5.2. Universalism

0.5.2.1. International Natural Law and Legal Monism

Olusanya explains that "natural law is universal, binding on all people and all States. It is therefore a non-consensual law based on the prevalence of rights and justice." Pursuant to Westphalian peace, however: "Natural law was to a great extent displaced by the rise of positivist interpretations of law and justice." That was because:

> It had become evident to international lawyers….that the states that made and applied law were not governed by morality or 'natural reason'; they acted for reasons of power and interest. It followed that law could only be ascertained through the actual methods used by the states to give effect to their political wills.[96]

Following World War II "the judgment of the Nuremberg tribunal…relied on natural law to determine the culpability of the Nazi high command, (which) confirmed the continuing validity of natural law as a basis for international law in the twentieth century."[97] Natural lawyers are monists who conceive of the international and domestic legal systems as comprising a single, fused normative

[93] *Ibid.*
[94] *Ibid.* pp 9-10.
[95] *Ibid.* p 10.
[96] Oscar Schather, *International Law in Theory and Practice* (Dordrecht/Boston/London: Martinus Nijhoff, 1991) p 78.
[97] Olusanya, *Double Jeopardy, supra* note 86 p 64.

system. No express adaptation is required by local legislatures – under monist theory – in order to domesticate provisions of international treaties.

0.5.2.2. The Human Rights/Cosmopolitan Rights Model

Turning to the international criminal tribunals within the human rights/cosmopolitan rights model, Candace Blake-Amarante argues that: "With the notion of crimes against humanity, how a state treats its own citizens has become a matter of international concern rather than just a matter between the state and its citizens, a principle that marks a dramatic rupture with the idea of state sovereignty."[98] Instead: "Now, international law imposes obligations not only on states but also on individuals within states. Individuals also have rights under international law and one such right is the ability to petition international bodies to intervene when either states or other actors violate human rights."[99] This is attributable to "the idea of global cosmopolitan rights, which stipulates that sovereignty resides with individuals as well as states." According to the idea of HR/CR, "legal regimes are endowed with the necessary legal powers and jurisdictions that serve to constrain any state from neither derogating from the duty to prosecute nor affecting the tribunal's ability of prosecuting culpable parties."[100] However, there arises:

> the problem of pursuing both the goals of peace and justice simultaneously. D'Amato observed that, under the legal powers and jurisdictions afforded by the human rights legal regime, if the leaders needed to negotiate a peace agreement are slated to be prosecuted, they will have no incentive to bargain for peace and will continue to fight and commit atrocities.[101]

Another problem with human rights legal regimes is that "if atrocities have already taken place, the punishment that is going to take place under these regimes might suck up all the potential gains achievable from bargaining. In such circumstances, 'all out war' would be left as the only option."[102] Human rights or cosmopolitan legal regimes tend to favour justice over peace.

0.5.2.3. Neoliberal Institutionalism and an Atrocities Regime

Neoliberalist institutionalist international relations scholarship emphasizes the role of regimes in facilitating co-operation between state actors[103] and regards

[98] Blake-Amarante, "Peace vs. Justice," *supra* note 92 p 13 (footnote omitted).
[99] *Ibid.* p 14.
[100] *Ibid.*
[101] *Ibid.* p 15.
[102] *Ibid.*
[103] Robert Axelrod and Robert Keohane, "Achieving Cooperation under Anarchy: Strategies and Institutions (1985) *World Politics*, 38(1), 226-254; See also Robert Keohane, *After*

the emerging tribunal system as an attempt to facilitate cooperation in a given issues area through the construction of an atrocities regime.[104] The neoliberal conceptualization of the state as a unitary rational actor provides theoretical common ground with neorealists. Hence "the absence of an explanation for why states obey international law in some instances but not others threatens to undermine the very foundation of the discipline."[105] Defection or non-compliance acts can be a rational choice for policymakers and are not dictated by moral imperatives.[106]

0.5.3. Globalization

According to Benjamin Schiff, beyond realism and liberal institutionalism: "Social constructivists observe that all visions of how the world works are based on ideas that people develop within a social, historical context. For constructivists not all motives are materialist and the vision of a world based on anarchy is a particular mental construction."[107] He argues that:

> For constructivists creation of the ICC could demonstrate a change of the system in the sense that collectively, – without clear nonmaterial reasons, states committed themselves to cooperate with an international organization established to prosecute collectively proscribed acts whose prosecution had previously been considered (if at all) on an ad hoc, war-by-war basis.[108]

Thus: "Constructivism expands the realm of free will as against realism's determinism and neoliberalism's tepid optimism."[109] In the balance of theories, constructivists "explain development of the consensus upon which the (International Criminal) court is based; the realists explain the states'

Hegemony: Cooperation and Discord in the World Political Economy (Princeton: Princeton University Press, 1984); Robert Keohane, *Neorealism and Its Critics* (New York: Columbia University Press, 1986); Robert Keohane, *International Institutions: Two Approaches* (December 1988) *International Studies Quarterly*, 32, 4, 379-396, cited in Christopher K. Lamont, *International Criminal Justice and the Politics of Compliance* (London: Ashgate, 2010) p 14.
[104] Kenneth W. Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts" (1999) *American Journal of International Law*, 93, 361-379; Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals" (Summer 2001) *International Organization*, 55, 3, 659-91 cited in Lamont, *ibid.*
[105] Andrew T. Guzman, "A Compliance-Based Theory of International Law" (2002) *California Law Review*, 90, 1826-1887, p 1826, cited in Lamont *International Criminal Justice, supra,* note 103 p 15.
[106] Lamont *ibid.* p 16.
[107] Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) p 8.
[108] *Ibid.* p 9.
[109] *Ibid.*

compulsion to protect sovereignty and seek relative advantage; the liberal institutionalists explore how the ICC embodies states' cooperative efforts to improve absolute welfare."[110] Schiff recounts that: "Constructivist international relations scholars Martha Finnemore and Kathryn Sikkink discuss how new ideas develop at the international level."[111] Some literature concerning international law's bindingness shall be reviewed in chapter six, as a precursor to rationalizing the Kenya government's alleged (non) compliance with its obligations under the Rome Statute and its ramifications.

0.5.3.1. The Information Age and International Criminal Justice

According to Norbert Elias, the emergence of globalization contradicted the *raison d'être* of the nation state. The impact of free flow of information and transportation had a double effect. At their apex, because individuals neither elect nor contact world leaders directly, therefore, undemocratic international institutions tend to generate an experience of alienation, powerlessness and inequality. At their base, in search of local, ethnic bonds or groups based on collective interests, citizens tend to abandon the fiction of liberal rights associated with their national identities.[112] Hence the Cold War inevitably ended – as had colonialism – and by the 1990s, military intervention began to crystallize around global human rights standards. At the Rome conference in 1998, a decision was made to establish a permanent International Criminal Court. Subsequent chapters of this book shall allude in greater detail to the political transformation of substantive international criminal law from its original inter-state-orientation – with a *nexus* to an international conflict, to an intra-state humanitarian role without a *nexus* to any conflict at all – whether international or non-international.[113]

0.5.3.2. Communitarianism, Republicanism and Cosmopolitan Pluralism

In the 21st century, a third dimension arises – local communities – challenging both positivists-cum-realists, on one part, as well as the universalists-cum-natural lawyers, on the other part, as notions of rights. According to Kenneth Morris, this third way builds upon the historic criticisms of rights, and is

[110] *Ibid.*
[111] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) *International Organization* 52, 887-917, quoted in Schiff, *Building the International, supra* note 107 p 14.
[112] Norbert Elias, *The Society of Individuals,* Robert Van Krieken (ed.) (Dublin: UCD Press, 2010).
[113] Rosanne Van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2010) p 416; See also Schiff, *Building the International, supra* note 107.

generally endorsed by communitarians – while answering their desire to support rights – but avoids confusing the other labels (the teleological or positivist critique and the ontological or natural law critique). In rejecting Western liberal cultural values, communitarians are similar to neoconservative or republican traditions. They assert that "(p)eople are not primarily autonomous, rights-bearing selves, but the products and carriers of social traditions…. (t)he traditions that mold people are unavoidably hierarchical, even necessarily coercive…in ways that express the group's values."[114] According to this view of rights and cultures, people conceive their highest good as participating meaningfully in and maintaining their hierarchical society, which espouses the norms of reciprocity and human equality based on "lived social practices" or "experiences."

0.5.3.3. The Domestic Tort Law Model

Blake-Amarante explains that: "Applied to the international setting, the views of the DTL (Domestic Tort Law) regime are in line with consequentialist concerns, which call for settling political accounts before dealing with concerns of justice."[115] Because she is "working under the rubric of the logic of consequences" therefore, using her "DTL regime, the (international criminal) court is neither a 'supra-state entity' nor an 'instrument' used for states to secure their interests. The court is merely a device to resolve disputes between opposing parties."[116]

> This implies two things: 1) both the state and the insurgent group can call the court to intervene when either one or both commit international crimes and 2) if the court should intervene, both the state and the insurgent group will be prosecuted and penalized in a way which is commensurate to the crimes committed.[117]

Blake-Amarante therefore opines that "in the DTL it is under the threat of court proceedings that settlements are concluded: parties agree to make concessions to each other because their interests are best served by avoiding the court."[118] As

[114] Kenneth E. Morris, "Western Defensiveness and the Defense of Rights: A Communitarian Alternative" in Lynda Bell, Andrew J. Nathan and Ilan Peleg (eds.) *Negotiating Culture and Human Rights* (New York: Columbia University Press, 2001) 68-95 p 82.
[115] Candace H. Blake-Amarante, *Choosing an International Legal Regime: How Much Justice Would You Trade for Peace?* (Graduate School of Arts and Sciences, Columbia University, Unpublished Ph.D. thesis, 2013) p 120 Blake_columbia_0054D-11387.pdf <accessed 7th July 2014>
[116] *Ibid.*
[117] *Ibid*. p 121.
[118] *Ibid.*

shown in the introductory section to this introductory chapter, during Kenya's post-2007 conflicts, the ODM opposition party complained to The Hague court about the Kibaki regime's repressive disruption of its protests. Indeed, the ICC Chief Prosecutor subsequently commenced *proprio motu* investigations into the situation in Kenya. It shall be argued in the next chapter that – both ODM as well as the PNU government – were granted symmetrical status to summon the ICC and hold the other party accountable for mass atrocities.

0.5.3.4. Communitarian Criticisms of the Rome Statute

Mark Drumbl accuses international lawyers of intellectual laziness for relying on Western liberal notions in constructing international criminal justice instruments.[119] Yet he concedes that – given its superpower status – the US is influential in promoting its values. For historical reasons, it is easier to discuss any new approach by commencing with the known and moving to the unknown. Ian Brownlie recognizes that states can contract out of the development of a customary international law rule.[120] Yet most states, such as Kenya, have signed international instruments – including the Rome Statute – and therefore are bound by their obligations. Communitarians, nonetheless, criticize the existing Rome Statute in order to advocate for amendment and improvement.

This chapter is justified in relying on a general penological theoretical framework – balancing positivist, penal judgment "general deterrence" as opposed to natural law's particularist retributive purposes – because the international criminal justice institutions rely mainly on these two, utilitarian and just deserts goals, to rationalize their sentencing their decisions. Rama Mani considers three types of justice facing low-income countries, in post conflict situations.[121] These include (1) *rule of law justice* under the legal system i.e. judiciary, police and prisons, to safeguard personal freedom amidst chaos; (2) *rectificatory justice* to redress the immediate humanitarian consequences emanating from conflict; and (3) *distributive justice* to address past systemic, political and economic discrimination. She therefore draws an equation: Correspondingly, overall Peace = Direct Peace + Structural Peace + Cultural Peace.[122] Mani accuses the Bretton Woods Institutions and international

[119] Mark Antonin Drumbl and Ken S. Gallant, *Appeals in Ad Hoc International Criminal Tribunals: Practice and the Community* (Dartmouth: Ashgate, 1999); See also Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) p 20.
[120] Ian Brownlie, *Principles of Public International Law* (4thed.) (Oxford: Clarendon Press, 1991) p 10.
[121] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of Wars* (UK: Polity, 2002) p 6 Chapters 1, 2 and 3.
[122] *Ibid*. p 12.

community policies of causing conflict in developing countries. She proposes that "peace builders need to recognize that a unidimensional approach to justice is inadequate. They need to address simultaneously all three dimensions of justice linked to the underlying causes, the symptoms and consequences of conflict, and recognize the dynamic linkages between them."[123] More elaborately than Mani, Drumbl recently concluded that there is an intrinsic tension within a model he calls *cosmopolitan pluralism* in terms of mediating the particular and universal that seems well suited "as a framework for emergent fields such as international criminal law, that must fulfill the difficult balancing act between global governance and local legitimacy."[124] The literature review of this chapter of the book identifies with a "third way" theoretical framework, close to Drumbl's cosmopolitan pluralism, which justifies a position that "although genocide and discrimination-based crimes against humanity are universal evils, they can be coherently sanctioned in diverse manners that might instantiate themselves differently in light of the different social geographies of different atrocities."[125]

0.6. Evolution of Crimes Against Humanity

0.6.1. Origins of Ethnic Cleansing in Kenya

Earlier episodes of election-related violence in Kenya during the 1990s had exposed not only the country's lack of a competent criminal justice system to contain or deal with land-based, ethnic clashes around election periods, but also a lack of political will.[126] Similarly, following the post-2007 conflicts, Kenya's 10th Parliament lacked political will to establish special criminal tribunals to investigate or prosecute and punish high-ranking suspects alleged by the Waki Report[127] to have planned, organized or financed gross human rights violations.

According to the CIPEV's recommendations and the agreement signed between both Kibaki and Odinga to implement them, MPs should have a bill to establish the tribunal by January 2009, with the tribunal up and running by the end of February 2009. Instead, MPs defeated the bill on February 2009, failing to get quorum. Two later attempts to pass the bill failed as well.[128]

[123] *Ibid*. p 169; See also pp 176 and 179.
[124] Drumbl, *Atrocity, Punishment, supra* note 119 p 20.
[125] *Ibid.*
[126] *The Report of the Judicial Commission Appointed to Inquire into Tribunal Clashes in Kenya* (Nairobi: The Government Printer, 1999) (hereafter *the Akiwumi Report*).
[127] The Waki Report, *supra* note 12.
[128] Mueller, "Kenya and the International Criminal Court," *supra* note 36 (footnotes omitted).

However, because "such grave crimes threaten the peace, security and well-being of the world" therefore in 2002, Kenya had signed and in 2005, ratified the Rome Statute establishing a permanent International Criminal Court, based at The Hague. The Statute's preamble[129] is further, "mindful of victims of unimaginable atrocities that deeply shock the conscience of humanity." Therefore "the most serious crimes of concern to the international community as a whole must not go unpunished." While it provides that "their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation," nevertheless, the ICC remains "complementary to national criminal jurisdictions."

0.6.2. Ingredients of Crimes Against Humanity

Most theorists concur that the Rome Statute's theory of common purpose appears based on Claus Roxin's explanation of group crimes under German law.[130] However we shall not discuss the criminal defences available under the Rome Statute.[131] Individual criminal responsibility under article 25 of the Statute is most recently and comprehensively discussed by Elies van Sliedregt. She explains that the Rome Statute contains a narrow notion of *substantive* legality,[132] as distinct from *procedural* legality, with which my book deals. I note that the Statute also adopts a substantive crime of indirect (co)perpetration from German criminal law.[133] Whether or not punishment is justified is a policy question which should be directed to the ICC Member States as the guardians of international values. It is necessary to develop, a rational test of international criminalization to critically evaluate the appropriateness of the ambiguous notion prescribed to proscribe indirect (co) perpetratorship contrived under civil law's *dolus* doctrines traced, *inter alia*, by Héctor Olàsolo[134] in chapter three of the book. He explains how individual criminal responsibility metamorphosed from an original formal approach into a subjective approach (based on "joint criminal enterprise" or JCE) and the current material-objective approach. In the English literature, Ohlin's[135] analysis of the JCE distinguishes it from control

[129] Preamble, Rome Statute, *supra* note 14.
[130] Claus Roxin, *Täterschaft und Tatherrschaft* (8thed.) (Hamburg: Verlag de Gruyter, 2006), cited in Van Sliedregt, *Individual Criminal Responsibility*, *post* note 133; Olàsolo, *Criminal Responsibility*, *post* note 134 p 287; Ohlin, "Joint Intentions," *post* note 135; Osiel, *Making Sense*, *post* note 203; Jain, "Control Theory," *post* note 862.
[131] Article 31, Rome Statute, *supra* note 14.
[132] Articles 22 and 23*, ibid.*
[133] Elies Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012) p 95.
[134] Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford and Portland, Oregon: Hart Publishing, 2009).
[135] Jens David Ohlin, "Joint Intentions to Commit International Crimes" (2011) *Chicago Journal of International Law,* 11, 2, 693-752.

theory. He critically analyses the different kinds of Joint Criminal Enterprise: JCE I (conspiracy), JCE II (knowledge) and JCE III (vicarious liability) developed haphazardly by the UN *ad hoc* ICTs on Former Yugoslavia and Rwanda. However, for reasons of academic economy, the interesting and complex JCE theme shall not be comprehensively discussed.

0.6.3. Jurisdictional Triggers

The jurisdictional theme of the ICC in mass atrocities in the book's theoretical framework relates two aspects of how decisions were made by the ICC. Specific reference shall be made in determining the admission of cases before the ICC in the Kenya situation. First, the Pre-Trial Chamber had to determine whether it possessed jurisdiction over the situation. Does the conflict arise from one of the three trigger sources? Either, first, a Rome Statute Member States Party.[136] For example, in 2003, Uganda referred the situation in Northern Uganda regarding the conflict pitting the Lord's Resistance Army led by Joseph Kony against the Uganda Defence Forces. Similarly, in 2004 another Member State, the Democratic Republic of Congo referred the conflict around Ituri province where, among other things, Thomas Lubanga Dyilo was allegedly recruiting child soldiers into his liberation army.[137] A second trigger source is the UN Security Council[138] in exercise of its power under Chapter VII of the UN Charter[139] which may refer a dispute to the Court. For example, in 2005 the Security Council passed a resolution referring the situation in Sudan's Darfur region to the Court. President Omar Al Bashir was alleged to be responsible for ten counts of crimes against humanity, war crimes and genocide on the basis of his individual criminal responsibility under article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator.[140] The third trigger source is the Office of the Prosecutor which may invoke its own jurisdiction under article 15 of the Rome Statute to commence preliminary investigations into a conflict situation. This

[136] Article 14, Rome Statute, *supra* note 14.
[137] *Prosecutor v Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06-2842 14-03-2012 1/624 5 International Criminal Court, Trial Chamber I, 14th March 2012.
https://www.scribd.com/doc/.../International-Criminal-Court-Dyilo-case<accessed on 3rd June 2013>
[138] Article 13(b), Rome Statute, *supra* note 14.
[139] The Charter of the United Nations was signed on 26th June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24th October 1945.
http ://www.un.org/en/documents/charter/intro.shtml<accessed 25th September 2014>
[140] *Prosecutor v. Omar Hassan Ahmad Al Bashir* case no. ICC-02/05-01/09 International Criminal Court, Pre-Trial Chamber I.
http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx<accessed 25th September 2014>

proprio motu jurisdiction[141] was exercised for the first time by the ICC's inaugural Chief Prosecutor Ocampo in the Kenyan situation in 2010. Irrespective of the source which triggers jurisdiction, the Security Council is empowered to defer the trial for 12 months.[142] Conversely, no state can itself fetter the prosecutor's jurisdiction, except by such domestic state initiating serious investigations or prosecutions of its own. Chapter two of the book shall evaluate controversies in the interpretation of the complementarity doctrine. A brief contextual background of how the ICC became seized of Kenya's post-2007 conflicts, as well as a descriptive interpretation of the relevant procedures, is introduced below.

Mbuthi Gathenji explains that the Waki Report:

> recommended that the Bill establishing a Special tribunal to adjudicate over the ….crimes against humanity related to 2007 post-election violence. The Bill presented in Parliament by and large conformed to the CIPEV recommendations, save for details that had to be modeled on international standards concerning issues of amnesty, retroactivity and presidential immunity. The rejection of the Bill by Parliament was, however, predictable as…wider consultation of stakeholders and building of consensus had not been done by the Government.[143]

On 15th October 2008, the Waki Report was presented to the Government of National Unity's co-principals, President Mwai Kibaki and Prime Minister Raila Odinga. Simultaneously, the Chief Mediator of the conflicts, former UN Secretary General Kofi Annan, received the Commission's secret envelope from its Chairman, Judge of Appeal Philip Waki, containing a list of alleged perpetrators suspected of bearing the greatest responsibility for crimes against humanity during the two month post-2007 conflicts. On 2nd July 2009 – citing lengthy delay by the Kenyan authorities to deal with the matter[144] – Annan transferred Judge Waki's secret envelope to Chief ICC Prosecutor Ocampo. This notwithstanding, as evidenced by rejection of a Special Tribunals Bill[145] – the Kenyan parliament persisted in its *de facto* amnesty or non-prosecution policy. Consequently, on 15th December 2010, Ocampo announced the names of six

[141] Article 15, Rome Statute, *.supra* note 14.
[142] Article 16, *ibid*.
[143] Mbuthi Gathenji, "Post-Election Violence and Crimes Against Humanity in 2007" in Njogu, *Defining Moments*, *supra* note 4, 168-88 p 180, chapter 13 of The Waki Report, *supra* note 12, pp 472-5.
[144] Failure to establish a special local court to try PEV suspects paved the way for the ICC: How Kenya handled local tribunal process. http://mobile.nation.co.ke/News/How-Kenya-handled-local-tribunal-process--/-/1950946/1997172/-/format/xhtml/-/dwh96i/-/index.html <accessed 3rd June 2014> Compare with Mueller "Kenya and the International Criminal Court," *supra* note 36.
[145] The Special Tribunal for Kenya Bill 2009 Kenya Gazette Supplement No. 7 (Bills No. 2).

suspects against who the OTP requested the ICC Pre-Trial Chamber to authorize investigative warrants. He claimed that there was a reasonable basis to initiate formal investigations to summon Agriculture Minister, William Ruto, Industrialization Minister Henry Kosgey, KASS FM radio broadcaster Joshua Arap Sang (*The ODM case*)[146] and Secretary to the Cabinet, Ambassador Francis Muthaura, Deputy Prime Minister Uhuru Kenyatta and Postmaster General (immediate former Commissioner of Police) Brigadier Hussein Ali (*The PNU case*).[147] Summonses were authorized on 31st March 2011, and confirmation of charges proceedings commenced in September 2011. In January 2012, a majority of the ICC Pre-Trial Chamber judges found substantial reason to believe that crimes within the court's jurisdiction had been perpetrated by four suspects: Ruto, Sang, Muthaura and Kenyatta.

0.6.4. Admissibility

Complementarity jurisdiction is restrictively provided under the Rome Statute under paragraph 10 of the preamble "emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."[148] This restriction is repeated in article 1 which confers "the power to exercise its jurisdiction over persons for the most serious crimes of international concern."[149] However no definition of the term "complementarity" is provided. Instead under article 17(1): "Having regard to paragraph 10 of the preamble and article 1, the (ICC) shall determine that a case is inadmissible"[150] in three circumstances. First, where a state is neither unable nor unwilling to genuinely investigate or prosecute. For example, where the evidence is inaccessible or witnesses or an accused person cannot be summoned or arrested. Second, where the state has already investigated as a result of which a decision is made not to prosecute – unless such investigations result from unwillingness or inability to prosecute. For example, where prosecution proceedings are a sham, designed to shield or protect the accused, then they shall not be a bar to the ICC's complementary power. Third, where such prosecutions are concluded in good faith, then the article 20 *ne bis in idem* principle estops ICC's complementary power.

[146] *The ICC Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* alleging crimes contrary to article 7(1)(a), (d) and (h) of the ICC Statute (hereafter *the Ruto case*).
[147] *The ICC Prosecutor v Uhuru Muigai Kenyatta, Francis Kirimi Muthaura and Mohamed Hussein Ali* alleging crimes contrary to not only articles 7(1)(a), (d) and (h), but also (g) and (k) Rome Statute, *supra* note 14 (hereafter *the Kenyatta case*).
[148] Paragraph 10 of the Preamble, Rome Statute, *ibid.*
[149] Article 1, *ibid.*
[150] Article 17(1), *ibid.*

Regarding the "interests of justice" criterion, controversy surrounds the scope of prosecutorial discretion. On one hand, as previously noted, the ICC's first prosecutor Moreno-Ocampo in an early position paper[151] argued that – even assuming that no cases were to be prosecuted before the ICC – the Court may nonetheless be considered as successfully acquitting its mandate. Ocampo's early argument reinforces the ICC's jurisdiction to *complement*, rather than *supplant*, domestic criminal justice systems. Hence the ICC's mandate commences with *positive* complementarity which, in the first instance, requires the Office of the Prosecutor (OTP) to co-operate and support domestic criminal justice systems to prosecute. Facilitation may entail information-sharing. Taken to its logical conclusion, the "interests of justice" criterion in Ocampo's earlier view reflects the common law "opportunity principle," under which prosecutors possess wide discretion not to prosecute suspected international crimes in the "public interest." On the other hand, Human Rights Watch contends that the ICC OTP's article 53 discretion not to prosecute should not be a political, but a strictly judicial one. Human Rights Watch adopts a civil law "legality principle" which demands mandatory prosecution of all incidents which disclose sufficient evidence.

0.6.5. Between Judicial Conservatism and Progressivism

Curiously, in the Kenya situation, on one hand, chapter two shall apply Kevin Jon Heller's "sentence-based complementarity."[152] Conversely, to interpret whether in 2011 the Kenya government was actively investigating and prosecuting the alleged mass atrocities committed during its post-2007 conflicts – the Pre-Trial Chamber upheld by the Appeal Chamber majority judges,[153] relied on a narrow "same person, same conduct" test.[154] In order to construe whether domestic responses attained the requisite threshold under the Rome Statute, so as to *exclude* the ICC's jurisdiction, the ICC Appeals Chamber majority judges interpreted article 17 of the Rome Statute to mean that Kenya should prosecute the same individuals who were identified by the ICC prosecutor, for the same international crimes. That is, to attribute individual criminal responsibility – not

[151] Ocampo, *Nairobi Star, supra* note 35.
[152] Kevin Jon Heller, "A Sentence-Based Theory of Complementarity" (Winter, 2012) *Harvard International Law Journal*, 53, 1, 315-336; reprinted in William Schabas, Yvonne McDermott and Niamh Hayes (eds.) *Ashgate Research. Companion to International Criminal Law: Critical Perspectives* (Farnham, UK: Ashgate, 2013).
[153] *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Hussein Ali* Judgment on Government of Kenya Challenging Admissibility of Case 30th August 2011 (hereafter *Kenyatta Appeals Chamber*, Kenya Challenge Against Jurisdiction) majority judges Daniel David Ntanda (presiding), Sang-Hyun Song, Akua Kuenyehia and Erkki Kourula.
[154] Carsten Stahn "'Sentencing Horror' or 'Sentencing Heuristic' A Reply to Heller's Sentence-Based Theory of Complementarity" in Schabas, McDermott and Hayes (eds.) *Ashgate Research*, *supra* note 152, 358-67.

only by characterizing four of the six suspects as indirect co-perpetrators and the other two as contributors – but also by particularizing the specified crimes against humanity, alleged to been committed. However, the Appeals Chamber's majority judges neglected to consider the admissibility of the situation under the article 53 "interests of justice" criterion. To this end, it shall be inferred that the Appeal Chamber's majority judges simultaneously invoked a broad, civil law "legality principle"[155] to require mandatory prosecution irrespective of any "public interest" considerations.

Chapter two shall consider whether the dissenting decision of the Chamber's minority judge[156] allowed Kenya's challenge against admissibility because she gave consideration to contemporaneous social and political contextual factors in Kenya. Appeal judge Anita Ušacka's dissenting judgment in the Kenya government's challenge furthered a common law "opportunity principle"[157] to determine that genuine domestic investigations were ongoing. This book goes a step further and considers the extent to which on the facts concerning Kenya's criminal justice policy in 2011, ICC's complementarity jurisdiction may have been ousted using either Heller's sentencing-based heuristic or a "process-based" test.[158]

0.7. "One Right Answer" to Crazy Cases in International Criminal Law

0.7.1. Sequencing

Thomas Carothers explains:

> the unhelpful tendency in the rule of law that has gained ground in international policy circles in the last decade is that of sequencing – the idea that transnational countries should not pursue rule-of-law-development and democratization together but rather in sequence, first building the rule of law and only after turning to democratization.[159]

In his view, "the new enthusiasm for sequencing on the part of some influential Western scholars and policy experts reflects their concerns over" what he calls "high risks involved when countries with weak states and weak rule of law, and

[155] Philip L. Reichel, *Comparative Criminal Justice Systems: A Topical Approach* (Upper Saddle River, NJ: Pearson Prentice Hall/Pearson Education, 2013).
[156] *Ruto Appeal Chamber* dissenting Judge Anita Ušacka.
[157] Francis Pakes, *Comparative Criminal Justice* (UK: Willan Publishing, 2010).
[158] Darryl Robinson, "Three Theories of Complementarity: Charge, Sentence or Process? A Comment on Kevin Heller's Sentence Based Theory of Complementarity" in Schabas, McDermott and Hayes (eds.) *Ashgate Research Companion, supra* note 152, 369-384.
[159] Thomas Carothers, "Why Developing Countries Prove so Resistant to the Rule-of-Law" in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds.) *Global Perspectives on the Rule of Law* (London; New York: Routledge, 2010) p 22.

little experience with political pluralism, attempt rapid processes of democratization."[160]

Such risks include the emergence of illiberal democracies and the outbreak of civil or interstate conflicts (e.g. Rwanda and Burundi). Sequentialists believe that by first developing the rule of law, traditionally authoritarian societies will create the necessary mechanisms and habits of control and restraint to ensure that potentially chaotic or unpredictable processes of mass political participation do not get out of hand....this pattern was followed in the eighteenth and nineteenth centuries by the well established democracies of Europe and North America.[161]

One question is therefore whether or not Kenya's post-2007 conflicts were attributable to the 2005 referendum rejecting the "Proposed Draft New Constitution."[162] If it was not possible to conduct an election under Kenya's dysfunctional post-independence constitution, then the fact that post-2007 ethnic conflicts erupted may be construed as a spontaneous collateral consequence attributable to systemic causes. If comprehensive constitutional reforms had succeeded in 2005, in all probability, the simmering revolutionary pressures causing the 2007 conflicts may have been averted.

0.7.2. Some Dilemmas of International Prosecution

It is necessary to reconcile the apparent normative incongruence between the ICC Pre-Trial Chamber's majority and dissenting judgments in *the Kenya cases,* on one hand, with the decision not to prosecute emerging from the Kenyan Government of National Unity policy, on the other. The GNU opted to either accord *de facto* amnesty to the persons suspected of committing crimes against humanity at the post-2007 conflicts, or adopt a moderate position of constitutional reforms. The ICC Pre-Trial Chamber's majority decision confirming the trials is consistent with maximalist retribution, while the Kibaki government's non-prosecution clearly preferred a minimalist approach. But because in actual fact various criminal justice responses co-exist, therefore criminal law scholars may adopt a social constructivist approach advanced by Schiff[163] as well as the social discursive arguments of Mark Osiel[164] which

[160] Fareed Zakaria, *The Future of Freedom* (New York: W. W. Norton & Co., 2003), cited in *ibid.*
[161] *Ibid.*
[162] Amos Wako, The Attorney General, Kenya Gazette Supplement no. 63 (Nairobi, Government Printer, 22nd August 2004) (hereafter the Wako, Draft).
[163] Schiff, *Building the International*, *supra* note 107 pp 8-9 and 14-15.
[164] Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J. and London: Transaction Publishers, 1997).

explain the role of criminal trials during mass atrocities by having regard to the socio-cultural context or the society in which trials are conducted. The latter ideology reveals the underlying reasons which may explain why the ICC Appeal Chamber majority judges may be justified in asserting judicial activism to dismiss the Kenya government's challenge against ICC's jurisdiction in 2011.

0.7.3. Between Judicial Conservatism and Progressivism

On one hand, optimists, such as Declan Roche argue that the salient criteria in deciding whether in the "interests of justice" a prosecutor may exercise his or her article 53(1)(c) discretion not to prosecute should be the social sentiments of the survivor society.[165] On the other hand, pessimists like Human Rights Watch, decry that if political criteria such as sociological factors are introduced, then victims' justice suffers. Elizabeth Stanley's conclusion is that truth commissions are, at best, likely to provide only a partial solution to the ethnic conflicts.[166] This is because, either the offenders may benefit from amnesty – which amounts to impunity – or the survivor society can use majoritarian popularity to override justice for minority victims. If such "majoritarianism"[167] is permitted, then the very essence of international criminal justice, which is to protect the most vulnerable and minority populations – is undermined. Noting that: "Nothing….provoked as much controversy in this election cycle, as the narrative about a 'tyranny of numbers' put out by the veteran political commentator Mutahi Ngunyi,"[168] I shall therefore explore the hypothesis that dismissing utilitarian approaches to mass atrocities is a simplistic analysis of the dynamics underlying social cohesion. It is claimed that a trend developed in *the Kenya cases* displays the ICC majority judges' early decisions adhering to teleological or purposive interpretation of the Rome Statute, which judicial activism advances retributive justice goals.[169] Enforcement of compliance with international criminal law norms, is however at best, predicated upon *reputational,* rather than economic or a military, sanctions.[170] Conversely,

[165] Declan Roche, "Truth Commission Amnesties and the International Criminal Court*"* (2005) *British Journal of Criminology*, 45, 565-581.
[166] Elizabeth Stanley, "Truth Commissions and the Recognition of State Crime" (2005) *British Journal of Criminology*, 45, 4, 582-597.
[167] "Mutahi Ngunyi Predicts a Jubilee Alliance Win – The Tyranny of Numbers (Hypothetically)" http://kenyapolitical.blogspot.fr/2013/02/mutahi-ngunyi-predicts-jubilee-alliance.html<accessed 4th October 2013>
[168] "Is the 'Tyranny of Numbers' Just a Hoax?" *The Nairobi Star,* 16th February 2013. <accessed September 25th 2014>
[169] Schiff, *Building the International*, *supra* note 107.
[170] Guzman, "A Compliance-Based Theory," *supra* note 105.

judicial restraint[171] shown by dissenting opinions of a minority of the ICC's judges in *the Kenya cases*, draws on literal, and historical or contextual interpretations which suggest that the drafters of the Rome Statute desired restorative justice values. Instead I shall argue that judicial creativity[172] should advance a prudential or consequential interpretation which pays greater attention to the socioeconomic and political-cultural factors in the situation country. Evidence from the Kenyan Supreme Court's constitutional jurisprudence indicates that the African ethos can *legitimately* respond to reconcile ethnic protagonists of the post-2007 conflicts. Additionally, it is urged that to ensure victims' rights are safeguarded in the survivor society, reparations are necessary. Moreover I conclude that because judicial interpretation cannot *resolve* the vague provisions in the Rome Statute, and may even prove counterproductive, instead, domestic constitutional reform and Kenya's 2013 presidential election provided an acceptable political settlement.

0.8. Law as Interpretation

0.8.1. Key Terms and their Application

0.8.1.1. Key Terms

According to Lawrence Solum: "Judges interpret statutes when they attempt to disambiguate words and phrases that could have multiple senses."[173] For Gerard Conway: "The terms 'activism' and 'restraint' are frequently used in describing a judicial approach to interpretation. The term 'activism' having a sometimes pejorative connotation of excessive creative interpretation or interpretation that approximates legislation."[174] Conversely, " 'restraint' indicates the other end of the interpretive spectrum marked by minimalism, caution and a conserving approach to constitutional or legal meaning," while: "Deference…appears to be more typically used to indicate a reluctance to question policy arguments or evidence advanced by the executive on grounds of lack of judicial expertise."[175] As shown below, various scholars argue that – to resolve disputes in situations where no formal rule has been posited by the legislature – judges should make a

[171] Salvatore Zappalà, "Judicial Activism and Judicial Restraint," in Antonio Cassese (ed.) *The Oxford Companion to International Criminal Justice* (New York: Oxford University Press, 2009) 216-22 p 216.
[172] Joseph Powderly, "Distinguishing Creativity from Activism: International Criminal Law and the 'Legitimacy' of a Judicial Development of the Law" in Schabas, McDermott and Hayes (eds.) *The Ashgate Research Companion, supra* note 152 chapter 10.
[173] Lawrence B. Solum, "The Unity of Interpretation" (2010) *Boston University Law Review Rev.*, 90, 551-78 p 552.
[174] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012) p 17.
[175] *Ibid.*

moral judgment. To anticipate the legislature's original intent, some judges adopt *collaborative interpretation*. Dworkin's "law as integrity" requires that the purpose of morality demands that it should not be that of the judge, but that one should make a *conceptual interpretation* to satisfy the academic community which owns the concept. The current book however asserts that such conceptual interpretation is teleological. Instead, the ICC should adopt an *explanatory interpretation* which considers evidence or intuition to enhance the consequences of a decision on the addressees of the rule, so as to not merely evaluate but also to benefit the recipient Kenyan society.

0.8.1.2. Application of Terms

Conway infers that: "The meaning and context of legal interpretation is complicated by the fact that interpretation in the application of a legal norm may relate to a specific set of facts not explicitly envisaged by the authors of the texts in question, simply because it is not possible to predict every factual scenario to which laws of general applicability may in future be applied."[176] I shall classify the methods by which judges justify their decisions into three broad categories. These may be termed as, first, the descriptive or literal method. Second, the purposive or teleological method. Third, the contextual method. The third category which comprises three sub-varieties: the consequential, the historical or original interpretation and the first-order vs. second-order method, is importance to the "third way" notion.

0.8.2. Conceptual Justifications for Hard Cases

0.8.2.1. Within the Penumbra of the Rule

Dworkin accepts that "there are 'brute fact(s)' about the world that are not the product of 'interpretation' in the broad sense."[177] According to Solum, Dworkin argues that "interpretation is a very general human practice, and that legal interpretation, musical interpretation, moral reflection, and every human intellectual activity (aside from science) are instances of interpretation."[178] "You are interpreting me as you read this text. Historians interpret events and epochs, psychoanalysts dreams, sociologists and anthropologists societies and cultures, lawyers documents, critics poems, plays and pictures, priests and rabbis sacred texts,"[179] Dworkin says.

[176] *Ibid.* pp 19-20.
[177] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2011) cited in Solum, "Unity of Interpretation," *supra* note 173.
[178] Conway, *Limits of Legal Reasoning supra* note 174 p 12.
[179] Dworkin, *Hedgehogs*, *supra* note 177, cited in Solum, "Unity of Interpretation," *supra* note 173, p 558.

The idea of law as integrity was developed in Dworkin's later writings. "Law-as-integrity" requires judges "to adhere to the second-best moral theory in hard cases."[180] Interpretativism thus suggests a tendency to problematize legal reasoning and underestimates the role of precedent. Broader systematic questions must be conceptualized by abstraction in order to simply complex facts. It is necessary to move beyond the method of precedents familiar to common law into the less restricted realm of practical reason favourable to jurisprudence. A judge is then required to interpret the morality of the political system in which he practices. This is the "second-best" moral theory. This reference to concepts, according to Solum, is caused by "the instability of the core"[181] and adopts a "second best" solution to resolve hard cases.

Dworkin agrees with H.L.A. Hart[182] that there exist hard, as distinct from easy, cases. However, he disagrees that judges possess unfettered discretion. Rather, Dworkin postulates that hard cases have "one right answer" which depends on correct application of principles to resolve the *semantic* context or ambiguity in words as distinct from, the *implicative* sense or teleological purpose.[183] "Judicial practice does so, ideally, in a manner that best fits with the political morality reflected in the legal system"[184] by omniscient Judge Hercules. For Dworkin, "ethical individualism" conceived that in event of conflict between a rule advancing collective interests and one promoting individual rights, then "rights are trumps."

0.8.2.2. The Consequentialist Argument

Dworkin's "one right answer" thesis reflects a teleological concept which – in a liberal, homogeneous, developed society – would elevate use of criminal trials in vindication of victim's core human rights to physical bodily integrity, above collective rights to peace and stability. However, to Solum, "a consequentialist could argue that consequentialism is the correct comprehensive moral theory for a variety of reasons (using the method of reflective equilibrium, using arguments from metaethics and so forth)."[185] He concludes that Dworkin cannot answer this argument with evidence that the consequentialist view is inconsistent with

[180] *Ibid.* p 556.
[181] *Ibid.* p 555.
[182] H.L.A. Hart, "Positivism and the Separation of Law and Morals" (February, 1958) *Harvard Law Review*, 71, 4, 593-629 cited in Solum, "Unity of Interpretation," *supra* note 173 p 554.
[183] *Ibid.* p 561.
[184] *Ibid.* p 556.
[185] *Ibid.*

phenomenology of judging or the implicit commitments of legal practice."[186] Solum recognizes that "the notion of 'reflective equilibrium' (was) deployed by Rawls in *A Theory of Justice*."[187] The consequentialist may conclude that the development of preferences for individual rather than group rights by Western legal traditions, "perceptions and practices are moral mistakes."[188] Similarly, as argued above, Rawls's *Law of Peoples* asserts that the international legal system should not impose liberal, Universalist or cosmopolitan ideology on decent well-ordered peoples. Indeed, the current book shall argue that a "third way" of evaluating rules permits of valid consequentialist justification of preferring not merely preservation of peace and stability for current survivors, but also predicting and thus preventing potential harm to the physical bodily integrity of possible victims of likely future conflicts.

0.8.2.3. Evaluative Justifications in "Crazy Cases" where there is no Rule

As stated earlier, Dworkin describes the purpose of statutory interpretation in the abstract as follows: "the practice aims to make governance of the pertinent community fairer, wiser and more just."[189] However he distinguishes between three forms of interpretation. *One*. "Collaborative interpretation...assumes that the object of interpretation has an author who had a project the interpreter tries to advance."[190] In collaborative interpretation the judge considers himself merely as a writer of a chain novel which must be continued into time. Thus, the judge is in collaboration with the author of the legislation. Hence where there is a gap in the law, the judge must interpret the practice in which he is involved and fill the gap by constructing a new rule which would best fit with the pattern of normative framework of that legal system. It is argued that the collaborative approach is not useful for justifying the interpretation of international criminal law in *the Kenya cases* since – apart from the authors of the Rome Statute – the ICC lacks a sufficiently long institutional memory for the current judges to collaborate with. However, there are two other forms of interpretation. This book shall argue that the role of the ICC in interpreting the Rome Statute should not be literal – since there are gaps in the law. Besides, because positivism is limited to recognizing rights as valid only upon enactment, therefore it is only a useful strategy to identify conflicting provisions and attempting to resolve the conflict by clarification. However, legal positivism is not useful to critically evaluate gaps in the legislation or recommend alternative prescriptions. Positivists lack capacity to collect empirical data or conduct scientific

[186] *Ibid.*
[187] *Ibid.* p 560.
[188] *Ibid.* p 557.
[189] *Ibid.* p 559.
[190] *Ibid.* p 560.

experiments to justify one interpretation over another. Neither is the teleological approach particularly useful under international law. *Two*: "Conceptual interpretation, which assumes 'that the interpreter seeks the meaning of a concept that is created and recreated not by single authors but by the community whose concept it is.' "[191] i.e. international criminal law scholars. *Three*, and of significance to this book: "Explanatory interpretation which assumes that 'an event has some particular significance for the audience the interpreter addresses.' "[192]

For Conway, the difficulty with so-called "universalist" notions of human rights is that they are accused of imposing "politically correct" theories of human nature or morality. Yet the international relations system values a multi-polar world. Such teleological justifications of interpreting the Rome Statute, appear as illegitimate. The *conceptual interpretation* argues that a correct interpretation of the Rome Statute should interpret concepts that are created and recreated by the community of international criminal law scholars whose concept international criminal law is. This is futile because – I argue that – following Rawls's *Law of Peoples*, the community of international law scholars are divided about the application of rules in the Rome Statute to *the Kenya cases*. The book instead argues that, in order to reach a correct interpretation of the Rome Statute, the ICC should construct an abstract normative framework by which to construe the international criminal justice system and the practice of international criminal law. The Rome Statute was reached through political compromise and self interests of the diplomats who attended the 1998 Rome Conference. *Collaborative interpretation* with the drafters of the Rome Statute is futile since the original or historical intentions – whether subjective or objective – are invariably unascertainable, ambiguous and vague. Significantly, most African countries – represented by the AU, and particularly East African countries with circumstances similar to Kenya – discouraged the ICC's use of criminal trials in response to Kenya's post-2007 conflicts. Ultimately, the ICC should interpret the Statute using *explanatory interpretation* which seeks to address a single limited audience i.e. decent, well-ordered, hierarchical peoples where the alleged international crime occurred. I urge that the ICC *should* re-interpret its complementary jurisdiction by giving more weight or respect to the successful efficacy of alternative domestic processes – particularly structural reforms – which may serve as an adequate response to the post-2007 conflicts. At one extreme, both Leila Sadat's[193] and Charles Jalloh's[194] early

[191] *Ibid.*
[192] *Ibid.*
[193] Leila Nadya Sadat, "Crimes Against Humanity in the Modern Age" (April, 2013) *American Journal of International Law,* 107, 334-77 p 335.
[194] Charles Chernor Jalloh, "What Makes a Crime Against Humanity a Crime Against Humanity" (2013) *American University International Law Review*, Vol. 28 (no. 2) 381-441.

interpretations justify "universalist" teleological goals. Ohlin's interpretation tolerates the combined conceptual and evaluative interpretations of this book which justifies "culturally relative" consequentialist approaches.

0.9. Rationalizing the ICC's Conflicting Jurisprudence in *the Kenya cases*

In contrast to Sadat's endorsement of the ICC Pre-Trial Chamber majority's purposive *Kenya cases* interpretation, Ohlin[195] accuses them of effectively reviving common law's discredited Joint Criminal Enterprise (JCE) doctrine which had informed the scope of crimes against humanity at the United Nations *ad hoc* International Criminal Tribunal on the Former Yugoslavia established in 1993, and International Criminal Tribunal on Rwanda, 1994. Ohlin instead praises dissenting Judge Hans-Peter Kaul's recognition of the limited scope of the Rome Statute's definition of organizational liability. Thus, for Ohlin, Kaul's interpretation of the international substantive crime of "state-like organizations" is correct. Because it is stretching legal interpretation to apply the term "state-like" organization to the so-called "Network" in *the Ruto case* or the Mungiki in *the Kenyatta case*, therefore Judge Kaul declined to issue authorization warrants or even confirm charges against any Kenyan suspect.[196, 197]

Sadat[198] supports the ICC Pre-Trial Chamber's majority decision in the confirmation of charges judgments in both *the Kenya cases* which she justifies as a purposive interpretation of the Rome Statute aimed at preventing impunity and punishing the perpetrators of the worst crimes known to mankind. She rejects Judge Kaul's historical and contextual dissenting decision since – in departure from the drafter's intentions – it represents a restrictive interpretation of the Statute. That appraisal is made by Sadat's interpretation of Judge Kaul's dissenting decision in the Kenyan conformation-of-charges cases, as being too "restrictive," by not only relying on the "Nuremberg precedent" as his historical context in which individual criminal responsibility evolved, but also adopting a textual approach which is unsuitable for constitutive international organizations such as the Rome Statute which establishes the ICC.

According to Ohlin's organizational liability theory, in *the Kenya cases* the charges should have been declined by the Pre-Trial Chamber, not on account of

[195] Jens David Ohlin, "Organizational Criminality," in Elies Van Sliedregt (ed.) *Pluralism in International Criminal Law* (Oxford University Press, Forthcoming) 107-127. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2153818<accessed 24th May 2014>
[196] *Ruto Pre-Trial Chamber,* Confirmation of Charges decision, 23rd January 2012, dissenting Judge Hans-Peter Kaul.
[197] *Kenyatta Pre-Trial Chamber,* Confirmation of Charges decision, 23rd January 2012, dissenting Judge Hans-Peter Kaul.
[198] Sadat, "Crimes Against Humanity," *supra* note 193 p 335.

the ICC prosecutor's failure to investigate exculpatory evidence, but because the Rome Statute does not attribute individual criminal responsibility for informal group violence. Analyzing the Warrants Authorization Decisions in *the Kenya cases*,[199, 200] Jalloh agrees that the Rome Statute fails to explicitly criminalize informal organizations.[201] Moreover, judicial activism of recognizing the unknown crime of "indirect co-perpetrator" – by the majority judges in *the Kenya cases* – has exposed the ICC to a legitimacy crisis. Indeed before Trial Judge Christine Van Den Wyngaert pulled out of *the Kenyatta Trial*, she concurred that the prosecution's investigations were "shoddy," "tardy" and "negligent."[202] To avoid the spectre of judicial activism, Jalloh recommends an urgent amendment to the Rome Statute. Ohlin is defensive of Judge Kaul's dissent since – the majority's interpretation of both "the Network" in *the Ruto case* and Mungiki in the *Kenyatta case* as being "state-like" organizations, with a policy to perpetrate crimes against humanity – is inaccurate. Rather Judge Kaul held that the existence of such militia groups is only temporary, can be contained by the state and should not exhaust ICC's scarce resources. Moreover, Ohlin agrees that no general principle of indirect co-perpetratorship is created under the article 25 provision of the Rome Statute. There is no explicit principle which specifically criminalizes horizontal actions by senior members of a group – who know about or even share a common intention with other senior members of such group, notwithstanding that – in reality, such other senior group member possesses vertical influence over subordinates who may be ordered to commit acts of atrocity. Ohlin instead accuses the Pre-Trial Chamber majority judges, in the confirmation of charges judgments, of inventing the indirect co-perpetratorship notion which serves the purpose of the common law "joint criminal enterprise" notion which was deployed to bad effect by the ICTY and ICTR. According to Ohlin and other commentators, drafters of the ICC rejected the JCE doctrine because – like common law, whether conspiracy or vicarious liability – so too JCE generates the risk of "guilt by association," which seriously discredited the Nuremberg trials. Unlike Jalloh who insists on an amendment by the Assembly of State Parties, Ohlin instead calls on the ICC Appeals Chamber to clarify the scope of organizational liability and particularly

[199] Judge Kaul Dissent in the "Investigation into the Situation in the Republic of Kenya" No.ICC-01/09. 1/83. 31st March 2010. *Ruto case* Article 15 Decision http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf<accessed 7th July 2014> Warrants Authorization judgment 31st March 2011, majority judges Ekaterina Trendafilova and Cuno Tarfusser.

[200] *Kenyatta Pre-Trial Chamber,* Warrants Authorization 31st March 2011, Ekaterina Trendafilova and Cuno Tarfusser.

[201] Jalloh, "What Makes a Crime" *supra* note 194.

[202] The Concurring Opinion of Judge Christine Van den Wyngaert "Decision on Defence Application Pursuant to Article 64(4) and Related Requests" 26th April 2013 http://jurist.org/paperchase/138245541-International-Criminal-Court-Annex-2-Decision-on-Defence-Application-Pursuant-to-Article-64-4-and-Related-Requests.pdf<accessed 10th July 2014>

to require proof of joint intention between a defendant and such other superior co-perpetrator who vertically commands a militia organization to perpetrate a widespread or systematic attack on a civilian population.

On his part, as noted in the opening section of this introductory chapter, Ocampo's assessment attributes Kenya's democratic and peaceful 2013 election to the confirmation of charges indictments. However Ocampo does not interpret the meaning of political communication of the voting outcome from the Kenyan 2013 election of Hague suspects by the Kenyan population at the first round of voting. What meaning or value, if any, should be accorded to the voice of the survivor community? According to Ohlin's analysis, the ICC Pre-Trial Chamber's majority decision in *the Kenya cases* justified their confirmation of the charges using an expansive, common law or JCE notion of enterprise liability. Conversely, Sadat's description accuses Judge Kaul's dissent of adopting a restrictive, historical or contextual approach to hold that the ICC lacks jurisdiction and she commends the majority ICC Pre-Trial Chamber judges for using a teleological, purposive interpretation. This book aims to contribute to this interpretive debate not only by evaluating the ICC Pre-Trial Chamber majority's interpretation of civil law's control theory of perpetration in *the Kenya cases*, but moreso by introducing elements of Osiel's social discursive approach[203] in his earlier writings as a "third way" based on consequentialism as distinct from his recent writings which interpret Roxin's control theory of perpetration. Ultimately, it is preferable for the Court's Appeals Chamber to fill in the gaps in the Rome Statute, rather than permit different Chambers and judges to distort the individual criminal responsibility definition according to their ideological persuasions. Other conflicting interpretations of ICC Chambers range from, on one hand, the Appeals Chamber's dismissal of the Kenya government's challenge against jurisdiction,[204] the Pre-Trial Chamber's majority Warrants Authorization judgments,[205] the Trial Chamber's cavalier attitude towards the prosecutor's pre-confirmation negligent investigations,[206] as well as

[203] Osiel, *Mass Atrocity, Collective Memory, supra* note 164; as distinct from Mark Osiel, *Making Sense of Mass Atrocity* (New York: Cambridge University Press, 2009).

[204] *Ruto Appeals Chamber*, *supra* note 226.

[205] *Ruto Pre-Trial Chamber supra* note 232.

[206] *Kenyatta Trial Chamber,* Majority Judges Kuniko Ozaki and Chile Eboe-Osuji, *The Situation in the Republic of Kenya In the Case of The Prosecutor v Uhuru Muigai Kenyatta the Kenyatta Case*. ICC-01/09-02/11, Public Redacted Version of "Defence Application Pursuant to Article 64(4) for an Order to Refer Back to Pre-Trial Chamber II or a Judge of the Pre Trial Division the Preliminary Issue of the Validity of the Decision on the Confirmation of Charges or for an Order Striking Out New Facts Alleged in the Prosecution's Pre-Trial Brief and Request for an Extension of the Page Limit Pursuant to Regulation 37(2)," 7th February 2013; (hereafter Decision on Defence Application pursuant to Article 64(4) and Related Requests 26th April 2013). http://www.icc-cpi.int/iccdocs/doc/doc1585619.pdf<accessed 8th July 2014> See also Judge Wyngaert concurring opinion *supra* note 202.

its orders compelling the Kenya government to co-operate with the prosecutor's post-confirmation investigations.[207, 208] Judicial activism in these examples emphasizes the ICC's mandate to "protect human values." On the other hand, other scholars instead support the dissenting and concurring opinions by minority judges in each of these Chambers. As stated earlier, one Appeals Chamber minority judge Anita Ušacka rejected the ICC's complementarity jurisdiction since, in her opinion, investigations in Kenya were "active."[209] The Kenyatta Trial Chamber's Judge Christine Van den Wyngaert criticized the prosecutor's "shoddy," "tardy" and "negligent" investigations,[210] while a Ruto Trial Chamber Judge Olga Herrera Carbuccia, dissented against the majority decision ordering the Kenya government to co-operate with the prosecutor's post-confirmation investigations.[211] Judicial restraint, in these examples, informed a literal interpretation which also expressed the historical context of the Rome Statute.

0.10. Neither Quantitative nor Qualitative Explanations

Various shortcomings are inevitable in any criminal law research work right from the outset. These inadequacies include both theoretical and methodological prejudices. From a theoretical perspective, I reject both the state sovereignty as well as the Universalist standpoints as explanatory of the international legal system. Instead a value judgment is made to conjecture that Rawls's *Law of Peoples* which extends his "overlapping consensus" developed under political liberalism,[212] provides an explanatory normative framework by which to interpret international institutions.

[207] *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, CC-01:09-01/11 (Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation) 17th April 2014 http://www.icc-cpi.int/iccdocs/doc/doc1771401.pdf<accessed 12th July 2014> (hereafter *Ruto Trial Chamber,* Order Compelling Kenya Government Cooperation, *majority* judges Chile Eboe-Osuji and Robert Fremr).

[208] *Kenyatta Trial Chamber*, Order Compelling Kenya Government to Co-Operate with Prosecutor by Producing Records, unanimous judges Kuniko Ozaki, Robert Fremr and Geoffrey Henderson.

[209] *Ruto Appeals Chamber*, *supra* note 146.

[210] *Kenyatta Trial Chamber supra* note 197.

[211] Dissenting Opinion of Judge Herrera Carbuccia on the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/chambers/tcVa/Pages/1274.aspx<accessed 15th July 2014>

[212] John Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1993).

Shortcomings which emerge from a methodological perspective,[213] are those that afflict legal reasoning as distinguished from the scientific method which is used in hard sciences, such as mathematics, or physics or even life sciences, like chemistry, biochemistry and biology or applied to medicine. The empirical method of experiment, observation and deduction is useful for analyzing physical data. Neither does the book utilize the quantitative methods preferred by Olsen, Leigh and Reiter[214] as does Louise Mallinder.[215] Nor does it rely on sociological qualitative research like Sikkink's "justice cascade."

Consider law as literature. "Linguistics and the philosophy of language provide the theoretical structure of the science of interpretation." Consequently:

> The truth or falsity of particular interpretations is a function of the correct theory of linguistic meaning, linguistic facts about patterns of usage that establish conventional meanings and regularities of syntax, and grammar and the particular facts that provide the content and context of a particular utterance or writing.[216]

Therefore:

> The fact that interpretation is 'scientific' in this sense does not imply that we can be certain about the meaning of particular utterances, nor does it imply that particular interpretations are not causally influenced by the values, purposes, or ideologies of the human beings who do the interpreting.[217]

Instead:

> The claim is simply that interpretations (or assertions about interpretations) are truth apt (they can be true or false), and that their truth or falsity (as opposed to their acceptance or effect) is determined by facts about the world).

The book is careful not adopt a criminal advocacy approach – whether in favour of or against any party – to Kenya's Hague trials. It is sensitive to the plight of victims who have suffered catastrophic harm during the post-2007 conflicts and continue to suffer from post-traumatic stress disorders. Nonetheless, citizens must share the value of equal justice. Justice does not entail violating the rights of suspects to appease victims. Nor should suspects suffer scapegoating merely

[213] Rob Watts, Judith Bessant and Richard Hil, *International Criminology: A Critical Introduction London* (New York: Routledge: Taylor & Francis Group, 2008).

[214] Olsen, Leigh and Reiter, *Transitional Justice, supra* note 29.

[215] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008); See also Jon Elster, *Closing the Books: Transitional Justice in a Historical Perspective* (UK: Cambridge University Press, 2004).

[216] Solum, "Unity of Interpretation," *supra* note 173 p 571.

[217] *Ibid.* p 572.

to calm the anxieties or collective guilt experienced by bystanders. Objective evidentiary analysis and interpretation of rules cannot be driven by emotion. Instead, the book prefers an approach of criminal law scholarship which attempts to consider and compare the merits and demerits of the normative frameworks advanced by competing international criminal law theories. Secondary literature in the form of academic articles or books written by international criminal law scholars as well as from other disciplines such as international law, criminal law, constitutional and administrative law or even jurisprudence provide useful beacons which guide the arguments made by this book. Unlike wider philosophical reasoning which is based on faith or acceptance of assumptions of a particular tradition – whether natural law, positivist or sociological – legal reasoning validates norms according to the authoritativeness of their sources. In constructing an authoritative normative framework it is necessary to venture beyond a textual or literal approach entailed by positivist legal analysis of primary and secondary documentary sources and to undertake constructivism of social facts to supplement the ambiguity, ambivalence or gaps revealed by the ICC and domestic authorities in interpreting the Kenya situation under the Rome Statute. Significantly, the juridical evidence of the efficacy of Kenya's constitutional reforms is introduced by interpretation of the Kenyan Supreme Court's judgment dismissing the 2013 presidential election petition.

0.11. Compensate or Co-operate

Judging – in the international community – is more complex than domestic judging. Not only do international criminal judges join a practice which is relatively young. But also the equality of individuals is subordinated to the equality of peoples. The international criminal justice system principally comprising the Rome Statute, draws almost exclusively from the common law and civil law traditions – to the ostensible exclusion of other major legal traditions. The marginalized practices include the Islamic, Hindu, Talmudic, Oriental and Chthonic or African indigenous law.[218] The problem with Western criminal trials is that phenomena are reduced to simple binary outcomes – of guilt and innocence – between victims and offenders. Yet as Mbeki and Mamdani explain, perpetrators of ethnic conflicts have political constituencies and therefore require complex solutions. The third variable in complex cases demands solutions which additionally satisfy the survivor society. The final

[218] H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn.) (Oxford: Oxford University Press, 2014).

section of chapter six of the book shall extrapolate from precedents of the European Court of Human Rights on judicial activism.[219]

While the provisions under the Rome Statute and its Rules of Evidence and Procedure provide pre-interpretive data, the principles of *jus cogens* (customary international law) assist in legal interpretation. Beyond that, ICC judges are tempted to engage in statutory construction by way of judicial activism. They either attempt to compare alternative consequences which may result from one decision or another; or to decipher the original intent of the drafters of the Statute; or to reason from first principles. I argue that the best evidence of consequences of using criminal trials in response to an election dispute in the Kenya post-2007 conflicts can be ascertained from the Kenya Supreme Court's reasoning at the 2013 presidential election petition. The explanatory interpretative methodology adopted by this book shall undertake a comparative analysis of the decision emerging from the Kenyan Supreme Court dismissing the election petition in the celebrated case of *Raila Odinga and 2 others v Independent Electoral and Boundaries Commission and 3 others*[220] and various ICC dissentient decisions in *the Kenya cases*. The Kenyan Supreme Court's main reason for dismissal of the petitioners' claim was hinged on the technical constitutional rule which excluded illegally acquired evidence from consideration. Decisively, the Kenyan Supreme Court considered the consequences of permitting the fragile state to risk occasioning a vacuum in the chief executive's office during the period which a comprehensive dispute resolution process would have taken. The Supreme Court judges considered that the social costs of renewing ethnic conflicts outweighed any potential benefits of having a drawn out election petition. Hence the six Supreme Court judges unanimously interpreted the ambiguity in the Kenyan constitution as strictly limiting the time within which to conclude the petition process. It shall be argued that the relevant morality, regarding whether or not to prosecute the Hague-bound suspects – in a Rawlsian international system – should be the political morality of the affected community, i.e. the majority of Kenyan people.

[219] Keir Starmer, Michelle Strange and Quincy Whitaker, Crimin*al Justice, Police Powers and Human Rights* (Blackstone's Human Rights Series) (London: Blackstone, 2001).

[220] Supreme Court of Kenya Judgment, dated 16th April 2013 in Petition no. 5 of 2013 Supreme Court at Nairobi filed by Raila Odinga on 16th March 2013 against the Independent Electoral and Boundaries Commission, Isaac Hassan, Uhuru Kenyatta and William Ruto was considered the main petition. All others were consolidated under it. Supreme Court judges W.M. Mutunga (Chief Justice and President of the Supreme Court), P.K. Tunoi, M.K. Ibrahim, J.B. Ojwang, S.C. Wanjala and S.N. Ndung'u SC JJ. (A third petition which sought to increase Kenyatta's victory margin by excluding spoilt ballots is not relevant to the book and hence not considered).

Applying a common law standard to evaluate the Kenyan Director of Public Prosecution's discretion not to prosecute "the Hague six," I argue that the DPP may legitimately decline to prosecute, provided he can give reasons which show that his decision is not unfair. In 2013, some victims sued the Kenyan state to vindicate their rights. The book shall however submit that under common law "opportunity principle" the state cannot be compelled to prosecute. At best, regional human rights law emerging from the European Court of Human Rights suggests that non-prosecution of perpetrators of post-election crimes constitutes an unfair prosecution policy. While the victims may not compel domestic prosecution, they may claim compensation for their constitutional right to protection from torture by the state or by other private actors. Alternatively, victims may approach the Kenyan constitutional court to claim compensation for breach of the state's affirmative duty to safeguard their privacy rights. Conversely, a European civil law standard compels compensation for non-prosecution so as to restore the perception of equality, and remove the perception of impunity among the victim community. In the *Kenya cases*, the majority ICC Pre-Trial, Trial and Appeals judges upheld a civil law standard under an "legality principle" to uphold the OTP's discretion to not to decide *not* to prosecute.

0.12. Between Internal and External Shaming

The book concludes, first, that the Rome Statute simultaneously embraces a multiplicity of conflicting punishment goals of retribution and deterrence. However, by making the "millions of children, women and men (who) have been victims of unimaginable atrocities"[221] the centre of its purpose, it significantly shifts criminal law from focusing exclusively on the offender. Neither does it focus on the victim. Rather it shifts focus onto the bystanders whose interest is in social stability of the survivor society.

Election is a conflict reconciliation tool.[222] The significant aspect is not that President Kenyatta and Deputy President Ruto's Jubilee Alliance won the 2013 presidential election, but that the IEBC conducted the process democratically and peacefully. And that the Supreme Court handed down a judgment which the population accepted. These features evince a functioning rule of law. Even assuming that a united Jubilee coalition had lost to the Orange Democratic Movement (ODM) in a peaceful, democratic vote, it is unclear whether or not the legitimacy of the ICC prosecutions would nonetheless have been seriously undermined. This is so given the fact that co-operation with The Hague prosecutions by an Odinga regime may have threatened to reignite domestic

[221] Preamble, Rome Statute, *supra* note 14.
[222] Liban, "Kenyan Elections," *post* note 309.

political tensions and increase likelihood of post-2013 human rights violations. Such consequential social and historical utilitarian factors are essential considerations for determining whether prosecutions are not in the "interests of justice." When the post-2007 conflicts erupted, Kenya was – a low-income country, with an ethnically-heterogeneous population – undergoing transition to a new constitution. Yet, it is only in the context of a sovereign state that criminality can occur. The use of criminal trials should thus – either await state failure or the resolution of the transition to a stable survivor society before selecting suspects for prosecution – so as to be able to legitimately judge suspects in relation to the ethos and values of the society in question.

Nowhere in the Rome Statute is the term "victim" clearly defined. Indeed, many victims are deceased, while others lack sufficient evidence, knowledge or capacity to successfully prosecute their cases. Hence I commend Ocampo's earlier interpretation of the ICC's mandate as establishing a *positive* complementarity principle to facilitate the state's efforts to prosecute. Suppose, on one hand, the state refrains from prosecuting – in legitimate exercise of a common law "opportunity principle" – based on the domestic public's "interests of justice." While, on the other hand, the OTP applies a civil law "legality principle" to prosecute in consideration of sufficient evidence and the victim dissatisfaction criterion. Then on the same evidence, the ICC does not fulfill its purpose of acting "complementary to national criminal jurisdictions" but appears to *supplant* them. Most problematic, in the ICC Appeals Chamber's decision admitting *the Kenya cases* in September 2011, it ignored Kenyan non-judicial processes. Thus neither the constitutional reform nor TJRC made a conclusive impact in the prosecutorial calculus. Instead the ICC's "same person, same conduct" test reflected an activist value judgment which was not necessarily intended by the drafters of the Rome Statute.

From a restorative justice perspective, "community service is unpaid labour done by the offender for the benefit of a community or its institutions, meant as a (symbolic) compensation for the harm caused by the offence to that community."[223] In this respect in the Kenyan post-conflict situation, the 2008 National Accord mediated by the African Union provides only a partial response to the post-2007 conflicts, followed by the Kibaki-Odinga Government of National Unity's support for a new constitution and presidential elections. The restorative justice component should also entail victim reparations. *Travail d'intérêt general* or "(c)ommunity service is advanced as the prototype of a compensatory or reparative gesture towards the community…as a possible

[223] Lode Walgrave, "Community Service as a Cornerstone of a Systemic Restorative Response to (Juvenile) Crime," in Gordon Bazemore and Lode Walgrave (eds.) *Repairing the Harm Done by Youth Crime* (Monsey, NJ: Criminal Justice Press, 1999).

alternative to victim offender mediation."[224] Hence one lesson learned from this study is that for post-conflict victims to realize their right to reparations, under the Rome Statute, they must not only testify before the ICC at a full trial, but also the defendant must be convicted. Thus at international level – reparation from the Victim's Reparation Fund, is contingent upon successful prosecution – which is predicated upon a victim's co-operation with the OTP. Furthermore, being an ICC witness subjects a victim to isolation from one's family under a witness protection program. Yet there is little guarantee for the safety of some witnesses or their relatives. Neither are the protective conditions of a witness necessarily hospitable, lest the defence alleges bribery. Conversely, at domestic level, a victim may receive reparation from the state, without necessarily having to undergo the rigours of secondary victimization, which are entailed by testifying as a witness at a public trial (e.g. compensation of internally displaced persons). Having observed the social realities emerging in the post-2007 scenario of *the Kenya cases*, as well as the alleged (non)co-operation by the Kenya government with the ICC prosecutor, the ICC Trial Chamber was confronted with the reality of the 2013 election of two Hague suspects as president and deputy president. This created a dilemma for some potential witnesses who either died, disappeared or recanted their evidence in *the Kenya cases* upon what the new ICC Chief Prosecutor Fatou Bensouda termed unprecedented interference, "bribery" or intimidation. The dilemma of whether or how to compel compliance with Rome Statute obligations and enforce ICC orders exacerbates the crisis of legitimacy facing the ICC in *the Kenya cases*. Yet under common law, a prosecutor has the discretion not to prosecute any crime in the "public interest." Moreover, such public interest may incorporate the need to nurture fragile democracy and/or avert potential human rights violations. In these extraordinary circumstances, notwithstanding termination or withdrawal of the cases, rectificatory justice demands compensation – by the state – of victims to reintegrate them into the survivor society.

0.13. Conclusion

This introductory chapter has attempted an outline of the entire book. The hypothesis advanced is well illustrated by the Mbeki-Mamdani thesis. Orthodox conflicts involve one state against another. By branding the loser as an international criminal as happened at Nuremberg following World War II, the winner may impose victor's justice. Simultaneously, the Allies naturally benefitted from *de facto* amnesties for their own mass atrocities. Furthermore, Holocaust survivors required a separate territory, Israel, and – above all else – binary notions elevated victim's interests. However, judicial processes cannot

[224] Robert Cario, *Justice Restaurative: Principles et Promisses* (2nd ed.) (Paris: L'Hartmann, 2010 [2005]).

resolve modern civil wars. This is because protagonists have constituencies and each faction has perpetrated human wrongs. Moreover, offenders and perpetrators must dwell together with bystanders in the survivor society. The South African power-sharing model exemplifies such a "broad based" agreement. However, such minimalism may be too extreme. An optimum solution lies in the sequence with which the use of criminal trials in response to post-conflict situations, may be justifiable. Six research questions were framed which subsequent chapters shall address.

Chapter one shows how Kenya's post-2007 conflicts were ended through a settlement, with no party having sufficient power to enforce victor's justice. Hence a political solution appeared preferable to a judicial one. What is meant by the "interests of justice" criterion? Chapter two argues that, at a procedural level, it was unclear whether or not the domestic processes – in response to atrocious crimes allegedly committed during the post-2007 conflicts – attained the necessary threshold to oust the ICC's complementary jurisdiction. The third chapter focuses on the harm caused during the post-2007 conflicts. It suggests that the degree of harm was not sufficiently widespread, and neither were the entities which perpetrated it, "state-like" organizations. It was unclear whether or not such informal militia groups constituted "state-like" organizations so as to warrant the international community's intervention. Chapter four contends that the ICC prosecutor neglected or otherwise conducted substandard pre-confirmation of charges investigations. Thus it became necessary to request for additional time to conduct post-confirmation investigations. However, as shown in the fifth chapter, domestic popularity of non-criminal responses to the post-2007 conflicts was expressed through the 2013 presidential election victory by the "coalition-of-the-accused." Thus for the first time in the history of criminal proceedings, the Assembly of States Parties amended the Rome Statute to excuse persons holding "extraordinary public positions" from physical court attendance at trial. Chapter six analyzes how it also became necessary for the ICC to compel the Kenyan government to co-operate with the prosecutor in *the Kenyatta case* to supply requested documents and in *the Ruto case* to compel non-voluntary witnesses' attendance.

Rawls's *Law of Peoples* was selected as the theoretical framework for the book. It is a flexible model which – rather than prescribe liberal values for all societies – instead tolerates decent, hierarchical, nonliberal peoples. This is because, in a multipolar world, self-determination of developing countries is valuable. This introductory chapter reviewed the literature of three dominant perspectives deployed by scholars of international relations. These are (1) the state sovereignty, dualist, positivist, realist and neorealist model; (2) the Universalist, neoliberal institutionalist and human rights/cosmopolitan rights model; and (3)

communitarian, collectivist, cosmopolitan pluralism and the Domestic Tort Law model. This chapter was justified since the concept of international criminality has evolved over time as has the complementarity doctrine. Hence it is useful to critically explore which specific variety is applied by the ICC in *the Kenya cases*. The hypothesis of this introductory chapter was that first, in *the Kenya cases,* the ICC appeared to overreach its complementary role and began assuming a primacy one. Second, the facts of *the Kenya cases* appear to comprise a crazy case. It is illegitimate – from the domestic perspective – for the ICC to justify continuation of *the Kenya cases* following the election of key suspects as Kenya's president and deputy president at the 2013 election.

Descriptive terminologies of legal reasoning range from judicial activism, at one extreme, to judicial restraint at the other. Judges who defer to the executive – citing lack of capacity to investigate – are closer to exercising judicial restraint. A range of three broad typologies distinguish aspects of interpretative arguments into literal or ordinary; teleological or purposive; and evaluative or normative, which concerns statutory construction: consequentialist, historical or originalist and first order vs. second order. Distinguishing between easy and hard cases, the chapter adopted Hart's distinction between the core and penumbra of the rule. In Dworkin's interpretation, easy cases are resolved by selecting the rule which best fits the facts. Precedents describe how a rule has been applied by previous judges to similar facts. Hard cases have "one right answer." By invoking principles to supplement grey areas, the judge exercises discretion. In a given context, ambiguity can be resolved through interpretation of the meaning of words. This introductory chapter summarized the methodology of law as interpretation. Three approaches were distinguished, collaborative, conceptual and explanatory. Judges invoke *collaborative interpretation* to engage in an enterprise of law-making together with the Assembly of States Parties. *Conceptual interpretation* communicates with the community which owns the Statute, i.e. international criminal law scholars, while *explanatory interpretation* communicates to a specific audience, Kenyans, or wider, Africans. This introductory chapter concluded that the book shall attempt to address the ICC judges by advising them as to how they *should have* interpreted the Rome Statute provisions as well as applied its rules to the facts of *the Kenya cases*. Various ICC Chamber judges have issued divergent judgments in numerous opinions. For example, the idea of whether informal groups constitute "state-like" organizations whose acts are within the jurisdiction of the ICC under the Rome Statute, is problematic. The majority ICC Pre-Trial judges (including the Trial and Appeal Chamber where necessary) have clearly displayed activism in the early jurisprudence of *the Kenya cases*. Conversely, the minority judges exercise restraint. This introduction concedes that neither quantitative surveys nor qualitative interviews shall be used. No emotion be expressed – whether in

support of victims or the prosecutor. Nor will a defensive posture be adopted aimed at exonerating suspects. The suspects are presumed innocent, until or unless otherwise proven. Thus – in reference to the suspects in all interpretations of the ICC judgments in reference to the witness testimonies or the Chamber's decisions – the prefix "alleged" is contained. The tone of the book is derived from the perspective of a bystander who is part of the Kenyan survivor society. The originality of the book is acclaimed first, by an *explanatory justification* of selected ICC decisions. Second, from drawing lessons for the ICC from the emerging legal facts created by the Kenyan Supreme Court's decision at Kenya's 2013 presidential election. The "fidelity to the law" and consequentialist or prudential techniques in that domestic judgment, strongly indicate that Kenyan courts are bound to adopt a narrow or restrained approach – as opposed to an expansivist one – in interpreting the constitutionality of international criminal law – including the application of the Kenyan International Crimes Act. Many witnesses have either withdrawn their evidence or refused to testify in *the Kenya cases*. Others have either disappeared or died. The ICC prosecutor suggests that imminent collapse of the *Kenya cases* is due to interference by way of intimidation and bribery. Whether or not Kenyan law requires the state to facilitate attendance of non-voluntary wittiness before the ICC as part of co-operation obligations, is controversial. What became increasingly apparent is the importance of taking survivors, particularly witnesses, seriously.

PART ONE

KENYA'S TRANSITIONAL JUSTICE AND CRIMES AGAINST HUMANITY UNDER THE ROME STATUTE

CHAPTER ONE

NEGOTIATING KENYA'S 2008 NATIONAL ACCORD

1.1. The Culture of Resistance

1.1.1. Pre-Colonial and Colonial Legacy

Before Kenya attained independence in 1963 "(t)he Kikuyu lost significant landholdings to the British colonists in the early 20th century, and as a result many migrated to white owned settler farms in the Rift Valley and elsewhere as traders, also leading the way in adopting modern education and market agriculture."[225] By:

> 2008, Kenya's population was approximately 38 million composed of 42 African ethnic groups and significant minorities of Arab, South Asian, and European descent. The Kikuyu (with closely related Embu and Meru), whose traditional homeland is in Central and Eastern provinces, constitute the largest of the groups but only 22 percent of the total population. The Luhya located mainly in Western Province follow with 14 percent; the Luo, who reside in Nyanza Province comprise 13 percent; and the Kalenjin living mostly in the Rift Valley, account for 12 percent.[226]

From the perspective of the liberal state, Africa's pre-colonial ethnic geography can be seen as lacking the protection of basic human rights. According to John Lonsdale:

> In the 19th century the area that became 'Kenya' was stateless. Its peoples' civility, their ethnicity, was shaped by their subsistence: farming or herding, or some mixture of both. Such ethnic groups were not teams, not 'tribes.' Loyalties and rivalries were smaller than that – patriarchal lineages, marriage alliances, age-groups, trading partnerships, client-clusters…

Furthermore:

> Ethnic economies indeed were as often complementary as competitive, with different specialisms. But such inter-ethnicity – which was not without its frictions – was facilitated by the absence of any central power that might

[225] Michael Chege, "Kenya: Back from the Brink?" In Larry Diamond and Marc F. Plattner (eds.) *Democratization in Africa: Progress and Retreat* (Boulder, CO: Lynne Rienner Publishers, 2008) 135-152.
[226] *Ibid.* (see map of Kenya, Appendix 1).

> arrange groups in hierarchical relations. Sustained 'tribal rivalry' could not exist under such decentralised, underpopulated, conditions.[227]

Historians and geographers investigate the migration patterns and conflicts among pastoralists ranging from Hamites to Nilotic peoples in search of pastures or natural resources which apparently occurred among early inhabitants of the East African geographical location. For example, the Luo descended down the Nile[228] and encountered Bantus around Lake Victoria;[229] or the Kikuyu displacement of the Ndorobo at Kiambu, etc. Importantly: "It was European rivalry that imported that modern Leviathan, the state, in the late 19th century. It was, like all states, assembled by force and driven by self-interest. Its British officials allied with African leaders too weak to be rivals."[230] The establishment of the common law under colonial enterprise introduced respect for human rights of the White settlers only. Furthermore, the centralized state was undemocratic. Not only did jurisdiction of the colonial Supreme Court exclude African people the majority native population from electing representatives, but also Kenya's 1897 Judicature Ordinance expressly rejected African criminal law. In this regard, Y.P. Ghai and J.P.W.B. McAuslan attribute Kenya's independence struggles to rebellion against illiberal and discriminatory application of the rule of force which led, *inter alia*, to clamouring for land, freedom and economic development in favour of the majority indigenous communities.[231] However:

> Far from leaving behind democratic institutions and cultures, Britain bequeathed to its former colonies corrupted and corruptible governments. Colonial officials hand-picked political successors as they left in the wake of World War II, lavishing political and economic favors on their proteges (sic). This process created elites whose power extended into the post-colonial era.[232]

[227] John Lonsdale, "Kenya: Ethnicity, Tribe, and State," *Open Democracy*, 17th January 2008, https://www.opendemocracy.net/article/democracy_power/kenya_ethnicity_tribe_state<accessed 26th September 2014>
[228] Bethwell Allan Ogot, *History of the Southern Luo: Volume I, Migration and Settlement 1500-1900* (Nairobi: East African Publishing, House, 1967).
[229] *Kenya: An Official Handbook* (Nairobi, Government Printer, 1988).
[230] Londsdale, "Kenya: Ethnicity," *supra* note 227.
[231] Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (London/Nairobi: Oxford University Press, 1970).
[232] Caroline Elkins, "What's Tearing Kenya Apart? History, for One Thing" *The Washington Post*, 6th January 2008.
http://www.washingtonpost.com/wpdyn/content/article/2008/01/04/AR2008010404300.html?hpid=opinionsbox1<accessed 27th September 2014>

When the illiberal state was inherited into post-colonial Kenya, racial discrimination was replaced by ethnic exclusion. Yet President Jomo Kenyatta did not resolve the problem of ethnic exclusion.[233] Hence after thirty years of independence, a quest for "second liberation" commenced. The "second liberation" can be seen as an expression of three ambitions. First, on a liberal level, it was an attempt to introduce a properly-functioning liberal state. The *culture of resistance* was driven by human rights activists who protested against the authoritarian state's violation of core human rights through detention, assassination and exile.[234] Second, the bulk of Kenyans live their lives according to African customary values. Hence the "second liberation" represented the political opposition's self-interested demand – not merely for mass support to win democratic elections[235] – but more fundamentally, in the argument of this book, at a third level – as an expression of support for a state based on African traditional values. Tension among these three protest streams exploded into Kenya's post-2007 conflicts. Yet, the post-2007 conflict negotiations seeking solutions to problems excluded the human rights activists and civil society representatives. Instead, the political opposition forced the incumbent government into making concessions for comprehensive constitutional reforms. Consequently, it is argued that distributive justice under Kenya's new constitution – complete, *inter alia*, with a reformed electoral system, Supreme Court and devolved powers – not only substituted liberal demands for retributive justice, but reconstruction also superseded pending collective, culture-based appeals for recificatory justice. Before evaluating the responses to the post-2007 conflicts, it is necessary to understand three preceding causation factors. First, the impact of colonial imperial governance. Second, the post-colonial authoritarian state's failure – not only to satisfy liberal values – but also to promote ethnic inclusion. Finally, the inarticulate demand by the masses for a state based on traditional African values. This cultural "third way" implied – not only a demand for an alternative approach which pursued moderate, rather than retributive, or rectificatory responses to past injustices – but moreso, power-sharing governance.

[233] Githu Muigai, "Jomo Kenyatta and the Rise of the Ethno-Nationalist State in Kenya" in Bruce Berman, Dickson Eyoh and Will Kymlicka, *Ethnicity and Democracy in Africa* (Oxford: J. Currey; Athens: Ohio University Press, 2004) 200-217; See also Gabrielle Lynch, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (Chicago: University of Chicago Press, 2011).
[234] Robert M. Press, *Peaceful Resistance: Advancing Human Rights and Democratic Freedoms* (Aldershot, U.K.: Ashgate Publishing Limited, 2006).
[235] *Ibid.*

1.1.2. Civil Disobedience and Regime Concessions

During the 1980s, with the modest aim of reducing human rights violations in Kenya, individual activists initiated peaceful resistance against authoritarian rule.[236] They were driven by philanthropy, courage and principle. Upon generation of internal activist pressures, political space was opened for the conduct of multiparty politics. Throughout the 1990s, the Kenya government made incremental concessions in the governance structure. In 2002, when the ruling KANU party transferred power to the opposition alliance, a major victory was achieved. However, by early 2008, Kenya degenerated into two months of gross human rights violations, prompting conflict negotiations. These talks culminated into an undemocratic power-sharing arrangement between the PNU and ODM political parties. Significantly, civil society was conspicuously absent from the Serena Hotel conflict-settlement talks and therefore, their interests in establishing a "backward-looking" criminal trial response to the post-2007 conflicts necessarily received lesser priority. Instead, the key negotiators prioritized structural reforms. What series of events triggered the widespread post-2007 social disorder?

According to Robert Press, the key instigators of Kenya's social instability can be attributed to "individual activists, people who challenge a regime early on without the protection of an organisation" to initiate protests against authoritarian rule.[237] After an attempted *coup d'état* in 1982, the Kenya government became increasingly intolerant to dissenting views. From 1986, the Mwakenya dissident group was outlawed, and up to 50 activists suffered torturous detention or humiliating exile.[238] In 1990, Kenya experienced two high-profile political assassinations.[239] Press highlights seemingly trivial events which, in hindsight, appear to have had a significant impact on the bigger scheme of things. For example, a "sympathetic prison guard"[240] who responded positively to detained lawyer Wanyiri Kihoro's complaint about mistreatment by public officials.[241] That incident triggered a court application challenging alleged regime torture and captured international media attention[242] culminating in his

[236] Press, *Peaceful Resistance, supra* note 234 p 4.
[237] *Ibid.* pp xvi-xvii.
[238] *Ibid.* pp 69 and 80.
[239] *Ibid.;* See also David William Cohen and E.S. Atieno Odhiambo, *The Risks of Knowledge: Investigations into the Death of the Hon. Minister John Robert Ouko in Kenya, 1990* (Athens, Ohio: Ohio University Press, 2004); *R v Attorney General exparte Herma Muge* [1991]eKLR (Civil Application No. Nai, 77 of 1990).
[240] Press, *Peaceful Resistance, supra* note 234 p 5.
[241] Wanyiri Kihoro, *Never Say Die: The Chronicle of a Political Prisoner* (Nairobi: East African Educational Publishers, 1998) pp 88-9 cited in *ibid.* p 1.
[242] Blam Hodin, "Police Torture is charged in Kenya" *Washington Post,* 13th March 1987, cited in *ibid.* pp 5-6.

release.[243] However, individual activists could not attract large crowds to support their cause. Neither could they mobilize resources.[244] Instead – to publish protest articles in newspapers, magazines and lodge court cases – these "high-risk takers"[245] used limited personal resources.[246] For example, Bedan Mbugua published the controversial results of the 1988 *mlolongo* (queue-voting) elections – at which politically-correct candidates were declared winners notwithstanding having shorter queues lining up behind them – in the Christian *Beyond magazine*.[247] He was convicted for sedition and jailed.[248] For calling for constitutional change from the sanctuary of the pulpit, outspoken clerics like Reverend Timothy Njoya, were defrocked.[249] For recording the *mlolongo* electoral outcome in his personal diary, Reverend Imunde was imprisoned.[250] These personal costs, for Press, show that critical journalism undertaken through publications such as the *Nairobi Law Monthly*,[251] *Society* and *Economic Review* encountered relatively high-risks,[252] including suppression under public order law, such as sedition trials.[253]

From 1990, opposition politicians spread the message of protest through illegal, medium-risk, mass rallies, commencing with the Saba Saba rally.[254] The KANU government responded by repealing section 2A of the Constitution which had made Kenya a *de jure* single-party state since 1982. Thereafter, the expanded public domain made it possible for activists to mobilize and speak openly against repression. Press observes that many Africans are likely to pay more attention to informal associations than formal ones. Consequently: "In Africa (m)uch associational life and all underground protest or demands must occur outside civil society."[255] Informal individual activists, therefore either agitating in isolation or under the umbrella of formal organisations increased their

[243] *Ibid.* p 1, p 5 *ibid.* 29th July, 1986-10th October, 1986.
[244] *Ibid.* pp 10-11.
[245] *Ibid.* p 29.
[246] *Ibid.* p 87.
[247] Kibe Mungai, "The Law and Leadership: The Post-Colonial Experience in Kenya" in Kimani Njogu (ed.) *Governance and Development: Towards Quality Leadership in Kenya* (Nairobi: Twaweza Communications, 2007) 50-103 pp 75-7.
[248] Press, *Peaceful Resistance, supra* note 234.
[249] Hervé Maupeu, "The Churches and the Polls" in Marcel Rutten, Alamin Mazrui and François Grignon (eds.) *Out for the Count: The 1997 General Elections and Prospects for Democracy in Kenya* (Kampala: Fountain Publishers, 2001) 50-71.
[250] *Ibid.;*See also Human Rights Watch http://www.hrw.org/reports/1990/WR90/AFRICA.BOU-03.htm<accessed 27th September 2014>
[251] Press, *Peaceful Resistance, supra* note 234 pp 75, 88-89.
[252] Fletcher, *Rethinking Criminal Law*, *supra* note 40, the concept of relative gravity of risk.
[253] Press, *Peaceful Resistance, supra* note 234 p 89-89.
[254] *Ibid.* p 78.
[255] *Ibid.* p 19.

demands from respect for the rule of law to presenting an alternative rule of democratic governance. The organisational resistance was through "medium risk takers"[256] comprising organisational "outspoken activism"[257] by the Law Society of Kenya (LSK), the International Commission of Jurists (Kenya Section) [ICJ (K)], the Kenya Citizens Coalition for Constitutional Change (Kenya 4C's) and the National Convention Executive Council (NCEC).[258] These formal organisations faced fewer resource constraints and had greater planning and implementation capacity. When political parties pioneered by the Forum for Reforms and Democracy (FORD)[259] began to participate in mobilization, the protests drew large crowds of "low-risk takers, people in crowds who turn out for a political rally or other protest against an incumbent regime."[260] Nonetheless, brutal costs were encountered by the unfortunate frontline demonstrators who confronted the brunt of police truncheons, tear gas, and often, bullets.

By repeal – through the 1997 Inter Parties Parliamentary Group (IPPG) reforms – of sedition law, detention without trial, vagrancy, and sections of the notorious Chiefs Authority Act[261] which gave Chiefs immense powers, KANU government conceded to reforming minimal conditions which restricted access to public space. These concessions opened the door to political freedoms of conscience, expression, assembly and association and to movement. By 2002, media restrictions had also begun to thaw. Hence rejection of retiring President Daniel Arap Moi's preferred KANU candidate, Uhuru Kenyatta – through election of Mwai Kibaki, the NARC mass movement's nominee – represented the culmination of widespread protest against authoritarian rule. After the 2002 general elections, the NARC government comprised a combination, of hitherto pro-reform and conservative, politicians. The reformist opposition National Alliance of Kenya (NAK) absorbed the moderate Liberal Democratic Party (LDP). The latter party comprised a mélange of disgruntled politicians who defected from crumbling KANU on the election's eve. The LDP opportunists protested against retiring President Moi's unilateral selection of Kenyatta as his preferred successor. Kenyans overwhelmingly followed suit in rejecting KANU's candidate, thus reflecting an apparent protest against authoritarian rule. Press concludes that: "On balance…in Kenya domestic pressure posed a greater threat to the regime than inconsistent pressures from the diplomatic and donor community and thus provided the primary reason the regime made

[256] *Ibid.* p 29.
[257] *Ibid.* p 73.
[258] *Ibid.* p 73.
[259] *Ibid.* p 98.
[260] *Ibid.* p 29.
[261] Chapter 128 (Laws of Kenya).

concessions."[262] Yet NARC's marriage of convenience did not last long. Following the government's defeated constitutional proposal at the 2005 national referendum,[263] President Kibaki discarded his government's LDP wing. Consequently, prior to the 2007 general elections, NARC's major factions LDP and NAK were rebranded into ODM – led by Odinga (with a splinter ODM-K) and PNU led by Kibaki – respectively. Both these major presidential candidates at the 2007 elections were pre-dominantly associated with the 1990s organizational resistance against authoritarianism. However as president, Kibaki's priority had shifted from one of reformism to a personal interest in retaining office for a second term. As shown below, one outcome of Kibaki's revisionist ideology was that the 2007 elections not only proved to be undemocratic, but worse still, they resulted in gross human rights violations. During the post-2007 conflicts, distrust for the army's heterogeneous ethnic composition fettered President Kibaki's use of military force to repress ODM's emergent rebellion against public order or even to preserve the potential threat to national security.[264]

1.2. Social Legitimacy through Liberal Idealism or Ethnic Communitarianism?

Pre-colonial ethnic groups frequently engaged in inter-ethnic warfare in search of pasture, stock or even wives. Intra-ethnic disputes were resolved through restorative justice principles under African customary criminal law whose aim was to restore social harmony which attributed criminality collectively, thus responding by compensation. However, the European 1884-5 Berlin Conference carved up the African continent using artificial boundary lines which restricted movement of ethnic groups across arbitrary state boundaries. British colonialism ousted African customary criminal law and introduced the formal common law which attributed crime individually and responded by retribution.[265] Sections 83 and 85 of Kenya's post-independence Constitution provided for preservation of public security, reinforced by legislation. Evolution of the relevant constitutional and statutory public order provisions has been analyzed by Oketch Owiti and William Mbaya.[266] Briefly, to regulate World War II insecurity, emergency

[262] Press, *Peaceful Resistance, supra* note 234 p xviii.
[263] Wako, Draft, *supra* note 162.
[264] Isaac Ongiri, "Kibaki did not Trust Military – Wikileaks," *The Nairobi Star*, 12th March 2011
http://www.the-star.co.ke/news/article-69762/kibaki-did-not-trust-military-wikileaks#sthash.c1TGp8U2.dpuf <accessed 27th September 2014>
[265] Eugene Cotran, *Report on Customary Criminal Offences in Kenya* (Nairobi: Government Printer, 1968).
[266] Okech Owiti And William Mbaya, "Public Order and Preservation of Public Security Law" in Smokin C. Wanjala and Kivutha Kibwana (eds.) *Democratization and LawReform in Kenya*

provisions were introduced in 1939. Following the end of the War, in order to deal with the Mau Mau emergency of the 1950s, these provisions were reenacted and strengthened. Prior to independence, Parliamentary oversight of executive power was strengthened. However, after 1963 Jomo Kenyatta's post-independence government acquired unrestricted power to apply detention provisions to any situation which so required. Thus, moving beyond the North Eastern Frontier, by 1978 the entire country was under a perpetual state of emergency.

Through British colonial discriminatory and dispossessory practices the Kikuyu ethnic group lost their land. Thus by the 1950s, the Mau Mau organized open rebellion.[267] Moreover, to continue skewed economic developmental practices – save that Kenya's ethnic patronage for exclusion substituted racial criteria – the post-independence, *constituted* state retained repressive laws. Just as the struggle against colonial rule entailed ethnic organization, so also the "second liberation" relied on ethnicized masses to support ethnic opposition parties at political rallies and general elections. Invariably, during the 1990s, the opposition rallies would degenerate into riots which attracted state repression. However, to respond to worldwide mass atrocities, in 1998 the international community established a permanent International Criminal Court at The Hague to punish perpetrators. A problem arises where the organizers of ethnic conflicts are not state officials, but mere ethnic warlords. On one hand, using criminal law values, ethnic violence comprises crime. The Rome Statute thus confers jurisdiction for investigating, prosecuting and punishing perpetrators. If, on the other hand, traditional African values are taken seriously, then rebellions by an ethnic group are a legitimate expression of its right to self-determination by reconstituting the state. Conflict resolution entails accommodating such ethnic protests through restructuring the state. This ideological dichotomy characterized the dilemma of evaluating the contradictory and incoherent responses to Kenya's post-2007 conflicts.

1.3. Criminal Trials, a Truth Commission, Constitutional Reforms or Amnesties?

The first issue raised by the argument of this chapter – which concerns constructing a theoretical framework to evaluate the role of the colonial and post-colonial state – is the phenomenon of cultural domination. In order to expose the underlying motives behind the international community's establishment of a Rome Statute – which draws its substantive and procedural

(Nairobi: School of Law, University of Nairobi, 1997) 32-92; See also The Preservation of Public Security Act (Chapter 57 Laws of Kenya).

[267] Chege, "Kenya: Back from the Brink?" *supra* note 225.

provisions from two dominant Western legal traditions, namely the common law and civil law traditions – such a normative framework is necessary. From the outset this chapter must emphasize that other global legal traditions ranging from Hindi, Talmudic, Islamic, Oriental or Chthonic are excluded from the so-called "universal" notions posited in the Rome Statute. The ICC's preference for concepts, procedures and practices drawn from Western legal traditions, necessarily raises complaints by peoples from other cultures, against the Rome Statute's claim to universality as contrasted with the ICC's potentially-biased neo-liberal ideological leaning.

The second issue shall be to summarize relevant aspects of the literature discussing African ethnicity and citizenship.[268] Because ethnicity *per se* may be harnessed for either beneficial ends or harmful objectives, therefore it is useful to distinguish positive from negative ethnicity.[269] This review shall endeavour to undertake a brief survey into ethnicity's positive and negative manifestations in relation to Kenya's post-conflict responses. Third, the chapter shall assert that African traditional culture, based on group values may provide a valid governance alternative to liberal state constitutions which are based on Western individualistic cultural values. Hence the use of devolved, inclusive power-sharing as a stop-gap device to settle the post-2007 ethnic conflicts – as opposed to the authoritarian, winner-take-all, electoral apparatus – where power was centralized and the opposition faced marginalization. Given the ethnic character of Kenyan politics, power-sharing may have been the most pragmatic response, pending comprehensive constitutional review.

The major proposition of this chapter is two-pronged. One prong is that the emergent *culture of resistance* through civil disobedience of the late-1980s in Kenya, was initiated by individual human rights activists. The other prong is that by the 1990s, formal civil society organizations enlarged the grassroots protests into demands for democratization which witnessed not only the repeal of single-partism, but also the 1997 minimum pre-election reforms. The minor proposition of this chapter is that – in order to expand the protests from micro-intellectual or esoteric debates into popular, macro or mass action – the support of the political class was required. However, participation by the political society had dual effects, positive and negative. On the positive side, opposition politicians attracted the masses, thus raising national consciousness about the widespread support for an alternative approach to governance. However, whether or not the new constitution would be based on social justice, liberal values or adopt

[268] Glenn, *Legal Traditions, supra* note 218; See also Cronin-Furman and Taub, "Lions and Tigers" *post* note 525.

[269] Koigi wa Wamwere, *Towards Genocide in Kenya: The Curse of Negative Ethnicity* (Nairobi: Mvule Africa, 2008).

African traditions (*majimbo* or feudal) values would be the subject of constitutional debate at a national constitutional convention. On the negative side, the agitation through mass action generated not only anxiety among the propertied classes, but also awakened ethnic animosity and suspicion among the wider populace. Thus throughout the 1990s, periodic general elections in Kenya were highly polarized and accompanied by "low intensity" tribal or land clashes.[270] The conclusion of this chapter is that – in response to alleged gross human rights violations committed during the post-2007 conflicts – a dichotomous demand for conflicting responses emerged. At one extreme, Kenya's political class understood that the ethnic conflicts were merely symptomatic of latent structural anomalies which resulted in skewed economic distribution. Hence the political class recommended that a transitional or interim GNU should embrace a five-year power-sharing arrangement under a National Accord while undertaking comprehensive structural reforms. Such a moderate reform approach would impliedly incorporate a *de facto* amnesty for suspected perpetrators of gross human rights violations. At the other extreme, the ICC Chief Prosecutor insisted on criminal trials. Hence upon failure of the domestic criminal justice system to investigate and prosecute suspects, he requested the ICC to exercise its complementary jurisdiction over the "inactive" Kenyan situation.

1.4. Cultural Domination by Western Legal Traditions

1.4.1. Cultural Domination of African in the 21st Century

According to Francis Deng: "Cultural domination is essentially a conflict of identities rooted…in discriminating implications of…differences…that engenders violent conflicts."[271] Cultural domination is a characteristic of inequity in a multi ethnic state. There are two types.

One entails domination of some cultural, ethnic, or religious group by other groups; the other is the marginalization of African indigenous cultures by the colonial and post-colonial state. The first…is a function of cultural pluralism that poses a challenge to governance – which can be, and often is, a source of conflict. The other effects a cultural disconnect between the state system and its alien origins and institutions, on one hand, and the African cultural heritage on the other. This divide denies cultural legitimacy to the state and may weaken the

[270] The Akiwumi Report, *supra* note 126.
[271] Francis M. Deng, "Beyond Cultural Domination: Institutionalizing Equity in the African State" in Mark R. Bessinger and Crawford Young (eds.) *Beyond the Crisis? Post-Colonial Africa and Post-Soviet Eurasia in Comparative Perspective* (USA: Woodrow Wilson Center Press, 2004) 359-384 p 359.

effectiveness of the state as an embodiment of national identity, values and institutional capacity.[272]

Nonetheless: "Conflicts in Africa are provoked by gross injustices real or perceived."[273] A critical analysis of cultural domination of African states by the Western legal traditions embodied in ICC begins with an appreciation of the historical context in which "African 'tribal' or 'ethnic' groups and indigenous values…were subordinated and even marginalized in the process of state formation."[274] Deng laments that: "With contest over state power, resources and institutions often a conflict between identity groups each which seeks to capture the state, break away or pursue its own autonomous development the state ceases to be an embodiment of the collective national consciousness."[275] Consequently "the victims of humanitarian tragedies that often result from violent conflicts, especially if those victims are not members of the dominant groups, become dispossessed of their own governments unprotected and unassisted."[276] Therefore victims of state-driven mass atrocities: "can only turn outside…to seek and receive humanitarian assistance and sometimes human rights protection from the more compassionate international community."[277]

Since the end of the Cold War, instead of being distorted as episodes in the global confrontation between the superpowers, internal and regional conflicts are now seen in their proper context. However, the withdrawal (of superpower interests) has also led to the marginalization and neglect of certain regions, foremost among them is Africa. Therefore, in Deng's formidable prescription:

> First, situations must be analyzed contextually to identify the critical problem areas, probe their root causes, and explore appropriate solutions. And second, responsibility for addressing the problems has been reapportioned with primary responsibility now placed on the states concerned.[278]

Although responsibility for responding to post-conflict situations is only "residually on the international levels. The international community remains the ultimate guarantor of universal human rights and humanitarian standards." Nonetheless:

> Under the emerging policy framework national sovereignty…is increasingly postulated as a normative concept of responsibility, requiring a system of governance based on democratic citizen participation constructive

[272] *Ibid.*
[273] *Ibid.*
[274] *Ibid*. p 360.
[275] *Ibid.*
[276] *Ibid.*
[277] *Ibid.*
[278] *Ibid*. p 361.

management of diversities, respect for fundamental rights and equitable distribution of national wealth and opportunities for development.[279]

1.4.2. Deng's Diagnosis of the African Problem

Deng laments the fact that at independence Africa's founding fathers articulated development in terms of "the war against the real enemies 'poverty, ignorance and disease.' "[280] Despite Kenya's violent pre-independence struggle against colonial repression, the post-independence government considered human rights and democracy as luxuries to be sacrificed and postponed until the economy was sufficiently advanced. Conversely, a 1989 World Bank Report[281] argued that democracy and anti-corruption were pre-requisites for sustainable development. Given the exploitative global capitalist context, Deng attributes Africa's plight of retarded development in large measure to "the disconnect" between the continent's "indigenous values and institutions in the process of development and nation-building."[282] Because "the state is itself a creature of foreign invention – lacking indigenous cultural and moral values and integrity that should be the *sine qua non* of legitimacy," therefore, to "reverse the helpless, foreign-driven sense of Africa's destiny" he prescribes an "effective policy reform agenda." Such agenda would make it "representative of or responsive to the demands and expectations of its domestic constituencies."[283]

Consequently, the Anglo-Afro problems of post-colonial dysfunction are traced to the British "divide-and-rule" policy which effected indirect rule based on administrative divisions to marginalize indigenous culture from mainstream development. Artificial colonial boundaries were retained but no attempt was made to re-distribute wealth equitably within the ethnically-plural national units. Instead, democracy is associated with periodic elections. With the majority imposing its will on the minority, democracy risked becoming a dictatorship of numbers. Hence, Deng questions the suitability of democracy for Africa.[284] According to Abdullahi An'Naim, the strength of a people's determination to insist on the protection of their human rights is proportionate to their belief that those rights are essential to their existence. He poses the following question:

[279] *Ibid.*
[280] *Ibid.,* citing Thandika Mkandawire, "Globalisation and Africa's Unfinished Agenda" (1997) *Macalester International*, 7, 71-107.
[281] World Bank Report, *From Crisis to Sustainable Growth – Sub Saharan Africa: A Long-term Perspective Study* (Washington, D.C.: The World Bank, 1989).
[282] *Ibid*. p 363.
[283] *Ibid.*
[284] *Ibid*. p 365, citing Robert D. Kaplan, "Was Democracy Just a Moment?" *Atlantic Monthly*, December 1997, Cover Story; See also Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs*, November/December, 1997.

"How do African peoples relate to human rights and perceive the relationship between these rights and their own human existence?"[285] He argues that "the denial of the right to participate in government is likely to be resisted to the extent that it is believed to be related to physical survival because bad government and economic planning or poor response to natural disasters can threaten human life or essential health." In relation to African customary criminal law, Makau Mutua narrates similar findings since the belief prevailed, that "as an inherently valuable being, the individual systems and those with less rigidly organized societies, that 'as an inherently valuable being, the individual was naturally endowed with certain basic rights.'"[286] Expressing concurrent cultural relativity sentiments, An-Na'im insists that:

> another aspect of the legitimacy issue is the apparent tension between certain African cultural and religious traditions, on one hand, and human rights on the other, although other societies refused to recognize economic, social and cultural rights at par with civil and political rights in the African context. This discordance has greater resonance because they lacked political stability and economic development that would enable them mediate such tensions for themselves in their own specific contexts. The ruling elite seek to legitimize their authoritarian regimes and repressive practices while religious fundamentalists and other cultural relativists perceive the human rights ethos as antithetical to their worldview and vision of the social good.[287]

Hence he concludes that "to the extent that rulers are able to obtain donor funding by implementing human rights conditions this is the *external* aspect."

1.4.3. An Alternative to Elections

According to Deng: "In traditional Africa, rulers governed with the consent of the people, who participated broadly in their own self-administration, were free to express their will and held their leaders to high standards of transparency and accountability."[288] Because "the process of sharing power at all levels of the social structure is particularly pronounced in stateless or acephalous societies"[289] therefore "African realities need to be taken into account without degenerating into authoritarianism that is enimical to African political theory and practice."

[285] Abdullahi Ahmed An' Naim, "Introduction" in Abdullahi Ahmed An-Na'im (ed.) *Human Rights under African Constitutions: Realising the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2003) p 8.
[286] Makau Mutua, *Human Rights: A Political Cultural Critique* (Philadelphia: Penn University of Pennsylvania Press, 2002).
[287] An-Na'im, "Introduction," *supra* note 285 p 11; See also Morris, "Western Defensiveness," *supra* note 114.
[288] Deng, "Beyond Cultural Domination," *supra* note 271 p 366.
[289] *Ibid*. p 368.

Dictatorship of an individual is not an alternative to the tyranny of numbers. Rather than reject "the normative concept of democracy," instead, Deng proposes "a *procedural* solution." If "democracy will have to mean something more than electoral votes" and further given "the tendency of Africans to vote according to their ethnic identities," therefore, "true democracy would require some form of devolution of power through decentralization to the local level combined with some method of ensuring representation of those who would otherwise be excluded by the weight of electoral votes."[290] This is because: "Democracy implies accommodation of differences and a special responsibility for the protection of minorities." However: "Multiplicity of ethnic groups makes it difficult to speak of 'majority' and 'minority.' " Thus, some groups resist assimilation while others seek secession.

The positive aspects of "African heritage can serve in the creation of a sustainably democratic accommodative political order."[291] Deng argues that: "The most outstanding characteristics of traditional African society are the autonomy of component elements of the political and social order and the devolution of power and the decision-making processes to local units – territorial subdivision, lineages, and extended families."[292] However, "post-colonial states have discarded them." Jomo Kenyatta wrote about age-sets etc. in Kikuyu traditional political societies. Nonetheless, post-independence KANU managed diversity through superficial calls for African Socialism which were not implemented.[293] In his critique of the cultural dimension of development, Deng treats the modern emergence of patronage and corruption in post-independence Africa as a response to the realities of the socio economic status of Africa today, rather than a well-formatted method of building a model system on indigenous values and traditions.[294] Corruption is symptomatic of a high standard of living which destroys traditional interests.[295] He defines development as self-enhancement.[296]

Nostalgically, Mutua recalls how Leopold Senghor termed the "African personality" *negritude* or "the manner of self expression of the black character, the black world, black civilization."[297] Julius Nyerere named it *ujamaa*, the

[290] *Ibid*. p 365.
[291] *Ibid*. p 366.
[292] *Ibid*. p 367.
[293] *Ibid*. p 372.
[294] *Ibid*. p 379.
[295] *Ibid*. p 380.
[296] *Ibid*. p 382.
[297] Leopold Senghor, first President of Senegal 1960-1981, and an internationally respected poet, philosopher, and theoretician quoted in Mutua, *Human Rights, supra* note 286.

Kiswahili term for African socialism,[298] which Göran Hydén explains was the concept of kinship and is three-pronged: "respect, where each family member recognized the place and rights of others in the family; common ownership of property, that all must have the same basic necessities; and obligation to work, that every family member has the right to eat and shelter but also the obligation to work."[299] Hence, "*mtu* among Bantu peoples, in Kiswahili exceeds mere description of a person, but refers to an individual who lives in peace and is helpful to his or her community."[300] Mutua argues "thus community kinship in which individuals are responsible for the behaviour of their group members is a widespread tradition. But in addition, the individual person and his or her dignity and autonomy are carefully protected in African traditions as are individual rights to land, individual competition for public office, and personal success."[301] Yet if Africans welcome and show hospitality towards strangers then how can the widespread ethnic conflict which erupted between different Kenyan among communities around periodic multi-party electoral competition be explained?

Jack Donnelly[302] and Rhoda Howard[303] believe that human rights are only possible in a post-feudal state, and that the concept was alien to specific pre-capitalist traditions such as Buddhism, Islam or pre-colonial African societies. They hold liberal ideals as being inherently universal. H.W.O. Okoth-Ogendo counters their attack on the duty conception since "the State is the villain against which human rights law is the effective weapon" and towards which "individuals should not be called to discharge any responsibilities."[304] And, notwithstanding the causes of conflicts, African societies were more concerned about future relationships. The issue is whether retribution should punish or reparations be made in order to unite post-conflict Kenya. Regarding universality, An'Naim is skeptical of imperialism since:

> the same European powers which upheld human rights for their citizens under national constitutions and proclaimed the universal declaration for all humanity, were at the same time denying African societies their most basic right of any possibility of constitutional standing and participation. This is

[298] Julius Nyerere first President of Tanzania quoted in Mutua, *ibid.*
[299] Göran Hydén, *Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry* (Berkeley: University of California Press, 1980) p 98 quoted in Mutua *ibid.*
[300] Mutua, *ibid.*
[301] *Ibid.*
[302] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989), cited in Morris, "Western Defensiveness," *supra* note 114; See also Deng, "Beyond Cultural Domination," *supra* note 271; An-Na'im, "Introduction," *supra* note 285, also Mutua *ibid.*
[303] Mutua *ibid.*, citing Rhoda Howard.
[304] Mutua *ibid.,* quoting H.W.O. Okoth-Ogendo.

> the *internal* aspect of perception of lack of legitimacy of African human rights.[305]

An-Na'im concedes however, that:

> a useful function of legal protection of human rights is that it provides society with opportunities for resolving conflicts within specific rights or between conflicting claims of rights. The deliberate nature and slow pace of the legal process is particularly appropriate for the sort of sociological and theoretical reflection necessary for resolving difficult issues like striking a balance between freedom and protection of people's privacy and reputation.

Future national identity of Kenyan society may entail forgetting regrettable past events which divide society and remembering – what US President Barack Obama in his first inaugural address called "our better history"[306] – that which unites. The use of *Ubuntu* to confer conditional amnesties by the South African Truth Commission is cited as a leading example of a possible third way.[307] In Mbeki and Mamdani's diagnosis, "the violence in South Africa in the early 1990s was a symptom of deep divisions, the same is true of extreme violence in today's Kenya." However: "Rather than criminalize or demonize the other side" they recommend an alternative approach based on "the complex set of negotiations, known as the Convention for a Democratic South Africa (Codesa), which brought an end to apartheid in the 1990s." In their prescription, there is no "time and a place for courts" at the point of "inaugurating a new political order after civil wars."[308] The current book claims that elections may serve as a useful tool of reconciliation in response to mass atrocities.[309]

1.5. Dilemmas of Ethnicity and Citizenship

1.5.1. The Concept of Ethnicity

This chapter's literature review interrogates the concept of ethnicity and its role in post-independence Kenya. At independence Yash Ghai explains: "The rule of law and constitutionalism…paid very little attention to diversities among people

[305] An-Na'im, "Introduction," *supra* note 285.
[306] Transcript, "Barrack Obama's Inaugural Address," *The New York Times*, 20th January 2009. http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html?pagewanted=3&_r=4<accessed on 23rd July 2015>
[307] *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16.
[308] Mbeki and Mamdani, "Courts Can't," *supra* note 20.
[309] Guyo Liban, "Kenyan Elections within a Reconciliation Framework" (January 2013) *Policy Brief,* No. 2 (Institute for Justice and Reconciliation) p 2.

and the state. They were based on the assumption of the homogeneity of the people."[310] Citizenship became a means towards their assimilation in the wider political community. An in-depth examination of constitutionalism is beyond the scope of this book. He defines ethnicity as: "The rise of ethnic consciousness" which has however "challenged many of these assumptions including the concept of a homogeneous people. Because "Ethnicity presents its claims as imperatives of identity," hence "some key principles and concepts of the liberal state are being challenged."[311]

Ghai uses the term "ethnicity" to refer to:

> a situation where a community goes beyond a mere consciousness of what binds the community together such as (language, religion, race) and what distinguishes it from other communities, to claims that these differences are politically significant, and constitute the community as a 'people' or 'nation' which is entitled to recognition as such.[312]

In his view, ethnicity "generally begins with intellectuals or persons with political ambitions, who begin to give symbolic, emotional, and material significance to their differences from other communities…This therefore involves the presence of some objective factors like language or religion, but which increasingly take on a political or symbolic meaning."[313] However: "Unlike the policy of 'self-determination' which led to the establishment of 'nation-states' in empires vanquished in wars of Europe in the nineteenth and twentieth centuries, in Asia and Africa the territorial principle took priority over the cultural…"[314]

The distinction is that "in the west identity is a matter of psychic satisfaction."[315] This he observes in Kant's autonomy as interpreted by Charles Taylor's,[316] Will Kymlicka's[317] and Clifford Geertz's[318] notions of primordial givens. Obversely,

[310] Yash Ghai, "Constitutionalism and the Challenge of Ethnic Diversity" in Heckman, Nelson and Cabatingan (eds.) *Global Perspectives, supra* note 159, 279-302.
[311] *Ibid.* p 279.
[312] *Ibid.* p 284.
[313] *Ibid.*
[314] *Ibid.* p 285.
[315] *Ibid.* p 286.
[316] Charles Taylor, "The Politics of Recognition," in Amy Gutmann (ed.) *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25-73.
[317] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).
[318] Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973).

in Africa as "in Asia identity politics are important as a means to resources."[319] Hence:

> A community's entitlements may depend on how it and others perceive it. A self-conscious ethnic group can place itself in different categories, deriving from political science or legal discourse – it can be a cultural, religious, or linguistic group, or it can be a minority, or a 'nation' or 'people' or 'indigenous peoples.' Each of these categories is associated with a specific set of claims, participation, representation, recognition of language, religion, education, land, autonomy etc.[320]

Ghai concludes that: "Self-determination in this sense has become a framework for negotiations between the state and insurgents, denied the option of independence by internal and external forces."[321]

By ethnicity, Ghai means "ethnic affiliations, loyalties and preferences."[322] Because "control over the state is a critical factor in access to economic opportunity" and further because "(e)thnicity impinges on access to the state and on its workings" therefore, Ghai is interested in "how the state affects the emergence and regulation of the economy, and on tensions between political authority and market mediated by ethnicity."[323] He observes that "many new constitutions…despite their liberal orientations, can contain provisions intended to promote national identity and solidarity." His summary of the colonial state is similar to Deng's account detailed above, emphasizing how: "It led to uneven development, horizontal inequality, between groups and regions – with great significance for post-colonial ethnic relations."[324]

1.5.2. Ghai on Ethnic Hierarchy

The introductory section to this chapter attributed Kenya's *culture of resistance* to pressures from below instigated by individual activists who protested authoritarian violation of human rights. However Ghai's assessment appears to acknowledge that Kenyan society is not mobilized by bottom-up, but predominantly by top-down dynamics. He recently stated that Kenyan:

> Politicians promote ethnic difference and animosity to advance their careers, to win state power or achieve senior office, all for personal material gain – the reward of power or influence. Political ethnicity comes, as in some countries, not from below, but from above. Politics and state do not much reflect society as create conditions in which society accepts the state as agents of politics.[325]

Turning to the post-colonial period, Ghai laments that "far from independence solving the problems generated by colonialism, it made many of them more acute and produced several more, arising from the transfer of power to Kenyans. Land problems, with their layers of injustice, were not resolved, and independence created new ones." Unfortunately, "(h)eterogeneity render(ed) difficult the emergence of a nationalism shared by the whole country." Rather than "nation-building, the pursuit of ethnic advantage diminish(ed) the value of citizenship, human rights and the rule of law." Hence: "As the business class rises on the back of tensions between political authority and market mediated by ethnicity it finances, in return its political sponsors' electoral campaigns."[326]

Ghai concludes that: "People who are disadvantaged, poor, insecure and vulnerable are susceptible to demagogic incitement to the hatred of others, and are inclined to believe that members of other communities are responsible for their misery."[327] Because in "heterogeneous societies, ethnic difference can be invoked to argue the case for a basic lack of common interest, indeed for competing interests," instead: "A combination of the dominance of ethnicity and the state's role in accumulation leads to intense competition for the capture of the state." In turn: "Its capture by an ethnic group or inter-ethnic coalition changes, fundamentally, a state's purpose and nature. It becomes exclusionary, fails to resolve differences or to mediate between competing groups, loses its peoples trust and therefore its legitimacy" whereupon "(t)he exclusion of others reinforces the risk of social conflict."[328]

Because all participants in the ethnic clashes which have occurred in Kenya around elections are Kenyans – albeit from different ethnic communities – for purposes of this book, the concept of citizenship is peripheral. As shown in the Akiwumi Report,[329] the dominant identity is one of tribes, communities, nations or peoples. Ghai's theory of ethnic conflict is that "Kenya's experience suggests that violence motivated by inequality is more likely to occur in multiethnic states than in homogeneous ones." This is because "(m)anipulation from above

---

[319] *Ibid.,* citing Taylor, "Politics of Recognition," *supra* note 316; Kymlicka, *Multicultural Citizenship, supra* note 317; and *ibid.*
[320] *Ibid.*
[321] *Ibid.*
[322] *Ibid.* p 129.
[323] *Ibid.*
[324] *Ibid.* pp 138-9.
[325] Yash Pal Ghai, "State, Ethnicity and Economy in Africa" in Hiroyuki Hino, John Lonsdale, Gustav Ranis and Frances Stewart (eds.) *Ethnic Diversity and Economic Instability in Africa: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2012) 129-168 p 159.
[326] *Ibid.* p 153.
[327] *Ibid.*
[328] *Ibid.* pp 162-3.
[329] The Akiwumi Report, *supra* note 126; see also post Chapter three, secion 3.1.2

is easier to achieve if there is no prior or existing sense of social solidarity, shared history, or sense of common destiny."[330] The contents of the Akiwumi Report on Kenya's 1990s tribal clashes shall be analyzed in chapter three, by comparing its theory with that of the Waki Report on the post-2007 election conflicts.

1.5.3. Ethnicity vs. Citizenship in the Liberal State

Contrary to Ghai's above assertion, that ethnicity operates in a top-down mode, there are others who believe that, Kenya's cyclical mass conflicts are partly attributable to defensive, spontaneous, sub-cultural, counter-crime by excluded groups who resort to extortion, rent-seeking and protection rackets for survival.[331] How do groups interact with states? In addition to how ethnic groups function internally, another pressing question is how ethnicity impacts upon the liberal state and *vice versa*. "Critical claims of ethnic groups concern the orientation of the structure of the state."[332] Ghai discusses critiques of the liberal state embedded in the philosophy of one major approach – i.e. the rule of law – as failing to meet these claims. "There are now a wide variety of principles and institutions that seek to accommodate ethnicity. The recognition of ethnicity as a politically relevant category yields different results."[333]

The other major approach:

> proceeds from the political recognition of communities and their participation in the affairs of the state. Individual citizenship is combined with rights of communities, producing a complex set of relationships including entitlements. There is a particular emphasis on power-sharing as well as autonomy of communities, and proportionate share in state institutions.[334]

Ghai recommends that "the traditional nation state theory needs to be revised to give way to the concept of a multicultural or multinational state in which all cultures will be equally respected."[335] In this regard, he criticizes: "The excessive emphasis on human rights as (a) individual rights and (b) civil and political rights." Rather in Ghai's view, this individualization "has to be balanced by group rights and economic, social and cultural rights."[336] Human

[330] *Ibid.* p 158.
[331] Patrick Mbataru, "The Anatomy of a Crisis: Transitional Politics and the Rent Crisis in Nairobi" in Hervé Maupeu (ed.) *L'Afrique Orientale* (Paris and Nairobi: IFRA, 2003).
[332] Ghai, "Constitutionalism and the Challenge, *supra* note 310 p 287.
[333] *Ibid.*
[334] *Ibid.* p 287.
[335] *Ibid.*
[336] *Ibid.*

rights are not the only notion in need of rethinking. Also: "Democracy has to be reconceptualized moving away from the majoritarian model as a compact not so much between citizens as between communities."[337]

1.6. Power-Sharing as a Post-Conflict Response

1.6.1. Definition and Models

How can ethnic marginalization be overcome? Michael Chege recognizes that:

> The political tools used to end the conflict are well known. They include a 'grand coalition government' of all major parties and leaders; power-sharing between ethnic-based factions; and allocation of executive positions so that all major groups are fairly represented. Such practices represent important elements of the 'power-sharing' or 'consensus' model of democracy that Arend Lijphart prescribes for conflict-prone societies like Kenya.[338]

For Katabaro Miti, Ella Abatan and Stephanie Minou:

> Power-sharing has been defined as a 'set of principles that, when carried out through practices and institutions, provide every significant identity group or segment in a society representation and decision-making abilities on common issues and a degree of autonomy over issues of importance to the group.' [339]

Basically, it means participation to reduce majoritarianism. There exist four types: "At the political level, power-sharing involves a unity government that draws members from different groups."[340] However: "At the territorial level, power-sharing has historically been used to address the self-determination demands of minorities that are both ethnically, linguistically or religiously distinct from the rest of the country and geographically concentrated."[341] Third: "Military power-sharing implies first the sharing of command posts within the

[337] *Ibid.*
[338] Chege, "Kenya: Back from the Brink?" *supra* note 225 p 198.
[339] Katabaro Miti, Ella Abatan and Stephanie Minou, "Guest Editor's Introduction," *Is Power-Sharing the Solution to South Africa's Conflicts?* (September, 2011) *Southern African Peace and Security Studies, University of Pretoria,* 2(1), 1-8, p 1, citing Marisa Traniello, "Power-Sharing: Lessons from South Africa and Rwanda" (2008) *International Policy Review*, 3(2), 28-43.
www.saccps.org/pdf/2-1/Miti%20(Guest%20Introduction).pdf<accessed 17th September 2014>
[340] *Ibid.*
[341] *Ibid.* citing Chandra Lekha Sriram and Marie-Joëlle Zahar, "The Perils of Power-Sharing: Africa and Beyond" (2009) *Africa Spectrum,* 44, 3, 11-39; Karl Derouen and Jacob Bercovitch, "Enduring Internal Rivalries: A New Framework for the Study of Civil War" (2008) *Journal of Peace Research*, 45(1), 55-74.

army and the determination of the numbers of soldiers to be integrated in the newly constituted national army."[342] Finally: "Economic power-sharing involves the distribution of state resources between the different regions." Yet "these reforms must be complimented by other measures."[343]

1.6.2. The Challenges of Power-Sharing in Africa

According to Miti, Abatan and Minou, "the success or failure of power-sharing arrangements is dependent on the existence of specific conditions, that is, the balance of power between the warring groups and the resources available to them."[344] They "are designed to achieve a set of immediate security demands in the short-term. The goal is that of negative peace; halting current fighting and limiting the risks of its return."[345] Its production is problematic since:[346]

> Negotiations have frequently had to deal with 'spoilers', that is, those who are not actually interested in furthering a peace process. Some of these have the capacity and the will to resort to violence to subvert peace processes. This has often led to a vexing issue of who should be included or excluded from the peace process. The accommodation of potential spoilers has resulted in ever growing costs and the extension of negotiating periods, not to mention difficulties in reaching an agreement. Since funding for such negotiations is typically raised externally, periods in which negotiations had to be abandoned until sufficient funding could be raised are not uncommon.[347]

This chapter highlights Kenya's exclusion of civil society's formal organizations and individual activists from its post-2007 Serena Hotel negotiations. Perhaps their agitation for criminal trial responses to mass atrocities cast them as spoilers of the transitional justice process?

Tellingly: "Agreements have often been violated by signatories because the incentives contained in the agreement were not important to them or they felt that they could achieve their goals through violence."[348] Second, implementation problems have further arisen because parties "committing themselves to a power-sharing agreement may do so for cynical or short-term ends, and will eventually seek to obtain absolute power. This may particularly be the case if

[342] *Ibid.*
[343] Chege, "Kenya: Back from the Brink?" *supra* note 225 p 199.
[344] *Ibid.* p 4.
[345] *Ibid.*
[346] *Ibid.*, citing Scott Gates and Strøm Kaare, "Power-sharing and Civil Conflict" (2008) *Oslo: PRIO/CSCW, Policy Brief*, 1, p 3.
[347] *Ibid.* p 4 (footnotes omitted).
[348] *Ibid.*

power-sharing is viewed as imported or externally imposed."[349] "Furthermore, agreements do not dispel old patterns of mistrust and cheating. These are sometimes transported into the new partnership institutions of governance." The Kibaki-Odinga MoU, expounded upon below, is reminiscent in this respect. Moreover, from 2011, Kenya's war against Al Shabaab's terrorism along the border with Somalia had potential to destabilize the Government of National Unity in multiple ways. This is because "the implementation of power-sharing may be difficult if not impossible in 'bad' neighborhoods. Neighboring states that have an interest in the continuation of a conflict may foster, but also have the power to destabilize, power-sharing…"[350] It did not.

Nonetheless, precautions and pessimisms are justified since:

> power-sharing, rather than creating a space for reform coalitions, can be manipulated by incumbents, desperate to retain their positions in the face of electoral defeat. In this regard, not only do power-sharing arrangements freeze the war-time realities and prevent politics from evolving, but they also concentrate power in the hands of war-time elites and fail to create adequate political space for the expression of other interests.[351]

"Lastly, power-sharing counters the very basic principle of democracy." Thus: "In post-elections crises…power-sharing sets a precedent for anti-democratic behaviour, as it enables authoritarian leaders to maintain the benefits of incumbency which will no doubt be wielded with added ferocity in future elections."[352] In conclusion:

> (i)t also calls for changes in the electoral processes dominated by a winner-takes-all political mentality and the perception of the control of the state as a prize to be won rather than as one to be shared. Furthermore, power-sharing should be seen as a temporary measure – a transitional system that leads to a political system based on norms of trust and cooperation.[353]

Ultimately, "power-sharing should ideally create a political space for debate to take place outside the power-sharing arrangements in order to facilitate the emergence of new leaders and the strengthening of civil society."[354]

[349] *Ibid.* pp 4-5.
[350] *Ibid.* p 5.
[351] *Ibid.* p 6, citing N. Cheeseman and B.M. Tendi, "Power-Sharing in Comparative Perspective: The Dynamics of 'Unity Government' in Kenya and Zimbabwe" (2010) *Journal of Modern African Studies*, 48, 2, 203-229 p 219; See also N. Cheeseman and B.M. Tendi (2012) *Conflict, Security and Development*, 12, 2, 171-191 p 175.
[352] *Ibid.,* citing Cheeseman and Tendi, *ibid.* p 225.
[353] *Ibid.*
[354] *Ibid.*

1.6.3. Positive Outcomes from the Government of National Unity

Between 2008 and 2013, if Bruce De Mesquita, James Morrow, Randolph Siverson and Alistar Smith's[355] selectorate model is correct – the loyalists within Kibaki's instituted Government of National Unity were potentially more likely to defect, come the 2013 election to a rival candidate – depending on whose ministerial performance appeared successful. It followed – by extension – that a minister who happened to be caught perpetrating grand corruption, under the GNU was likely to become consigned to political limbo. Hence, grand corruption was expected to decrease as a governance tool in Kenya, over the 2008-2013 years, and be replaced by more rational policies or ideologies. While the immediate cost to the taxpayer was felt at the level of paying a higher wage bill for ministers, in the long-run, it is arguable that the savings from the impact gained – through checking grand corruption by permanent secretaries and generating ethical public servants – far outweighed the increased expenditure on salaries.

1.6.4. Kibaki's Chequered First-Term

1.6.4.1. Chege's Justification of Economic Inequality

On one hand, the colonialists introduced "divide and rule." Their strategies of exclusion were inherited into post-colonial Kenya under President Jomo Kenyatta's "willing-buyer-willing-seller" settlement underpinned by *harambee*[356] and continued by President Moi's *nyayo* philosophy.[357] The NARC promise, revised under Kibaki, failed to change the constitution. NARC thus replicated the self-same sectional governance policies. Yet, Chege suggests that the accusations against Kikuyu hegemony and economic domination by marginalization of other groups were a myth created by the opposition for political advantage and to generate ethnic hatred against Kibaki. Chege instead commends Kibaki for reviving Kenya's overall economic growth and suggests that the skewed wealth distribution was attributable to the industrious Kikuyus who earned their advantage through investment and purchasing of land in various parts around the country, including the Rift Valley. Clearly, there

[355] Bruce Bruno De Mesquita, James D. Morrow, Randolph Siverson and Alistar Smith, "The Selectorate Model: A Theory of Political Institutions" in Joseph Burger and Morris Zeldith Jr. (eds.) *New Directions in Sociological Theory* (USA: Rowman & Little field Publishers, 2002) 262-292.
[356] Jomo Kenyatta, *Suffering Without Bitterness: the Founding of the Kenya Nation* (Nairobi: East African Publishing House, 1968).
[357] Daniel Arap Moi, *Kenya African Nationalism: Nyayo Philosophy and Principles* (London: Macmillan Publishers, 1986).

existed a lack of consensus about the adequacy of the post-independence constitution's capacity to safeguard equal protection of the rule of law.

1.6.4.2. National Alliance Rainbow Disintegrates

After NARC came to power in 2003:

> the Kikaki administration presided over stunning economic recovery underpinned by macroeconomic discipline, reduced deficit spending, a doubling of tax revenue as a result of stricter enforcement of regulations, an improved business environment, and the privatization of failing state-operated enterprises.[358]

"National poverty levels fell from an estimated 56 percent in 1997 to 46 percent in 2006."[359] Nonetheless "Kibaki's first-term government clearly had a mixed record – it had delivered on the economy but disappointed in national governance. In the long-run, however, its failure to honor a power-sharing agreement with its coalition partners was to become its greatest political liability."[360] "But there was also a strong constituency that saw that the (proposed) new constitution as a charter that would guarantee a fairer distribution of tax revenues ('national resources') among Kenya's ethnic homelands, which roughly coincide with the provinces." These are "known in Kenya as *majimbo* government."[361] Chege further notes that:

> These demands received unexpected support from a 2004 donor-funded report on inequality in Kenya, which concluded that urban areas and the Kikuyu districts had superior economic and social indicators as a result of high level patronage from previous governments that had discriminated against less-developed regions. The allocations of public monies dominated public debate from 2004 up to the 2007 elections.[362]

1.6.4.3 Agitation for Distribution of Economic Resources

"On 22 July 2006, a widely read column by Barack Muluka,"[363] in the *East African Standard* accused the Kibaki government of perpetuating "economic inequality because Central Province, the Kikuyu homeland, took more in development projects from the treasury than it contributed."[364] The article broke down Kenya's total tax revenue of 23.7 billion shillings by province and claimed

[358] Chege, "Kenya: Back from the Brink?" *supra* note 225 p 200.
[359] *Ibid.*
[360] *Ibid.* p 201, citing Wako, Draft, *supra* note 162.
[361] *Ibid.*
[362] *Ibid.* pp 202-3 (footnote omitted).
[363] *Ibid.* p 204.
[364] *Ibid.* p 205.

that – except for the hardscrabble North Eastern Province – Central Province contributed less than all the others.[365] Nonetheless, Chege counters that "there is a clear relation between the level of commercial activity (which the Kikuyu were believed to dominate) and the level of taxation. Yet the level of government services such as education and healthcare, which serve all Kenyans alike account for the greatest part of public expenditure."[366]

Nonetheless, prior to Kenya's post-2007 ethnic conflicts, "the press began reporting (Muluka's misleading) tax figures as fact, with the Standard's opinion columnists agitating for *majimbo* as the path to regional economic equality." As opposition propaganda continued "building on the rhetoric of the 2005 referendum, the ODM grassroots campaign turned the election into a contest of 'forty-one tribes against one' and 'Kenya against the Kikuyu.' "[367] Another myth – according to Chege – was that: "it was widely believed that the Kikuyu obtained preferential treatment in government-financed settlement schemes of previously white-owned farms in the Rift Valley."[368] Yet: "In reality, however, there were already an estimated 150,000 Kikuyu in the Rift Valley in the 1930s as a result of British expropriation of Kikuyu lands." Furthermore: "The Orange Democratic Movement attacked the Kibaki administration for tolerating corruption and failing to prosecute those associated with it."[369]

1.6.4.4 Unequal Distribution of Opportunity

In 2014, Hervé Maupeu testified in *the Ruto case* that "over 100 Kalenjin civil servants employed under Moi regime were all sacked, with (Kibaki) hiring more of his tribesmen...leading to the 'kikuyuisation' of the civil service."[370] Maupeu further testified: "that Kalenjiins were also evicted from forests that had been gazetted as settlement areas by the Moi government." Lethargy with the Kibaki regime accrued because "Kibaki's leadership failed to tackle corruption, leading to a number of scandals like Anglo Leasing, which led to the theft of $ 750 million."[371] His testimony "described the Artur Brothers saga as 'strange.' " Maupeu reveals that:

> in the run up to the 2007 General Election the Kalenjin community felt that....Raila Odinga was their preferred candidate and not Mr Ruto....demonstrated by the fact that during ODM's primaries (where) Odinga trounced Mr Ruto and became the party's flag-bearer with the support of Rift Valley delegates.[372]

Thereafter, in December 2006 "prior to (ODM's) populist appeals, Kibaki led in the polls by 42 to 14 percent. In those conducted after Odinga's nominations as ODM's standard-bearer, he led Kibaki by 42 to 38 percent. Odinga would retain that narrow lead up to election day."[373]

1.7. *Structural Reforms Supersede Criminal Trials*

According to Pheroze Nowrojee, societies: "Build trust with confidence-building measures over a period of time. Constitutions are not the first point of concern; they follow agreement on the common agreements on answers to the real questions."[374] However at the 1997 IPPG minimal pre-electoral reforms: "In Kenya there was no common agreement on the end point or goal. You had two beligerants (sic) distrustful of each other and with different aims."[375] For instance: "Because before you bring these constitutions in place, South Africa went through a process by which the distrust in the country and the intense enmity and horrors of the past had first to be reversed so that you got a series of steps – what in the jargon is called *confidence building measures*." Therefore in 2002 as part of Kenya's transitional justice, Nowrojee recommended: "Hard negotiations," because South Africa additionally undertook "public steps which would bring about…quid pro quo." Nowrojee calls these trade-offs "a double helix in which you are building reciprocal steps which generate public trust. Measures of trust had to emerge"[376] between negotiating factions. In addition to the trust: "Then came the second question: what are the real problems in the country?" By posing the following question, Nowrojee contrasts successful South African peace-building approach with the Kenya's "status quo" IPPG negotiations in 1997:

> what is the common end to the negotiations in this country's constitutional debate, or in IPPG. It should have been a non-authoritarian, non-patrongage, (sic) non-tribal government. Has KANU agreed to that? Because deKlerk (sic) agreed to the non-racial thing, and so did all the whites…But they [KANU] did not agree to this.[377]

[365] *Ibid.*
[366] *Ibid.*
[367] *Ibid.* p 205.
[368] *Ibid.* p 206.
[369] *Ibid.*
[370] David Opiyo, "Kibaki axed Kalenjins after 2002, ICC told," *Daily Nation*, 20th February 2014, p 6.
[371] *Ibid.*
[372] *Ibid.*
[373] Chege, "Kenya: Back from the Brink?" *supra* note 225 pp 206-7.
[374] Robert Press interviews of Pheroze Nowrojee, 3rd August 2002 US Congress Library http://www.loc.gov/rr/amed/pdf/Kenyan%20Human%20Rights%20Interviews/Pheroze%20Nowrojee%20Interview.pdf<accessed 15th June 2014>
[375] *Ibid.* p 16.
[376] *Ibid.* p 15.
[377] *Ibid.* p 16.

Thus the major proposition of this chapter's hypothesis is that in Kenya's democratic transition the "internal" perspective of the early individual activists who resisted authoritarian rule, conceived of the good society as one with liberal values which respect human rights and upholds the rule of law. In this respect, during the 1980s, the attorneys, clerics, journalists and other brave individuals who acted selflessly to challenge regime repression such as torture, detention and assassination, did so notwithstanding their lack of the resources to organize large rallies. Consequently, Press concluded that rational choice theory does not explain the behaviour of these activists who acted out of duty or love for the public good, rather than self-interest.

The minor proposition is that the Kenyan political class (both the ruling party as well as the opposition) organized mass support, ethnically. However, Nowrojee argues that during the *culture of resistance*:

> Ethnicity was used to justify oppression. By saying that oppression was necessary to protect some of the ethnic groups because otherwise they would be swamped, or taken over, or discriminated against – used by the state….to oppress the Kikuyu between 1982 and 1992 because they are a threat to the Kalenjin, to the Maasai, to the coast and the pastoralists. So these people never spoke out against oppression…. Because the opposition parties did not rely upon offering ideology as their justification for existence, they fell back on the easier appeal to ethnicity.[378]

Lamenting the use of ethnicity to violate human rights, Nowrojee opines that:

> there was also a justification to use violations of human rights, saying (Jomo) Kenyatta did this to everybody else, therefore its (sic) OK if the Kikuyus get a taste of this medicine as well. The arugment (sic) is that ethnicity underground is a poision (sic) so we might as well recognize it and contain it. That is an argument by planners from outside. It's the consultants who come in from all sorts of places.[379]

Yet, in his principled view: "The answer is not acknowledging ethnicity, the answer is challenging corrupt personal rule. The rule of law will ensure that those people at the coast have as much a part of the national resources as someone in Nyanza."[380] Nowrojee therefore accuses "the West (of) encouraging the donors, encouraging this business about one President, two Vice Presidents, One Prime Minister, two deputy Prime Ministers."[381] He argues that the internal view of activists rejects ethnic balancing because: "Then (a public official) says:

[378] *Ibid.* pp 17-18.
[379] *Ibid.* p 18 (brackets supplied).
[380] *Ibid.*
[381] *Ibid.*

I'm here because of ethnic balance, so my job is to look after my own ethnic loyalty."[382] Nowrojee therefore concludes that: "Ethnic balancing not only encourages ethnic division,"[383] but also "ethnic responsibility as opposed to national responsibility for these offices. And even if they pretend and say we are national officers, there (sic) first loyalty in their heart is to the very constituency which has sent them."[384] However, "minorities haven't got the divisions to acquire any of the leadership positions. Moreover, once you cut someone out they tend to think of how to take over." "Thus" Nowrojee proposes that "if we move, from the notion of 'minority' to the concept of 'guests', we may better understand what structures to give our re-writing."[385] His perspective represents the "internal view" espoused by human rights activists.

The chapter hypothesizes however, that the informal organizations which mobilized mass public participation at public rallies in the 1990s not only aimed at democratization. To the extent that the informal organizations also assumed that individual self-interests could motivate Kenyan masses, to inspire those who vote at general elections to choose candidates who prefer liberal values, they were mistaken. Conversely, the "external view" – that espoused by the political elites and accepted by foreign donors – argued that in reality, Kenyan voters lack information or resources to make rational choices which promote their self-interest in survival or improved standards of living. Rather than elect leaders who would increase the democratic space or protect human rights or satisfy other social welfare preferences, instead typical Kenyan voters presumably choose expressively to identify with candidates who share their ethnic identity.[386] What forces triggered post-2007 ethnic cleansing?

1.8. Two Explanations for Kenya's Cyclical Ethnic Conflicts

1.8.1 The Impact of the 2002 Kibaki-Raila "Memorandum of Understanding"

According to Makumi Mwagiru:

> (t)here are two ways of explaining conflict in Kenya from the conflict cycle (literature). The first views the perspective as one of only an electoral

[382] *Ibid.*
[383] *Ibid.*
[384] *Ibid.*
[385] Pheroze Nowrojee, *The November 2005 Referendum and Kenyan Politics Today: Directions in Constitutional Reform* (Nairobi: African Research and Resource Forum; Heinrich Böll Foundation, 2006).
[386] Sirkku Hellstern, "Afro-Libertarianism and the Social Contract Framework in Post-Colonial Africa: The Case of Post 2007 Elections in Kenya" (June 2009) *Thought and Practice: A Journal of the Philosophical Association of Kenya* (PAK) Premier Issue New Series, 1(1), 127-146; See also Khamala, "Voting for a Change," *supra* note 350.

> conflict. In this perspective, there was a general feeling of peace and peaceful relations following the general elections of 1992 (sic, should be 2002). However tensions developed as a result of the infamous memorandum of understanding (MoU), and the failure to install a new constitution within one hundred days promised to Kenyans.[387]

This section shall distinguish Mwagiru's abovesaid "*structural* perspective" from his "*conflict cycle* perspective" as compounded by his *electoral crisis* perspective, explained below. As regards the conflict cycle, structural tension developed from the fact that, as with all Westminster model constitutions, so also Kenya's post-independence constitution did not contemplate its own demise.[388] In 2002, for purposes of overseeing comprehensive constitutional reforms, a "memorandum of understanding" committed Kibaki to a single-term presidency. At worst, this was a gentleman's agreement, an incomplete contract. Its parties lacked intention to create legal relations. However:

> Unfortunately, upon election Kibaki allegedly failed to honour a Memorandum of Understanding (MoU) with Odinga. In February 2003 murmurings of the private MoU began to appear in the public, with claims that Kibaki had failed to honour an agreement between Odinga and himself in which he had allegedly agreed to share appointment of cabinet ministers and other public appointments 50-50. This led to the eventual break-up of NARC, the creation of NARC Kenya (of Kibaki) and the return of the Liberal Democratic Party led by Odinga.[389]

Thus, in breach of his 2002 pre-election MoU with Liberal Democratic Party (LDP) leaders, Kibaki reneged on his pledges. He argued, apparently, that his allegiance was owed exclusively to the Kenyan people, as electors, who were not privy to any extraneous MoU with third parties.[390] Kibaki insisted that – subject only to renewal for a second term, upon successfully defending his seat at the 2007 presidential election – he became president in 2002 under a public contract. He effectively insisted that his presidency's termination should continue beyond its five-year term. Although the 2002 MoU was legally unenforceable, according to Mwagiru's first "structural tension" perspective of the post-2007 conflict, nevertheless, it had political consequences, since "(t)his crisis was also marked by the defeat of the government's proposed constitution

[387] Mwagiru, *The Water's Edge, supra* note 1 p 6 (hereafter the 2002 MoU or simply the MoU).
[388] John Hatchard and Tunde I. Ogowewo, *Tackling Constitutional Overthrow in the Commonwealth* (London: Commonwealth Secretariat, 2003).
[389] Muli, "Reflections," *supra* note 4 p 12.
[390] For a similar argument see generally Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995) Chapter 10 "Authority Law and Morality."

at the referendum of 2005. The relations of crisis went unattended and by the general election of 2007, they deteriorated into violent conflict."

At the ICC *Ruto case*, his lawyer Mike Hooper submitted that "the 2005 referendum period also coincided with the time people from non-Kikuyu ethnic groups were being sacked from the civil service, the police and the armed forces."[391] To this extent, this chapter argues that the *structural* issues preceded the *electoral* ones. Apart from skewed resource distribution, not only did the old constitution lack – what John Hatchard and Tunde Ogowewo call "a rule of obsolescence"[392] (in contemplation of its own demise or transition) – but also, it did not contain mechanisms to facilitate smooth power-transfer to an opponent, after a close presidential race. Upon President Kibaki reneging on his promise under the 2002 MoU to change the constitution, and further – upon the ECK failing to organize a credible 2007 presidential election – therefore, the president breached not only his informal MoU obligation to vacate office after five years, but also his constitutional one – to guarantee public safety and enforce national security. Putting the cart before the horse:

> The second way of explaining the conflict is that although it started as an electoral conflict, there were other structural issues which became evident as the conflict developed. These structural issues were part of the cycle of the conflict in Kenya, and represented serious crisis in the body politic.[393]

Koki Muli associates with an election conflicts perspective of the conflict cycle. She notes that President Kibaki reneged on his 2002 MoU – as evidenced *inter alia,* first, by failing to deliver on his promised new constitution within 100 days after the 2002 elections, and second, by failing to superintend over a consensus on the constitution and the process leading up to it. These were some "of the factors and events contributing directly to the heightened tensions and the post-elections violence in 2007/8."[394] However her analysis is limited to *the triggering events* at the 2007 national election tallying centre, and neither venture into the dynamics of analyzing the protracted conflict mediation process, nor the 'structural tension" perspective.

In 2002, the LDP's informal concession or Memorandum of Understanding with NAK was a gesture of good political "sportsmanship." Because the NAK-LDP deal was negotiated and agreed in secret, therefore, Kibaki could easily afford to

[391] Walter Menya, "Ruto Defence accuses Kibaki of Betrayal" *Daily Nation*, 31st October 2013.
http://www.nation.co.ke/news/politics/Ruto-defence-accuses--Kibaki-of-betrayal-/-/1064/2055492/-/p0k7tz/-/index.html<accessed<31st October 2013>
[392] Hatchard and Ogowewo, *Institutional Takeover, supra* note 388.
[393] Mwagiru, *The Water's Edge, supra* note 1 p 6.
[394] Muli, "Kenyatta International Conference Centre," *supra* note 4.

ignore it. Indeed, after becoming president in 2002, Kibaki did abandon his pre-election or *ex ante* agreement with Odinga. Conversely, in 2008, the National Accord was negotiated publicly at the Nairobi Serena Hotel mediated by reputable impartial, external brokers, chaired by Kofi Annan. The result was that unlike the 2002 MoU which was unenforceable, the 2008 National Accord became entrenched into the Constitution.[395] Arguably, the 2008 National Accord was enforceable not only locally – by way of "exit" by a dissatisfied partner– but also internationally, to the extent that the ICC has complementary jurisdiction over alleged crimes against humanity committed during the post-2007 conflicts. To this end, "the goal of the process was to achieve sustainable peace, stability, and justice through the rule of law and respect for human rights." The National Accord was negotiated between Kibaki and Odinga, as follows:

> Over a period of 41 days of negotiations at the Serena Hotel (Cana Room), under the leadership, of the two Principals, the Negotiators Martha Karua, Mutula Kilonzo, Samuel Ongeri and Moses Wetangula representing PNU/Government and Moses Mudavadi, William Ruto, Sally Kosgei and James Orengo – representing ODM – signed a raft of major agreements on 1st, 4th, 14th and 28th February, 4th March and 23rd July 2008.[396]

It acquired *ex post* ratification – not only from the legislature, as the people's representatives[397] – but ultimately from the people themselves at the August 2010 national constitutional referendum. This chapter thus contrasts the Kibaki-Odinga (NAK-LDP) dishonoured, informal political MoU of 2002, with their stable, formal power-sharing arrangement negotiated between Kibaki's PNU and Odinga's ODM during looming civil war five years later. In conclusion, public confidence in Kenya's constitutional arrangement was restored extra-judicially through a legal amendment under the Constitution of Kenya (Amendment) Act of 2008[398] and the National Accord and Reconciliation Act,[399] ingeniously brokered by tertiary actors mediating between the executive and legislature. Because the referendum model of choosing legitimate constitutional rules failed to change Kenya's secondary rules at the 2005 constitutional referendum, during peacetime,[400] and further upon ODM declining to recognize election petitions as the *legal* mode or institutionalized strategy by which to challenge the *legitimacy* of the disputed 2007 presidential election winner, instead a semi-

[395] Section 15 See Appendix 2A.
[396] Kimani Njogu, "Putting out the Flames: The Kenya National Dialogue and Reconciliation Process" in Njogu (ed.) *Defining Moments, supra* note 4, 105-46 p 114 See also Njogu, "Agenda Four Agreements," pp 128-46.
[397] NARA, *supra* note 8.
[398] Constitution of Kenya (Amendment) Bill of 2008 (enacted in March 2008).
[399] 2008 enacted simultaneously with Constitutional Amendment *ibid*. See Appendix 2B.
[400] Nowrojee, *November 2005 Referendum, supra* note 385.

institutionalized solution to non-institutionalized violence was chosen as a lesser necessary evil. In the classification of Mwagiru, various levels of mediators offered their intervention skills including: endogenous (Retired Army Generals Lazarus Sumbeiywo and Daniel Opande, ambassador Bethwell Kiplagat, COTU),[401] exogenous (UN Secretary General Ban Ki-Moon, The AU [Chairman Ghanaian President John Kuffour sent Former Presidents Mozambican Joaquim Chissano, Tanzanian Benjamin Mkapa and Zambian Kenneth Kaunda] and UK Prime Minister Gordon Brown)[402] and finally heterogeneous (ODM-K presidential candidate Kalonzo Musyoka) coteries.[403]

What the African Union and Kofi Annan's Panel of Eminent African Persons[404] – including Graca Machel and Benjamin Mkapa – succeeded in doing, was to boldly compel both the executive and legislature to amend section 47 of the old constitution so as to expressly provide for and enact a Referendum Act to change Kenya's dysfunctional first-past-the-post, winner-take-all constitution. If such advice had been extended by the international community by way of *positive* complementarity, prior to the 2007 elections, then – under Mwagiru's "structural tension" thesis – Kenya would most likely have avoided the constitutional crisis ushered in by perceived failure of political power-transfer in 2008. Upon failure to pre-empt the 2007 "electoral crisis," the Electoral Commission chairman himself admitted ignorance regarding whether the voting process had been fair. "Mr Kivuitu had been asked whether he believed that Hon Kibaki fairly won the election, to which he responded: I don't know. That is until I see the original records, which I can't for now unless the court authorizes. What we have are records of results from field officers."[405] For Muli: "This statement added to the already serious doubts about the credibility of the presidential election results."[406]

1.8.2. Political Anatomy of the 2007 Post-Voting Scenario

1.8.2.1. Pre-Bargaining Intrigues

Under Kenya's old constitution, an absence of a ceiling on electoral expenditure,[407] coupled with widespread poverty among the masses, according

[401] Mwagiru, *The Water's Edge, supra* note 1 pp 16-17.
[402] *Ibid.* pp 19-20.
[403] *Ibid.* pp 21-2.
[404] *Ibid.* p 33.
[405] "Now ECK Denies Rigging Poll in Favour of Kibaki," *Daily Nation*, 24th January, 2008 p 8 quoted in Mwagiru, *The Water's Edge, supra* note 1.
[406] Muli, "Kenyatta International Conference Centre," *supra* note 4 p 34.
[407] Repealed in 1991.

to World Bank reports of 46 % of Kenyans living below the poverty line,[408] realistic liberal democratic choice was restricted. For, as Okoth-Ogendo shows, Kenya's old dysfunctional constitution fatally embraced a winner-take-all structure. Thus, the *constituted state*,[409] as eroded by numerous incoherent amendments,[410] condemned an unsuccessful candidate and his supporters, to suffer exclusion from public appointments and ultimate marginalization from economic development during the inter-electoral period. That was sectional governance.[411] ODM's *majimbo* (federalist) manifesto, thus crafted attractive redistributionist policies. The decisive factor of all Kenyan presidential elections, is that dominant needs-based interests are invariably conditioned by communal voting motivations and patterns, along expressive or symbolic, rather than rational or ideological lines. Odinga's ODM relied heavily on Luo Nyanza, Luhyias in Western, pastoralists in the Rift Valley and indigenous squatter communities along the Coast. Kibaki's PNU derived its ethnic base from Kikuyus in Central Province, Embus and Merus in upper Eastern and would unite, post-2007, with Musyoka's ODM-K Kambas in Southern Eastern province. Swing votes came from cosmopolitan Nairobi and from Muslims at the Coastal and North Eastern Provinces. The presidential election was framed by the opposition as a contest pitting "Kikuyus versus the rest" or "41 tribes against 1."[412] Acute ethnic xenophobia expressed through parochial voting is noted by commentators including both Chege and Ghai.[413]

Wachui Makori's variety of Mwagiru's "structural tension" perspective of conflict cycles attributes "the conflict as being 'ethnic' at its base."[414] Because:

> a child who was 20 in 2007, was just five years old in 1992. But because (s)he grew up hearing blame heaped for his present circumstances on a particular group of people, 'this young person needs very little incitement to take up arms and seek revenge for the 'wrongs' that were inflicted upon his people.'[415]

Due to ethnic phobia "Kikuyus in the Rift Valley were referred to using the derogatory term '(m)adoadoa' mean(ing) exemplified as spots as on the skin of a hyena. The animal is depicted in most African traditions and folklores as greedy and dirty, feeding on decomposed carcasses and its own cubs. It connote(d) those who spoilt the pattern of voting."[416] As Joseph Stalin famously remarked: "Those who cast the votes decide nothing; those who count the votes decide everything."[417]

The entire ECK leadership comprised President Kibaki appointees. Following a close race between Kibaki and Odinga, after the 27th December 2007 presidential election vote, three days of heated wrangling concerning the vote-tallying process, ensued. Barricaded behind closed doors, the ECK Chairman, Kivuitu made his critical decision to recognize Kibaki's re-election. Fatefully:

> On the evening of December 30th, Chairman Kivuitu and his colleagues announced the presidential election results in a secluded room amid complaints of rigging and heavy presence of security personnel. Soon thereafter, Kivuitu was escorted by armed security men to State House to deliver the certificate of results that he had announced. Soon afterwards, a swearing in ceremony of President Kibaki was conducted under night cover at State House.[418]

Kibaki received 4,584,721 votes against Odinga's 4,352,993.[419] Barring a successful election petition, Odinga's unsuccessful position within the Kenyan legal system, became *fait accompli*. Citing his lack of confidence in the Kenyan judiciary to arbitrate impartially over a closely-contested, disputed presidential election outcome,[420] and further given that the presidential election result was apparently uncertain, therefore Mwagiru explains how Odinga strategically – partly abandoned the "institutionalized contest" and instead capitalized on public dysphoria – by urging mass protests among his supporters to engage in "non-institutionalized violence." This "electoral crisis" or "violence thesis"

[408] Document of The World Bank Report No.: 42143 Project Performance Assessment Report Republic of Kenya National Agricultural Research Project-Phase II (Credit No 2935-KE) 16 January 2008 p ix.
https://ieg.worldbankgroup.org/Data/reports/ppar_42143.pdf<accessed 6 July 2014>
[409] H.W.O. Okoth-Ogendo, "Constitutionalism without Constitutions: The Challenge of Reconstruction of the State in Africa" in Carla M. Zoethout, Marlies E. Pietermaat-Kros and Piet W.C. Akkermans (eds.) *Constitutionalism in Africa: A Quest for Autochthonous Principles* (Rotterdam: Sandres Instituut, 1996) 49-61 p 53.
[410] Githu Muigai, *Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of the Constitution* (Nairobi: Faculty of Law, University of Nairobi, Ph.D. thesis unpublished, 2001) pp 168-170.
[411] Nowrojee, *November2005 Referendum, supra* note 385.
[412] Chege, "Kenya: Back from the Brink?" *supra* note 225.
[413] Ghai, "State, Ethnicity and Economy,'" *supra* note 325.
[414] Mwagiru, *The Water's Edge, supra* note 1 p 10.
[415] Wacui Makori, "Staying the Course of Peace," *The Nairobi Star*, 17th January, 2008 p 17, quoted in *ibid.*
[416] Gathenji "Post Election Violence" *supra* note 143 p 187, footnote 6.
[417] Herma Percy-McDaniel, *Will Your Vote Count? America's Broken Electoral System* (Westport, Connecticut: Praeger, 2009) p 43.
[418] *Ibid.* p 33.
[419] Mwagiru, *The Water's Edge, supra* note 1 p 9.
[420] See for example Samuel Kinjire, "Kibaki's Petition Thrown Out," (January 2000) *The Lawyer Magazine* Issue no. 17.

seemed to confer ODM with negotiating leverage to negotiate for resolution of the structural "tension thesis."[421]

Kibaki begrudgingly accepted to meet Bishop Desmond Tutu "and vaguely hinted that he was not completely opposed to a coalition government."[422]

On 9th January, 2008 AU Chairman and Ghanaian President Kuffour separately met Kibaki and also Odinga. Later that day Kibaki not only announced his cabinet, but also demanded ODM recognize that there is a government in place and that Odinga should accept a non-executive Prime Ministership and a few cabinet slots.[423]

On his part, "while Odinga was not opposed to a government of national unity, he rejected a coalition government."[424] Significantly, in the contest for the influential post of Speaker of the National Assembly, ODM garnered 105 against PNU's 102 votes.[425] Considering that the law permitted a seven-day notice for a no-confidence vote on the president, therefore Kibaki faced high political risks. Even supposing that ODM MPs were reluctant to simultaneously precipitate their own by-election – which such no-confidence vote on the president entailed – they could, nevertheless, reject all government legislation thereby crippling the executive branch from accomplishing any national-interest disposition. Kibaki's second term risked becoming a "lame-duck" presidency.

Constrained by the prospect of dealing with a hung parliament, President Kibaki was compelled to seek co-operation from Odinga – as leader of the parliamentary majority party. However, Odinga's memory of the earlier dishonoured informal MoU would not entice him to enter into another informal agreement with Kibaki. In addition to having stronger moral authority than previously – since Odinga himself had been faithful to the MoU – he also claimed to have won the 2007 presidency and was therefore inspired to hold out for official commitment to power-sharing this time around, by legal recognition.

> In furtherance of its non-institutionalized, "structural tension" strategy, ODM called countrywide mass demonstrations for 16th, 17th and 18th January 2008.[426] PNU condemned the inflammatory call for protests.[427] On the other hand: "When there were reports that some Kenyans had been killed by the police, ODM's Anyang' Nyong'o stated that the ODM were compiling evidence about these killings, and would forward the same to The Hague (i.e. the International Criminal Court)."[428] This threat to invoke a criminal trial response indicates that ODM were prepared to "use legal means when convenient to them." Violent protests enabled Odinga to articulate his own agenda for negotiations.[429] Significantly, unlike earlier international criminal tribunal models, the modern ICC's jurisdiction need not be invoked exclusively by member states or even the Security Council. The Office of the Prosecutor may exercise its *proprio motu* jurisdiction.[430]

A prominent role was also played by the impact of exogenous forces upon the PNU-ODM negotiations. The international community reposes high value in the "right to make it happen"[431] – under international law – which enshrines the people's right to self-determination. However, "by the third week of the violent conflict, over six hundred people had been killed and 250,000 were internally displaced in the post election violence."[432] For Kenya to maintain its sovereignty – the Kibaki government had to be seen to be in control over the country's territorial affairs. Yet, the escalating turmoil increasingly constituted an humanitarian disaster justifying intervention by third-party states. Regional interests, including Uganda, Rwanda, the Democratic Republic of Congo, Sudan and Ethiopia, which rely heavily on Mombasa's port for access to imported goods, expressed their legitimate economic expectation of seeing swift restoration of stability in neighbouring Kenya. Hence the AU was justified in facilitating face-to-face dialogue between the protagonists.[433]

1.8.2.2. "Agenda 4"

The National Dialogue and Reconciliation process began in earnest on January 22nd, 2008 three weeks after the post election violence erupted across the country. It was led by former Tanzanian President Benjamin Mkapa of Tanzania, former South African first Lady Graca Machel and former UN Secretary General Kofi Annan as Chairperson […] On 24th January 2007 (sic) Kofi Annan was able to bring the two leaders together and they shook hands in public, symbolically showing that they were willing to engage in dialogue.[434]

[421] Mwagiru, *The Water's Edge, supra* note 1.
[422] "Electoral Commission Scrambles Frantically to Find Legal Route to Voter Recounting" *The East African,* 7th-3th January 2008 pp 2-3, cited in *ibid.* p 30.
[423] *Daily Nation* 10th January, 2008 p 2, cited in *ibid.* p 47.
[424] *Ibid.* p 48.
[425] 15th January, 2008, election of Kenneth Marende as Speaker of Kenya's 10th Parliament.
[426] Mwagiru, *The Water's Edge, supra* note 1 p 71.
[427] *Ibid.* p 72.
[428] *KTN Jioni* 17th January 2008, cited in *ibid.* p 41.
[429] *Ibid.* p 47.
[430] Rome Statute, *supra* note 14.
[431] Fletcher and Ohlin, *Defending Humanity, supra* note 49; see also article 1 of the ACHPR, *supra* note 74.
[432] *Daily Nation* 22nd January 2008, cited in Mwagiru, *The Water's Edge, supra* note 1 p 3.
[433] Mwagiru, *The Water's Edge, supra* note 1.
[434] Njogu, "Putting out the Flames," *supra* note 4 p 572.

The daily intrigues which accompanied the Panel of Eminent African Personalities' mediation process have been narrated by Ben Sihanya and Duncan Okello,[435] collating the media reports accompanying bargains traded-off by the respective parties during the mediation process.

The key point is that "external" pressure was brought to bear on the "internal" negotiating parties in order to attempt to deter extreme strategic bargaining or hold-out positions. For purposes of this chapter, it is sufficient to sample some events which transpired during four key dates on which the four agreements culminating into the 2008 National Accord, were signed. These were 1st, 4th, 14th and 28th February, 2008.

1.8.2.2.1. Agenda no. 1: Ceasefire, 1st February 2008

"On 1 February 2008, Mwai Kibaki reiterated his ambivalent strategy and stood his ground that ODM should seek legal redress over its claims of a stolen victory in the presidential election. This was in his address to the AU Summit in Addis Ababa, Ethiopia."[436] It is noteworthy that the Kenyan National Assembly and Presidential Elections Act[437] prescribed a deadline of 28 days within which an aggrieved party was permitted to file any intended election petition. Hence Kibaki's remarks belatedly inviting Odinga to seek legal redress may be construed as extremely cynical and unrealistic since he knew full well that the time-window for election petitions had long expired. Simultaneously, "Kibaki's statement came as the UN Secretary General…Ban Ki Moon" told "the leaders and people of Kenya….to stop the violence immediately and resolve all issues through dialogue."[438] Coinciding with the international community's call for the cessation of violence and pursuit of dialogue resolving the crisis: "Discussions on Agenda No. 1" signed on the Fourth Session held on 1st February resolved on "Immediate Action to Stop Violence and restore Fundamental Rights and Liberties." This entailed:

> Discussions…to be conducted to identify and agree on the modalities of implementation of immediate action aimed at:
>
> - Stopping the wave of violence that had gripped the country since the announcement of the results of the Presidential Elections;
> - Enhancing the security and protection of the population and their property;

[435] Ben Sihanya and Duncan Okello "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreements" in Karuti Kanyinga and Duncan Okello (eds.) *Tensions and Reversals in Democratic Transitions: Kenya 2007 General Elections* (Nairobi: Society for International Development and Institute for Development Studies University of Nairobi, 2010) 633-709 pp 679-690.
[436] *Ibid.* p 683.
[437] National Assembly and Presidential Elections Act (Chapter 7 Laws of Kenya).
[438] Sihanya and Okello, "Mediating," *supra* note 435 p 683, citing *The East African Standard,* 1st February 2008.

> - Restoring the respect for the sanctity of human life;
> - Ensuring that the freedom of expression, press freedom and the right to peaceful assembly were upheld.[439]

1.8.2.2.2. Agenda no. 2: Humanitarian Assistance and Criminal Justice, 4th February 2008

On 4 February 2008, the UN Security Council warned Kenyan leaders to immediately end post-election violence as mediation talks turned turbulent. At the mediation talk, PNU and ODM stuck to their positions over the disputed polls. These prompted Annan and the mediation team of eminent persons to appeal to both sides to compromise for a fast resolution. Raila said that his party was willing to climb down on its demands that Kibaki resigns.[440]
However:

> Mediation talks hit a stalemate when the two sides refused to cede ground forcing them to adjourn unusually. The PNU side accused the US, Britain, Canada and South Africa of coercing them to agree to certain proposals citing the imposition of visa bans on some of its members. The international community urged the wrangling sides to strike a deal to end the crisis or else the international community would intervene.[441]

Kimani Njogu summarizes "Agenda No. 2: Immediate Measures to Address the Humanitarian Crisis, Promote Reconciliation, Healing and Restoration." It prescribed that:

> Discussions were to be conducted to identify and agree on the modalities of implementation of immediate measures aimed at:
>
> - Ensuring that the assistance to the affected communities and individuals was delivered more effectively;
> - Ensuring the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty were brought to justice;
> - Ensuring the process of national healing, reconciliation were started immediately.[442]

One would expect that absence of the early individual agencies who initiated a *culture of resistance* to human rights violations and also the exclusion of formal organizations which mobilized large crowds to protest against authoritarian rule, (who had an "internal point of view" of the human rights violations) would result in the international community effectively supporting a political

[439] Njogu, "Putting out the Flames," *supra* note 396 pp 120-121.
[440] Sihanya and Okello, "Mediating," *supra* note 435 pp 683-4 (footnotes omitted).
[441] *Ibid.* p 684.
[442] Njogu, "Putting out the Flames," *supra* note 396 p 121.

settlement based on an "external point of view"[443] i.e. ethnic-balancing. However, on close reading of this limb of the Accord, the coercive threat from Western, neo-liberal democratic countries appear to have introduced a significant difference – from the 2002 MoU negotiated between NAK and LDP – which had been discussed in secret without any third party – by way of the ICC – to oversee or compel retributive responses to any international offences through criminal trials. It is submitted that the unusual adjournment of the preceding day's proceedings (3rd February 2008), as well as the Kibaki government's decry of visa bans as foreign interference, indicates his government's reservations about the negotiator's inclusion of "expeditious investigation of gross and systematic violations of human rights" and his government's tacit reluctance to bring "those found guilty" to "justice."

1.8.2.2.3. Agenda no. 3: Power-Sharing, 14th February 2008

On 13 February 2008, the UK and Switzerland once again demonstrated that the international community was in no disposition to entertain the collapse of the talks. They issued the harshest warning thus far to persons perceived to be pushing sectarian interests. The new international pressure was brought to sustain another momentous period of talks that began with a clarification by Annan…[444]

Under "Agenda No. 3: How to Overcome the Current Political Crisis," the parties were to negotiate and agree on a solution *towards resolving the political crisis arising from the disputed presidential electoral results as well as the ensuing violence in Kenya*.[445] Njogu explains that:

> The parties appreciated that the crisis revolved around the issues of power and the functioning of state institutions. Consequently, its resolution required making fundamental review to the constitutional, legal and institutional frameworks. The review would have the effect of redistributing power and ensuring more accountability and credibility in governance institutions.[446]

Further: "In a bid to buttress the mediation efforts, the US President George Bush told the Kenyan leaders through Secretary of State Condoleezza Rice on 15 February 2008 that Kenya must return to democracy." Yet she proposed a partially non-democratic solution to the 2007 "electoral crisis." Specifically that: "Power sharing will have to be genuine. Both sides must have responsibilities

[443] *Post* explained below.
[444] Sihanya and Okello, "Mediating," *supra* note 435 p 687.
[445] Njogu, "Putting out the Flames," *supra* note 396 p 121 (emphasis in original).
[446] *Ibid.*

and authorities that matter, she said. It can't be simply the illusion of power sharing. It has to be real."[447]

On 27 February 2008, talks remained suspended indefinitely and the leader of the mediation team Kofi Annan, said that he had suspended the talks after tempers flared in the talks room. The Chief Mediator said he would engage with the principals, PNU's Kibaki and ODM's Raila, in a bid to give the talks a fresh lease of life.[448]

"The US State department announced it was exploring a wide range of possible actions in Kenya. They said they would draw their own conclusions about who is responsible for the lack of progress and take necessary steps." Consequently: "The US threatened to mobilize UN, EU and AU to impose a political solution on Kenya."[449]

1.8.2.2.4. Agenda no. 4: Long Term Issues and Solutions, 28th February 2008

On 28th February, 2008, Kuffuor's successor as AU Chairman, Tanzanian President Jakaya Kikwete witnessed the signing of the National Accord between PNU and ODM. Mwagiru justifies the AU's intervention by referring to articles 51 and 52 of the UN Charter as well as the African Charter's "philosophy, objectives and principles" as authority for the Annan team's mediation buttressing the UN Charter under international law.

The UN Charter provides for the use of regional arrangements (e.g. the African Union) for the maintenance of international peace and security. The regional arrangements must however first use the peaceful settlement of local disputes before referring them to the Security Council of the UN. On the other hand, the situation in Kenya after the 2007 elections gave rise to violence and a humanitarian crisis, including the problem of internally displaced persons. These issues all fell under the philosophy, objectives and principles of the AU. The intervention of the UN and AU were clearly prescribed by the Charters.[450]

The European Union released a statement that they "would not do business as usual" with Kenya "until there is a political compromise which leads to a lasting solution that reflects the will of the Kenyan people, wins their confidence, helps

[447] Sheryl Gay Stolberg and Jeffrey Gettleman, "Rice in Nairobi, Offers Incentives to End Violence" *New York Times*, 19th February 2008 quoted in Sihanya and Okello, "Mediating," *supra* note 435 p 687.
[448] *East African Standard*, 10th February, 2008, cited in Sihanya and Okello, *ibid.* p 689.
[449] *Ibid.* p 690.
[450] Mwagiru, *The Water's Edge, supra* note 1 p 20.

return Kenya to stability."[451] A day earlier, US Assistant Secretary for African Affairs Dr. Jendayi Frazer took an identical stand.[452] Long before Annan's arrival, East African leaders including IGAD,[453] Uganda's Yoweri Museveni[454] and Rwanda's Paul Kagame[455] had attempted to facilitate dialogue.

Under "Agenda No. 4 Long term Issues and Solutions," were directed at resolving "structural tensions." Sihanya and Okello explain how:

> At the height of the crisis the parties seemed to agree that the disrupted election results were a mere trigger, and that there were deeper underlying injustices that were enduring. The parties therefore agreed that poverty, the inequitable distribution of resources, various perspectives of historical injustices as well as exclusion on the part of segments of the Kenyan society constituted and still constitute the underlying causes of the prevailing social tensions, instability and cycle of violence.[456]

In sum:

> Discussions under this agenda item would be conducted to examine and propose solutions for long-standing issues such as *inter alia*:
> - Undertaking constitutional, legal and institutional reform;
> - Tackling poverty and inequality as well as combating regional development imbalances;
> - Tackling unemployment, particularly among the youth;
> - Consolidating national cohesion and unity;
> - Undertaking Land reform;
> - Addressing transparency accountability and impunity.[457]

1.9. Normative Theory of Rational Bargaining

1.9.1. Safeguarding the Rational Contract

How do "two parties engage in contractual transactions" to settle a civil war, "*without law*?"[458] According to Jules Coleman, Douglas Heckathorn and Steven

[451] "EU Backs Annan Diplomacy" *The East African Standard*, 14th January, 2008 p 9 quoted in *ibid.* p 79.
[452] "Frazer's Full Statement on Situation," *Sunday Nation*, 13th January 2008 p 2 quoted in *ibid.* pp 52, 77-8.
[453] *Ibid.* p 101.
[454] *Ibid.* pp 96-7.
[455] *Ibid.* pp 53-4.
[456] Sihanya and Okello, "Mediating," *supra* note 435 p 691.
[457] Njogu, "Putting out the Flames," *supra* note 527 p 121-2.
[458] Jules L. Coleman, Douglas D. Heckathorn and Steven M. Maser, "A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law" in R.G. Frey and

Maser,[459] "each problem in the contractual relationship corresponds to a distinct phase of the contracting process and involves a distinct principle of rationality. First in the *pre phase* the decision of whether to coordinate" i.e.:

> whether to seek a contract, is made. If the parties are rational, each predicates an affirmative decision on expectations that joint gains will be attainable under the contract. Second, in the *negotiation phase* the parties agree on the terms of the contract, specifying the manner in which the gains emanating from the resulting contract and burdens of enforcing it are to be allocated.

Third, "in the *post phase* each party makes the decision to fulfill or to violate the contract and monitors the compliance of the other." In Kenya's post-2007 situation, the pre-phase lasted from 30 December 2007 until 24 January 2008, then the negotiations-phase until 28 February, 2008, after which the post-phase ensued.

"To resolve the defection problem," first, "each party must reduce the other party's incentive to defect."[460] This is most common, but more costly. Second, "(c)ompliance can be made more rewarding, defecting less rewarding or (third) opportunities to defect reduced or blocked."[461] This is most impractical. "Individual rationality then requires that a contract be *enforceable*."[462] In general, "the greater an individual's enforcement incentive, the stronger must be the penalties that would succeed in making compliance rational."[463] It is in this respect that the AU's Panel of Eminent Personalities played a second-order, third party role to, first, ensure the reduction of the National Accord into legislation, and second, transfer Judge Philip Waki's "secret envelope" to the ICC Chief Prosecutor in July 2009 when Kenya failed to prosecute the persons suspected of bearing greatest responsibility for crimes against humanity in the post-2007 conflicts. As shall be shown in chapter two, the ICC prosecutor subsequently applied *ex parte* and obtained authorization warrants against six Kenyan suspects. However, the Kenya government challenged admissibility of the cases under the ICC's complementarity principle. The dispute about complementarity would return to haunt the trial proceedings when the prosecutor claimed that the Kenya government was in breach of its co-operation obligation. Significantly, the government commissioned and facilitated not only the Serena negotiations, but also the Waki Commission, which recognized the ICC's enforcement role.

Christopher W. Morris (eds.) *Liability and Responsibility: Essays on Law and Morals* (Cambridge: Cambridge University Press, 1991) 173-254 p 191.
[459] *Ibid.* p 186.
[460] *Ibid.* p 206.
[461] *Ibid.* pp 206-7.
[462] *Ibid.* p 207.
[463] *Ibid.*

Depending on the way in which the transaction gains are distributed, rational bargaining theory can explain and defend outcomes of contracting as more or less rational. It can explain safeguards in contracting aimed at securing certain divisions; and failures in contracting as often resulting from failure to solve the bargaining concession problem or owing to the high cost of safeguarding agreed upon divisions. Coleman, Heckathorn and Maser call the "process of expending resources to prevent contract failure, 'rational safeguarding.' "[464] Safeguarding without compliance is simply a waste of resources and is therefore irrational. In their view, prior to pursuing a decision of contractual gains, the defection problem must be resolved. In the complete rational contract, the parties bargain over both gains of trade (in the post-conflict negotiations, power-sharing), and over contractual safeguards.[465] Thus the ICC's enforcement of compliance with prosecution investigations to promote criminal justice can be seen as part of Kenya's 2008 National Accord. Furthermore, significant national resources were expended to ensure promulgation of a new Constitution in 2010, vetting of personnel and electoral reforms and establishment of other "Agenda 4" Commissions. That basic law automatically domesticates all treaties which Kenya has signed, including the Rome Statute.

Did the ODM and PNU players possess sufficient resources to enforce the agreement so as not to call on third-party enforcement mechanisms? Coleman, Heckathorn and Maser caution that if the question of who shall bear the costs of defection is solved, then the second cooperation game is played: Division of the gains. In Kenya, the 2008 power was theoretically shared 50-50. Under conditions of complete information, both cooperative games were played so that the following was true: a rational National Accord minimized the sum of the costs the protagonist political parties imposed on one another and the costs they bore to protect themselves. If bargainers underestimate one another's resistance, then they would demand more concession than the other would grant, and the result: conflict, as occurred after fallout from the 2002 MoU. The Kenyan people thus incurred bargaining costs, decision costs and monitoring costs[466] in the form of 2008 settlement negotiations at Serena. Tom Wolf notes that after 2002, President Kibaki was not inclined to pursue his predecessor for alleged past injustices. Wolf suggests that facilitating a peaceful transition purchases amnesty.[467] The 2002 post-Moi precedent may be partly attributed to the African spirit of *Ubuntu*. Similarly, it may be submitted that swift settlement of the post-2007 conflicts and acceptance of power-sharing as well as co-operation with

[464] *Ibid.* p 210.
[465] *Ibid.* p 211.
[466] *Ibid.* pp 213-14.
[467] Wolf, "Immunity," *supra* note 38.

ICC investigations, may have operated to earn both Kibaki and Odinga *de facto* amnesties.

1.10. Conceptualizing the Peace vs. Justice Debate

1.10.1. From State Responsibility to Individual Criminal Responsibility

This section digresses from contractual enforcement to an economic analysis of tort law, focusing upon the Domestic Tort Law model as a theoretical framework for rationalizing bargaining and negotiations to settle civil wars.

1.10.1.1 The Origins of State Responsibility for International Crime

Although states are not usually directly responsible for the actions of private citizens, they are obligated to provide access to an effective domestic tort system to aliens who are victimized by private citizens. In this section the position of aliens under international law is considered as analogous to the position of "foreign" ethnic groups within Kenya. Eric Posner and Alan Sykes[468] explain that the problem of aliens preoccupied leaders in the early years of American independence. In 1784, the secretary of the French legation in America was assaulted in Philadelphia by another Frenchman. Despite protests by foreign states, the US Congress had no power to reinforce the weak response by the Pennsylvania authorities. This precipitated a national scandal which led to enactment of the Alien Torts Statute[469] empowering US Federal Courts to intervene in torts considered as violating of the law of nations. This legislation facilitates a remedy at Federal level in event that states should fail to safeguard aliens against tortuous harms.

The optimal tort system differs from one state to another. Hence Posner and Sykes's economic analysis of international law endorses the tort law system since:

> States are generally responsible for harms that they can prevent at reasonable cost; they can almost always prevent the harms caused by officials at reasonable cost because states control officials. States cannot prevent the harms caused by citizens at reasonable cost because states have little control over private citizens. But states can reduce the frequency of these harms

[468] Eric A. Posner and Alan O. Sykes "An Economic Analysis of State and Individual Responsibility under International Law" (2007) *American Law and Economics Review*, 9 (1), 72-134.
[469] The Alien Tort Statute (28 U.S.C. § 1350; ATS), originally enacted by Congress in 1789 and was also referred to as the Alien Torts Claims Act (ATCA).

> through an effective tort system; so international law requires states to grant access to the tort system.[470]

However:

> The optimal tort system varies from state to state, and depends on the particular monitoring technologies of each state, so that it would be impossible for international law to specify the type of tort law that must be due globally…in effect recognizing that the optimal system varies across nations. This principle is analogous to the principle of nondiscrimination in international trade law.[471]

1.10.1.2. Limits of General Deterrence in International Criminal Law

Posner and Sykes assume, first, that individuals are rational actors and respond to incentives. Second, that in order to pursue their interests or interests of their constituents, leaders and officials use state power rationally. Third, that in order to avoid reputational sanctions or retaliation from other states, therefore states comply with international law at least sometimes. Fourth, that the economic analysis both of individual as well as vicarious liability of employees holds lessons for the economic analysis of citizens and vicarious liability of states. They then treat states as analogically similar to the employees of firms.

Posner and Sykes draw four conclusions: First, that a state should only be responsible for the acts of its citizens (whether state officials or private actors) that harm other states – when the state can engage in cost-effective monitoring of these citizens – and when the remedies available against these citizens are inadequate to produce deterrence of harmful acts. However, the inadequacy of direct liability may result because the citizens are judgment-proof, immune from suit or beyond jurisdiction of domestic courts. Second, that citizens should only be personally responsible under international law for harms they cause to other states if the combination of state responsibility with the available remedies under domestic law are inadequate to produce proper deterrence for harmful acts. Third, that international criminal liability may be justified for citizens because they are judgment-proof domestically or otherwise insulated from adequate incentives for proper behaviour when state responsibility alone exists but makes little sense for states. Fourth, that the remedy for violation of international law should provide compensatory, rather than restitutory, or punitive remedies. States and individuals should internalize the costs of the

[470] Posner and Sykes, *Economic Analysis, supra* note 466.
[471] *Ibid.*

harms that they cause, at least when valuable monitoring will result, and the compensatory remedy achieves this objective.[472]

1.10.2. The Domestic Tort Law Litigation as Applied to International Criminal Tribunals

As seen in the introductory chapter, Candace Blake-Amarante discusses Anthony D'Amato's Domestic Tort Law model as applied to international criminal tribunals. The Domestic Tort Litigation model departs from the model of state sovereignty "in that not only the state but all parties involved in the conflict are given the right to petition international courts."[473]

1.10.2.1. The Problem of Civil War and the Domestic Tort Law Solution

Blake-Amarante[474] argues that "an international criminal tribunal can be viewed as a devise which imposes costs and provides rewards for the warring parties. In this way, international criminal tribunals may alter the profitability of the various options available to warring parties and, by doing so, ultimately change the parties' choices."[475] Yet, "a popular view holds that the ability of an institution (for instance, a court) of deterring behavior is directly correlated to its punishing power."[476] Hence: "The idea that the ability of deterring behavior is directly correlated to its punishing power was tragically proven wrong by the war in the former Yugoslavia (e.g. genocide in Srebrenica)."[477] Because "D'Amato realized that measures proposed by the international community posed an incentive problem: even with the threat of punishment, the system provided no incentives for the warring parties to cease hostilities"[478] instead, he "proposed a model of an International Criminal Tribunal based on the principles of the *domestic tort litigation model* (DTL)."[479] In the words of Blake-Amarante: This is based on the notion that culpable parties would not be prosecuted once they settle *inter se*. The rationale for this model is that "exact justice" can be attained among individuals in conflicting situations without necessarily involving a court. This is so because the DTL model creates the right

[472] *Ibid.*
[473] Blake-Amarante, "Peace v Justice," *supra* note 92, citing D'Amato "Peace vs. Accountability," *supra* note 92.
[474] Blake-Amarante, *Choosing an International Legal Regime, supra* note 171.
[475] Blake-Amarante, "Peace v Justice," *supra* note 92.
[476] *Ibid*. p 4
[477] *Ibid.*
[478] *Ibid.*
[479] *Ibid.* p 5.

incentive for opposing parties to bargain for a mutually beneficial agreement in order to avoid that neither one of the parties call the court.[480]

Two original aspects emerge from D'Amato's proposal: First "the DTL would operate in an international setting rather than a domestic one."[481] Second, "the DTL would operate in a criminal setting rather than a *civil* one. Yet, the basic logic would be same: just like in civil matters, the court is not an actual threat, but only a potential threat." Blake-Amarante takes issue with the fact that "in criminal law it is generally held that the state has an obligation to punish perpetrators in the interest of deterring future transgressions like murder. This idea finds its application in an international setting with the principle of Human Rights (HR) law."[482] Instead, D'Amato observes that first, "in several cases of Mafia or terrorism, criminals have been granted immunity for the crimes they committed on the basis that they were going to provide information on other (more culpable) criminals." Second, where "punishing perpetrators leads to more atrocities which would be associated to severe moral concerns as well."[483]

Ultimately, D'Amato generalizes that: "*different legal systems produce different incentives for parties to commit crimes, to bargain to avoid involvement of the court, and to bargain for a durable peace*. As a consequence, in many circumstances different legal systems will lead to different outcomes."[484] This conclusion seems to agree with Posner and Sykes cited above. D'Amato's further considerations include "extant legal regimes coming out of the principles of state sovereignty, human rights and cosmopolitan rights, and DTL." Hence "the formal study of civil wars…along with the findings of the literature on bargaining for peace"[485] support "D'Amato's thesis that, under certain circumstances, the DTL model may be the most efficient model for achieving both justice and peace during civil wars."[486] Thus the Domestic Law Model can be understood in comparison to and in contrast with the state sovereignty model, on one part and the human rights/cosmopolitan model on the other.[487] An analysis of the DTL model is useful.

[480] *Ibid.*
[481] *Ibid.*
[482] *Ibid.* p 6.
[483] *Ibid.*
[484] *Ibid.* p 8.
[485] *Ibid.*
[486] *Ibid.* pp 8-9.
[487] See *supra* introductory chapter, section 0.5.3.3.

1.10.2.2. The Domestic Tort Law Model

During civil struggles, one of the main goals one would like to pursue is to either prevent the onset of armed conflict or to put an end to it if it is already ongoing. Ideally, one would like that the opposing parties would be capable of settling their disputes at the bargaining table rather than on the battlefield. Usually, this goal is pursued by trying to provide, in one way or another, the opposing parties with the right incentives to bargain. This is done, however, *within a given institutional context*.[488]

Consequently: "The legal rules which redress claims for damages by accident victims are found in the law of negligence," which according to Hazel Genn, is based on the legal principle that, "where an injury has been caused by the negligent behavior of another person the injured plaintiff may bring an action for 'damages' against that third party."[489] Because "it is under the threat of court proceedings that settlements are ultimately concluded; without the threat of proceedings there is little to no incentive for complicit parties to respond to claims of damages." Similarly civil wars "are settled by means of compromise rather than adjudication because the interests of both parties are best served by avoiding the court."[490]

Additionally, Genn disputes claims that both deterrence and retribution are exclusive to criminal punishment. She instead argues that the "punishment" element "is also an important and legitimate function of the law of negligence."[491] Because "the effective transposition of the domestic tort litigation principles to civil wars requires that the same rights would be afforded to all warring parties" and further because of "two things: 1) both state and insurgent group can call the court to intervene when either one or both commit international crimes and 2) if the court should intervene, both the state and the insurgent group will be prosecuted and penalized commensurate to the crimes committed," therefore "the DTL model is symmetric."[492] It not only "aims at creating an environment that enhances the parties' ability to settle their disputes at the bargaining table,"[493] but also, Blake-Amarante concludes that:

> in certain circumstances, the DTL model is likely to outperform the human rights/cosmopolitan rights model. This occurs when the penalties imposed on the human rights/cosmopolitan rights model excessively reduce the potential

[488] *Ibid.*
[489] *Ibid.* pp 16-17, quoting Hazel G. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (New York: Oxford University Press, 1987) p 3.
[490] *Ibid.,* citing Genn, *ibid*. p 11
[491] *Ibid.* p 17, citing Genn, *ibid.* p 3.
[492] *Ibid.* p 19.
[493] *Ibid.*

gains from negotiations, thus making war relatively more appealing (for at least one party) than settling at the bargaining table.[494]

1.10.3. Fletcher's Justice and Fairness in the Protection of International Crime Victims

Can civil courts arbitrate claims alleging a state's failure to punish perpetrators of criminal offences? In 1985, the European Court of Human Rights, at Strasbourg, interpreting the European Convention on Human Rights adopted in 1949, began to explore the doctrinal possibilities of recognizing a violation of the Convention when States fail to adequately prosecute criminal offences. The first case was *X & Y v The Netherlands*,[495] involving a mentally-handicapped young woman residing in a mental hospital, when a young man induced her to have intercourse. The prosecutor decided not only that the victim was not mentally competent to file the complaint, but also rejected her father's attempt to substitute himself in her stead. The father's complaint to the Strasbourg Court that the prosecutor violated his daughter's right to privacy under article 8 of the ECHR was upheld. However, the European Court awarded the minimal compensation of US dollars 1,700 (3,000 guilders) to the victim, but made no order directing the Dutch prosecutor to prosecute. Nonetheless, George Fletcher explains[496] that the clear message was that the Netherlands must correct – and in fact they then did so – the flaw that led to the failure to prosecute the case.

In Fletcher's interpretation, the above *X & Y* decision was based on what appeared to be an arbitrary expectation for mentally-handicapped victims of rape.[497] "In effect the Court was applying the German constitutional theory of *Drittwirkung* (third party effect), by which private parties secure protection under the constitution against other private parties..."[498] In the 1998 case of *A v The United Kingdom*,[499] a stepfather was prosecuted for beating his nine-year old stepson. While liability was proved, the accused was acquitted for assault on grounds that he used a reasonable amount of force. Nonetheless, a precedent was set that: because private conduct reflected explicitly brutal, inhuman and

[494] *Ibid.* pp 19-20.
[495] *X & Y v The Netherlands*, App. No. 8978/80 (28th February 1985), cited in Fletcher, "Justice and Fairness" *supra* note 16 available at http://www.echr.coe.int/Eng/Judgments.htm. <accessed 22nd May 2014> See also Starmer, Strange and Whitaker, *Criminal Justice*, *supra* note 219.
[496] Fletcher, *ibid.*
[497] *Ibid.* p 259.
[498] *Ibid.* p 258.
[499] European Court of Human Rights 3455/05, cited in *ibid.* p 259, the sequel to *the Belmarsh case* [2005] UKHL 71.

degrading, conduct prohibited by article 3 of the ECHR, therefore the UK was in violation of the Convention for not having prosecuted him.[500]

In *M.C. v Bulgaria*,[501] the ECHR imposed a broad general duty to enact an effective criminal law protecting women against rape. In stressing the positive obligations of the state, Judge Tulkens of Belgium properly expressed reservations about the propriety of insisting on a criminal remedy at the national level. She emphasized that criminal proceedings should remain a last resort or subsidiary remedy, both in theory and in practice. Moreover, the ECHR recognizes only tort liability for breach of the Convention. Conversely, the Rome Statute is the first major international document to place the interests of victims as fundamental to the pursuit of justice. It reverses the traditional priority between justice and fairness.[502] Whereas justice is about what we deserve – individually, fairness is about the way we are treated in comparison to others.[503]

Fletcher's reason for requiring justice for the victims in addition to fairness for suspects (article 67 Rome Statute right to a fair hearing), is that when the state tolerates criminality that it has capacity to punish, it becomes complicit in the crime.[504] To the extent that the state's "mission is to protect its citizens against crime,"[505] hence failure to do so results in loss of its legitimacy to claim equal state sovereignty so as to prevent invasion by external forces seeking to protect the humanity of such citizens from core human rights violations. A problem arises where "states such as Congo or Sudan are unable genuinely to carry out the investigation or prosecution."[506] Then, Fletcher argues, the Rome Statute endorses not only retributive, but also consequentialist, punishment. Because "that is simply what justice requires."[507] Thus the conclusion of this chapter argues that the consideration of collective punishment at global level and individual retributive punishment to satisfy victim's justice, fails to consider Fletcher's third interpretation of the Rome Statute which may consider an individual consequentialist response at the national level. In this regard, this chapter concludes that – through compensating the victims (rather than prosecuting suspects), such compensation may suffice to satisfy the justice requirement – assuming that the domestic state expresses the equal rights of victims, using the principles of restorative justice under an African

[500] *Ibid.* p 258.
[501] Eur. Ct. H.R., 39272/98 (2003), cited in *ibid.* p 259.
[502] *Ibid.* p 260.
[503] *Ibid.* p 254.
[504] *Ibid.* p 260.
[505] *Ibid.*
[506] *Ibid.* p 260-1.
[507] *Ibid.* p 261.

communitarian perspective. In such case, assuming that Internally Displaced Persons (IDPs) from Kenya's post-2007 conflicts were resettled on their land, and further assuming that victims with evidence against suspects were compensated by the state, then the ICC's complementary jurisdiction would effectively be satisfied.

1.11. A Consequentialist Theory of International Criminal Law

1.11.1. Introduction

Jens Ohlin draws two basic distinctions. One, between the institutional competence of the UN Security Council and the ICC Chief Prosecutor. The other, between collective security and determination of individual culpability i.e. "between a security court and a criminal court, and the discretion of the prosecutor…(which) raises the question of the basic fundamental goals of international criminal law."[508] He then poses the following questions: Does the international criminal enterprise exist to redress the balance of power between warring ethnic groups (as the Security Council hopes), or does the discipline exist to hold individuals accountable for their crimes (as the court hopes). Or is it both?

1.11.2. Paradigms of Criminal Justice

The first point Ohlin makes is that:

> these two fundamental views about the goals of international criminal justice represent conflicting moral theories about the nature of the adjudicative process and criminal justice. In basic criminal law theory….first, punishment and incarceration are justified on consequentialist grounds because, for example, punishing perpetrators will prevent them from committing future acts.[509]

This is known in the literature as specific deterrence.[510] The other more global version of this first rationale for incarceration is that it will discourage other potential criminals from straying from the demands of the law. As everyone knows, this is called general deterrence.[511] Ohlin calls attention to "a second theoretical justification for punishment, which is essentially deontological. Inspired by Kant, retributivistsis argue that punishment of the guilty is an *a priori* good." Simply "because…there is something abhorrent about the guilty going free."[512]

These two paradigms of criminal justice are in great tension in international criminal justice.[513] On one hand, this retributive notion of ending impunity is codified in the Rome Statute's preamble as one of the core rationales for the development of the ICC which is "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[514] Since: "Impunity itself was the enemy"[515] hence it was necessary to close "the impunity gap." On the other hand, under the first paradigm of criminal law, based on consequentialist justice, both forms of deterrence are "clearly important to some international criminal lawyers."[516] Yet there is a third form of consequentialism which according to Ohlin:

> is more collective in nature and which gets to the core of our current discussion about prosecutorial discretion at the ICC. The real rationale for punishing war criminals is, of course, that it has consequences at the collective level: warring ethnic groups will be more willing to put down their arms and forego reprisal attacks if they believe that aggressors….will have to face legal scrutiny in a court of law.[517]

Ohlin concludes that: "If justice for the guilty can be meted out by an international court, then victims need not hand down justice by their own hands. The result is that there is an end to justice."[518] Hence a third rationale emerges for international criminal law: "the first retributive, the second consequentialist at the individual level and the third, consequentialist at the collective level."[519] However, Ohlin dismisses consequentialism at the individual level since "it is fraught with empirical questions about its applicability in the context of international crimes as opposed to domestic penal law, where matters of deterrence are much more likely to succeed." Instead he argues that the retributivist and consequentialist at the collective level rationales "are closely

[508] Ohlin, "Peace, Security," *supra* note 32 p 201.
[509] *Ibid.* p 202 (footnote omitted).
[510] *Ibid.*
[511] Fletcher, *Rethinking, supra* note 40 p 414.
[512] *Ibid.* 459-60; See also George P. Fletcher, "The Place of Victims in the Theory of Retribution" (1999) *Buffalo Criminal Law Review*, 3, 51.
[513] *Ibid.,* p 202 citing M. Findlay and R.J. Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Devon, UK: Willan Publishing 2005).
[514] Rome Statute, *supra* note 14.
[515] Office of the ICC Prosecutor, *Policy Paper on the Interests of Justice* (September 2007) available online.
[516] Mark A. Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity" (Winter 2005) *Northwestern University Law Review,* 55, 539-610 p 577.
[517] Ohlin, "Peace, Security," *supra* note 38 p 203-4.
[518] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).
[519] R. Henham, "Theorizing Law and Legitimacy of International Criminal Justice" (2007) *International Journal of Law in Context*, 3, 257.

tied together." This is because: "The very reason that collective groups are willing to put down their weapons and forego reprisal attacks is because they want to see justice achieved for its own sake."[520] This approach is different from that proposed by Larry May – which shall be shown in chapter three – who offers a theory of moral legitimacy for international criminal law that connects individual and collective by an appeal to the Hobbesian "security principle."[521]

Ohlin conjectures that "although international criminal law is consequentialist at the collective level, it is retributive at the individual level." Therefore: "Victims will naturally favour an institutional design, such as the ICC, that facilitates such (retributive) punishment, and the result will be greater likelihood that victim groups will forego collective reprisals against whatever national group that first victimized them."[522] The ICC is actually two courts in one: "a security court in the sense that it is designed to pursue collective consequentialist goals…it is also a criminal court designed to pursue individual retributivist goals implicit in penal law."[523] This book explores a conflict in the retributive goal and the consequentialist goal. This emerges because some of the individual victims (those who subsequently revoked their statements or decline to testify) in *the Kenya cases* presumably believe that their individual consequentialist goal will advance from renouncing their individual retributive goals. However:

> Ohlin concludes that the proper role for the ICC prosecutor is….to act as a simple prosecutor: prosecute defendants when the evidence warrants it. Matters of peace and security must be left to the Security Council, just as a domestic prosecutor must leave matters of policy to the legislative and executive branches. The prosecutor's role even where discretion is concerned is to implement policy, not create it.[524]

1.11.3. Decision on Prosecution of Post-2007 Crimes upon Kenya's 2013 Presidential Election Outcome

In order to explain and understand the context in which protagonist leaders in Kenya's 2007 closely-contested Kenyan presidential elections, this chapter develops an "expressive deterrence" rationale. Because both President Kibaki (PNU) and his main rival Raila Odinga (ODM), participated in conflict mediation, brokered by AU mediator Kofi Annan who negotiated a settlement under a National Accord, therefore neither party may legitimately be expected to be prosecuted for crimes against humanity in Kenya's post-2007 conflicts. It is

[520] Ohlin, "Prosecutorial Discretion," *supra* note 38 p 204.
[521] May, *Crimes Against Humanity*, *post* note 632.
[522] Ohlin, "Peace, Security," *supra* note 38 p 205.
[523] *Ibid.* p 208.
[524] *Ibid.*

argued that expressive deterrence theory to prosecution may also account for relatively fewer casualties, in lieu of an even more exacerbated human cost. Optimists suggest that in absence of the Rome Statute – particularly its provisions criminalizing crimes against humanity, war crimes and genocide – and further assuming that no real prospect existed of international humanitarian intervention, investigation, prosecution or conviction of any senior political or military leader, as was the 1990s situation in Kenya, therefore there existed a high likelihood of increased human rights violations during the post-2007 conflicts and a decreased likelihood of a negotiated settlement and constitutional reform. Hence it is inferred that the expressive deterrence effect significantly contributed – in the first instance – to an earlier conclusion of successful negotiations under the National Accord, signed in February 2008.

In the second instance, the looming threat of possible international criminal prosecution attributable to preliminary investigations by the Waki Commission – whose secret envelope was transmitted to Chief Mediator Annan and in turn ICC Chief Prosecutor Ocampo – provided an incentive for various senior politicians and leaders, not limited to both coalition principals Kibaki and Odinga, to co-ordinate their Government of National Unity to support promulgation of a new constitution. Their compliance with the spirit of the 2008 National Accord became entrenched into the new dispensation which thus facilitated peaceful transfer of democratic power at the 2013 presidential election. The 2013 presidential election was a watershed moment in two respects. First, notwithstanding the fact that it was closely-contested, no widespread human rights violations occurred. At the 2013 presidential election, Kenya conformed to its obligations under the various human rights instruments, not limited to the Rome Statute. Second, it was democratic. Kenyans successfully achieved a progressive milestone towards the goal, of transitional justice, from authoritarian to democratic rule. What impact should these increases in social welfare – measured by the improved human rights record and increased democracy – have on ICC's continued prosecution of Kenya's post-2007 conflicts? Do the post-2013 emerging circumstances suggest that the Rome Statute has attained its function of preventing future human rights atrocities? If so, then the ICC Pre-Trial Chamber confirmation procedure possibly contributed to a holistic transitional justice approach, including not only, constitutional reform but also TJRC hearings, as well as "expressive deterrence."

1.11.4. "Expressive Deterrence" through International Criminal Punishment

From the principles of restorative justice, this chapter argues that under an African communitarian perspective – assuming that the domestic state expresses the equal rights of victims, though compensating the victims (rather than

prosecuting suspects) – such compensation may suffice to satisfy an associative justice requirement. In such case, assuming that Internally Displaced Persons (IDPs) from Kenya's post-2007 conflicts were resettled on their land, and further assuming that victims with evidence against suspects were compensated by the state, then the ICC's complementary jurisdiction would effectively be satisfied. This seems to be the approach of the Domestic Tort Law model which permits perpetrators to escape retributive justice by charge-bargaining. Suspects trade-off their pending prosecutions in exchange for ending the conflicts by compensating sufferers or other remedy, such as constitutional reforms undertaken in the Kenyan situation. Assuming that mass atrocities may be settled by democratic amnesties, and further assuming that the prosecution option was considered by the negotiating parties during Kenya's post-2007 conflict negotiations, then two conjectures may be advanced. First, from the terms of the 2008 National Accord, it appears that not only would both coalition principals receive amnesty against ICC prosecutions – since their positions were crucial in ending the conflicts and preserving the fragile peace – but also any suspected lieutenants, or even low-level perpetrators may benefit from such trade-off. Consequently, to the extent that by 2010, upon passage of the new constitution, it was apparent that both sides of Kenya's political divide had complied with the terms of the National Accord, both the Government of National Unity principals, President Kibaki and Prime Minister Odinga legitimately rejected the formation of special criminal courts. Consequently, the book raises the question as to why the ICC prosecutor decided to nevertheless apply for investigative warrants against six Kenyan suspects, against four of whom the ICC Pre-Trial Chamber confirmed criminal charges.

Kate Cronin-Furman and Amanda Taub discuss the expectations of international criminal justice and the ability of international criminal trials to address the traditional rationales for prosecution and punishment. They distinguish between traditional and expressive deterrence.[525] One broad punishment goal is "retributivism." The second "reductivism," comprises three sub-justifications deterrence, rehabilitation and prevention.

Apart from the retributive and reductivist goals, the third broad category of punishment justification is expressive or communicative. The modern variety, known as denunciation serves as a societal expression of disapproval of criminal behaviour.[526] In its wider application Emile Durkheim captured the essence of

[525] Kate Cronin-Furman and Amanda Taub, "Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice" in Schabas, McDermott and Hayes (eds.) *The Ashgate Research Handbook, supra* note 152, 435-452.
[526] *Ibid*., See also Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (London: Sage, 2006) p 44, citing Lord Denning's submissions in *Report of the Royal Commission on Capital Punishment* (London: HMSO, 1949-1953).

punishment as an expression of social outrage by the conscience collective.[527] He accounted for quantitative and qualitative differences in punishment in traditional and modern societies. Due to mechanical solidarity among peasant communities in the traditional setting, social outrage generates harsh punishment in response to deviations from the norm. However, anomic societies are characterized by the onset of division of labour among strangers. Organic solidarity thus responds with more temperate punishment accompanied by a larger volume of criminal conduct.

Extrapolating punishment justifications from domestic to international settings, Cronin-Furman and Taub[528] distinguish participants in group conflicts into four types. The first category comprises superiors or leaders who order others, their subordinates. Second, subordinates who are influenced to partake in mass atrocities by receiving superior orders. Third, superiors who neither order nor finance perpetration, but fail or neglect to prevent or punish their juniors. Fourth, low-level physical perpetrators acting of their own volition. Cronin-Furman and Taub argue that – since none of the above participants in group conflicts, are likely to be deterred – traditional general deterrence is an inadequate prosecution theory.

These two scholars observe that utilitarians assume that criminals are self-interested maximizers who choose to engage in criminal conduct after weighing the consequences derived from their conduct. By increasing the costs attached – and thus reducing the benefits – of perpetrating ethnic conflicts, it is possible to decrease gross human rights violations. Cronin-Furman and Taub attribute ethnic conflicts to elites who benefit from territorial gains (land grabbing) and wish to avoid military defeat (or election loss). And further, because the temptation to realize these benefits accruing from ethnic conflicts outweighs the criminal punishment, all-things-considered,[529] therefore, the international criminal justice system operates to generate an *expressive* deterrence rather than a *general* deterrence effect.

Punishment is assessed not in gross, but rather, in net value. Hence Cronin-Furman and Taub caution that the value of an overall sentence which the court awards is discounted depending, first, on the probability that it will be handed down, and second, on the delay. According to traditional deterrence theory, notwithstanding the Rome Statute, the temptation to perpetrate crimes against humanity remains overwhelming. In reality, however, for various reasons,

[527] Emile Durkheim, *The Division of Labor in Society* (translated by George Simpson) (New York: The Free Press, 1947).
[528] Cronin-Furman and Taub, "Lions and Tigers," *supra* note 525.
[529] *Ibid.*

traditional deterrence does not attain ideal results under international criminal law. First, because international substantive crimes are vastly more complex than simple garden-variety crimes and correspondingly more difficult to prove. International crimes and procedures comprise an amalgam of civil law and common law concepts and provisions and are applied in societies that have a third variety of criminal laws whose legal systems invariably may be based on neither of the two.[530] For example, either on Hindu, Talmudic, Islamic, Oriental or Chthonic legal traditions.[531] Hence the emerging international criminal jurisprudence does not merely lack coherence. Worse, international criminal law appears biased in favour of neoliberal Western criminal justice traditions whose substantive norms and procedural practices it regards as "universal." Second, the investigation procedure of the ICC is parasitic upon domestic legal systems. Yet domestic priority given to local political circumstances may prevent local actors from fully co-operating with their international counterparts. Third, given the sheer magnitude of a conflict situation, international criminal investigations and prosecutions face inherent resource-constraints and are required to select which situations, and cases to prioritize. Although international prosecution selection should be based on judicial criteria, it is often constrained by logistical extenuating circumstances and professional self-interests which are different from considerations by ordinary state prosecutors. For example, ordinary prosecutors are able to build cases against organized crime by commencing with low-level suspects and extracting statements, confessions, plea-bargains and evidence against senior ring-leaders. By contrast, international prosecutors rarely arrive at a "fresh" crime scene. Rather, the ICC Office of the Prosecutor (OTP) often receives second-hand reports from NGO's or other agencies with different institutional mandates. Such reports are skewed, biased and pose monumental evidentiary problems at the trial.

For various reasons Cronin-Furman and Taub argue that low-level perpetrators – on a traditional or general deterrence prosecution theory – are unlikely to be deterred by distant prosecution calculi. First, given that ICC proceedings are in a foreign language, English or French, no low-level perpetrators are likely to know or care about The Hague process. As shall be shown in chapter six, outreach programs remain slow. Second, in any event, low-level perpetrators possess too little to lose. They lack foreign bank accounts to freeze or assets to seize. Neither do they possess reputations to fear losing, nor do they apprehend a ban against making foreign visits.[532] Elite perpetrators, conversely, value diplomatic travel and immunity from arrest. International criminal proceedings

[530] *Ibid.*
[531] Glenn, *Legal Traditions, supra* note 218; See also Cronin-Furman and Taub, "Lions and Tigers," *ibid.*
[532] Cronin-Furman and Taub, "Lions and Tigers," *supra* note 525.

which diminish these trappings of power may alter their cost-benefit calculations regarding whether or not to precipitate ethnic conflicts. This chapter thus emphasizes the importance of relying on an "expressive deterrence" theory to evaluate the rationality of the conduct of Kenyan leaders during the post-2007 conflicts negotiations. Particularly, expressive deterrence theory predicts that leaders are deterred by the prospects of international criminal trials and therefore their behaviour would correspondingly be conditioned to avoid ethnic conflicts. To explain why the OTP would not be expected to select either President Kibaki or main opposition candidate PM Odinga for international criminal prosecution, "expressive deterrence" provides a feasible prosecution theory. This theory also partly explains why the two principals in Kenya's post-2007 Government of National Unity sustained their co-operation until the 2013 general election. Thus both *internal* incentives – pursuant to the selectorate theory – as well as *external* enforcement pursuant to expressive deterrence theory, combined to ensure that political peace and stability was restored. What remains unclear – considering the benefits of the 2008 National Accord – is the precise extent to which the negative peace which prevailed through Kenya's 2013 presidential elections between Kenyatta and Odinga was attributable to the ICC criminal trials. An analysis of the 2013 presidential election, as a culmination of the political processes which furthered transitional justice, shall be revisited in chapter five. Chapters two-four shall focus on ICC's criminalization of Kenya's post-2007 conflicts.

1.12. Conclusion

This chapter has provided the socio-economic and politico-cultural background of the context in which the legal interpretations had to be made by various actors regarding how to respond to Kenya's post-2007 conflict situation. The post-2007 conflicts were not an eruption triggered by primordial hate of different communities against others, as the Aryan supremacy may have led German Nazis to despise other races. Rather the conflict was ostensibly attributable to an alien, unresponsive and repressive state apparatus. For over twenty years, opposition parties had generated a *culture of resistance* against the authoritarian Kenyan state. The KANU government incrementally conceded to piecemeal reforms, first restoring political pluralism, then renouncing draconian statutes. Eventually, in 2002, executive power was peacefully transferred to the opposition. However, the political opposition which united under NARC absorbed some ruling party apparatchiks as well as some moderate reformists from civil society. Nevertheless, Kibaki reneged upon his pre-election promises to Odinga, not only failing to kick-start constitutional reform, but also refusing to confine himself to a one-term presidency. This split between LDP and NAK produced a revisionist, government-driven proposed new constitution which was

rejected at the 2005 referendum. It is in that context that despite President Kibaki's economic gains, nevertheless, his first term was defined as a political failure. Given Mwarigu's tension thesis between electoral and structural conflicts at the 2007 presidential election, three major ethnic groups (Luos, Luhyias and Kalenjins) united behind Odinga as ODM's presidential candidate. Although Kibaki's new-fangled PNU retained the bulk of the Kikuyu community, as the election date approached, he trailed Odinga by 38 to 42 percent. The Electoral Commission of Kenya's declaration of Kibaki's victory triggered a series of protests by ODM accompanied by violent protests – first against electoral malpractice and then structural historical injustices – which the government was unable to contain. Hence, the African Union dispatched a Panel of Eminent Persons to mediate the spiraling post-electoral conflicts.

This chapter has described the inherently inimical orientation of the colonial state which was imposed on African populations through colonialism. The concept of cultural domination was introduced to emphasize not only that the artificially-constituted state was deployed to exploit indigenous labour and expropriate raw materials, but also to illustrate how the individual rights logic of the liberal state run counter to African group rights and the need for social, economic and cultural rights. Unfortunately, independence inverted the problem facing post-colonial governance. Instead of diagnosing the propensity for ethnic conflicts, human rights violations, illiberal democracy and authoritarianism as the key problems facing newly independent governments, the triple enemies were identified as poverty, ignorance and disease. That was a mistake. By introducing a *de facto* and then *de jure* single party state, Kenya's "development first" agenda not only violated individual human rights. It also systematically undermined African Socialism. Authoritarian domination was thus resisted by two categories of protestors. First, in the late 1980s, principled individual activists launched press articles, convened academic seminars and undertook court cases challenging violations of core human rights. Second, in the early 1990s, formal civil society groups organized mass rallies in support of democratization. The latter stage was supported by the political class which attracted the masses, but ethnicized the protests. The state responded not only by making concessions. Individual activists were also often harassed through criminalization while rallies met police squads complete with riot gear, truncheons, shields and even live ammunition. The official response was accompanied by state-sanctioned violence through unofficial warriors to intimidate attendance at opposition campaigns. This cyclical conflict marked the onset of how suspected gross human rights violations came to be perpetrated at the post-2007 conflicts.

This chapter has interrogated the modern concept of ethnicity as a political tool for distributing resources as distinct from Kant's autonomy, based on psychic sentiment. Kenyan ethnicity is instead driven from the top-to-bottom and serves as a defence in competition for vote-banks against others. Consequently, it was explained that the electoral presumptions of the liberal state do not adequately respond to African group realities. Instead, power-sharing arrangements are perceived as representative, inclusive and equitable. Neo-liberal critics dismiss ethnic-balancing as undemocratic, corruption-prone, opaque and thus disadvantageous. Notwithstanding the expense it entails, however, power-sharing distinctly diffuses the tendency for conflict, secession or complaints. This chapter thus hypothesized that the negotiations which established Kenya's Government of National Unity can be explained using rational choice theory. Human rights activists and civil society organizations were regarded as potential spoilers and hence excluded from the post-2007 deliberations. The negotiations were mediated by the AU and generated a National Accord which effectively undermined the criminal trial responses to alleged mass atrocities perpetrated during Kenya's post-2007 conflicts.

In an attempt to test, falsify or verify the above hypothesis, the chapter applied a descriptive method. It traced the sequence of four sub-agreements adopted by two interested parties – PNU and ODM – which participated in Kenya's protracted post-2007 conflict negotiations at Serena Hotel culminating in the 2008 National Accord. The chapter rationalized international criminal offences as torts which may therefore be settled using contracts. Given that the PNU and ODM ethnic parties were each concerned to avoid defeat at the 2007 election as well as to avoid prosecution before the ICC, therefore, it was possible to settle the escalating conflicts by trading-off the criminal punishments option in exchange for political power, concessions or continued protests. Hence the chapter argued that the role of the Rome Statute was one of supplying a deterrent threat in consequence of non-compliance by either party to the post-conflict settlement agreement. For the ICC Chief Prosecutor – to justify a criminal trial response against either President Kibaki or Prime Minister Odinga – would have required a default by either party to the National Accord in implementing the terms of settlement which were designed to facilitate transitional justice. Yet ICC's investigations commenced in 2010. The fact that both principals under Kenya's coalition government co-operated under the 2008 National Accord, and inasmuch as the 2010 constitution was promulgated and the 2013 presidential elections were peaceful and democratic, may thus provide only weak evidence that the Rome Statute effectively contributed to an "external" deterrent effect which may have combined with norm internalization to constrain against defection or default from the terms of the Accord. The key point is that criminal trials comprise a second order or default position. Rather

than resort to retributive justice, it is possible to use alternative responses to post-conflict situations. However, the National Accord gave little priority to issues concerning humanitarian assistance to internally displaced persons or to victim compensation. The ICC may have frustrated Kenya's TJRC process.

In light of the above socio-economic and politico-cultural background and the problem of cultural domination, subsequent chapters shall attempt to consider four salient aspects of the preliminary parts of international criminal jurisprudence. Chapter two, the ICC Appeals Chamber's interpretation of its complementarity jurisdiction. Chapter three, the ICC Pre-Trial Chamber's interpretation of the definition of individual criminal responsibility which attributed suspicion of indirect co-perpetratorship upon four Kenyan suspects. Chapter four, the ICC Trial Chamber's interpretation of the prosecutor's obligations not only in conducting impartial pre-confirmation investigations, but also in respect of suspect's rights.

In contrast to the liberal approach by the majority ICC judges – whom this book evaluates as being expansivist or activist – its minority judges' decisions during the early stages of the *Kenya cases* appear more positivist, literal or restrained. By comparison, an evaluation of the Kenyan Supreme Court judges' decision in the 2013 election petition shall be undertaken in chapter five. It suggests that the domestic law would prefer a judicial restraint interpretation of Kenya's International Crimes Act which domesticates the Rome Statute. Chapter six considers the ICC Trial Chamber's interpretation of Kenya's (non)compliance with its purported obligation to co-operate with the prosecutor's post-confirmation investigations by supplying documents which may implicate an accused; as well as its purported obligation to facilitate attendance by non-voluntary witnesses, and the ICC's enforcement strategies.

Therefore the book concludes that if the Rome Statute incorporates a goal of individual criminal punishment, then – assuming that the domestic processes can satisfy victims by way of compensation – retributive punishment through ICC prosecution may not be an appropriate response. The importance of the book is that it asserts that there exists a culturally-relative option which may justify decriminalization of mass atrocity responses. While the ICC Chief Prosecutor expected witnesses to volunteer information to vindicate victim's justice, the Victim and Witness Unit underestimated the need for witness protection. They were both wrong.

CHAPTER TWO

THE INTERNATIONAL CRIMINAL COURT'S COMPLEMENTARITY JURISDICTION OVER KENYA'S POST-2007 CONFLICTS

2.1. Domestic Criminal Prosecutions from the Post-Conflict Situation

2.1.1. R v Henry Kiprono Kosgey

On 15th December 2010, veteran politician Henry Kiprono Kosgey – the country's then longest serving Member of Parliament, at 30 years – was one of the six Kenyans whom the International Criminal Court's Prosecutor Luis Moreno-Ocampo announced as suspected of bearing the greatest responsibility for crimes against humanity allegedly perpetrated in the country's post-2007 conflicts.[533] The Pre-Trial Chamber's decision, pursuant to the Office of the Prosecutor's application for Authorization of Warrants for investigation was fixed for 31st March 2011 at The Hague. Meanwhile, in early 2011 Kenya's Attorney-General, Amos Wako, instructed the Kenya Anti-Corruption Commission to arrest and charge Kosgey for illegally allowing the importation of over-age vehicles. In *R v Kosgey*[534]– the MP for Tinderet and Chairman of Prime Minister Raila Odinga's Orange Democratic Movement (ODM) party – was unprecedentedly accused before a Nairobi court on 12 charges of abuse of office.[535] The suspicion arose from allowing importation of 123 used motor vehicles that failed a standards test. Before Principal Magistrate Elijah Obaga, he denied all 12 counts of abuse of office contrary to section 46 of the Anti-Corruption and Economic Crimes Act.[536] The hearing of his domestic corruption cases was set for 2nd March 2011. Each of the 12 charges carried a maximum penalty of 10 years imprisonment. If convicted by the Nairobi court, Kosgey faced a cumulative total of 120 years in jail. He was forced to step aside as Minister for Industrialization. It is remarkable that, in Kenya's history – notwithstanding documented evidence of embezzlement, *inter alia*, in Kenya's Public Accounts Committee Reports – grand corruption prosecutions against senior ministers are unprecedented. Cynically, the timing of Kosgey's domestic

[533] ICC Ocampo announcement; See Mueller "Kenya and the International," *supra* note 36.
[534] *Republic v Henry Kiprono Kosgey,* Chief Magistrate's Court Criminal Case No. ACC 1/2011.
[535] Caroline Rwenji and Zadock Angira, "Kosgey on 12 Counts for abuse of Office," *Daily Nation*, 4th January 2011, http://www.nation.co.ke/news/politics/Kosgey-on-12-counts-for-abuse-of-office--/-/1064/1083554/-/a4qwvwz/-/index.html<accessed 25th June 2014>
[536] Anti-Corruption and Economic Crimes Act no. 3 of 2003.

prosecution was no coincidence. It may therefore be perceived as a suggestion that the Kenyan criminal justice system had conveniently selected a key actor in Rift Valley politics for apparent punishment relating to his investigation for the post-2007 international crimes. Ultimately, Justice Nicholas Ombija of the High Court prohibited the *Henry Kiprono Kosgey corruption case*, asserting that "a breach of regulations (*per se*) does not equal to a commission of a criminal offence."[537] He quoted the case of *Republic v Hosea Waweru & Joram Mwenda Guntai and the Chief Magistrates*[538] in which the Court of Appeal held that "any perceived criminal charges on the regulations would in most cases be ill-advised."

As compared to his Hague charges, Kosgey faced relatively less serious domestic prosecution – as they related to property offences – albeit with potentially equivalent or even more punishment than his looming international prosecution for crimes against humanity, which attracts a maximum of life imprisonment.[539] Nonetheless, considering the commensurate magnitude of punishments of the offences which Kosgey was facing, a conceptual question arises. Can domestic prosecution for a different offence be construed as an adequate – albeit indirect – response to that particular suspect's alleged role in an international crime? If so, then a corresponding question is whether "lesser" suspects may be prosecuted domestically for serious ordinary crimes, such as murder,[540] robbery with violence,[541] or attempted robbery with violence[542] – which carry the death penalty – or even attempted murder,[543] rape,[544] arson[545] or causing grievous harm,[546] which attract a maximum of life imprisonment – in place of the international suspects. Or whether prosecution of senior political and military leaders should necessarily be accorded "priority." What determines the adequacy of a domestic prosecution policy for the Kenya's post-2007 conflicts?

[537] High Court of Kenya, Nairobi, Criminal Miscellaneous Application no. 435 of 2011, *Republic v Director of Public Prosecutions and the Chief Magistrate's Court, Nairobi ex parte Henry Kiprono Kosgey and Patrick Omwenga Kiage (interested party);* http://kenyalaw.org/caselaw/cases/view/81022<18th September 2014>
See also Edward Aboki Begi "Abuse of Office over 'Abuse of Office' Charges" *East African Standard* November 22nd 2012,
[538] Nairobi Civil Appeal no. 228 of 2003, Court of Appeal.
[539] Article 77(1)(b), Rome Statute, *supra* note 14.
[540] Contrary to section 203 as read with s 204 of the Kenyan Penal Code (Chapter 63 Laws of Kenya).
[541] c/s 296(2) *ibid.*
[542] c/s 297(2) *ibid.*
[543] c/s 220 *ibid.*
[544] c/s 3 of the Kenyan Sexual Offences Act no. 3 of 2006.
[545] c/s 332 Kenyan Penal Code, *supra* note 540.
[546] c/s 234 *ibid.*

2.1.2. Domestic Criminal Justice Responses to the Post-2007 Conflicts

In December 2011, Human Rights Watch[547] accused the Kenyan state of "half-hearted accountability"[548] attributable to governmental failure to prosecute "priority" cases and other serious crimes emerging from the country's post-2007 conflicts. That Human Rights Watch Report pointed out "weaknesses in investigations and prosecutions"[549] as well as "impunity for police shootings and misconduct."[550] HRW's Report concluded by reviewing the "status reforms, steps required and the case for a special mechanism"[551] including a possible Truth, Justice and Reconciliation Commission, reparations and compensation. Critical review of the HRW's Report in its entirety is beyond the scope of this chapter. Instead, a catalogue of cases are selected in this introductory section for purposes of sampling the quantity and quality – in terms of political parties, places and ethnic extraction – of Kenya's then "ongoing" post-2007 conflict investigations and prosecutions as at the end of 2011. The Human Rights Watch's status sample encompasses – not only the paltry number and half-hearted efforts – but also the allegedly slow rate and the low-ranking level of suspects, against which the domestic criminal justice authorities were proceeding.

2.1.2.1. Acquittals and Withdrawals in Six High Profile Cases

Six high profile acquittals contained in HRW's December 2011 Report are sketched below. First, *Stephen Kiprotich Leting and three others (the Kiambaa Church Burning case).*[552] On 1st January 2008 several hundred attackers set fire to the Assemblies of God Church at Kiambaa farm in Eldoret where Kikuyus were taking refuge, killing at least 28 and injuring dozens. It is this incident which initiated – and effectively attracted international attention to – Kenya's post-2007 conflicts. Yet:

> On April 30, 2009, the Nakuru High Court acquitted the four following a trial. The judge found that Emmanuel Kiptoo Lamai, according to witness testimony, was helping people at the scene; no one who testified before the court had seen him involved in acts of violence. The prosecutor did not present a single witness to testify against Clement Kipkemei Lamai, and eventually conceded he had no evidence against him. Leting and Rono

[547] Human Rights Watch, *Turning Pebbles: Evading Accountability for Post Election Violence in Kenya* (USA, HRW, December 2011) http://www.hrw.org<accessed on 18th September 2014>
[548] *Ibid.* p 16-28.
[549] *Ibid.* pp 45-59.
[550] *Ibid.* pp 60-69.
[551] *Ibid.* pp 70-80.
[552] Nakuru High Court HCCR 34/2008, cited in *ibid.* pp 30-1 footnote 96.

> presented alibi defenses, which the prosecution failed to challenge; further, the judge found the witness testimony implicating Leting and Rono to be unreliable.[553]

Second, in *Republic v Jackson Kibor*,[554] on 31st January 2008 the accused – who was recognized as an opinion leader in Eldoret – declared "war" against Kikuyus and promoted their removal from the area. On 20th February 2008, he was charged with incitement to violence. Third, the case of *Republic v Edward Kirui*[555] involved a "Rambo cop." On one hand:

> The prosecution presented eyewitness testimony from persons present at the crime scene who recognized Kirui as the shooter. Further, two police officers, including Chief Inspector Hansent Kaloki, the Officer Commanding Station at Kondele at the time of the shooting, testified that they recognized Kirui in the video footage. The KTN (Kenya Television Network) footage was presented in court as evidence.[556]

On the other hand, from:

> the state firearms examiner, the bullets removed from Onyango's and Chacha's bodies were traced to an AK-47 rifle with the serial number 3008378; but police sergeant Isaac Serem produced in court a log book claiming that a rifle with the serial number 23008378 had been issued to Kirui on the day of the shootings.[557]

In that murder acquittal – as shall be shown later in this chapter – the mismatched evidence was allegedly a cover-up for a colleague.[558] Fourth, in *Republic v Paul Kiptoo Barno, James Yator Korir and Isiah Kipkorir Leting: The Killing of Benedict Omolo and Elias Wafula Wakhungu,*[559] on 1st January 2008, a mob attacked a police vehicle at Chebii Primary School, mortally wounding two policemen with arrows and machetes and robbed three officers of their guns and a mobile phone, while injuring others. Fifth, in *Republic v Francis Kipn'geno and others: The killing of an Administration Police Officer Hassan Omar Dado,*[560] on 31st January 2008 a mob attacked the administrative and police offices at Ainamoi outside Kericho – following news of killing of Ainamoi MP, David Too – who was shot in Eldoret earlier that day. Although Too's shooting was apparently attributable to a love triangle, it was

[553] *Ibid.* p 30 (footnote omitted).
[554] Nakuru Magistrate's Court CR 96/08, cited in *ibid.* pp 32-3 footnote 109.
[555] Nairobi High Court HCCR 9/08, cited in *ibid.* pp 33-4 footnote 118.
[556] Cited in *ibid.* p 33 (footnote omitted), (brackets supplied).
[557] *Ibid.* p 34.
[558] *Ibid.*
[559] Eldoret Magistrate's Court, CR 387/08, cited in *ibid.* pp 34-6 footnote 123.
[560] *Ibid.* pp 36-7 footnote 134.

unfortunately misinterpreted as an election-related assassination.[561] Upon being repulsed at the police station – instead of stealing guns, the incensed crowd retaliated against the police – who opened fire upon the crowd, injuring a member of the public. In turn, the irate mob killed one policeman, chopped him into pieces with machetes and torched his corpse. It was burnt beyond recognition. Sixth, in *The Killing of Father Michael Kamau*, on 26th January 2008 a mob killed a Kikuyu priest with bows and arrows.

2.1.2.2. Six Convictions on Serious High Profile Cases

"The only serious crimes for which Human Rights Watch was able to document convictions"[562] are summarized below. Most cases involved ODM-affiliated accused persons and one of the two murder convictions was for the killing of police officers. Notwithstanding that some PNU-affiliated suspects – as well as police officers themselves committed crimes – none of their statistics were included in HRW's short-list of convictions. The HRW sample comprised, first, *Republic v Robert Kipgetich Kemboi and Kirkland Kipngeno Langat: The killing of police officers Peter Githinji and David Odhiambo*.[563] On 31st December 2007 two police officers, Githinji and Odhiambo were escorting a private citizen, Paul Kirui Wachira's private vehicle, from Kisii to Kericho. At Roret Trading Centre in Bureti, the vehicle was confronted by a rowdy mob which stoned it, knocking Wachira unconscious and killing the police officers, whose firearms the mob then stole. The circumstantial evidence was based on stolen items from the scene including the guns and also cell phones. These were sufficient to link the accuseds to the crime and convict them for murder. Upon conviction, the accuseds received life imprisonment. Second, in the case of *Republic v John Kimita Mwaniki*, which stands out as the sole election-related murder conviction of a Kikuyu.[564] On 27th November 2007 *pre-election* violence erupted between the Kikuyu and Kalenjin. As part of a machete-wielding group, the accused killed Rose Chemutai and two five-year old boys. His alibi evidence was contradictory about his whereabouts. Upon conviction he was sentenced to 30 years imprisonment. Third, in *Republic v Charles Kipkumi Chepkwony*,[565] on 28th January 2008, the accused was charged with robbery with violence for attacking Wilson Soi Wanyama together with his family, and stealing cattle in Kipkelion district. Wanyama was shot with an arrow, but recognized Chepkwony – a low-level perpetrator – who was convicted in May 2009 and

[561] *Ibid.* footnote 135.
[562] *Ibid.* footnote 151.
[563] Kericho High Court, HCCR 24/08, subsequently filed as Appeal 310/09, at Nakuru Court of Appeals, cited in *ibid.*
[564] Kericho High Court HCCR 24/08, cited in *ibid.* p 41 footnote 154.
[565] Kericho Magistrate's Court CR 101/08, appealed at Nakuru Appeals Court as HC.CR.A. 30/09, cited in *ibid.* p 41.

whose appeal was dismissed. Fourth, in *Republic v James Mbugua Ndungu and Raymond Munene Kamau*,[566] the accused persons were convicted for robbery with violence in Naivasha, but acquitted of attempted rape. Although they removed a woman's trousers, touched her genitals and stole money, the court found no evidence of intention to rape. Fifth, the case of *Republic v Willy Kipng'eno Rotich and Seven others*[567] was the only conviction for robbery with violence arising from HRW's survey of Kenya's post-2007 election violence cases. The accused persons robbed cash and property from their victim in Sotik, threatening to use violence. The victims were familiar to the complainant and his wife. Sixth, in the case of *Republic v Peter Ochieng,* during the post-election violence, a Luo was convicted of grievous harm and sentenced to 10 years imprisonment for setting fire to his Kikuyu wife who survived the attack.[568]

2.1.2.3. Few Significant Post-Election Violence cases Remained Pending before the Courts[569]

In *Republic v Joseph Lokuret Nabanyi,*[570] on 28th January 2008, the accused was charged with murder in circumstances in which a mob stoned Zezia Wangui Karanja, an elderly Kikuyu woman, to death. In *Republic v Peter Kipkemboi (the Peter Ruto Case)*:[571] "Kepkemboi (was) accused of being part of a group that shot Kamau Kimani Thiongo, a Kikuyu, in the head with an arrow. The prosecution finished its case in October 2011 and was awaiting a ruling, due November 25."[572] Peter Kipkemboi Ruto had a case to answer, and in June 2012, (nearly a year after the ICC Appeals Chamber had conferred the ICC's complementary jurisdiction over the Kenya situation) was eventually convicted of murder. In 2015, the Court of Appeal upgraded his sentence to death. The facts and judgment shall be outlined later in this chapter. In *Republic v James Omondi Odera and three others*[573] the accused was charged with killing newly-elected Member of Parliament for Embakasi, Nairobi, Melitus Mugabe Were, who was shot in Nairobi on 29th January 2008. Evidence suggested an attempted robbery gone wrong. In *Republic v Paul Mungai Mwihia*[574] the accused person was charged with gang raping a woman in Nakuru district, during Kenya's post-2007 conflicts, and assaulting her husband with a machete.

[566] Naivasha Magistrate's Court, police file 764/44/08, cited in *ibid.* p 41 footnote 157.
[567] Sotik Magistrate's Court CR 4001/08, cited in *ibid.* p 42 footnote 159.
[568] Nakuru Magistrate's Court, CR 4001/08, cited in *ibid.* p 42.
[569] *Ibid.*
[570] Nakuru High Court HCCR 40/08, cited in *ibid.* p 42 footnote 161.
[571] *Ibid.* HRW p 43 footnote 163.
[572] *Ibid.* p 42.
[573] Nairobi High Court HCCR 57/08, cited in *ibid.* p 43 footnote 168.
[574] Nakuru Magistrate's Court, CF 7202/08, cited in *ibid.* p 44 footnote 169.

2.2. Complementarity over What?

The foregoing section presented a glimpse into some early criminal trial responses for wrongdoings allegedly perpetrated in connection to Kenya's post-2007 conflicts. On one hand, a state's monopoly over criminal punishment – manifested by its criminal justice system – is a key characteristic of sovereignty. Under public international law, the principle of equal sovereignty is a key feature of the international legal system as a part of *jus cogens* under customary international law. It prevents foreign states from interfering with domestic activities in a host state, without consent. Before exercising jurisdiction over individuals who are resident on another state's soil, a domestic extradition order must be obtained. On the other hand, where a state fails to provide physical security or subsistence to its own citizens, then such dereliction of duty triggers a "responsibility to protect"[575] upon the international community. The ICC thus emerges as a legitimate, second-order, third-party forum to supplement the ordinary criminal justice system's power for removing threats to social order. Based on material facts, the ICC Pre-Trial Chamber adjudged in Kenya's post-conflict situation, that Kenya's government – by September 2011 – had abdicated its responsibility to protect its own citizens from gross human rights violations. Conversely, the government asserted – generally, that its domestic response to the post-2007 conflicts, under the ordinary criminal law, was sufficiently responsive – and specifically that investigations of high-level suspects who allegedly perpetrated crimes against humanity, were ongoing. However, if the evidence, conclusions and recommendations from the Human Rights Watch Report outlined above are to be believed, then it is apparent that different interpretative approaches, tests or standards – one by the international community, and another by the Kenya government – were being used to evaluate the adequacy of the domestic criminal justice system's response to the post-conflict situation. The question therefore arises as to whether or not there exists global consensus regarding what is objectively expected from any domestic criminal justice system in order to be considered as *genuinely* responding to international crimes. Particularly, how does the ICC interpret domestic responsiveness to crimes within its jurisdiction?

[575] *The Outcome Document of the 2005 United Nations World Summit* (A/RES/60/1, para. 138-140) and formulated in the Secretary-General's 2009 Report (A/63/677) on Implementing the Responsibility to Protect.
http://www.un.org/en/preventgenocide/adviser/responsibility.shtml<accessed on 18th September 2014>

2.3. The International Criminal Court as a Second-Order, Third Party

In order to demarcate how, when and where the two criminal justice systems of respective jurisdictions – domestic and international – *ought* to overlap it is necessary to demystify the complementarity articles which *are* currently embedded in the Rome Statute. Such an interpretation of the complementarity provisions is not possible without first abstracting – so as to construct an ideal normative framework – by which to then evaluate the extent to which admissibility provisions in the Rome Statute are justifiable in relation to such ideal model. An evaluative justification of the Rome Statute rejects the positivist approach – which embraces the Statute's provisions simply by a literal reading. Neither is a realist approach, by which any particular norm is necessarily justified simply by virtue of being upheld by some international judges in particular cases, helpful. Rather, a normative framework facilitates a critique of the adequacy of current human rights instruments and judicial precedents so as to expose any gaps, prejudices or inadequacies, which then enables prescriptive proposals for their improvement by way of amendment. Evaluative justification thus facilitates a critique of various interpretations by ICC judges in *the Kenya cases*. "Law-as-interpretation"[576] assumes that not all judgments are correct. Rather, some judgments are, all-things-considered, "better fit" than others. H.L.A. Hart's *concept of law*[577] is perceived through descriptive sociology, unlike Rawls's *theory of justice*[578] mentioned in the introductory and first chapters, which is conceived using political morality. Brief recall of both theories are useful – to distinguish the Hobbesian liberal state, from the international norms prescribed in John Rawls's *Law of Peoples*[579] – also explained in the introductory chapter. On one hand, in a State of Nature, individuals are at risk of violence against the person. Moreover, there is inherent insecurity in a "war of all against all."[580] Efficient protection against harm necessitates co-operation amongst vulnerable groups. However, because such concentrated state power is prone to abuse, it is in turn subject to second-order, third-party intervention by the international community to prevent impunity. On the other hand, the concentration of the means of violence in the hands of centralized officials may extinguish sub-group violence among militias.

The purposes of this chapter are, first, to outline the normative framework within which to evaluate the provisions and rules contained in the Rome Statute conferring jurisdiction upon the ICC. Second, to specify the circumstances under

[576] Dworkin, *Hedgehogs*, *supra* note 177.
[577] H.L.A. Hart, *A Concept of Law* (Oxford: Clarendon Press, 1961[1994]).
[578] Rawls, *Theory of Justice*, *supra* note 79.
[579] Rawls, *Law of Peoples*, *supra* note 55.
[580] Thomas Hobbes, *The Leviathan* (C.B. MacPherson ed.) (Harmondsworth: Penguin Books, 1974 [1651]).

which given country situations become *inadmissible* for investigation or by which the ICC's jurisdiction, is denied. It is necessary to elucidate the mechanism by which the two co-existing or partially overlapping domestic and international systems co-ordinate their responses. The objective is to compare and contrast the legal framework under Kenya's domestic criminal justice system – with that of the ICC – for dealing with widespread social disorder. Some general questions revolve around whether or not domestic criminal justice systems and the ICC operate in disharmony or co-ordinate in an efficient optimum for a justifiable outcome. Some indicators of successful criminal justice systems may be the extent to which they attain the traditional punishment goals of retributivisim and reductivism, introduced in chapter one which are familiar to penologists and shall only be mentioned in passing. Does the net outcome from the combined domestic and international responses to mass atrocities provide just deserts to offenders, reduce gross human rights violations and reduce impunity? These are the basic objectives of the ICC. The general questions underlying the discussions of this chapter are: why are dual criminal justice systems necessary? What, if any, are the similarities and differences between the two systems and the respective crimes with which they deal? To what extent should they recognize and defer to each other's processes, actions and decisions?

2.4. Heller's Sentence-Based Complementarity Heuristic

2.4.1. The Rome Statute's Article 17 Provision

To interpret whether in 2011, the Kenya government was actively investigating and prosecuting the alleged mass atrocities committed during its post-2007 conflicts, this section applies Kevin Jon Heller's "sentence-based complementarity."[581] The Pre-Trial Chamber (upheld by the ICC's Appeal Chamber majority judges[582]) relied on a narrow "same person, same conduct" test.[583] The admissibility provision is set out from the outset.

Article 17 of the Rome Statute is entitled "Issues of admissibility" and reads as follows:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

[581] Heller, "A Sentence-Based Theory," *supra* note 152.
[582] *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Hussein Ali* Judgment on Government of Kenya Challenging Admissibility of Case 30th August 2011 (hereafter *Kenyatta Appeals Chamber*, Kenya Challenge Against Jurisdiction) majority judges Daniel David Ntanda (presiding), Sang-Hyun Song, Akua Kuenyehia and Erkki Kourula.
[583] Carsten Stahn, "'Sentencing Horror' or 'Sentencing Heuristic,' " *supra* note 154.

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[584]

Nothing in the Rome Statute prohibits states from prosecuting international crimes as ordinary crimes.[585] Yet according to Heller,[586] the ICC Appeals Chamber has decided that a national prosecution must "cover the same person and substantially the same conduct as alleged in the proceedings before the

[584] Rome Statute, *supra* note 14.
[585] J.K. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law (2003) *Journal of International Criminal Justice*, 1, 86-113; Bruce Broomhall, "The International Criminal Court: A Checklist for National Implementation" in M.C. Bassiouni (ed.) *ICC Ratification and National Implementing Legislation* (13, quarter) (Érès, Nouvelles Études Pénales, 1999) 113-15.
[586] Heller, "A Sentence-Based," *supra* note 152 p 335.

Court."[587] It is to clarify "that a national prosecution of a crime – international or ordinary – *did not prohibit* ICC retrial for charges based on different conduct"[588] notwithstanding that the " 'same conduct' language was specifically added to the chapeaux[589] of Article, 20(3)." Rather article 17 is limited to excluding ICC jurisdiction over national prosecutions involving the same conduct as the intended ICC prosecution. "The 'conduct' test determines whether a state is 'inactive' with regard to the ICC prosecution" – not whether "a state satisfies Article 17(1)'s willingness requirement. Scholars have thus encouraged the ICC to supplement the 'same conduct' test by adopting a view of unwillingness that limits states to charging defendants with 'serious' ordinary crimes."[590]

Most complementarity scholars "accept that an inadequate (domestic) sentence can also justify the ICC (jurisdiction) therefore pre-empting a national prosecution of an ordinary crime." Even more radically, Heller's "sentence-based alternative" argues that the ICC:

> should focus *exclusively* on the sentence when determining whether a national prosecution results in a sentence no less severe than the defendant would receive in the ICC prosecution, the case should be inadmissible regardless of the gravity of the domestic crime prosecuted or whether or not it is based on the same conduct.[591]

If "a state challenges admissibility – pre-conviction, the ICC (sh)ould" – in Heller's view "compare the average sentence for the international crime charged by the ICC with the average sentence for the ordinary crime being investigated or prosecuted by the state. As long as the national average is equal to or greater than the ICC average," then Heller asserts, "the case should be inadmissible. The (ICC) (sh)ould then revisit the inadmissibility challenge after the national prosecution has concluded, retrying the defendant under Article 20(3) if the defendant was acquitted after a sham domestic trial or received an inadequate sentence."[592]

[587] *Kenyatta Appeals Chamber*, Kenya Challenge Against Jurisdiction, *supra* note 153 para 39; Situation in Darfur, *Prosecutor v Harun and Kashayla* 27th April 2007 *Prosecutor v Lubanga* Decision on Prosecutor's Application for a Warrant of Arrest Art 58, 10th February 2006; cited in Heller, "A Sentence-Based," *supra* note 152 p 335-6.
[588] Heller, *ibid.* p 336; See also articles 89 and 94, Rome Statute, *supra* note 14.
[589] More commonly, in journalism contexts, Francophone cultures use the word "un chapeau" to refer to the introduction (sentence or paragraph) of a news story. In such contexts English equivalents would be "lead," "resumé," "summary;" See Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2006) chapter 11.
[590] *Ibid.*
[591] *Ibid.* p 337.
[592] *Ibid.* p 338.

Furthermore:

> If a state challenges admissibility post-conviction, then the ICC should simply compare the actual sentence the defendant received for the ordinary crime with the average sentence for the international crime charged by the ICC. As long as the actual sentence, meted out domestically, is equal to or greater than the ICC maximum – or perhaps slightly below it, permitting states a certain 'margin of appreciation' – the case should be inadmissible before the ICC.[593]

In sum: "(W)hen faced with an admissibility challenge, the ICC should," on Heller's interpretation:

> determine the applicable statutory maximum for the international crime – 30 years if the crime was neither extremely grave nor the defendant particularly heinous, life otherwise – and use that as its baseline comparison. Alternatively, the ICC could apply the average sentence for the international crime at the ICTY and ICTR, which have sentenced more than 100 defendants for a variety of international crimes.[594]

Sentencing constitutes the central – and, basically only measurement device that liberal institutions avail themselves when it comes to operationalizing punishment in extant sentencing frameworks. In Heller's words, the "length of prison term is a meter for retributive value."[595] He asserts that his "sentence-based" heuristic is no less retributive than the "conduct-and-gravity" heuristic. "The deterrence value of a criminal justice system – international or ordinary – is a function of three factors: the likelihood that a perpetrator will be prosecuted; the likelihood that a perpetrator will be convicted; and the severity of the sentence that a convicted perpetrator will receive."[596] First, because:

> international crimes are so legally complicated and resource-intensive, prosecutions for ordinary crimes will normally take far less time and far less cost to complete. States that prosecute, international crimes as ordinary crimes can thus be expected *ceteris paribus* to prosecute more defendants than states that prosecute international crimes as international crimes.[597]

Second, "national prosecutions are far more likely to result in conviction when prosecutors are not artificially limited in terms of the conduct they can investigate and the ordinary crimes they can charge." Third, "national sentences for ordinary crimes are normally longer than international sentences for

[593] Article 77(2), Rome Statute, *supra* note 14.
[594] *Ibid.* p 338-9.
[595] Heller, "A Sentence-Based," *supra* note 152 p 352.
[596] *Ibid.* p 353.
[597] *Ibid.*

international crimes."[598] The *raison d'être* of criminal justice derives from the state's power to use legitimate force to interfere with human rights of individuals who threaten the security of others.

2.4.2. A Classification of Ordinary Crime Prosecutions

To explain why a sentence-based heuristic is superior to a heuristic based on conduct and gravity, Heller creates "a taxonomy of scenarios in which a state charges a defendant with an ordinary crime instead of an international crime. Three factors are particularly relevant:" First, "whether the ordinary crime and the international crime are based on the same conduct or different conduct." Second, "whether the ordinary crime is serious or minor." and third, "whether the ordinary crime carries a severe or light sentence."[599]

Scenario	Conduct	Crime	Sentence
1	Same	Serious	Severe
2	Same	Serious	Lenient
3	Same	Minor	Severe
4	Same	Minor	Lenient
5	Different	Serious	Severe
6	Different	Serious	Lenient
7	Different	Minor	Severe
8	Different	Minor	Lenient

Table 1: Adopted from Kevin Jon Heller (2013: 339)

The above classification emerges:

Scenario 1: a defendant charged with the crime against humanity of murder is convicted of ordinary murder and sentenced to death.

Scenario 2: a defendant charged with the crime against humanity of rape is convicted of ordinary rape and sentenced to five years in prison.

Scenario 3: a defendant charged with the crime against humanity of murder is convicted of assault and sentenced to 30 years in prison.

Scenario 4: a defendant charged with crime against humanity of rape is convicted of indecent assault and sentenced to three years in prison.[600]

[598] *Ibid.*
[599] *Ibid.* p 339.
[600] *Ibid.* p 340.

Heller also distinguishes how: "Scenarios 5-8, by contrast, involve situations in which a state ignores the conduct underlying the ICC prosecution and prosecutes the defendant for an unrelated ordinary crime."

Scenario 5: a defendant charged with crime against humanity of rape is convicted of rape and sentenced to death.

Scenario 6: a defendant charged with crime against humanity of murder is convicted of ordinary rape and sentenced to five years in prison.

Scenario 7: a defendant charged with crime against humanity of rape is convicted of theft and sentenced to thirty years in prison.

Scenario 8: a defendant charged with crime against humanity of rape is convicted of theft and sentenced to three years in prison.[601]

2.4.3. Applying Heller's Heuristics

Heller's "Scenarios 1-4 above each satisfy the 'same conduct' requirement, so that the most important factor under the traditional heuristic would be gravity. Scenario 1 would clearly be inadmissible before the ICC: This is because murder is the most serious ordinary crime. Scenario 2 would likely be admissible" because "a five-year sentence seems manifestly inadequate relative to the crime against humanity of rape."[602] Various scholars conclude that an inadequate sentence can manifest a state's unwillingness to prosecute. Consider the Kenyan situation, the sole murder conviction against a low-level offender arising from post-2007 conflicts which resulted in conviction in June 2012, more than a year after the government's admissibility challenge had been dismissed by the Pre-Trial Chamber. Nonetheless, given that it was pending, therefore, notwithstanding the fact that the domestic case of the *R v Peter Ruto*[603] charged a different person (i.e. Peter Ruto who is not selected for prosecution before the ICC) for different conduct (murder as an ordinary crime), since murder is of serious gravity and under the Kenyan Penal Code[604] carries the maximum of death sentence. Under Heller's sentence-heuristic the low-level domestic *R v Peter Ruto case* would have rendered the high-level, international *Ruto case* (*Prosecutor v William Ruto, Henry Kosgey and Joshua Sang*),[605] inadmissible before the ICC. Ultimately, although the accused, Peter Ruto, received a fifty-year prison term, as seen below, that domestic prosecution did not impress the

[601] *Ibid.*
[602] *Ibid.*; See also Kleffner, "The Impact of Complementarity," *supra* note 585;" And also Broomhall, "The International Criminal Court" *supra* note 585; Also Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" (2003) *Max Planck Yearbook of United Nations Law,* 7, 591-632.
[603] *R v Peter Ruto*, *supra* note 571.
[604] Section 203 as read with 204, Penal Code, *supra* note 540.
[605] *The Ruto case, supra* note 146.

majority Appeals Chamber judges in the Kenya Challenge against ICC jurisdiction. Thus activist ICC interpretations assert that domestic criminal justice systems should essentially prosecute the same person as the suspect selected by the international prosecutor. The "same person, same conduct" test assumes that the goal of international criminal punishment is retributive, rather than, consequentialist.

Scenario 4 under Heller's taxonomy of serious ordinary crimes, the rape domestic conviction "would almost certainly be admissible" before the ICC, given that the three years assault sentence does not reflect equivalent gravity of rape. Scenario 3 involving "same conduct," is the most difficult situation. For example, where a defendant charged by the ICC with the crime against humanity of murder conviction for assault and sentenced to 30 years. In the Kenyan *"Rambo cop" case* of *Edward Kirui*, criticized in the Human Rights Watch 2011 Report above, a low-level perpetrator was prosecuted for the capital offence of murder, but acquitted for "lack of" ballistics evidence, a verdict widely believed to have resulted from collegial cover-up. In 2014, the Court of Appeal subsequently declared that decision a mistrial upon which the accused was re-charged with murder. By contrast, retributive justice emerged from the first conviction for a low-level physical perpetrator of serious crime during post-2007 conflicts, against Peter Ruto wich was entered by the High Court in June 2012. Nakuru High Court Lady Justice Roselyne Wendo sentenced Peter Kipkemboi Ruto[606] to a fifty year prison term for murdering 67-year old Kamau Kimani Thiong'o at Kamura farm in Kagema village in Timboroa in Uasin Gishu County on 1st January 2008. "The court was told that the old man was hit by something which was to be later identified as an arrow and fell after which Ruto dashed forward and struck him with a panga on the head." While the attack was part of a group the judge found that "he could have done it himself."[607]

The substantive facts were indeed matters for review by an appeal court. Nonetheless, the trial court dismissed his alibi as an "after-thought meant to defeat justice." Should Peter Kipkemboi Ruto's severe punishment from the post-2007 conflicts render *the Kenya cases* before the ICC, inadmissible? Of significance for this chapter are two intriguing contradictions from that landmark post-2007 conflicts murder conviction. First, that the first post-election violence murder conviction was made in 2012 – five years after widespread incidents of *manifest criminality*.[608] Second, that the maximum

[606] http://www.citizennews.co.ke/news/2012/local/item/1919-pev-suspect-sentenced-to-life-imprisonment<accessed on 18th February 2013>; See also Charles A. Khamala, "Legal Aid and Actuarial Justice in Kenya" (March 2013) *Law Society of Kenya Journal*, 9, 1, 117-153 pp 151-152.
[607] Wanjiru Macharia, "Court Convicts Kenyan of Poll Chaos," *Daily Nation*, 12th June 2012.
[608] Fletcher, *Rethinking, supra* note 40.

sentence under the Rome Statute for international crimes either (a) "may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances."[609] This term seems lenient compared to capital punishment available for serious "ordinary" crimes under the Kenyan Penal Code yet international crimes under the Kenyan International Crimes Act provides for the life imprisonment.[610] Notwithstanding the pending prosecution of Peter Kipkemboi Ruto under Kenya's domestic criminal justice system, in 2011 however, as shown below, and contrary to Heller's heuristic, the ICC Appeals Chamber nonetheless dismissed the Kenya government's challenge against the ICC's complementarity. The main ground for dismissal was that no domestic investigations or prosecutions were "active" or ongoing so as to preclude or oust ICC's jurisdiction.

It is observed that not only were "Rambo cop" Edward Kirui and murder convict Peter Kipkemboi Ruto different persons from those suspected before the ICC (although Kirui's role as a police officer may be construed as representing a low-level perpetrator for whom former Commissioner of Police Hussein Ali may conceivably have been alleged to possess command responsibility in *the Kenyatta case*; while Peter Kipkemboi Ruto's violence may have constituted low-level perpetration attributable to "the Network" in *the Ruto case*), but also they were both charged with the serious ordinary crimes of murder which are different from the crime against humanity of murder, *inter alia*, which the ICC suspects were facing. For these reasons, Heller decries that most scholars would deem Scenario 3 admissible for trial before the ICC.[611] This is because of "consistent emphasis on gravity" whereby the "lengthy sentence" cannot "offset the choice of an inadequate ordinary crime." Conversely, regarding Scenario 7, as seen in the introduction to this chapter, the Kenyan Attorney-General charged Kosgey with 12 counts of embezzlement – a minor crime which in any event was unrelated to the crimes against humanity allegedly committed during the post-2007 conflicts – charged by the Office of the Prosecutor before the ICC.

As argued in the preceding section, notwithstanding that the cumulative 120-year sentence which Kosgey potentially attracted if he was convicted, nonetheless, Heller criticizes scholars who reason that Kosgey's domestic prosecution for offending the Kenyan Standards Act would not preclude admissibility of his alleged crimes against humanity before the ICC. This is because "despite involving the 'minor' crime of theft…a 30-year sentence is far longer than the defendant would likely receive if he was convicted by the ICC of

[609] Articles 77(1)(a) and (b), subject to article 110, Rome Statute, *supra* note 14.
[610] Section 5, The Kenyan International Crimes Act no. 16 of 2008.
[611] Heller, "A Sentence-Based," *supra* note 152 pp 340-1.

rape as a crime against humanity."[612] He notes that "the average sentence for that crime at the ICTR is 12-15 years." Because the ICC Appeals Chamber has adopted a same-conduct requirement, Scenarios 5-8 would each be inadmissible on the ground that – in relation to the ICC proceedings – the state was "inactive." In the absence of the "same conduct" requirement, the analysis of Scenarios 5-8 would be similar to the analysis of Scenarios 1-4.

2.4.4. The Advantages of a Sentence-Based Theory of Complementarity

In Heller's abovesaid view, the need to make difficult and inherently subjective assessments of the gravity of the ordinary crimes disappears; as long as the sentence for the ordinary crime is equal to the sentence for the international crime, then the nature of the ordinary crime is irrelevant.[613] Conversely, the traditional "complementarity heuristic, in short, leads to a very ICC-centric approach to the prosecution of ordinary crimes. Indeed only one of the eight scenarios is inadmissible, Scenario 1."[614]

A sentence-based heuristic, by contrast, leads to a much more state-centric approach to the prosecution of ordinary crimes. It would deem four of the scenarios as inadmissible, because each involves an adequate sentence vis-à-vis the ICC proceedings. Scenarios 1 and 5, because the domestic death penalty is far more severe than the most severe sentence (life) that the ICC can impose.

Scenario 3, "because a thirty-year sentence is well above the average sentence for the crime against humanity of murder." Heller thus emphasizes that there *"is* no justification for the ICC to admit a national prosecution of an ordinary crime that results in an adequate sentence simply because the ordinary crime does not capture the gravity of the international crime or is based on different conduct."[615] A sentence-based complementarity heuristic, for Heller,

> provides states with greater flexibility to prosecute international crimes as ordinary crimes than the conduct-and-gravity heuristic, it would significantly decrease the number of national prosecutions that the ICC would have to either pre-empt (prior to conviction) or re-try (after conviction) thereby conserving the ICC's limited resources which permit prosecution of approximately six to 10 cases over a three-year period. Thus the (ICC) has to attempt to avoid admitting cases in which the state is not, in fact, attempting to shield the perpetrator from criminal responsibility.[616]

[612] *Ibid*. p 341.
[613] *Ibid*. p 352.
[614] *Ibid*. p 341.
[615] *Ibid.*
[616] *Ibid*. p 346.

The state would have the option of compensating for its failure to criminalize command responsibility (as shown in the Kenyan case of *Edward Kirui*[617]) by relying on a different mode of participation to convict the superior of a different ordinary crime.

2.4.5 Criticisms of Heller's Sentence-Based Heuristic

2.4.5.1. Stahn's Critique

Consider underlying assumptions.[618] Does the ICC's admissibility test create undue pressure to charge international crimes under an international label?[619] As explained by Darryl Robinson below, there are a "hard" and a "soft" mirror theses. Article 17(3) of the Rome Statute does not *per se* oblige states to investigate and prosecute under an international crimes label. However, because domestic law might not reflect all specific aspects of international crimes, capture their specific "gravity" or provide "effective penalties" that take into account their contextual elements,[620] therefore, an ordinary crime label might not be ideal. Instead, Carsten Stahn prefers a cost-benefit analysis of "ordinary" crime prosecution. For him, an "international crime" label might offer broader basis for jurisdiction (i.e. prosecution for extraterritorial acts). He then counterposes checks and balances against Heller's sentencing heuristic. While complementarity must be incentive-based to promote checks and balances, Heller's is an "all-or-nothing" approach. It assumes that higher sentences amount to better justice. Stahn asks whether a change of methodology is desirable.[621] Merits of the "same conduct" test are "based on a consistent application of the notion of the 'case' under the admissibility regime namely article 17(1)(a)(b) and…(c) in conjunction with Article 20(3)." Stahn concludes that Heller's sentencing heuristic may not be strictly necessary to save ICC resources. Instead, the same result may be achieved through the prosecutor who might on his/her own motion decide not to proceed further based on new facts or information.[622] In contrast to the sentence-based definition, Stahn proposes an alternative "conduct" definition.

[617] *R v Edward Kirui, supra* note 555.
[618] Stahn, "'Sentencing Horror,'" *supra* note 154.
[619] *Ibid.* p 358.
[620] *Ibid.* p 359.
[621] *Ibid.* p 361.
[622] Article 53(4), Rome Statute, *supra* note 14.

2.4.5.2. Robinson's Critique

Darryl Robinson[623] asks whether national proceedings warrant deterrence. He postulates three major theories about what the ICC should scrutinize when it assesses a national proceeding. First, the nature of the *charges* laid. Second, the *severity* of the *sentence* imposed, or, third, the quality of the *process* adopted. Heller criticizes "charge-based" approaches that would focus on the domestic or international nature of the charges or on the serious or minor gravity of the charges. On the other hand, Stahn's is "conduct-based." A third option is the "*process-based*" approach.[624] In this respect, Robinson distinguishes between the "hard mirror" and "soft mirror" theories. The "hard mirror" thesis following Frederic Mégret, is "that prosecuting an international crime by using ordinary criminal offences (e.g. murder or assault) will not satisfy the principle of complementarity."[625] However, Heller demonstrates that that thesis is not supported by the Rome Statute. For Heller, use of ICC definitions may promote impunity. Conversely, according to Robinson, the "soft mirror" thesis demonstrates that "states are not obliged to use ICC definitions but...it is *preferable* for states to do so."[626] "Another type of charge-based theory would focus," for Robinson, "on whether the charges for a serious or minor crime (rather than on the national or international nature of the charges) may be an indicator of a non-genuine process."[627]

Robinson provides three criticisms for Heller's sentence-based theory. "First, in order to assess the national proceeding, the ICC would examine the sentence imposed and require it to be at least equivalently stringent (with the average imposed by the ICC for the corresponding international crime)." However, "a sentencing theory cannot cope with acquittals." This is because "where an accused is acquitted, there is no sentence." A second problem "is that one must await until the end of a proceeding to assess the outcome." The third problem is that "(t)he accused may face a serious-sounding charge but have played a very minor role or there may be mitigating circumstances. Thus, a proceeding may produce a sentence which falls dramatically below the 'average' international sentence, without in any way being improper or warranting ICC action." Alternatively, we would need a true presumption of innocence which protects the accused from a guilty presumption. Instead, Robinson's "process-based"

[623] Robinson, "Three Theories," *supra* note 158, citing Frédéric Mégret, "Too Much of a Good Thing? ICC Implementation and the Uses of Complementarity" in C. Stahn and M. El Zeidy (eds.) *International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2010).
[624] *Ibid.* p 369.
[625] *Ibid.* p 370, citing Mégret, "Too Much of a Good Thing?" *supra* note 623.
[626] *Ibid.* p 371.
[627] *Ibid.* p 372.

approach[628] proposes as follows. Ultimately, "if the ICC reaches the interpretation that excessively repressive national proceedings can trigger admissibility, then a harsh sentence will not forestall further inquiry into genuineness and it will still be necessary to look at other factors."[629] Article 17 does not exhaust the principles of complementarity. Rather, for one thing, article 17 is but an important technical admissibility rule, which renders a case *inadmissible* before the ICC, if it is genuinely addressed by a state.[630] Second, for Robinson there is no a lacuna in the Rome Statute requiring repair. Third, neither is there any question of the ICC requiring states to prosecute any case – nor of prohibiting, limiting or nullifying them. Rather, fourth, the ICC's concurrent jurisdiction,[631] remains inadmissible. Fifth, the following cases meet the "same conduct" test: (i) an identical case; (ii) a significantly overlapping case; (iii) a different case within the overall situation; (iv) a completely unconnected case (e.g. embezzlement); and (v) Those with no admissibility issues at all, i.e. with a margin of appreciation. Overall, this section concludes that the ICC's preference of the "same person, same conduct" test effectively results in activist complementarity. Conversely, by applying Heller's restraining "sentence-based" heuristic it would be possible to construe prosecutions for different persons or for different conduct as compliant with the complementarity principle.

2.5. A Normative Approach to International Crimes

2.5.1. International Crimes and Moral Legitimacy

As seen in the introductory chapter, various international relations scholars claim that customary international law is of a "universally binding nature." Positivists claim that the support for international criminal law comes from binding international agreements.[632] Instead, Larry May argues that international crimes are simply those crimes *recognized* by international law. Regarding domestic law, John Stuart Mill asks: "what are the nature and limits of the power which can legitimately be exercised by society over the individual?" May explains that more is needed than to show that a valid law is in place. Similarly, he argues that a like question can be asked at international level, that is, it is not sufficient to argue that a certain norm is valid simply because it exists in the

[628] *Ibid.* pp 374-8.
[629] *Ibid.* p 378.
[630] *Ibid.* p 380.
[631] Article 17(1)(b) and (c), Rome Statute, *supra* note 14; See also *ibid*. pp 380-2.
[632] Larry May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005) p 43.

Rome Statute or because some country has acceded to it.[633] Rather: "The ICC needs a clear basis for identifying international crimes, distinguishing them from domestic crimes and...explaining why the prosecution of these crimes has moral legitimacy."[634] Where does its rationale come from – international customary law or *jus cogens*. Why? There are three possible sources: First, treaty obligations that states have incurred to enforce crimes. Second, what is customarily accepted as criminal by the community of nations. Third, acts that are clearly proscribed by *jus cogens* norms, i.e. norms of such transparent bindingness that no individual can fail to understand that he or she is bound by them and no state can fail to see.

What is the moral legitimacy for the exercise of the collective, coercive power of states in international tribunals? Law's *effectiveness* is so closely linked with a person's sense that the law is legitimate and corresponding obligation that the person feels. Yet: "Law's effectiveness depends on the 'moral legitimacy' of the law."[635] Thus May recognizes that international law is premised on the idea that there are norms that all states should embrace.[636] Typically:

> these norms are designed as 'justice-based' or in some manner connected to human rights. In order to promote justice or to protect human rights, certain state practices need to be interfered with. Strategies for understanding the nature of international crimes require an explicit moral justification for 'jeopardizing' the loss of liberty of the defendant in a criminal trial.[637]

Hence "international tribunals should be limited to violations of basic human rights – that is to violations of the right to physical security and subsistence, and not to the panoply of human rights listed in various international documents."[638]

According to Douglas Husak's theory of criminalization, all states have an interest in protecting victims against violation of their rights to life and property. Criminal law constitutes a public good. However, to legitimize the expenditure of scarce public resources on punishing specific violations, the majority of the population are required to enact a penal statute. Consequently, although the state has a *legitimate* interest in retribution, it must have a *substantial* interest before resorting to the criminal sanction. It must overcome the costs of resorting to the criminal sanction, by overcoming the following three *drawbacks* of punishment:

[633] *Ibid.* p 65; See also John Stuart Mill, *On Liberty* (London: Longman, Roberts, & Green Co. [1869] 1859).
[634] May, *ibid.*
[635] *Ibid.*
[636] *Ibid.* p 63.
[637] *Ibid.*
[638] *Ibid.* p 64.

First the expense of our justice system is astronomical. Our penal institutions cost huge sums of money that might be used to achieve any number of other valuable goods taxpayers might prefer: education, transportation, funding for the arts, and the like. Second, our system of punishment is susceptible to grave error. Despite the best of intentions, punishment is bound to be imposed incorrectly, at least occasionally. Third, the power created by an institution of punishment is certain to be abused. Officials can and do exceed the limits of their authority, intentionally or inadvertently.[639]

2.5.2. May's Security Principle of International Criminalization

The earliest comprehensive attempt at a normative account of international criminal law is by May. He begins with what he terms as the "international security principle." With the notion of citizen's rational individual's equal rights,[640] Thomas Hobbes wrote contemporaneously with the Westphalian state's rise in Enlightenment Europe. His Leviathan[641] entices individuals to leave the State of Nature and enter into the nation-state.[642]

May concurs with Hobbes's view of how the Leviathan who – to overcome the war of "all against all" – entices individuals to leave the State of Nature and join civil society since their survival and subsistence shall become more secure. In international relations, a Hobbesian defence of the security principle begins from the notion that: "Attacked states have a right of self-defence against the aggressing nation which is an extension of the right of self-defence of the subjects of the nation."[643] May explains that: "The central idea is that the sovereign ruler of a state in effect promises to hold the safety of the people as his or her chief duty. The sovereign's right to rule derives from the hypothetical transfer of the right from subjects to the sovereign."[644] Hence it is implied that if the state should fail to limit the liberties of villains and thereby expose innocent subjects to harm, then the victims have a duty to reclaim their innate right to self-defence which had been surrendered to the sovereign. Because:

> Subjects have a right to self-defence – a moral minimum – and they entrust to the sovereign the right to enforce such a right. On the assumption that the sovereign will indeed protect its subjects from attack or assault....they temporarily give up their right to exercise violence against their potential attackers. If the sovereign displays an inability or unwillingness to continue to protect its subjects, the sovereign loses the exclusive right to the means of violence or adjudication that can protect those subjects.[645]

In the absence of physical security "people are unable to use any other rights that society may be said to be protecting without being liable to encounter many of the worst dangers they would encounter if society were not protecting the rights."[646] Thus security of physical integrity may be considered as " 'the core value of all human rights' which make it possible to realize 'human dignity on the widest scale possible.' "[647] By extension, when the citizens' core human rights are unprotected, then the sovereign forfeits the right to prevent foreign sovereigns from crossing into the state's territory for purposes of safeguarding the vulnerable citizens. For May:

> If a state deprives its subjects of physical security or subsistence, or is unable or unwilling to protect its subjects from harms to security or subsistence,
> (a) then that state has no right to prevent international bodies from 'crossing its borders' in order to protect those subjects or remedy their harms;
> (b) and then international bodies may be justified in 'crossing the borders' of a sovereign state when genuinely acting to protect the subjects.[648]

It is this "international security principle" which he claims confers legitimacy on international criminal tribunals as an exception to the international principle of non-interference in the affairs of sovereign states. While: "Security is an obvious interest or need,"[649] the United Nations Declaration of Human Rights[650] contains many (although important) superfluous rights which are irrelevant to international criminal law. It is for this reason that, in response to Kenya's post-2007 conflicts, the ICC Office of the Prosecutor selected specific individuals, and not others, for investigation. For example, first, the ICC prosecutor did not select the Electoral Commission of Kenya officials for their role in bungling the elections. Yet the ECK's actions or omissions may have not only denied Odinga an employment opportunity, but also denied voters their right to vote. However, these first generation civil liberties are not as important as harm to the basic

[639] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2009) pp 203-204.
[640] Yael Tamir, "Class and Nation" in Phillipe Van Parijs (ed.) *Cultural Diversity versus Economic Solidarity* (Brussels: De Boeck and Larcier, 2004) 139-157 p 147.
[641] Hobbes, *The Leviathan, supra* note 580.
[642] Wayne Morrison, "Globalization, Human Rights and International Criminal Courts," in J. Munice and D. Wilson (eds.) *Student Handbook of Criminal Justice and Criminology* (London: Cavendish Publishing, 2004) 153-165.
[643] May, *Crimes Against Humanity*, *supra* note 632 p 72.
[644] *Ibid.*
[645] *Ibid.*
[646] *Ibid.* p 70.
[647] *Ibid.* p 71.
[648] *Ibid.* p 68.
[649] *Ibid.* p 70.
[650] UNDHR, *supra* note 66.

needs.[651] Second, neither did the ICC prosecutor select low-level suspects. This is because: "International prosecutions should not be risked unless there is also a harm to the international community because international prosecutions risk loss of liberty to the defendants, a loss that is of such potential importance."[652] Furthermore, international criminal law does not impose vicarious liability for gross human rights violations – on the state. Rather, the most optimum means for securing such rights is by individual criminal responsibility.

The first component of May's international security principle, he calls security of existence; the second, security of welfare or well-being. The components of the security principle are, one, that bare preservation be secured, and two, that one not be subjected to danger in ways that disrupt one's pursuit of contentment or happiness.[653] Violating property rights alone is insufficient, because "failing to provide for broad contentment of the members of the state should not be given equal weight to the risk to liberty that is involved in international criminal prosecution."[654] This is ultimately because: "The liberty of those who would be subject to international criminal prosecution is more *important* than *contentment*."[655]

May's international security principle thus concludes that because international "claims are grounded in natural rights that these subjects held in the state of nature and never really lost"[656] and further, because "sovereignty is based on the willingness and ability of a state to protect its subjects,"[657] therefore three criteria regulate admissibility of cases before the ICC. First, the host state should be unwilling or unable to genuinely investigate or prosecute. Inability may be evinced by a delay by a domestic prosecutor in commencing criminal proceedings against suspects for committing serious ordinary criminal offences. Similarly, lack of genuine domestic criminal processes may be inferred from the prosecuting of suspects for conduct that is not a serious crime or under a provision which attracts a lenient sentence. Thus, the second criteria for international admissibility may accrue from failure by parliament to enact enabling legislation to domesticate international crimes or procedures. Third, however, upon domestic conviction – whether for a serious domestic crime or an international one – and imposition of an adequate sentence, following a *bona*

[651] Terence C. Halliday, "The Fight for Basic Legal Freedoms: Mobilization by the Legal Complex" in Heckman, Nelson and Cabatingan (eds.) *Global Perspectives, supra note* 159, 210-240.
[652] May, *Crimes Against Humanity*, *supra* note 632 p 70.
[653] *Ibid.* p 73.
[654] *Ibid.*
[655] *Ibid.*
[656] *Ibid.* p 75.
[657] *Ibid.*

fide process, international jurisdiction is precluded. The international rule against "double jeopardy" is explained towards the end of this chapter. Crucially: "Crimes against humanity...normally involve a state's choosing to attack its own subjects, outright, or choosing to allow attacks on its subjects to occur within its own borders."[658] Hence the Rome Statute determines when cases are *not* admissible.

The most relevant objection May levels against his own international security principle, is that he may be accused of "having confused the question of what is an international crime with the question as to which forum should prosecute."[659] He replies to himself that the best way to think of domestic prosecutions of international crimes "is as if they were taking place in an international tribunal." This is because:

> various crimes that fit under the heading 'crimes against humanity' are not normally recognized as crimes by the criminal statutes that govern public tribunals, and are not clearly crimes that affect the domestic community in the way that they do affect, and create interest in, the international community.[660]

In conclusion, May views "these trials that occur domestically as really stand-in trials for trials of international tribunals."[661] A perusal of the historical evolution of the Rome Statute's complementarity principle, shall show that, contrary to May's normative ideal or even Deng's assertion of regarding the international community's residual "universal" jurisdiction, seen in the previous chapter, in reality, the ICC possesses reverse complementarity.

2.6. The Rome Statute's Complementarity: Admissibility

2.6.1. Basic Operation

Under the Rome Statute, it shall be shown that in alternative to *proprio motu* proceedings, the ICC's jurisdiction may be invoked either by a State Party or the UN Security Council. Thus mandatory as well as optional admissibility conditions coexist. The Rome Statute's complementarity model empowers the prosecutor to "initiate" an investigation *proprio motu*,[662] and if satisfied – after having evaluated supporting materials, including the admissibility of the

[658] *Ibid.* p 69.
[659] *Ibid.* p 78-9.
[660] *Ibid.* p 79.
[661] *Ibid.*
[662] Article 15, Rome Statute, *supra* note 14.

situation – that there is a "reasonable basis to proceed" to request the Pre-Trial Chamber to authorize commencement of an investigation.

The Rome Statute commences with a default or conditional rule, namely, that the "Court shall determine that a case is inadmissible where…"[663] According to Mohamed el Zeidy,[664] this negative language emphasizes that the jurisdiction is mandatory during the situation phase. A distinction is maintained between *situations* and *cases*. If a State is unwilling or unable to deal with a situation before its domestic courts, the ICC could proceed without further consent from the state. Thus, by requiring the Chief Prosecutor or Security Council or any Member States Party to apply for transfer to the ICC's jurisdiction, a state's failure to prosecute automatically triggers the jurisdiction of the ICC. Failure of domestic courts to prosecute is subject to genuine proceedings. In El Zeidy's view – the criteria were defined as objectively as possible – where the ICC was given authority to intervene. The effect is to encourage domestic proceedings as a primary duty while preserving the powers of the ICC to intervene when required.

Articles 17(1)(a) and (b) of the Statute thus establish inadmissibility of a case when domestic investigation and prosecution proceedings are being carried out. Yet according to El Zeidy, as regards truth commissions and amnesties, the provision fails to clearly state the type of investigations that should be conducted.[665] It is unclear whether an investigation by a truth commission would be sufficient, particularly if the truth commission investigation did not result in an amnesty. Paragraph (a) under article 17(1) refers to investigation and prosecution. Presumably, investigations ordinarily conducted by a non-judicial body are not judicial in nature and would not necessarily lead to prosecution. Rather, prosecution is always a judicial activity, carried out by a judicial body. In his view, article 17(1) is therefore only concerned with judicial proceedings as opposed to alternative mechanisms of justice. Because it entails contending ideological legal opinions, El Zeidy thus laments the Statute leaving it to the ICC to resolve the gap, as problematic, as explained below.

2.6.2. Exceptions

The most difficult aspect of complementarity concerns the apparent exceptions to the admissibility criteria. First, articles 17(1)(a)-(c) and (2)-(3) define the terms "unwilling" and "unable" to "genuinely." Second, according to El Zeidy a

[663] Article 17, *ibid.*
[664] Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff, 2008).
[665] Article 53, Rome Statute, *supra* note 14, cited in *ibid.*

difficulty arises from assessing the gravity test under admissibility of a situation or case. Regarding the test of "unwillingness,"[666] it is left undecided as to whether the list of conditions for making a finding of "unwillingness" is open-ended or exhaustive. Exceeding the criteria widens the ICC's monitoring power to assess willingness. This may, or not, favour states. Under article 17(2)(a), the criterion of shielding a person from criminal responsibility requires a subjective test to discover a state's hidden intentions. What factors render domestic proceedings inadequate? Article 17(2)(a) defines proceedings as investigations and prosecutions. When are domestic trial proceedings a sham? Under article 17(2)(c), "unjustified delay" at the trial stage or intentional miscarriage of justice. In this regard, the Kenyan *Edward Kirui case*[667] is instructive. In that case, a policeman ("Rambo cop"), as was shown earlier, was acquitted by the Kenyan High Court on the strength of ballistics evidence. He was accused of murdering two unarmed civilians at Kisumu. Curiously, the forensic expert's report suggested that the bullets which killed the deceased persons were not fired from the rifle officially issued to him. Yet the close range shooting incident was broadcast on national television and eye witnesses' testimonies identified the accused who apparently perpetrated extra-judicial execution during the post-2007 conflicts. Did that expert falsify his report? It is trite law that Kenyan High Court Judge Fred Ochieng was not entitled to rely on controversial expert evidence to overrule lay eyewitnesses.[668] These questions were successfully appealed by the Director of Public Prosecutions before the Court of Appeal and a mistrial was declared. One lesson from that tragic incident is that not only were the victim's freedoms of assembly, expression, and movement, violated. But also, their rights to life and freedom from cruel and unusual treatment, curtailed.

Articles 17(2)(b)-(e) of the Rome Statute deal with the elements of objectivity regarding "unjustified" justice and "delay," and lack of independence or impartiality in carrying out domestic proceedings. What are these objective boundaries? This book notes that the *Lubanga*[669] proceedings exceeded the projected trial time span which should not exceed three years. Worse still,

[666] Article 17, *ibid.*
[667] *R v Edward Kirui supra* note 555.
[668] *Koccis v State* (1873) 50 N. J. Law, 44, *27* Atl. 800, cited in *Black's Law Dictionary Free Online Legal Dictionary* (2nd ed.) Law Dictionary: What is Experts? Definition of Experts (*Black's Law Dictionary*); See also Charles A. Khamala, "The Poverty of Lords: The Value of Forensic Evidence and the Role of Experts before Kenyan Courts" in Luis G. Franceschi and Andrew M. Ritho (eds.) *Legal Ethics & Jurisprudence in Nation building* (Nairobi: Strathmore University Press and LawAfrica, 2005) 101-129.
[669] *Prosecutor v Thomas Dyilo Lubanga*, *supra* note 358 convicted on 14th March 2012, of the war crime of enlisting and conscripting of children under the age of 15 years.

Slobodan Milošević[670] – the Serbian and Yugoslavian president who was charged for crimes against humanity – died before his ICTY trial could be concluded. Due to extraordinary delays, he was therefore never found guilty. In *the Butare Trial*,[671] the ICTR heard 189 witness testimonies spanning over a decade culminating in "the longest, largest, and probably most expensive" international trial ever to be completed, before sentencing all six defendants for crimes related to genocide. Three of the six are sentenced to life imprisonment.

2.7. Applying the Complementarity Doctrine to the Kenyan Situation

At one extreme, a teleological international criminal judge would make a conceptual interpretation of the admissibility rule under article 17 of the Rome Statute to apply the letter of the provision to the Kenyan situation. From decided cases, a conceptual interpretation of the complementarity rule under an application of the "same-person, same-conduct" test suggests that the Kenyan situation falls within the cases over which the ICC has jurisdiction. Assuming the factual accuracy of Kenya's investigations and prosecutions status based on the "independent" evidence of the Human Rights Watch Report December 2011 – the Kenya situation revealed acquittals and withdrawals in six high profile cases, six convictions on high profile serious cases and few significant post-election violence cases remained pending before the courts – the argument of this chapter would expect the conclusion of a universalist judge to be that no relevant criminal trials were "active" in Kenya in 2011.

However, sacrificing individual rights in the national interest is a positivist, utilitarian or even communitarian goal. Consider factors *external* to the criminal law. Further assume that according to Husak's overcriminalization theory, state criminal punishments are unjustified in situations where the state may lack *substantial*, *legitimate interest* in investigating or prosecuting persons suspected of bearing the greatest responsibility for crimes against humanity as announced by the ICC Chief Prosecutor in December 2010. Then prosecution amounts to overcriminalization. Thus, going by the statistics gathered by the Human Rights Watch Report in 2011 – it was unclear whether or not the ongoing investigations and prosecutions under Kenya's domestic law satisfied the Rome Statute

[670] *Prosecutor v Slobodan Milošević* IT-02-54 Trial Chamber International Criminal Tribunal on Former Yugoslavia.

[671] Case no. ICTR-98-42-T Trial Chamber II of the International Criminal Tribunal on Rwanda on 24th June 2011 - handed down its Judgment in the case of *Prosecutor v Nyiramasuhuko et al.,* the "*Butare Trial*" which started on 12th June 2001. Faustine Kapama, Rights-Africa: "Rwandan Woman Sentenced to Life for Genocide" <http://www.ipsnews.net/2011/06/rights-africa-rwandan-woman-sentenced-to-life-for-genocide 24th June 2011.<accessed 7th October 2013>

inadmissibility criteria if a "process-based" test of complementarity was applied. In order to construe whether or not domestic responses attained the requisite threshold under the Rome Statute – so as to *exclude* the ICC's jurisdiction – the ICC Appeals Chamber majority judges interpreted article 17, of the Rome Statute to mean that Kenya should prosecute the same individuals who were identified by the ICC prosecutor, for the same international crimes. That is, the ICC expected the Kenya government to generally attribute individual criminal responsibility – not only by characterizing four of the six suspects as indirect co-perpetrators and the other two as contributors – but also to particularize the specified crimes against humanity, alleged to been committed. However, the majority judges neglected to consider the admissibility of the situation under the article 53 "interests of justice" criterion. To this end, it shall be inferred that the Appeals Chamber majority judges simultaneously invoked a broad, civil law "legality principle"[672] to require mandatory prosecution irrespective of any public interest considerations.

This chapter's hypothesis restated, is that *the Kenya cases* fall within the penumbra of article 17 rather than the "core of the rule." If the international criminal judge interpreted the facts as a hard case, then they would be justified in conceptualizing the *external* socio-economic or cultural attributes of the majority in the concerned population. In such case, the non-prosecution of The Hague six suspects in 2011 by the Kenyan state criminal justice system, may be justified. Kenya's non-prosecution of persons suspected of bearing the greatest responsibility for crimes against humanity was justifiable not only on grounds of lack of *legitimate* interest in retribution. But also, non-prosecution policy may be justified because Kenya did not possess a *substantial* interest in order to resort to the criminal sanction. Instead, due to what Dworkin calls the "instability of the core" of the rule, the situation country may legitimately prefer to pursue a second-best moral solution of "truth" based on "knowledge" (establish a truth commission) or even a third-best solution of restructuring its constitution or according amnesties to suspects for the sake of a "strong" minimalist goal of peace. An international criminal judge who upholds a collectivist, communitarian, republican or cosmopolitan pluralist values may contend that an international criminal judge who imposes a retributive solution – based on May's "weak" moral minimalist view – may run afoul of political liberalism itself. Worse still, adoption of the narrow or restrictive, domestic common law rule of the self-defence, together with the accompanying civil law mandatory prosecution procedure at international criminal law, may not necessarily result in a "first-best" solution. This is because the international

[672] Reichel, *Comparative Criminal Justice, supra* note 155.

community is diverse and multiculturalism would benefit from broader prosecutorial discretion under a common law opportunity principle.

2.8. Kenya's Challenge Against the "Same-Person, Same-Conduct Test"

2.8.1. Arguments on Kenya's Admissibility Challenge

To prove the validity of the above hypothesis, a critical analysis shall be made of two conflicting interpretations of article 17 by the ICC Appeals Chamber in its judgments of the Kenya government's challenge against admissibility of the situation. This section shall set out the respective arguments advanced by contending parties as well as the majority judgment by judges Daniel David Ntanda Nsereko, Song Sang-Hyun, Akua Kuenyehia and Erkki Kourula ("the Impugned Decision"),[673] while the next section considers the dissenting opinion of Judge Anita Ušacka.

2.8.2. The ICC Pre-Trial Chamber's Decision on the Kenya Government's Admissibility Challenge

According to the ICC Pre-Trial Chamber:

> the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. It is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so as explicitly stated in the Statute's preambular paragraph 6. However, it should be borne in mind that a core rationale underlying the concept of complementarity aims at 'strik[ing] a balance between safeguarding the primacy of domestic proceedings vis-à-vis the [...] Court' on the one hand, and the goal of the Rome Statute to 'put an end to impunity' on the other hand. If States do not [...] investigate [...], the [...] Court must be able to step in.[674]

In another judgment of 25th September 2009, the ICC Appeals Chamber construed article 17(l)(a) of the Statute as involving a twofold test:

> [I]n considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute.[675]

The government of Kenya's challenge against ICC admissibility, was whether there were actually ongoing domestic proceedings (complementarity) and the second limb (gravity) was not contested.[676] The question concerned whether or not "national investigations must [...] cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC." In this respect the Pre-Trial Chamber held that the Kenya government "either misunderstood or disagreed with the remaining limb of the test, which requires that those investigations must also cover the same persons subject to the Court's proceedings." The government of Kenya purportedly relied on the test established by the Pre-Trial Chamber in the 31st March 2010 Authorization Decision, which referred to "the groups of persons that are likely to be the object of an investigation by the ICC, and thus, concluded that it was not necessary to investigate the same persons." Rather, it was sufficient to investigate "persons at the same level in the hierarchy."[677]

The ICC Appeals Chamber asserted that: "The criteria established by the Chamber in its 31 March 2010 Authorisation Decision were not conclusive but simply indicative of the sort of elements that the Court should consider in making an admissibility determination within the context of a situation, namely when the examination is in relation to one or more 'potential' case(s)." Because at the preliminary stage of an investigation into the situation it is unlikely to have an identified suspect, therefore, at that stage, the reference to the groups of persons is mainly to broaden the test.

The test is more specific when it comes to an admissibility determination at the 'case' stage, which starts with an application by the Prosecutor under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified. At this stage, the case(s) before the Court are already shaped. Thus, during the 'case' stage, the

673 *Kenyatta Appeals Chamber*, Kenya Challenge against Jurisdiction, *supra* note 153.
674 *Ibid.* p 16 para 40.
675 *Ibid.* p 18 para 44.
676 *Ibid.* p 18 para 45.
677 *Ibid.* p 19 para 49.

admissibility determination must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings.[678]

The *Lubanga* Appeals Chamber in the last three lines of paragraph 81, stated that "at the time of the admissibility challenge proceedings before the Trial Chamber, there were no proceedings in the DRC in respect of the Appellant. Hence, the question of whether the '*same-conduct test*' is correct is not determinative for the present appeal" (emphasis added).[679] Accordingly, during the admissibility challenge, the *Kenyatta Appeals Chamber* inferred that the Appeals Chamber in the *Lubanga Warrants Authorization* decision ruled on part of the test. Namely that a determination of the admissibility of a "case" must at least encompass the "same person," which in the context of the appeal was the Appellant himself. Similarly, in *the Kenya case* the same conduct test was not considered. Rather, the government of Kenya explained its understanding of the test to be applied to the present admissibility challenge, as being that "national investigations must encompass the same conduct in respect of persons at the same level of hierarchy."[680] However, the Pre-Trial Chamber found that "it (wa)s unclear how the Chamber could be convinced that there are actually ongoing investigations, with respect to the three suspects in the present case." Instead: "[T]here (wa)s simply no guarantee that an identical cohort of individuals will fall for investigation by the State seeking to exclude ICC admissibility."[681] Consequently, "there (we)re no concrete steps showing ongoing investigations against the three suspects subject in the present case."[682]

The Kenya government promised "that it will provide the Chamber with a progress report regarding prospective investigations to be carried out under the new DPP and 'how they extend up to the highest levels."[683] However since that report would "build 'on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible'…" it was actually an acknowledgment by the government of Kenya that "so far the alleged *ongoing* investigations ha(d) not yet extended to those at the highest level of hierarchy, be it the three suspects subject to the Court's proceedings, or any other at the *same level*."[684] Hence the "judicial reform

[678] *Ibid.* p 20 para 49 and paras 50, citing *The Prosecutor v Thomas Lubanga Dyilo*, Pre-Trial Chamber I, "Decision on the Prosecution's Application under Article 58(7) of the statute," ICC-02/05-01/07-l-Corr, para.24, para. 32.
[679] *Ibid.* p 21 para 52, citing Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12th June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, para. 81.
[680] *Ibid.* p 22 para 55.
[681] *Ibid.*
[682] *Ibid.*
[683] *Ibid.* p 23 para 57.
[684] *Ibid.* p 23 para 58.

actions and promises for future investigative activities" were accompanied by "no concrete evidence" of "current initiatives […] "regarding the three suspects in question."[685] "Nowhere in (the) report (78-page progress report including data on Post Election Violence cases in six provinces, submitted by the Chief Public Prosecutor and other State counsels to the Attorney General of the Republic of Kenya) (wa)s there the slightest mention of the names of one or more of the three suspects subject to the Court's proceedings in the present case"[686] in "*ongoing* investigations." However, in reference to the other case before the ICC Pre-Trial Chamber "there (wa)s a pending case involving Mr. Ruto (file No 10/2008) and that the investigation ha(d) not been completed…for various reasons that include, unreliable and uncooperative witnesses."[687]

"The Appeals Chamber lacked information about dates when investigations, if any, had commenced against the three suspects, and whether the suspects were actually questioned or not and if so, the contents of the police or public prosecutions' reports regarding the questioning." Furthermore: "The Government of Kenya also fail(ed) to provide the Chamber with any information as to the conduct, crimes or the incidents for which the three suspects (we)re being investigated or questioned for. There (wa)s equally no record that show(ed) that the relevant witnesses (we)re being or have been questioned." The admissibility of the *Kenya case*s was determined "on the basis of the facts as they exist(ed) at the time of the proceedings concerning the admissibility challenge." Because: "The Chamber consider(ed) that there remain(ed) a situation of inactivity," consequently it:"c(ould) not but determine that the case (wa)s admissible following a *plain reading* of the first half of article 17(l)(a) of the Statute. It follow(ed) that there (wa)s no need to delve into an examination of unwillingness or inability of the State, in accordance with article 17(2) and (3) of the Statute."[688] This chapter rejects the majority's above assertion of having made a literal interpretation. It is argued that the Rome Statute was read selectively.

2.9. Judge Ušacka's Dissenting Judgment on Kenya's Admissibility Challenge

Dissenting ICC Appeals Chamber Judge Anita Ušacka[689] believed that the Trial Chamber's above "Impugned Decision"[690] – "based upon the assessment of the facts before it, that potential cases would be admissible because there is a

[685] *Ibid.* p 23 para 60.
[686] *Ibid.* p 24 para 61.
[687] *Ibid.* p 25 para 63.
[688] *Ibid.* p 26 para 66 (emphasis added).
[689] *Ruto Appeal Chamber* dissenting Judge Anita Ušacka.
[690] *Ibid.* p 1 para 1.

situation of inactivity in Kenya with respect to the investigation and prosecution of the conduct of senior business and political leaders during the 2007 post-election violence"[691] – should be reversed. This was because:

> Kenya clarified in its filings before the Pre-Trial Chamber that it was currently reforming its criminal justice system with a view to enabling it fully to investigate and prosecute the post-election violence. Kenya emphasised (sic) that it required a few more weeks to present a complete picture, and it put forward a schedule for the additional filings which would have allowed Kenya to show the Court fully its progress in investigating the case within a matter of a few months.[692]

Particularly:

> With respect to Mr Ruto, this information indicated that a case file had been opened, referred to him as 'suspect,' indicated his case file number, and stated where the case was pending. It also provided information as to the scope of the investigations and the allegations against Mr Ruto, including the location and time of the alleged criminal conduct. Further, it indicated that orders had been given, apparently by the authorities in charge, to start investigations against the other five persons under investigation by the Court too.[693]

Appeals Judge Ušacka criticized the Pre-Trial Chamber for, first, wrongly adverting "to the lack of information and detail in the documentation provided by Kenya" thus "on the definition of a 'case' – adopting the 'same person/same conduct test,' "[694] in order to find "that Kenya had not presented evidence of 'any concrete step' taken that would show that it is currently investigating the three suspects in the present case."[695]

Second, Judge Ušacka strongly criticized three procedural errors in the ICC Pre-Trial Chamber's exercise of discretion identified: One, "by rejecting the Request of 18 May 2011 for an oral hearing." Two, "by not allowing the Appellant to produce additional documentation as to the ongoing investigation in Kenya within a certain period of time." Three, "by not deciding the Request for Assistance, before the issuance of the Impugned Decision." Yet the observation made by her dissent against the Impugned Decision was that expediency by the ICC Pre-Trial Chamber is impermissible. This is because rule 58(2) of the ICC Rules of Procedure and Evidence "vests broad discretion in the Chamber to

[691] *Ibid.* p 2 para 4.
[692] *Ibid.* p 5 para 7.
[693] *Ibid.* pp 5-6 para 8.
[694] *Ibid.* p 7 para 12.
[695] *Ibid.*

regulate the Procedure. "It follows, *inter alia* that: "It may join the challenge or question to a confirmation or a trial proceedings as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first." Conversely, I shall show in chapter five that under Kenya's constitution, expediency may be justifiable. Ironically, in 2013 the Kenyan Supreme Court invoked "judicial economy" to exclude evidence by a petitioner who disputed the election of two Hague suspects – Kenyatta and Ruto – as Kenya's president and deputy, respectively. It shall be argued that, in effect Kenya's judiciary appeared to be resisting the outcome of "the Impugned Decision" suggesting that the ICC Appeals Chamber majority judges overreached its complementary role and instead usurped the sovereign will of the Kenyan people.

Appeals Judge Ušacka recognized that:

> Complementarity is, as a commentator said,
> '[...] one of if not the cornerstone of the Rome Statute. It strikes a balance between state sovereignty and an effective and credible ICC. Without it there would have been no agreement.'[696]

That complementarity is a core guiding principle for the relationship between States and the Court is confirmed by its prominent place in the Statute (article 1 and Preamble) as well as by the drafting history of the Rome Statute:[697]

> The 'criminal jurisdiction' of the Court and that of States are 'complementary' to each other. This means that both the Court and States strive to achieve the goals of the Statute, as reflected in its Preamble, especially that of putting an 'end to impunity for the Perpetrators' of 'the most serious crimes of concern to the international community as a whole.'[698]

Appeals Judge Ušacka's dissent explained that:

> Complementarity reinforces the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction; but it also ensures that the Court can step in to give effect to the goals of international

[696] S.A. Williams, "Issues of Admissibility, Article 17," in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article* (1st ed.) (Baden-Baden: Nomos, 1999) p 392, quoted in *ibid.* p 10 para 18.
[697] See *Ad hoc* Committee on the Establishment of an International Criminal Court, Draft Report of the *ad hoc* Committee, 22nd August 1995, A/AC.244/CRP.5, p l; See also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the 1998 Diplomatic Conference, 11th meeting, 22nd June 1998, A/CONF.183/C.1/SR11, para 19; See also 12th meeting, 23rd June 1998, A/CONF.183/C.1/SR.12, para. 49.
[698] *Ibid.* p 10 para 19

> criminal justice. While dialogue between the State and the Court is therefore required and desired, it is the Court, and not a third authority, that is the arbiter in case of conflict.[699]

It is only upon failure by domestic criminal justice reforms to reconcile "the imperatives of sovereignty and global justice" then, that the International Criminal "Court will have to determine whether a case is admissible on the basis of article 17(1)(a) and (b) of the Statute."[700] It follows that: "At the root of understanding matters relevant to complementarity is that the assessment of complementarity is the outcome of an ongoing process."[701] While: "A State [...] shall make a challenge at the earliest opportunity,"[702] Judge Ušacka asserted that "in the interest of the Court and the proper administration of justice because it will avoid potentially lengthy and expensive proceedings before the Court that may have to be stopped at a later stage because the case has become inadmissible. This also supports that a State acting in good faith."[703]

Accordingly, a State making use of its right to challenge the admissibility of a case may expect the (International Criminal) Court fully to respect the State's rights when framing the procedure for determining the admissibility challenge. This procedure must take into account the specific circumstances put forward by the State, including the State's clearly evinced intentions.[704]

Because the ICC "Rules of Procedure and Evidence and related….rules of 'due process' for States will develop over time" therefore it was necessary for the ICC Pre-Trial Chamber to "seek guidance from procedural rules applicable at the Court as well as from other courts where States are applicants in proceedings and sovereignty of States is at issue."[705] Dissenting Judge Ušacka advocated for a procedure to be implemented that "best meet(s) the needs of transparency,

[699] *Ibid.*
[700] *Ibid.* p 10-11 para 19.
[701] F. Gioia, "Comments on chapter 3 of Jann Kleffner," in J. Kleffner and G. Kor (eds.) *Complementary Views on Complementarity* (The Hague: TMC Asser Press, 2006) p 109; the author also found the characterization of a "procedural dialogue;" See also J.T. Holmes, "Complementarity: National Courts versus the ICC," in Antonio Cassese, Paola Gaeta and John Jones (eds.) T*he Rome Statute of the International Criminal Court: A Commentary, Volume I* (New York, NY: Oxford University Press, 2002) p 683, cited in *ibid.* p 11 para 20.
[702] Article 19(5), Rome Statute, *supra* note 14.
[703] Chapter 6 *post* shall return to the importance of concept of "good faith" in public international law and related proceedings; See R. Kolb, "General Principles of Procedural Law" in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds.) *The Statute of the International Court of Justice, A Commentary* (Oxford: Oxford University Press, 2006) p 830, cited in *ibid.* p 12 para 21.
[704] *Ibid.* p 13 para 22.
[705] *Ibid.*

efficiency, respect for national primacy and urgent action where doubts about national proceedings are raised."[706] Her criteria required that:

> The sovereign rights of the State…must be balanced with the need to pursue the goals of international criminal justice by assuring the efficacy of the investigation and the prosecution of a case. In addition, the overall interests of justice as well as the interests of victims have to be respected. Finally, the Chamber has to adapt the procedure to the specific issues arising in the case at hand, such as uncertainties as to the legal and factual situation at hand or the fact that proceedings are conducted for the first time.[707]

However, upon the Kenya government's challenge the majority decision of the ICC Pre-Trial Chamber "did not consider that it was able to add to or adapt the procedure adopted in that decision. Instead, the Pre-Trial Chamber ruled on the Admissibility Challenge within eight weeks of its filing."[708] As a result of expeditious adjudication, "the Chamber did not seek specific submissions on such pivotal matters as the definition of 'investigation' and 'prosecution,' the standard of proof, and the type of evidence that was required to meet the burden, even though the Appellant had requested a hearing on those matters, making the Chamber aware of the need for guidance."[709] She concluded that the "Chamber applied what appear to be a high burden of proof and a demanding definition of 'investigation.' "[710] Given "that the terminology is based on the criminal law traditions of the countries – in relation to the understanding of the terms 'investigation' and 'prosecution' not only between, for instance, Common Law and Civil Law systems, but also between the various national jurisdictions belonging to the same tradition" – therefore: "Any standard and evaluation of evidence in this respect w(ould) need to be based upon the principle that States should be treated according to equal or similar standards."[711] Crucially, she held that the ICC should not circumvent the high threshold – between "inactivity" as the first limb of admissibility determinations and "unwillingness" or "inability" as its second limb – by requiring a State to prove e.g. the existence of a full-fledged investigation or prosecution of a case in order to establish that there is no situation of inactivity.[712]

In summary, first, "the Pre-Trial Chamber did not give sufficient weight to the sovereign rights of Kenya in balancing the interests at stake." Second, it "did not take into account that complementarity implies that during the admissibility

[706] See Holmes, "Complementarity," *supra* note 701 p 684, cited in *ibid.*para 23.
[707] *Ibid.*
[708] *Ibid.* p 14 para 24.
[709] *Ibid.*
[710] *Ibid.*
[711] *Ibid.* p 15 para 27.
[712] *Ibid.* p 16 para 27.

proceedings Kenya could start with taking investigative steps or prosecuting a case" or "did not act in good faith when stating that it intends to conduct the investigations in Kenya." Instead: "The Admissibility Challenge was rejected within eight weeks of the date of filing."[713] Curiously, although: "Neither article 19 of the Statute nor rule 58 of the Rules of Procedure and Evidence specifically use the term 'expeditious' " nevertheless: "The Pre-Trial Chamber's prevailing consideration was that the proceedings had to be conducted expeditiously."[714] That was so, notwithstanding that "(t)he suspects were not in detention."[715]

Finally, as there was no ongoing conflict in Kenya, the impact of the admissibility proceedings on the investigation of the Prosecutor, which is according to article 19(7) of the Statute suspended during such proceedings, was probably limited. Therefore, it must be concluded that expeditiousness was unduly emphasized in the Pre-Trial Chamber's exercise of discretion and given too much weight, especially in comparison to the Appellant's sovereign right to investigate and prosecute the case itself.[716]

Appeals Judge Ušacka concluded that:

> the Pre-Trial Chamber did not completely account for the sovereign rights of Kenya and the principle of complementarity. Instead, the Chamber, on the basis of its understanding of what constitutes a 'case' in terms of article 17(1)(a) of the Statute, gave too much weight to considerations of expeditiousness.[717]

Failure to consider relevant criteria in determining the procedure under rule 58(2) of the Rules of Procedure and Evidence "led to an abuse of discretion."[718]

2.10. The Historical Limits of the Complementarity Doctrine

2.10.1. From Consensual to Functional

Since World War I, the traditional international justice system has undergone vast changes after which the treaty of Versailles[719] established a League of Nations. Because German courts were unlikely to punish their own citizens

[713] *Ibid.*
[714] *Ibid.* p 17 para 29.
[715] *Ibid.*
[716] *Ibid.*
[717] *Ibid.* para 30.
[718] *Ibid.* para 30.
[719] El Zeidy, *Principle of Complementarity, supra* note 664 pp 1-18; See also Jann K. Kleffner, *Complementarity in the Rome Statute and National Jurisdictions* (Oxford: Oxford University Press, 2008).

appropriately, therefore, victims of mass atrocities would probably have suffered a sense of injustice. But rather than simply execute the German nationals suspected to have committed war crimes, the US persuaded other Allied forces who won the war to recognize the need for a prosecution process to legitimize the punishments and create an historical memory. So as to complement the German Supreme Court at Leipzig – notwithstanding unwillingness on the part of the German Supreme Courts, to convict German suspects – a compromise position was reached in which the international community designed Foreign Tribunals. However, the international community neglected to actualize its threat to prosecute the German suspects in lieu of domestic justice processes. Nonetheless that *consensual* complementarity model was different, but resembled the idea and intention behind the jurisdictional framework which would be conferred upon the permanent International Criminal Court,[720] created by the 1998 Rome Statute. The difference is that primacy is vested in the ICC.

In 1928, the *Association Internationale de Droit Pénal* "pursued a…strategy of…*unifying* common penal codes and trying to influence state legislatures to implement them."[721] El Zeidy[722] explains how two other basic complementarity models have been proposed in 1937, between The League of Nations Convention Model[723] and the Draft ICC Statute[724] by the International Law Commission in 1994. In between this period, various attempts have been made to fashion a *functional* complementarity model.[725] These have been designed by the London International Assembly, the International Commission of Penal Construction and Development, the United Nations War Crimes Commission and the UN Committee on International Criminal Jurisdiction.[726]

2.10.2. Absolute or Mandatory

It is essential to distinguish the evolution of complementarity conferred upon the ICC, from the absolute or *mandatory* jurisdiction[727] conferred upon both the International Military Tribunals at Nuremburg and the Far East, as well as the UN *ad hoc* International Criminal Tribunals on the Former Yugoslavia at The Hague and on Rwanda at Arusha. The new idea of state consent and voluntary

[720] Article 16, Rome Statute, *supra* note 14.
[721] Mark Lewis, *The Birth of a New Court: The Internationalization of Crime and Punishment 1919-1950* (Oxford: Oxford University Press, 2014) p 113.
[722] Zeidy, *Complementarity, supra* note 664 pp 32-137.
[723] *Ibid.* pp 43-56.
[724] *Ibid.* pp 126-32.
[725] *Aut dedere aut judicare* "extradite or prosecute" *ibid.* p 115.
[726] *Ibid.* pp 99-102; See also Schiff, *Building the International, supra* note 107; *AIDP* established in 1924 was highly instrumental.
[727] *Ibid.* 74-76 p 135.

relinquishment of jurisdiction retained the primacy of state sovereignty, but radically diminished the host state's immunity from foreign intervention in its domestic affairs.

2.10.3. Optional

State primacy without impunity is captured in the notion of *optional* complementarity.[728] This second model – proposed by the UN War Crimes Commission after the Second World War – justified international criminal jurisdiction neither on the basis of willingness, nor on the inability of the concerned state to prosecute suspects. Rather, the international community was conceived – as a matter of division of labour, respecting state primacy – but lending assistance.

2.10.4. Friendly or Amicable

The wave of independence of post-colonial states interrupted the search for complementarity. Indeed, the right to self-determination was enshrined as article 1 under the 1981 African Charter on Human and Peoples' Rights.[729] However, the search for complementarity did not die. In the 1980s, the debate of the relationship between national and international criminal jurisdictions reemerged when the International Law Commission designed a third draft model[730] based on the nature of the crimes. However, because ceding sovereignty could result in state leaders being put on trial, states would be apprehensive about doing so. Paradoxically, to the extent that the international forum would only prosecute opponents but not incumbent leaders, the political leaders would be likely to agree to international intervention. Hence, while providing an admissibility-valve – to limit the scope of the court's jurisdiction – thus resulting in *friendly* or *amicable* complementarity, the ILC model combined features from the initial *consensual* system. The proposed court itself would filter admissibility of cases – using a higher threshold or standard. Thus the ILC draft reduced fears, that incumbent rulers would abuse their consent by simply referring political opponents for international trial as a harassment mechanism.

2.10.5. Reverse

Finally, the fourth model, by a *reverse* complementarity structure incorporated into the Rome Statute resolved this age old tension regarding criminal

[728] *Ibid.* pp 102-109, p 135.
[729] ACHPR, *supra* note 74.
[730] *Ibid.* pp 109-126, 134.

prosecutorial jurisdiction.[731] While making certain cases inadmissible on the pretext of criteria prescribed under articles 53 and 17-20, primacy is conferred upon the ICC.

2.10.6. Ne Bis in Idem

2.10.6.1. Res Judicata

According to Dionysios Spinellis,[732] the *ne bis in idem* principle is universally included in the domestic laws of states. It provides that a person shall neither be punished nor prosecuted twice for the same act.[733] The extent to which a holding of *res judicata* in one state should be recognized in another state depends on the legislation of that state. Recognition of this rule against double jeopardy softens the harsh consequences of restricting *ne bis in idem*, internationally.[734] However the traditional application of this principle on the international level has began to be questioned. The international instruments that establish penal tribunals have provided the *ne bis in idem* principle in the relations between them (horizontal perspective), or between them and the national jurisdictions (vertical perspective).[735]

2.10.6.2. Horizontal Effect under the International Covenant on Civil and Political Rights

Article 14(7) of the ICCPR provides that: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."[736] This provision has been criticized since, first, it does not demand either that the sentence in respect of conviction be enforced or be being enforced. Yet, second, such conviction must be "final" and rendered following penal, and not administrative, procedures. Third, it must concern an "offence" not a conduct or fact. Hence it may, arguably, permit prosecution for a different offence on the same facts. For example, if a suspect were tried for an ordinary offence, rather

[731] *Ibid.* pp 157-8.
[732] Christine Van Den Wyngaert and Guy Stessens, "The International Non Bis in Idem Principle: Resolving some of the Unanswered Questions" (October 1999) *International and Comparative Law Quarterly,* 48, 4, 709-804; Christine Van Den Wyngaert and Tom Ongena, "*Ne Bis in idem* Principle, Including the Issue of Amnesty" in Cassese, *et al. The Rome Statute, supra* note 701, 705–29, cited in Dionysios Spinellis, "The *Ne Bis in Idem Principle* in the 'Global Instruments' " (2002) *International Review of Penal Law*, 73(3-4), 1149-1153 pp 1149 and 1150, respectively.
[733] *Ibid.* p 1149.
[734] *Ibid.* p 1150.
[735] *Ibid.* p 1151.
[736] ICCPR, *supra* note 67.

than an extraordinary crime. Fourth, the state that is bound by *ne bis in idem* has to recognize the procedural acts and the entire previous procedure which transpired in the other country of conviction of acquittal.[737]

2.10.6.3. Vertical Effect under the Rome Statute of the International Criminal Court

Article 20 of the Rome Statute has different provisions from both the ICTY Statute and ICTR Statute. This follows from the Rome Statute's article 17 limitation according to which the ICC will try cases that fall within its jurisdiction when a state is unwilling or unable to genuinely carry out the investigation or prosecution. Therefore, the ICC has no *compulsory* jurisdiction. Article 20(1) includes a *ne bis in idem* prohibition of a new trial before the court as to cases tried before the ICC itself, to wit: "Except as provided in this Statute no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court."[738] As "idem" is considered a "conduct," that conduct cannot be prosecuted even under a different legal assessment or offence characterization. José Luis de la Cuesta concludes that:

> The prevention of *ne bis in idem* scenarios must be the first step in international regulation. Efforts with this aim should be devoted to the establishment of international regulations that approach cases of concurrent jurisdiction from the outset; application of mechanisms and systems of early identification of double jeopardy would be very useful.[739]

2.11. The Rome Statute's Complementarity: "Interests of Justice"

2.11.1. "Principle of Legality"

The procedural "principle of legality" as a prosecution policy arose from the requirements on police, prosecutors and judges to guarantee equal protection of the law and the principle of material truth. Private knowledge is ascertained through eavesdropping, undercover agents and invading the citizen's private sphere. To what extent can these practices in search of truth be tolerable in a democratic society where the citizen has the rights to remain silent, to not divulge secrets and to be private?[740] According to Sarah Nouwen:

[737] Wyngaert and Stessens, "*Non Bis in Idem Principle*," *supra* note 732 p 1153.
[738] *Ibid.* p 1157.
[739] José Luis de la Cuesta, "Concurrent National and International Criminal Jurisdiction and the Principle '*Ne Bis in Idem*' General Report" (2002) *International Review of Penal Law*, 73, 707-736 p 736.
[740] Reichel, *Comparative Criminal, supra* note 155.

> Article 53(1) requires the (ICC) prosecutor to consider admissibility when deciding on whether to open an investigation, but applies only if the Security Council or a state party has referred a situation to the Court. Article 15(3) provides a special rule in respect of the prosecutor's *proprio motu* investigations. In practice, however, the test is the same, since rule 48 of the ICC Rules of Procedure and Evidence obliges the prosecutor to consider the factors laid down in Article 53(1) when making a determination whether there is a 'reasonable basis to proceed' as required under article 15(3).[741]

Article 53(1) of the ICC Statute confers jurisdiction on the Office of the Prosecutor in deciding what crimes to investigate. Paragraph (a) requires consideration of whether the crimes involved genocide, crimes against humanity, war crimes or the crime of aggression. And, whether they were committed by a citizen of a Member State. Under paragraphs 53(1)(b) and 53(1)(c), the existence of a truth commission is relevant. They provide that: "The case is or would be admissible under Article 17."[742]

According to El Zeidy, under the Rome Statute's article 17 test, admissibility is based on the fundamental principle that the court's purpose is not to supplant but *complement* national proceedings. Unless the state is "unwilling or unable to genuinely carry out the investigation or prosecution," the case is inadmissible. Such unwillingness is considered by the court's determination of a variety of specified criteria, i.e. whether national proceedings are (a) shielding criminally responsible offenders; (b) an unjustified delay in pursuing justice; and (c) not being conducted impartially. To determine whether an investigation would not serve the interests of justice, under article 53(1)(c), the ICC Prosecutor considers not only "the gravity of the crime and the interests of victims" but also whether or not "there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice." It is submitted by El Zeidy that the meaning of the phrase "interests of justice is vague and potentially ideological." In this section I pose the question: does "interests of justice" mean liberal or republican justice?

If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58; (b) The case is inadmissible under article 17; or (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of

[741] Sarah M.H. Nouwen, "Fine-Tuning Complementarity" in Bartram S. Brown (ed.) *Research Handbook on International Criminal Law* (Cheltenham: Edward Elgar, 2011) Chapter 9, p 200.
[742] Roche, "Truth Commission Amnesties," *supra* note 165.

victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber…[743]

2.11.2. Ambiguous "Interests of Justice" under the Rome Statute

2.11.2.1. Legality in the Kenyan Context

The Rome Statute empowers the Chief Prosecutor to independently and impartially decide "whether to initiate an investigation," and upon investigation, to decide "that there is not a sufficient basis for a prosecution." Various commentators argue that the phrase the "interests of justice" is insufficiently defined. On one hand, in the situation in Kenya, for example, the Kenya Government of National Unity, as well as the African Union, contended that investigations have a potential to jeopardize peace between the Kalenjin and Kikuyu communities in the Rift Valley. Domestic political instability may correspondingly destabilize regional peace.

Thus Kenya requested the UN Security Council for deferral of the situation before the ICC. Hence the constitutional reform argument, presented throughout the book advances a cultural or communitarian values position, rather than either retributive "just deserts" or inaction.

For retributivists, the construction of the "interests of justice" phrase should be a narrow one which requires the Chief Prosecutor to respond to all incidents of mass atrocities by retributive justice. To Human Rights Watch,[744] the seemingly conflicting objectives of justice and peace, is illusory. Rather, justice is a pre-condition to peace. While the HRW admits that the OTP possesses a limited amount of discretion in the timing of when to initiate an investigation, the former nonetheless asserts that a narrow construction should be given to the words "interests of justice."

Conversely, my argument is that, with all due respect, Human Rights Watch are imposing a civil law *legality principle* which empowers a prosecutor to prosecute whenever there exists sufficient evidence, as opposed to an Anglo-American common law *opportunity principle* to prosecute "in the public interest." The difficulty with the former "one-size-fits-all" approach, is that it is insensitive to contextual factors and special cases. HRW narrowly interprets the prosecutor's judicial function to pursue justice relentlessly, as distinct from the

[743] *Ibid.*
[744] Human Rights Watch, *The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute* (Washington D.C., HRW, June 2005) http://www.hrw.org/node/83018 <accessed on 20th October 2013>

UN Security Council's political function to defer situations where the international peace is threatened. Ultimately, so as to retain the perception of impartiality, even HRW admits that guidelines should prescribe criteria to guide the ICC prosecutor's discretion.

2.11.2.2. The Words "Interests of Justice"

By review of the prosecutor's decision, the ICC Pre-Trial Chamber has residual jurisdiction to ultimately decide whether the prosecution threshold is attained.[745] Would a strict construction be considered as sound? Where words are obscure, the interpretation of treaties requires that in making determinations, an ordinary meaning should be given to the terms of the treaty in context and in light of the treaty's object and purpose.[746] Reference should be made, first and foremost to "the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence." And "(b) in the second place, where appropriate, applicable treaties and the principles and rules of international law."[747] Viewed in the context of the Statute's preamble and article 16, HRW argues that limits are imposed on the prosecution's powers, since the Security Council can "defer investigations or prosecution for twelve months based on considerations of international peace and security."

The text under article 53 sets the following formula that: "The Prosecutor shall having evaluated the information made available to him or her, initiate an *investigation unless he or she determines that there is no reasonable basis to proceed* under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider"[748] *inter alia,* the gravity of the crime and the interests of the victims. Clearly, the requirement for the prosecution is to determine whether or not there exist circumstances *not* to prosecute. Notwithstanding the suspicion that mass atrocities have been perpetrated, she is not expected to function mechanically, but to relent or decline in circumstances where prosecution would *not* serve the interests of justice. Additionally and specifically, the prosecutor is permitted to infer that "there is not a sufficient basis for a prosecution" if *inter alia* "prosecution is not in the interests of justice taking into account all the circumstances, including gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or

[745] Article 53(1) and (2), Rome Statute, *supra* note 14.
[746] United Nations Convention on the Law of Treaties signed at Vienna 23rd May 1969, entry into force: 27th January 1980. http://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/ <accessed 21st October 2013>, cited in Human Rights Watch, "Interests of Justice," *supra* note 744 p 2.
[747] Article 21, Rome Statute, *supra* note 14.
[748] Human Rights Watch, *Interests of Justice*, *supra* note 744 p 3; See also article 53(1)(c) *ibid.* (italics added)

her role in the alleged crime."[749] In summary, it is not disputed that: "The prosecution has discretion to determine *not* to initiate an investigation or not to proceed with the trial based on the interests of justice."[750]

2.11.3. Creative Ambiguity

According to Human Rights Watch:

> neither the language of the Rome Statute nor actual language in the *travaux préparatoires* reflect any agreement that the phrase 'the interests of justice' permits the prosecutor to consider the existence of a national amnesty or truth commission process, or ongoing peace negotiations as factors to be evaluated.[751]

On the contrary: "A Kenyan delegate reaffirmed his nation's support of 'a body free from political manipulation, pursuing only the interests of justice, with due regard to the rights of the accused and the interests of the victims.' "[752] The preamble of the Rome Statute sets out its purposes as follows:

> *that the most serious crimes of concern to the international community as a whole must not go unpunished…to put an end to impunity* for the perpetrators of these crimes and thus to contribute to the prevention of such crimes…the *duty of every State to exercise its criminal jurisdiction* over those responsible for international crimes…to establish an independent permanent International Criminal Court ... *with jurisdiction over the most serious crimes* of concern to the international community…and the *enforcement of international justice.*[753]

The retributivist views are first, that a construction of the phrase "interests of justice" in a manner that will result in perpetual deferral, is absurd and inconsistent with the purpose of the Statute since it would result in impunity.[754] Rather, "UN deferral should not be renewed over and over again to create indefinite deferral as that would result in de facto immunity."[755] Second, in a

[749] Article 53(2), Rome Statute, *supra* note 14.
[750] Human Rights Watch, *Interests of Justice*, *supra* note 744 p 3.
[751] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: summary records of the plenary meetings and of the meetings of the Committee of the Whole (UN Diplomatic Conference) 379, A/CONF.183/13 (Vol. II) (1998), cited in *ibid.* p 4.
http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf <accessed 25th October 2013>
[752] *Ibid.* p 97.
[753] Preamble, The Rome Statute, *supra* note 14, emphasis added by Human Rights Watch, *Interests of Justice, supra* note 744 pp 5-6.
[754] *Ibid.* p 7.
[755] *Ibid.* p 8.

manner that "permits consideration of domestic amnesties, domestic truth commission or peace process and results in *permanently* not initiating an investigation would be at odds with the object and purpose of the Rome Statute as set forth in its preamble."[756] The retributivist argument is supported by Giuliano Turone's assertion that the prosecutor is a "judicial, *non-political organ* with no *political legitimation* and liability."[757] Similarly, Human Rights Watch argue that: "The Security Council assesses that the peace process needs to be given priority over international criminal justice."[758]

The questions I raise are, first, are there situations in which retribution will *increase* injustice? The Rome Statute need not be interpreted as conceiving of restorative justice as a somewhat inferior means or goal. Second, is the task of making exceptions a political task for the Security Council? Or should the prosecutor make a moral value judgment based on whether criminalization is *justified* based on a normative framework which she can explain and apply? I argue that the conflict between peace and justice should not be the only situations for non-prosecution. Additionally, there are "extra-desert" components which can provide justice in special cases. The Prosecutor is empowered not to mechanically investigate in a vacuum, but conferred with discretion to determine the socio-political and contextual impact of such prosecution, i.e. to make a consequentialist interpretation.

Such interpretation of the meaning of discretion does not contradict the prosecutor's duty "to act independently" and that "no member of his office shall seek or act on instructions from any external source."[759] I disagree with the *justification* which underpins Human Rights Watch's argument that the phrase "where specific investigation is carried out by the prosecutor (it) might provoke such a grave political crisis as to endanger international peace and security,"[760] stipulates political criteria. While the conclusion that "the only means by which concerns about a peace process…trump prosecutorial efforts is through a deferral by the UN Security Council under its Chapter VII powers" may currently be legally valid, that is no reason why it should necessarily always remain so. Rather the *aut dedare aut judicare* (state's obligation to extradite or prosecute) maxim under *obligations orga omnes* attests to a general *jus cogens* principle.[761] But I conclude that even customary international law must evolve. The Rome Statute can, by agreement, circumscribe the operation of *jus cogens*

[756] *Ibid.* p 6.
[757] Giuliano Turone, "Powers and Duties of the Prosecutor," in Cassese *et al.* (eds.) *The Rome Statute, supra* note 701 p. 1142 (emphasis added by Human Rights Watch) cited in *ibid.* p 7.
[758] *Ibid.* p 8.
[759] Article 45, Rome Statute, *supra* note 14 cited in *ibid.*
[760] *Ibid.*
[761] *Ibid.* pp 9-10.

by prescribing prosecutorial guidelines which do not "undermine the perception and reality of the prosecutor as an independent office any beyond political influence."[762]

Some suggestions are made by HRW from decisions by international tribunals which suggest that the gravity of crimes, for example, requires consideration of:

- the amount of premeditation and/or planning;[763]
- the scope and extent of the crimes;[764]
- the numbers of victims;[765]
- the ramifications to the victims – for example, the extent of physical and psychological suffering;[766] and
- the heinous means and methods used to commit the crimes.[767]

As to the age or infirmity of an alleged perpetrator, the decisions suggest, that, at least as to sentencing, the following may be factors to consider:

- the young age of the accused;[768]
- the poor health of the accused;[769] and
- the advanced age of the accused.

The issue is whether or not the above suggestions are exhaustive. A prosecution is not in the interests of justice, taking into account all the circumstances, *including* the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.[770]

[762] *Ibid*. p 8.
[763] *Prosecutor v Krstić*, case no. IT-98-33, Trial Chamber, 2nd August 2001, para.711 p 16.
[764] *Prosecutor v Plavsić*, case no. IT-00-39 & 40/1, Trial Chamber, 27th February 2003, para. 52
[765] *Ibid.;* See also *Prosecutor v Semanza*, case no. ICTR-97-20, Trial Chamber, 15th May 2003, para. 571.
[766] *Prosecutor v Krstić*, Trial Chamber, case no. IT-98-33, para. 703
[767] *Ibid.;* see also *Prosecutor v. Kayishema and Ruzidana*, Trial Chamber, Case No. ICTR-95-1-T.
[768] *Prosecutor v Serushago,* case no. ICTR-98-39, Trial Chamber, 5th February, 1999, para. 39-42.
[769] *Prosecutor v Rutaganda,* case no. ICTR-96-3, Trial Chamber, 6th December, 1999, para. 471-73.
[770] Rome Statute, *supra* note 14, the above cases in this paragraph are cited in Human Rights Watch, *Interests of Justice*, *supra* note 744 p 20 (emphasis added).

Furthermore:

> Because the word 'including' is present in Article 53(2)(c), it is clear that the factors enumerated in Article 53(2)(c) are not the only ones that may be considered by the prosecutor in making a determination under Article 53(2)(c). Thus, for example, additional factors might include:
> (i) the military rank or the governmental position of an alleged perpetrator;[771] or
> (ii) whether a decision not to proceed would insult the memory of the victims.[772]

However that 2005 Human Rights Watch policy paper concluded that "factors articulated in Article 53(1)(c) and 53(2)(c) do not suggest that there should be consideration of broad criteria, such as the ramifications of an ICC investigation upon political stability."[773] Thus, HRW is:

> concerned that if the OTP *explicitly* agrees to defer the issuance of arrest warrants in order to enhance stability, states or rebel groups under investigation will have every incentive to attempt to manipulate the OTP by purporting to engage in peace efforts every time they believe issuance of an arrest warrant is near.

HRW recommended that:

> A decision whether or not to initiate an investigation or proceed to trial must not be influenced by:
> a. possible political advantage or disadvantage to the government or any political party, group or individual;
> b. possible media or community reaction to the decision.[774]

Conversely, according to Kumaralingham Amirthalingham "a preferable approach is to encourage a culturally-sensitive interpretation and application of existing defences. The experience with the development of the 'battered woman syndrome' defence by feminist scholars provides valuable lessons."[775] Husak too cautions against throwing out the baby with the bathwater. A law which attempts to regulate an activity by prescribing a punishment which inflicts more harm than the activity itself, is counter-productive. If punishment and prevention of

[771] Turone, "Powers and Duties of the Prosecutor," p 1174, cited in HRW, *ibid.* p 20.
[772] HRW, *ibid.*
[773] *Ibid*.
[774] Human Rights Watch, *Interests of Justice*, *supra* note 744 p 20.
[775] Kumaralingham Amirthalingham, "Culture, Crime and Culpability: Perspectives on the Defence of Provocation" in A.D. Renteln and M.C. Foblets (eds.) *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Oxford: Hart Publishing, 2009) 35-60; See also L. Walker, *The Battered Woman Syndrome* (New York: Springer, 1984).

impunity aim at preserving human dignity of victims, then punishing offenders in a manner that will exacerbate the number of future victims, defeats the purpose of the Rome Statute. The Domestic Tort Law model, as shown in the book's introduction, also argues that relenting to investigate the Government of National Unity principals, President Kibaki or Prime Minister Odinga in the Kenya post-2007 situation, appreciates the real possibility that – but for their influential roles in ensuring mitigating responses – the ethnic conflicts may have escalated into a catastrophe of even graver proportions. However, whether or not alleged perpetrators, who successfully manage the early stages of mass atrocities, should receive less punishment than unresponsive dictators – who cling to power or continue to overtly violate rights after clear warnings have been made by the international community – is controversial. The appropriate test is the perspective – not of the individual victim, but the victim community as a whole. In the Kenya post-conflict situation both ODM and PNU were victims and both agreed to abide by the outcome of the successor government policy. The ceasefire ending hostilities prioritized constitutional reform, as chapter one of the book shows, thereby effectively permitting suspects of post-election violence to contest the 2013 presidential election. *De facto* sanitization of wrongdoing would be implied upon victory by the ICC suspects, which would amount to ratification of any atrocious deeds. By permitting suspects to contest Kenya's 2013 presidential elections, even the ICC tacitly acquiesced in accepting that the verdict of Kenyan citizens at the 2013 general election would represent the domestic public interest in not continuing with the prosecutions. Furthermore, whether indirectly or inadvertently, the ICC investigations may have compromised the search for corrective justice by the TJRC. A third consequence of continuing with the ICC in pursuit of retributive justice, despite lack of political legitimacy may have been to constrain performance of the chief executive's optimal domestic functioning, and thereby decreasing the overall social welfare, or distributive justice. Which quality of justice is preferable – that of the past or of the future? Such dilemma presents a "crazy case" of choosing between two goods or rejecting the lesser of two evils.

2.12. Prosecutorial Discretion and the Problem of Radical Evil

Jens David Ohlin argues that the twin goals of international law – providing peace and security for collective groups – can only be realized through the prosecution of particular individuals. This is the essence of international criminal law's hybrid nature as an intellectual descendant of two traditions: domestic criminal law and public international law. At issue in his argument is a fundamental distinction between adjudication of individual and collective disputes. The ICC insofar as it is a criminal court, is designed for resolving

particular disputes, like any other criminal court, where matters of guilt, innocence, evidence, and individual culpability are the key concepts.

"But…the entire structure of the Security Council deferral is that the Council determines that peace between groups can only be secured if…the guilty individuals are brought to justice under the rule of law. This shows the connection between the individualized nature of the criminal law and the collective nature of international law."[776]

Suppose the state refers a situation, then the ICC prosecutor will initiate a preliminary investigation to determine whether to approach the Pre-Trial Chamber for warrants to open investigations. If, however, the Security Council makes a referral, (still) the Pre-Trial Chamber must issue warrants to conduct full investigations with the co-operation of the Assembly of States Parties. Division of power, between the Security Council and the ICC, in Ohlin's view, is as follows. The former deals with matters of collective justice, the latter with matters of individual justice. "Otherwise it exercises discretion it does not have. It would be somewhat absurd for the ICC Prosecutor to decide upon receiving a Security Council referral, that he was declining to investigate the matter in the 'interests of justice' or for the 'interests of victims.' "[777]

"In the first instance….a decision not to investigate 'in the interests of justice' under Article 53 would be exceptional in nature."[778] For Ohlin: "There is a general background presumption in favour of investigation and prosecution."[779] "Consequently, the reasons to decline an investigation in the interests of justice is quite narrow….since the interpretation of the concept 'interests of justice' should be guided by the ordinary meaning of the words in light of their context and the objects and purpose of the Statute" in particular "the desire to end impunity for perpetration of some of the most serious crimes of concern to the international community."[780] The following factors are relevant for an "interests of justice" analysis: "the gravity of the crime, the interests of victims the particular circumstances of the accused, and 'other justice mechanisms' a reference to the court's complementarity jurisdiction and a requirement that it defer to local proceedings that meet certain criteria."[781] In addition to local prosecutions under domestic criminal law, the OTP specifically recognizes the legitimacy of other forums of local judicial intervention. Contrary to HRW,

[776] Ohlin, "Prosecutorial Discretion," *supra* note 32 p 191.
[777] *Ibid.* p 196.
[778] *Ibid.* p 198.
[779] *Ibid.* footnote 48, Office of the Prosecutor Policy Paper, *The Interests of Justice* (September 2007) p 3.
[780] *Ibid.* p 8 footnote 48.
[781] *Ibid.*

Ohlin recognizes that: "As such it fully endorses the role played by domestic prosecutions, truth seeking reparations programs institutional reforms and traditional justice mechanisms in the pursuit of broader justice."[782]

For Fabricio Guariglia "foot soldiers to general, from a municipal leader to prime minister should be singled out."[783] Peace and security depends on legitimacy. He notes that in *The Reign of Radical Evil,* Immanuel Kant explains that offences against human dignity are so widespread, persistent and organized beyond the normal moral context of massive human rights violations. Amid radical evil, is there truly room for pragmatic considerations and for attempts to maximize in a utilitarian calculus, the positive impact of a confined number of investigations and prosecutions or should rather a Kantian approach prevail and thus all efforts be exhausted to ensure that every single instance of victimization and every single perpetrator is adequately dealt with?

The manner in which any jurisdiction approaches this complex matter can have far reaching consequences and adversely affect its legitimacy and legacy. Should prosecutions before international criminal tribunals focus on those at the top of the decision-making process or on subordinates?

2.13. Conclusion

The question arises as to how the ICC determines whether or not to intervene in one given situation while ignoring another. Considerations are given to the state's willingness and capacity to conduct genuine criminal proceedings against mass atrocity suspects. Outlaw states fail to protect their own citizens from mass wrongs and thus provide an obvious case where the international community may exercise its responsibility to protect. Similarly, where there is a clear victor emerging from a conflict, then – irrespective of the preferences of the vanquished state – there is a real likelihood of victors imposing retributive justice. Problematic situations are those where decent, hierarchical, non-liberal peoples refuse to punish a high-level suspect – or merely chose to punish for a different conduct from that which caused gross human rights violations – or even to punish for a minor offence and accord a lenient sentence. Then the primary goal of international criminal justice – of reducing gross human rights violations, leave alone that of liberal justice, of increasing democracy – are likely to be frustrated.

[782] *Ibid.* p 8 footnote 48.
[783] Fabricio Guariglia, "The Selection of Cases by the Office of the Prosecutor of the International Criminal Court" in Stahn and Sluiter, *The Emerging Practice, supra* note 32, 209-218, citing Carlos Santiago Nino, *Radical Evil on Trial* (New Haven/London: Yale University Press, 1996); Immanuel Kant, *On The Radical Evil in Human Nature*, translated by Thomas Kingsmill Abbott, B.D. (4th revised ed.) (1792).

While a population may ratify wrongdoing, it nonetheless may require ICC complementarity *not* to prosecute, either under *ne bis in idem* or in the "interests of justice." Such broad interpretations are not necessarily inconsistent with the purpose of the Rome Statute. It may be conjectured that in *the Kenya cases* – the ICC prosecutor apparently refrained from investigating the National Accord principals, President Kibaki and Prime Minister Odinga – since doing so may have resulted in deterioration of the fragile peace. But is such *de facto* immunity transferable to subordinates? Apparently not. As shall be shown in chapter five, so as to earn *de facto* immunity of their own, two Hague suspects successfully contested Kenya's 2013 presidency. They then assumed a position where continued prosecution may result in deterioration of the fragile national peace. It is not in the interests of international justice to prosecute them if so doing may potentially inflict further harm by creating a class of future victims. Consideration of the interests of potential future victims is a second reason for not prosecuting.

The procedural rules of adjudication were illustrated using complementarity and admissibility concepts. As shown in this chapter, in 2011, the ICC Appeals Chamber majority judges described Kenya's domestic investigations as "inactive." This description was made possible by using a narrow "same person, same conduct test." It requires national authorities to not only investigate the same suspects who are identified by the ICC, but also to select the same conduct for prosecution as that selected by the ICC's prosecutor. Conversely, as this chapter explains, Heller's "sentence-based" test would permit the domestic authorities to prosecute lower level perpetrators for serious ordinary offences, in lieu of prosecuting for international crimes. It would also permit prosecution of the same senior "persons bearing the greatest responsibility" for crimes against humanity, but would only accept their prosecution for a different conduct – provided that such less serious conduct attracts an equivalent or more severe punishment – than that for the international crime under the Rome Statute. Third, this chapter further argued that "process-based" approaches to complementarity may even consider alternative responses to mass atrocities such as truth commissions, constitutional, electoral or judicial reforms, as constitutionally valid responses. Adopting these alternatives to the "same person, same conduct" test, would result in a restrained complementarity interpretation. The ICC Chief Prosecutor faces a particular dilemma when considering the "interests of justice" criterion. Instead, Judge Ušacka, of the ICC Appeals Chamber displayed remarkable judicial restraint in her culture-sensitive interpretations, thus construing Kenya's domestic investigations and reform processes as "active." Her decision seems akin to endorsing a common law procedural "opportunity principle" regarding prosecutorial discretion.

Nonetheless, Kenya's challenge against the admissibility over its situation was dismissed.

A detailed study of the special and general parts of international substantive crimes – in relation to both the Pre-Trial Chamber's authorization of warrants as well as its confirmation of charges decisions in *the Kenya cases* – is the subject of the next chapter, underpinned by May's normative "international harm principle."[784]

[784] *Ibid.*

CHAPTER THREE

INDIRECT CO-PERPETRATION OF CRIMES AGAINST HUMANITY WITH SPECIFIC REFERENCE TO *THE RUTO CASE*

3.1. Inquiries into Kenya's Ethnic Conflict Cycles

3.1.1. The Waki Report on Post-Election Violence

As seen in chapter one of the book, pursuant to Kenya's post-2007 conflict negotiations, the establishment of various "Agenda 4" commissions were agreed upon. Foremost of these commissions was the Commission of Inquiry into Post Electoral Violence[785] created by President Mwai Kibaki "to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and make recommendations concerning these and other matters."[786] The Waki Commission's hearings lasted barely four months, from June to September 2008, covered only certain regions of the country, and partly relied on secondary sources, particularly the Akiwumi Report[787] discussed in the next section. From the latter, it however differed significantly, not only in its findings, but also its recommendations. The 2008 Waki Report[788] found that since Kenya's return to multi-party politics in 1991, violent conflicts were progressively becoming a more spontaneous feature of electoral disputes.

Different recommendations of the Waki Report, in comparison to the earlier Akiwumi Report, may be attributable to various factors. First, their compositions. Although both were appointed by presidents, the Waki Commission's membership, included a majority of foreign commissioners selected by the Panel of Eminent African Personalities.[789] Second, the 2007-8 clashes themselves were predominantly post-electoral as opposed to the previous episodes which included significant pre-electoral violence. Third, the post-2007 ethnic conflicts were more intense – with 1,133 people killed and 350,000 forcibly displaced over a shorter duration, i.e. 2 months (January-

[785] The Waki Report, *supra* note 12.
[786] *Ibid.*
[787] The Akiwumi Report*, supra* note 126.
[788] The Waki Report, *supra* note 12.
[789] Panel of Eminent African Personalities chaired by former UN Secretary-General Kofi Annan; See Mwagiru, *The Water's Edge, supra* note 1 see also *supra* note 404.

February 2008)[790] – while the 1990s tribal clashes produced an equivalent number of victims covering a nine-year period (1991-1998). Finally, unlike previously when the clashes were restricted to rural areas, the post-2007 incidents of ethnic conflicts spread to urban areas. The introduction to this chapter shall distinguish the state's responses to the ethnic conflicts in the Waki and Akiwumi Reports. Although their quantity appears identical – while the Waki Report even relied on the Akiwumi one – nonetheless, the former made significantly different recommendations, particularly, proposing the establishment of special criminal tribunals.

Significantly, the Waki Commission found *inter alia* that "the post electoral violence was spontaneous in some geographical areas"[791] and "indeed in the North Rift in general, was spontaneous, not planned."[792] This finding is explained, first, as "an episode in a trend of institutionalization of violence in Kenya over the years."[793] "Second, the personalization of power around the presidency." Unlike the Akiwumi Report which omitted to derive its recommendations from economic relative deprivation in Kenya – despite its finding of neo-colonial exclusion as a cause of violence – the Waki Report boldly zeroed in on, third, "inequalities and economic marginalization, often viewed in ethnographic terms, very much at play in the post-election violence in places like slum areas of Nairobi."[794]

Conversely, transitional balance is achieved from holistic approaches. The Waki Report's recommendations provided an enforcement clause to the effect that – a failure to enact the enabling legislation within 45 days to prosecute the offenders would automatically trigger consideration by the Panel of Eminent Panel of African Personalities – of whether to forward a secret list of names of the suspects for further investigations by the ICC prosecutor at The Hague, in accordance with the Rome Statute. The Waki Report quantified that "3,561 people suffered injuries inflicted by or resulting from sharp pointed objects – 1,229, blunt objects – 604, Soft tissue injury – 360, gunshot – 557, Arrow shots 267, Burns – 164, Assault – 196."[795] Distribution of deaths recorded in Rift Valley province were 744, with three districts – Uasin Gichu (230), Nakuru (213) and Trans Nzoia (104) registering the highest – which figures were comparable to deaths in Nyanza (134) and Nairobi (125) provinces.

[790] Subsequent reports were that over 600,000 people were displaced.
[791] The Waki Report, *supra* note 12 p viii.
[792] *Ibid*. p 66.
[793] *Ibid.* 33.
[794] *Ibid.* p 16.
[795] The National Council for Law Reporting, *Waki Report: An Abridged Version* (Nairobi: NCLR supported by German Technical Cooperation, 2008) p 11.

According to it, much spontaneity of the post-2007 conflicts was attributed not only to land scarcity,[796] but moreso to the rising numbers of unemployed youth.[797] The Waki Report recommended the establishment of Special Criminal Tribunals under legislation to be promulgated in 45 days.[798] From a maximalist perspective, this recommendation was somewhat diluted by the chilling impact generated upon enactment of a Truth, Justice and Reconciliation Commission Act in 2008 to both investigate as well as facilitate amnesties for historical injustices. However, the Kenyan TJRC,[799] was explicitly precluded from conferring amnesties for any crimes against humanity. Nonetheless, as seen in the introductory chapter, according to Tricia Olsen, Leigh Payne and Andrew Reiter,[800] a moderate approach to transitional justice prefers either a truth commission or constitutional reforms in response to mass atrocities. Moreover, as is argued in chapter two the ICC's jurisdiction pursuant to article 53 of the Rome Statute may be interpreted as recognizing restorative justice. The Waki Report's key recommendation were that:

1. The International Crimes Bill 2008 be fast-tracked for enactment by Parliament to facilitate investigation and prosecution of crimes against humanity.
2. The Witness Protection Act 2008 be fully utilized in the protection of all witnesses who will need such protection in the course of investigation, prosecution and adjudication of PEV cases.
3. The Freedom of Information Bill be enacted forthwith to enable state and non-state actors to have full access to information which may lead to arrest, detention and prosecution of persons responsible for gross violations.
4. All persons holding public office and public servants charged with criminal offences related to post-election violence be suspended from duty until the matter is fully adjudicated upon.
5. Upon conviction of any person charged with post-election violence offences of any nature, such persons shall be barred from holding any public office or contesting any electoral position.[801]

3.1.2. The Akiwumi Report on Tribal Clashes in the 1990s

Why was the Akiwumi Commission established and what were its recommendations? In 1998, the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya[802] was commissioned by President Daniel Arap Moi, to

[796] *Ibid*. p 30.
[797] *Ibid*. p 33.
[798] *Ibid*. p. 18.
[799] The TJRCA, *supra* note 10.
[800] Olsen, Payne and Reiter, *Transitional Justice, supra* note 29.
[801] http://www.africafiles.org/article.asp?ID=19264 <accessed June 29th 2014>
[802] Olsen, Payne and Reiter, *Transitional Justice, supra* note 29.

inter alia, investigate Kenya's 1991-8 tribal clashes with a view to determining the:

> (i) origin, causes…(ii) action taken by police and other law enforcement agencies with respect to any incidents of crime arising out of or committed in the course of the said tribal clashes and in preventing the occurrence of such tribal clashes in the future."[803]

And:

> (b) to recommend (i) prosecution or further criminal investigation against any person or persons who may have committed offences related to the tribal clashes (ii) ways, means and measures that must be undertaken to prevent, control or eradicate such clashes in future (iii) to do (sic) inquire into or investigate any other matter connected with the foregoing.[804]

The Akiwumi Report thus clearly conceded that it was not pursuing any rectificatory justice goal but purely retributive and preventive ones, to wit:

> that we must at once say that the functions of this Commission of Inquiry is (sic) not to determine what compensation should be paid to the victims of the tribal clashes and by whom but …to investigate the causes and incidents of tribal clashes and make recommendations concerning appropriate action to be taken …such as would avoid future tribal clashes.[805]

The Akiwumi Report effectively noted that its recommendations were expressly towards either prosecution or punishment as underpinned by a retributive moral philosophy espoused by Kenya's received common law justice system. Although the Commissioners recognized that "such inquiry may also provide the opportunity for mistakes to be acknowledged, forgiveness granted and the past forgotten."[806] Nonetheless any restorative justice aspect was at best merely implied or collateral. It received 331 testimonies, at the 194-day public hearing, producing 384 exhibits.[807] The evidence recorded that, between 1991 and 1998, some 3,000 people were killed, while 400,000 were forcibly displaced. The Akiwumi Commission described the concept of ethnic conflict as referring to:

> …tribal turmoil in the form of tribal clashes between certain tribes from 1991 and continued intermittently until October 1998. These clashes took the form of warlike activities between tribes in which sophisticated as well as primitive weapons were used. This led to the killing of and the infliction of barbaric injuries on men, women and children; the displacement of thousands from their land and homes; the slaughter and maiming of innumerable, valuable and precious homes; and the looting and destruction of billions of shillings worth of property.[808]

It is instructive that during Kenya's ethnic conflicts of the 1990s, no urban areas were affected. Significantly, with regard to distinguishing pre- from post-colonial ethnic conflicts, the Akiwumi Commission further held that:

> the phrase tribal clashes within the context of what occurred during the period under consideration, and the political and economic development of Kenya and its advancement in modern civilization, can no longer be limited to the unsophisticated objectives of pre-colonial wars between tribes.[809]

Regarding the quality of the 1990s conflicts, the Akiwumi Commission's concluded that the clashes were not spontaneous, but organized by politicians, provincial administrators and police. This inference does not necessarily follow from one of their holdings which attributed the causes of discontent to historical injustices. Remarkably, they nevertheless, correctly identified that:

> one of the problems that befell the first independent government was the existing deep-rooted tribalism which was there because of lack of contact between various tribes promoted in colonial days…Indeed the brutal expulsion that seemed to be an important objective of the clashes, supports the conclusion that *what occurred can also be described with some justification as ethnic cleansing*.[810]

It is submitted that, having recognized that Kenya's dysfunctional constitutional structure was responsible for repressive governance and economic marginalization, the Akiwumi Report therefore ought to have recommended the promulgation of a bottom-up inclusive constitution ensuring legitimacy as part of the solution for effectively guaranteeing the protection of individual rights and increasing democracy. It did not. The Report not only expressly rejected restorative justice responses. By trivializing systemic social marginalization, it also effectively assumed the legitimacy of the existing constitution. Considering that the authorities had prior information that such attacks were imminent, both in 1991 before the Nandi invaded Miteitei Farm, and in 1996, where the "Flashpoints of the 1997 General Election Violence Report" attribute the exacerbation of the clashes to the luke-warm approach taken by police officers in tackling the tribal clashes. Police inaction – notwithstanding receipt of prior intelligence – indicates that they were either complicit, complacent or condoned the forcible displacements and arson. By shooting in the air, not to harm or

[802] The Akiwumi Report, *supra* note 126.
[803] *Ibid.*
[804] *Ibid.*
[805] *Ibid*. p 18.
[806] *Ibid*. p 6.
[807] *Ibid*. p 7.
[808] *Ibid*. p 20.
[809] *Ibid.*
[810] *Ibid.* p 26 (emphasis added).

disable offenders, suggests that the forces only half-heartedly supervised the mayhem. Significantly, the Akiwumi Report decried the fact that the army was never called upon to intervene and stop the clashes, as authorized under the Armed Forces Act.[811]

Neither were military police deployed to investigate the normal police – as is their secondary duty in international practice – or to assist with civic order. Nor was follow-up made. Notwithstanding the Report's narrow recommendations directing further investigation of the politicians who incited violence or provincial administration and police for complicity, it was only after a High Court order in 2002, that its contents were publicized.[812] In addition to the government's inaction on the Akiwumi Report, no comprehensive constitutional review was successfully undertaken to prevent recurrence of ethnic clashes. Instead, in 2005 a national referendum rejected the government's proposed "Wako" draft constitution, ostensibly because it was executive-driven. Furthermore, between 2006 and 2008, around Mt. Elgon, another militia group, the Sabaot Land Defence Force[813] killed some 600 and displaced 150,000 persons ostensibly for land scarcity reasons. Then widespread violence erupted following the disputed 2007 presidential election.

3.2. Are Informal Groups "State-Like" Organizations?

In European feudal societies, responsibility for traditional crimes would be attributed to an individual. However, the modern emergence of the corporate form was accompanied by new corporate crimes. Difficulties arise when dealing with organized crime, particularly white-collar crime, which does not involve physical violence. Corporate crimes tend to be ignored because, according to Celia Wells:

> Legal structures facilitate rather than hinder the corporate form. The legal system within which they operate largely serves their interests, corporate personality protects their owners from the full consequences of failure and the regulation to which they are subject assumes beneficence.[814]

[811] The Armed Forces Act (Chapter 199 Laws of Kenya).
[812] *Rodhanali Karmali Khimji Pradhan v The Attorney General & Another Republic of Kenya* [2004] eKLR High Court of Kenya (Mombasa) misc. civil app. no. 1216 of 2000, per Joyce Khaminwa Comm. Ass.; See also "Waiting for Justice" (August 2003) *Nairobi Law Monthly*, 24, 38-48.
[813] Stephanie McCrummen, "Kenyan Troops Strike at Militia involved in Land Clashes," *Washington Post*, 11th March, 2008. http://www.washingtonpost.com/wp-dyn/content/article/2008/03/10/AR2008031001015.html# <assessed 28th September 2014>
[814] Celia Wells, "A Cry in the Dark: Corporate Manslaughter and Cultural Meaning" in Ian Loveland, *Frontiers of Criminology* (London: Sweet and Maxwell, 1995) 109-125, p 109.

Concepts of vicarious liability[815] are drawn from corporate law. Yet, under international criminal law, organized, harmful group activities – like money laundering, drug trafficking or even electoral malpractice are not of concern to the international community. This disparity is not entirely because organized *suite* crimes[816] are perpetuated by sophisticated people, but partly because it merely harms property – unlike organized *street* crimes – which harm core physical integrity. And also partly because: "A company is a creature of law with no physical existence. Accordingly it cannot be tried for murder or treason as the punishments available on conviction are imprisonment or death." Therefore Gary Slapper and Steve Tombs observe that: "The only criminal penalty that can be imposed on a company in English law is a fine or compensation order."[817]

It was not until after World War II, at the Nuremburg trials that a clear distinction between criminal proceedings against individuals, rather than the Nazi corporate body emerged. Hence state liability was reduced in circumstances of conventional inter-state war.[818] Nowadays, however under international criminal law, the corporate veil does not shield individuals from criminal responsibility in times of civil war.[819] Yet, not only has the requirement of "guilty knowledge" on the part of perpetrators, been revived, but also the proof of a "material element" has emerged as an essential requirement under the Rome Statute.[820] Mary Douglas concludes that perceptions of corporate organizations and their responsibilities for mass deaths have undergone a change: "There is less blind faith in the ability or willingness of corporate organisations to take safety seriously." Wells concurs that "while corporate manslaughter is a widely recognized cultural phenomenon criminal doctrine is very reluctant to acknowledge corporations as criminals for these purposes."[821] She therefore recommends that:

> …while we switch from the individual to the corporation we should conduct a deeper inquiry into the roles that blame and risk perform in reinforcing social constructions of crime and criminals. Notions of cause, blame, and risk are inextricably bound up with the prevailing political and cultural climate, resulting in a symbiotic process rather than a flow in one direction.[822]

[815] *Tesco Supermarket v Nattrass* [1972] AC 153.
[816] Edwin H. Sutherland, "White-Collar Criminality," (Feb. 1940) *American Sociological Review*, 5, 1-12.
[817] Gary Slapper and Steve Tombs, *Corporate Crime* (UK: Pearson Education, 1999) p 16.
[818] Van Sliedregt, *Individual Criminal Responsibility*, *supra* note 133 pp 3-6.
[819] Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 https://www.icrc.org/ihl/INTRO/470 <accessed 29th June 2014>
[820] Article 30, Rome Statute, *supra* note 14.
[821] Mary Douglas, *Risk and Blame:* Essays in Cultural Theory (London: Routledge, 1992) cited in Wells, "Corporate Manslaughter," *supra* note 814 p 112.
[822] *Ibid.*

Regarding organized mass *street* crime, that is, where corporate forms are used to perpetrate mass physical violence, international criminal law borrows historic concepts from both common law (joint criminal enterprise based on conspiracy, vicarious liability etc.) and civil law (direct perpetratorship, co-perpetration and indirect co-perpetration). These novel modes of liability are necessary in order to criminalize and contain a new kind of criminality which derives from organized groups to deal with mass violence. Nonetheless, a problem remains in situations where members belonging to an informal group – one lacking a distinct identifiable leadership. Because acephalous ethnic group violence appears to occur semi-spontaneously, and further because international criminal justice apparently omits to criminalize acts by such informal organizations,[823] therefore attributing individual criminal responsibility for belonging to informal groups contravenes two well-known common law substantive legality principles: *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without a law).

3.3. The Special and General Parts of International Criminality

According to Mark Osiel: "When one joins a group committed to criminal ends, one knows in advance that one will not be able to fully control the conduct of all other members at all times and that their conduct may not remain entirely within the purposes to which the other members have agreed."[824] Because: "The accused was aware of and accepted the risk that other members would commit criminal acts beyond the scope of the particular purpose shared with them" therefore "the criminal enterprise may be defined in terms of somewhat more than the 'common purpose' to which its members subscribe."[825] No formal command was given in *Radovan Karadžić*. Brokers are often central to mass atrocity. They provide the essential nodal point linking regular army units and irregular militias who perpetuate the worst violence. This link permits operation through informal networks. It "enables regime rulers to deny responsibility to resulting atrocities with some plausibility often enough to create reasonable doubt at least."[826] However, enterprise law makes no differentiation between military officers and civilians. Rather: "In any effective enterprise there is generally a climate of shared commitment to its purposes, as well as a sensation of spontaneity in serving them. This climate effaces the distinction between leaders and the led. There is an élan, a sense of 'all for one and one for all.' " Nonetheless "one can draw such distinctions (those with greater and those with

[823] Osiel, *Making Sense*, *supra* note 203.
[824] *Ibid.* p 53.
[825] *Ibid. Prosecutor v Radovan Karadžić* Case no. IT-95-5/18 trial to be completed October 2014.
http://www.icty.org/cases/party/703/4 <accessed 25th September 2014>
[826] *Ibid.* p 55.

lesser degrees of influence over events and fellow participants) at the punishment stage of the proceeding, after the defendant's guilt has been established." Hence Osiel concludes that: "instead of binary opposition – a choice between acquittal and conviction – the law thus now has a range of possibilities, permitting a more subtle and fine-grained assessment of the importance of different contributors to the harm."[827]

The purpose of this chapter is to review the literature concerning normative justifications of international criminalization. The strategy is to identify criteria by which behaviour qualifies to become classified as an international crime. The objective is to evaluate the substantive or special part of international criminal law with respect to the provisions criminalizing conduct described as genocide, crimes against humanity or war crimes, under articles 6, 7 and 8 of the Rome Statute, respectively. This is the special part of international criminal law. However, due to space constraints, the analysis shall be limited to crimes against humanity, which are relevant for this book's purposes. In seeking to elucidate criteria which are common to all international crimes, two tactics are identified. First, a "harm-orientation" tactic focuses on the physicality of the harm inflicted upon victims. Particularly, the fact that physical harm is inflicted *against* a group. Second, an "act-orientation" tactic focuses on the nature of the offender's act. Particularly, the fact that physical harm is inflicted *by* a group. If either of these two group orientations exist, then the wrongful conduct concerns humanity as a whole. This chapter distinguishes the abovesaid special part of international criminal law – from the general part – with particular respect to individual criminal responsibility, prescribed under article 25 as distinct from command responsibility, under article 28. Critical analysis of the issues of suspect's rights and some defences under the general part shall be deferred to the next chapter.

The question guiding this chapter is whether or not the Rome Statute can be correctly interpreted to attribute individual criminal responsibility to members – apparent leaders or followers – of an *informal* organization which perpetrates mass violence offences. Alternatively, whether or not such informal groups can better be criminalized under the ordinary criminal law. In *the Kenya cases*, Judge Hans-Peter Kaul's dissenting ICC Pre-Trial Chamber judgments not only declined to authorize investigations against any of the six suspects, but subsequently did not confirm any cases for trial. Judge Kaul reasoned that the evidence did not satisfy any of the familiar notions of criminality known to impute individual criminal responsibility upon leaders of *formal* organizations which perpetrate mass crimes, i.e. the violence was not perpetrated *by* a group. Conversely, it is necessary to critically analyze the various reasons which

[827] *Ibid.*

supported the ICC Pre-Trial Chamber's majority judges in authorizing warrants against the six suspects and confirming four cases in the Kenya situation. Crucially, Judges Ekaterina Trendafilova and Cuno Tarfusser suggested that they had "sufficient reason to believe" that there existed evidence in support of perpetration of a novel crime called "indirect co-perpetration." However, as shown in the next chapter, in *the Kenyatta case*, that majority judgment not only ignored an alternative prosecution theory – that allegations against key suspects were made under a "guilt-by-association" notion – but they also relied on false evidence. Therefore in the *Kenyatta case*, the Pre-Trial Chamber's confirmation of charges judgment was challenged, by the defence, as unsafe. Nonetheless, the prosecutor persisted in pursuit of post-confirmation investigations.

3.4. The International Harm Principle

3.4.1. Two Kinds of Collective Criminality

It is instructive that the centerpiece of international criminal procedure is protection of an individual's *core* human rights or basic needs. These irreducible, minimum human rights also provide the *raison d'être* for classification of behaviour as part of substantive international criminal law (the special part). Consequently, the inaugural international crime of piracy is not included as one of the crimes punishable under the Rome Statute. Instead, modern international crimes – genocide, crimes against humanity, war crimes and crimes of aggression – are limited to protection of individuals against violation of their physical or bodily integrity. As explained in the preceding section, Larry May's normative framework for substantive international crimes distinguishes behaviour which is classified as an international substantive crime by reference to two kinds of group-orientations. They comprise actions either *against* a victim group or actions performed *by* a perpetrator group, or, ideally, *both*. These two perspectives are considered in greater detail below. From the outset, it is worth setting out May's "international harm principle" as follows:

> Only when there is serious harm to the international community, should international prosecution against individual perpetrators be conducted where normally this will require a showing of harm to the victims that is based on non-individualized characteristics of the individual's group membership, or is perpetrated by, or involves, a State or other collective entity.[828]

[828] *Ibid.* p 83.

3.4.2. Crimes Against Humanity: The Special and General Parts

It has been suggested above, that to offset the non-individualized feature of the victim – thereby risking private harm – when an agent of the state participates in the harm, it becomes systematic. In order "to counter the claim by the defendant that his liberty is jeopardized by such international trial,"[829] this normative justification is necessary. It follows that international harm may be attributable to dual sources: "either the group based status of the victim or the group based status of the perpetrator. Group-based harm violates a strong interest in the international community, and can even be said to harm humanity."[830] This subsection considers the targets of violent acts. According to May: "Harm generally concerns a serious setback to an important interest of a person – deprived of life, liberty or property in an arbitrary manner."[831] Because: "Significant harm is risked to the defendant in a criminal trial,"[832] therefore May recognizes that harm is not only suffered by victims, but may also potentially be inflicted upon innocent suspects.

3.4.2.1. The Special Part: Harms against Victim Groups

Victims of international criminality are not selected on the basis of their *individual* character traits. Rather, victims are targeted, first, because of the features of a wider group to which they belong. For example, *genocidaires* target individuals who belong to a particular race, religion, ethnicity, political party or other such collective identity. Second, in the context of an armed conflict – whether international or non-international (civil) – war criminals target vulnerable individuals who may be either injured combatants, non-combatant civilians or even aid workers. Third – and of key relevance to this book's theme – crimes against humanity may be perpetrated during peacetime. They comprise an itinerary of core human right violations such as murder, rape, torture etc. accompanied by three characteristics itemized in the next but one paragraph.

Article 6 of the Rome Statute establishing a permanent International Criminal Court codifies the conservative Geneva Convention[833] genocide definition, without modification. The Geneva Convention may thus be seen as a

[829] *Ibid.* p 80.
[830] *Ibid.*
[831] *Ibid.* p 81.
[832] *Ibid.*
[833] The Convention on Genocide was among the first United Nations conventions addressing humanitarian issues. It was adopted on 9th December 1948 in response to the atrocities committed during World War II and followed G.A. Res. 180 (II) of 21st December 1947. https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/357?OpenDocument <accessed 25th September 2014>

codification of customary international law. Broader concepts of mass killing could be addressed within the framework that crimes against humanity can be committed during peacetime. For example, both the Convention on the Suppression and Punishment of the Crime of Apartheid[834] as well as the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.[835] Because the practice since Nuremburg had dispensed with the *nexus* with an armed conflict, therefore May notes that in *Prosecutor v Dusko Tadić*[836] the ICTY Appeals Chamber held that the UN Security Council had defined crimes against humanity "more narrowly than necessary under customary international law." The definition of crimes against humanity in Article 7 of the Rome Statute consists of an enumeration of an attack "directed against any civilian population."[837] The *Tadić Trial Chamber* had held that "(a)ll those who have engaged in serious violations of international criminal law, whatever manner in which they may have perpetrated, or participated in the perpetration of those violations must be brought to book."[838] Similarly, in the *Pinochet case*[839] where the defendant was found outside his home state and "even the case of Eichmann who was captured in Argentina and was effectively kidnapped to Israel."[840]

The Rome Statute defines crimes against humanity as any of the followings acts when committed as part of a "widespread or systematic" attack directed at any civilian population with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty violation of fundamental rules of international law;
(f) Torture;

[834] International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force 18th July, 1976.
[835] Convention Against Torture, Cruel, Inhuman and Degrading Forms of Treatment or Punishment adopted by the General Assembly of the United Nations on 10th December 1984 (resolution 39/46). The Convention entered into force on 26th June 1987 upon ratification by 20 States.
[836] Appeal Judgment, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15th July 1999; See also *Tadić Trial Chamber*.
[837] *Ibid.*
[838] *Tadić Trial Chamber, supra* note 836 para 190; See also Wayne Jordash, "Joint Criminal Enterprise Liability: Result-Oriented Justice" in Schabas, McDermott And Hayes (eds.) *Ashgate Research Companion*, *supra* note 152, 133-161 p 133.
[839] *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, Pinochet Ugarte (No.2),* 2 W.L.R. 272 (H.L. 1999) (usually referred to as "Pinochet II");
[840] May, *Crimes Against Humanity*, *supra* note 632 p 78

(g) Rape, sexual slavery and enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds recognized as impermissible under international law in connection with any crime within the jurisdiction of the court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhuman acts of similar character internally acquiring great suffering, or serious injury to body or to mental or physical health.[841]

Both the mental and material part of the substantive definition – of a specific crime must be proven to exist – on the part of an accused actor, beyond reasonable doubt. This means that the in order to qualify for conviction under international criminal law, a defendant must first possess the *mens rea* and *actus reus* of the serious ordinary *crime*. Second, if the act is shown to be part of an *attack,* the behaviour's internationalization accrues. Third, such attack must be aimed at non-military personnel, that is, at *civilians*. If, as part of an insurrection or revolt intending to liberate a region of the country or overthrow a particular government – an army base is attacked – such rebellious attack cannot become the concern of the international community as a whole.

The essence of the "civilian population" requirement of international crimes is that it appears to discriminate against the victim's possession of a trait which he or she did not choose, but shares with all other human beings, in common. Everyone must possess some traits – religion, race, ethnicity, gender or colour which forms a part of their being that they did not choose. Thus the act of attacking a victim on the basis of an unchangeable trait makes members of the whole international community equally apprehensive about the dangerous character of the perpetrator.

If an individual person is treated according to group characteristics that are out of that persons control, there is a straightforward assault on that person's humanity. It is as if the individuality of the person were being ignored, and the person were being treated as a mere representative of a group that the person has not chosen to join.[842]

The root of international criminality of an act thus lies in its abstract victimization of an individual whose character as a rational agent is impugned

[841] Article 7(1), Rome Statute, *supra* note 14.
[842] May, *Crimes Against Humanity*, *supra* note 632 p 85.

by virtue of being selected for arbitrary punishment merely on account of belonging to a collectivity that he or she did not rationally choose. For this reason, on one hand, simple or even serial ordinary crimes which may "shock the conscience of mankind" e.g. horrific murders or rapes do not qualify to be international crimes. When groups or classes – rather than the individuals – are harmed as members of a club then "the harms adversely affect the reputation of the club, and even the ability of the club to remain in existence."[843] However the "shocking 'the conscience of humanity' test may very well apply to individualized crimes that have no collective nature and are not part of a 'state-plan.' "[844] Essentially: "The assault is on what is common to all humans and hence to all humanity." In the case of *Prosecutor v Duško Tadić* it was held that acts rise to the level of an international crime warranting prosecution when "the emphasis is not on the individual attributes but rather because of his membership to a targeted civilian population."[845]

Seemingly less heinous crimes such as recruitment of child soldiers are crimes against humanity. These can be distinguished from domestic crimes such as serial killings which shock the conscience of humanity, but are not considered as sufficiently widespread. This is because the latter are "randomly" perpetrated. "If harm is conducted randomly in that any...resident could have been harmed....then the state...will be likely to prosecute the crime as it was standing in for all potential victims made less secure by the crime."[846] Conversely:

> the international community is likely to be harmed when the perpetrator of the crime does not react to the individual features of a person, but rather those features that the individual shares with all, or very many others, or if the perpetrator of the harm is, or involves, a State or other collective entity other than being merely perpetrated by an individual human person.[847]

The distinction lies in an additional factor whereby the perpetrator must either target a large number of people or must act in concert with others by using a "state-like organization" to achieve a common purpose, under a devised plan or policy. The next sub-part analyses the general part of international criminal law which – by imposing individual criminal responsibility – qualifies the meaning of a "state-like organ." May summarizes the following principle of group-based harm:

> To determine if harm to humanity has occurred, there will have to be one of two (and ideally both) of the following conditions met: either the individual is harmed because of the person's group membership or other non-individualized characteristic, or the harm occurs due to involvement of a group such as the State.[848]

Cheriff Bassiouni thus "makes sense of *jus cogens* norms by recognizing that 'certain crimes affect the interest of the world community as a whole because they threaten the peace and security of human kind and they shock the conscience of mankind.' "[849] Hence May concludes that because discriminatory treatment is based on the common characteristics – rather than the unique features of the victim – and further because *jus cogens* norms protect individuals from a certain form of non-individualized treatment that is group-based, therefore international courts only prosecute harms that are systematic or widespread.

3.4.2.2. The General Part: Harm by Perpetrator Groups

This sub-section considers the sources of international criminal acts. May argues that a serious human rights violation may concern the international community if it was perpetrated by a group. Alternatively, if the alleged serious ordinary heinous behaviour which constitutes a crime against humanity is not widespread, the Rome Statute requires that it should be perpetrated by a "state-like organization." Various concepts have been invented by international criminal tribunals not only to describe the group-like nature of a perpetrator of crimes against humanity, but also to isolate the individual's role in perpetrating the relevant act which attracts individual criminal responsibility. Modern international criminal law has evolved distinctions between different classes of offenders within each group. This evolution overcomes its original accusations of treating perpetrators indiscriminately, as happened through "guilt by association" after World War II at Nuremberg or the Far East.[850] Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting caution that the risk of "guilt by association:"

> would be greatest in large scale cases, where the contribution of an accused might in fact be rather remote from the actual crime; think, for example, of the politician concerned with the organization of transport and security for convoys in a war zone, including (but not limited to) convoys of deported persons.[851]

[843] *Ibid.* p 81.
[844] *Ibid.* p 84.
[845] *Tadić, supra* note 836 para 644 cited in *ibid* .p 85.
[846] *Ibid.*
[847] *Ibid.* p 83.
[848] *Ibid.*
[849] *Ibid.*
[850] *Ibid.* p 86.
[851] Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2013) 334-5.

The Holocaust trials criminalized belonging to the Nazi Socialist party as a collective offence under which members were convicted simply on account of membership irrespective of any individual criminal acts. Similarly, in *the Yamashita case,* according to Guénaël Mettraux, the standard of liability set out against Japanese General Yamashita[852] by the US Military Commission amounted to:

> a form of objective liability pursuant to which a commander could be held criminally responsible for crimes committed by his troops where he failed to discover and control the criminal acts of his subordinates and despite the absence of knowledge on his part that such crimes had been committed or rather regardless of any such awareness.[853]

The US Military Commission and the US Supreme Court decisions in the *Yamashita case* laid down the proposition "for the statement of principle that a commander would be held criminally responsible under international law in relation to crimes committed by his men."[854] As explained above, such failure to presume innocence and accord suspected persons a right to defend themselves reduces the legitimacy of a criminal trial. Thus the Allies were accused of perpetrating victor's justice, at Nuremberg. At the other extreme, the Far East trials at Tokyo criminalized "command responsibility" by which numerous senior military leaders were held vicariously liable for crimes of their subordinates. Not only were many "innocents" punished, but also some guilty went unpunished. For example, the Allies as well as the Japanese emperor the Hirohito were exempted. In 1961, *The Trial of Adolf Eichmann* in Israel was an example of one low-level perpetrator being made to feel as if he was "made to pay for a glass that someone else has broken."[855]

As briefly outlined in the introductory chapter, to avoid the disadvantages of both "guilt by association" and "crimes of omission" – towards the end of the 20th Century, the former Yugoslavian and Rwandan Statutes establishing *ad hoc* International Criminal Tribunals – set down the elements of crimes against humanity. However both these two UN Statutes allowed the judges wide discretion regarding who to convict. Unfortunately, this latitude was abused. Both the ICTY and ICTR judges invented a doctrine known as "joint criminal

[852] *Judgment of the US Military Commission*, Manila, 8th October 1945-7 Dec 1945, reprinted in *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission,* Vol. IV (London: HMSO, 1948) 1 pp 35-36, cited in Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009) p 7.
[853] Mettraux, *ibid.*
[854] *Ibid.*
[855] *AG of Israel v Eichmann* (Israel Supreme Court case no. 40/61) decision on12th December 1961; See also Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963).

enterprise" which derisively amounted to "just convict everyone."[856] Although the case law which distinguishes between various broad JCE I, II and III typologies is interesting, and although it is directly relevant to understanding how ICC judges are constrained to interpret the narrower provision imposing individual criminal liability imposed under the Rome Statute, for reasons of space, the intriguing complexities and intricate confusions which characterize the joint criminal enterprise doctrines are not comprehensively discussed in this book. A glimpse of that argument – as advanced by various scholars, shows that that the Rome Statute is based on the civil law tradition, while the previous ICTY and ICTR were common law-based. The *Tadić Trial Chamber*[857] held that "in some *jus cogens* justifications of international crimes 'the conduct in question is the product of state action or state-forming action.'"[858] "When the state (or state-like actor) is involved in an assault (on its citizens) there is an opening for prosecution by an international tribunal." This is because "it may be so unlikely that the State could impartially prosecute itself."[859] Furthermore: "When harm is systematic in that it is carried out by a State or State-like entity, there are likely to be other people who are victimized on the basis of characteristics picked out by the plan since the harms being planned are aimed at more than a single individual."[860]

In brief, so that leaders can know in advance what actions may result in criminality, the Assembly of States Parties which established the Rome Statute accepted to formalize a narrow basis of individual criminal responsibility. In May's view: "Ideally both the group-based harm conditions should be satisfied that is the harm should be both widespread and systematic."[861] This "ideal model" of international crime will best secure the rights of defendants. As explained in the previous chapter, May's "international security principle" provides a reason why state sovereignty may be abridged i.e. because citizens' security and subsistence are likely to suffer egregarious risk of harm; while the "international harm principle" requires that the harms should be either widespread *or* systematic. The above analysis thus considers both the character of the harm as well as that of the mode of perpetration by the suspects. *The Kenyan cases* before the ICC allege indirect co-perpetration. Therefore in the literature of this chapter focus shall be given to an analysis of what constitutes

[856] Mohamed Elewa Badar, "'Just Convict Everyone!' – Joint Perpetration: From Tadić to Stakić and Back Again" (2006) *International Criminal Law Review*, 6, 2, 293-302, cited in Sadat, *Crimes Against Humanity*, *supra* note 193.
[857] *Tadić, supra* note 836.
[858] May, *Crimes Against Humanity*, *supra* note 632 p 88.
[859] *Ibid.*
[860] *Ibid.*
[861] *Ibid.* p 89.

the general part of crimes against humanity, i.e. attribution of forms of perpetration.

3.5. The Evolution of Individual Forms of Perpetration

3.5.1. Control Theory of Perpetration

Neha Jain begins by illustrating a series of "double-effect" dilemmas under philosophy, political science and ethics which involve "necessary evils." One illustration depicts that stabbing of a father would technically constitute patricide. However, if perpetrated in order to avoid killing both parents, then criminal responsibility may not lie. Thus depending on "our concept of responsibility" and "our relationship to the community in which we live,"[862] our reasons for doing actions may speak louder than the way we do the actions themselves. The jurisprudence of "double effect" is crucial to evaluating a gap in the provisions of the Rome Statute in responding to crazy cases. This book argues that various provisions in the Rome Statute prescribe rules which are, at best, unclear or at worst, lack any applicable norm at all. Particular attention is given to article 7 on crimes against humanity, as read with article 25, under which what constitutes a "state-like organization" is ambiguous or vague, and does not sufficiently attribute individual criminal responsibility for leaders of informal groups. Therefore, this chapter analyses the ICC Pre-Trial Chamber's interpretation of the rule prescribing individual criminal responsibility under article 25 of the Rome Statute in *the Kenya cases*, particularly *the Ruto case*. A minority of ICC Pre-Trial Chamber's judges interpreted that provision as not being applicable to the alleged violence by informal groups not only in *the Kenya cases*, but even in *the Katanga Trial* (discussed in the next chapter). Conversely, the majority of the Pre-Trial Chamber judges in *the Kenya cases* interpreted that provision and applied article 25 to the facts in these cases, differently. I assert that these dichotomous interpretations are attributable to varying interpretive theories held by the divided judges, which they used to justify the normative practice of international criminal law itself.

Jain observes that in considering international or collective crimes,[863] dilemmas of domestic criminal law confronting impunity, become more complex. Take the situation in Kenya. Under the old, dysfunctional constitution, white-collar officials perpetuated systemic injustices and marginalization of others through the bureaucracy. Corrupt judges lacked public confidence to arbitrate over Kenya's post-2007 conflicts, after the Electoral Commission of Kenya announced results which its chairman himself did not believe to be fair. Chapter one showed that key stakeholders in the Kenyan post-2007 conflicts were the PNU and ODM parties. Peripheral actors – such as civil society organizations and other bystanders – were however excluded from post-conflict deliberations which negotiated a power-sharing settlement. The analysis of rational bargaining theory reveals that the international community not only functioned as a mediator, but also as an enforcement mechanism to monitor and ensure compliance with the 2008 National Accord agreement.[864] Particularly, the criminal law inquires into whether the low-level perpetrators were merely aiders for facilitating torture intended and planned by seniors or others who advise. Yet, there was no evidence regarding wrongdoing by the coalition government principals: Kibaki or Odinga. Moreover, power-sharing theory as well as the Domestic Tort Law model[865] and arguments based on communitarianism, collectivity, and cosmopolitan pluralism all suggest that there are situations where non-criminal responses may be advantageous – even where evidence of complicity in atrocity exists. Criminal responses to *the Kenya cases* are problematic for a variety of reasons. Notwithstanding a potentially volatile post-conflict environment, ODM instigated mass protests, not only against the stolen presidential election but also against historical injustices. At criminal law, such freedom of expression is technically legal. Nonetheless, in a transitional conflict, the Mbeki-Mamdani thesis[866] would emphasize that the issues focus on political constituencies. Furthermore, given the looming legal black hole, i.e. in absence of law and order, during the power vacuum, PNU were perhaps entitled to exercise a right to self-defence against escalating attacks.

From the outset it is advantageous to set out the relevant article 25 provisions of the Rome Statute in entirety:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

[862] Neha Jain, 'The Control Theory of Perpetration in International Criminal Law," *Chicago Journal of International Law*, 12, 1, 2011, 159–200 p 160.
[863] *Ibid.*
[864] *Supra* note 8, chapter one section 1.8.2.2.
[865] *Supra* introductory chapter, section 0.5.3.3; See also *supra* chapter one, sections 1.10.2 and 1.10.3.
[866] *Supra* introductory chapter, section 0.1.1.

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;…[867]

Various approaches have been developed in response to the question of: "How does one hold an individual responsible as a perpetrator for conduct that is part of a collective criminal project, and further, can he justifiably be labeled as a perpetrator when he personally does not carry out any of the *actus reus* of the international crimes?"[868] Jain recognizes that "JCE is largely a common law influenced doctrine, with close analogues in the doctrine of joint enterprise in English law and the *Pinkerton* conspiracy doctrine in the US."[869] She then "provides an account of the concepts of co-perpetration and indirect co-perpetration based on control theory in German criminal law."[870]

3.5.2. Roxin's Theory

3.5.2.1. Organized Structure of Power (Organisationsherrschaft)

Two main groups of indirect perpetration are recognized. The first is the normal case of indirect perpetration. This is where, due to some factual or legal grounds, the hegemony of the *Hintermann* is based on his dominance over the *Frontmann.*[871] Then an "obeying superior orders defence"[872] exempts the latter low-level perpetrator from criminal responsibility. The second group is where the *Hintermann* is the "perpetrator behind the perpetrator."[873] The exception is where – despite the actor-in-the front (F) actually carrying out the deed, the actor-in-the-rear (R) who remains behind the scenes,[874] – i.e. the accessory, is also held liable alongside the principal. Thus Jain's interpretation of Roxin's theory is that:

Frontmann normally possesses some deficit (for instance, he lacks the requisite intent for the offense), which the *Hintermann* exploits in order to

[867] Article 25(3)(a)-(d), Rome Statute, *supra* note 14.
[868] Jain, "Control Theory," *supra* note 862 p 160.
[869] 328 US 640 (1946).
[870] *Ibid*. p 161.
[871] Jain, "Control Theory," *supra* note 862p 161.
[872] Article 32, Rome Statute, *supra* note 14.
[873] Jain, "Control Theory," *supra* note 862 p 169.
[874] Fletcher, *Rethinking*, *supra* note 40 p 656.

control or dominate him…..*Organisationsherrschaft* refers to the category of cases where the *Hintermann* has an organized power apparatus at his disposal through which he can accomplish the offenses at which he aims, without having to leave their realization contingent on an independent decision by the *Frontmann*.[875]

Accordingly, the most frequently cited cases of establishing control (*täterschaft*) leading to indirect perpetration are: coercion; utilization of a mistake on the part of the actor-in-the-front or on the basis of the actor-in-the-rear's superior knowledge; and hegemony through control over an organizational apparatus, or *Organisationsherrschaft*.

The "*Hintermann* sits at the operational center of the organizational structure and, if to order a killing he presses a button, he can expect it to be fulfilled without him even knowing who executes the action."[876] This expectation of fulfillment is based on the fungibility of the executing organs. Thus, another organ immediately steps into the first one's place if it refuses to participate, and the execution of the total plan continues unhindered. Consequently, like a simple cog in a "machine-like" organization, each executing organ is therefore an anonymous and arbitrarily exchangeable figure. It does not arise from any deception or duress on the part of the actor-in-the-rear.

In sum:

There are three main elements in Roxin's theory of *Organisationsherrschaft*: (1) the existence of a hierarchical vertically-structured organization (power apparatus), (2) the unlimited exchangeability of the direct author within the power apparatus (fungibility); and (3) the working of the apparatus outside of the legal order (detachedness from the law).[877]

3.5.2.2. Sliedregt's Interpretation of Roxin's Theory

The most recent English language comprehensive treatment on the notion of individual criminal responsibility for collective crime is that of Elies Van Sliedregt.[878] Her book lucidly depicts notions of conspiracy under the Anglo-American common law tradition as inadequate to punish senior perpetrators of collective crimes. The problem is that under common law, the high level planners of collective crimes are considered as mere aiders or abettors, yet in

[875] Roxin, *Täterschaft, supra* note 130 p 242, cited in Jain, "Control Theory," *supra* note 862.
[876] Jain, "Control Theory," *ibid.* p 170 Claus Roxin, *Straftaten im Rahmen organisatorischer Machtapparate* (1963) Goltdammer's Archiv für. Strafrecht 110, 193 p 200; See also Roxin, *Täterschaft, supra* note 130 p 245.
[877] *Ibid.* pp 171-2.
[878] Van Sliedregt, *Individual Criminal Responsibility, supra* note 133.

reality the intellectual actor bears the greatest responsibility. Therefore international criminal law has grappled with inverting the criminalization and punishment. At Nuremberg, the prosecution's hypothesis was that because Adolf Hitler wrote *Mein Kampf*, "the bible" of National Socialism[879] and further because most senior members of the Nazi party co-operated in realizing the book's objectives, therefore they bore collective responsibility for acts of low-level perpetrators. This "guilt by association" approach was problematic. Instead, both the ICTY and ICTR attempted to fashion a mental or subjective, element based on intent. However, unless there was material participation, ICC Member States Parties were reluctant to accept criminalization of senior politicians for juniors. The Rome Statute adopts the control of the act (*täterschaft*) and control of an organized structure of power (*organisationsherrschaft*) in departure from the "act requirement" as a way of re-introducing an "intent requirement." Van Sliedregt concludes that for "Roxin's dominance theory to really work requires the context of organized criminality (*Organisationsherrschaft*)."[880]

According to Van Sliedregt:

> In Roxin's theory a principal is the person who dominates the commission of the act (*tatherschaft*) having 'control over the act,' is the distinguishing criterion between principals and accessories. Dominance requires that the person has power to determine whether a certain act is done. There are three ways in which domination can occur: (1) when a person does the relevant act him/herself, (2) when he does it jointly with others, or (3) when he uses another person as a tool (indirect perpetration).[881]

3.5.2.3. Osiel's Critique of Roxin's Theory

3.5.1.3.1. Osiel's Interpretation of Roxin's Theory

According to Mark Osiel:

> "Claus Roxin argues that 'what happens in such events [as the Holocaust] is, so to speak graphically, that a person behind the scenes at the controls of the organized structure presses a button' that results in an order that he or she can count on to be implemented, without needing to know who will actually do so or in what fashion. A particular subordinate who does not comply with the order will be immediately substituted by another, so that the plan's execution will not be compromised."[882]

[879] *Encyclopedia Britannica* http://www.britannica.com/EBchecked/topic/373362/Mein-Kampf<accessed on 19th September 2014>
[880] Van Sliedregt, *Individual Criminal Responsibility, supra* note 133 p 82.
[881] *Ibid.* p 83.
[882] Osiel, *Making Sense*, *supra* note 203 p 94.

The decisive factor is the fungibility of those who execute the commands. "The superior's control over an 'organizational apparatus of hierarchical power'….enables that superior to use the subordinate as a mere gear in a giant machine' to produce the criminal result on its own as it were."[883] The Rome Statute provides that "a person who commits a crime jointly with another or through another person" is liable "regardless of whether that other person is criminally responsible."[884] In Osiel's interpretation, "Roxin's lay insight, then, is that the more powerful parties behind the scenes may, through the organizational resources at their disposal (including the culpable inferiors), be said to commit the offence."[885] Regarding: "Ordering atrocity…..to effectively order another person to do one's murderous bidding requires an organizational machinery that stands behind the speaker; otherwise the statement is just instigation, a form of complicity with punishment diminished accordingly."[886]

"The bureaucracy of murder" by a high-ranking official in Osiel's view "by hypothesis, is subject to a unified chain of command imposing strict subordination upon him even as it bestows similar supervisory powers and duties over others."[887] Because: "Episodes of mass atrocity often notably depart from the rational orderliness, sensitized precision, and efficiency suggested by the 'organization man account.' Scholars now stress instead the spontaneous initiative at lower echelons, informal character, and face-to-face of much Nazi killing."[888] Thus, first:

> Roxin's analysis assumes the existence of a rigidly formal bureaucracy of the sort contemplated by Weber's famous ideal type (bureaucracy). Developed from his understanding of the authoritarian Prussian army, in which the organizational chart perfectly mirrors the behaviour of the people occupying positions within it.[889]

However, to discredit the prosecution case, "defence counsel would merely need to demonstrate that their client lacked the power to replace sullen juniors with more enthusiastic drones."[890] While "replacing reluctant inferiors….may be possible in theory, but it can often be difficult in practice to show that subordinates were actually fungible."[891]

[883] *Ibid.* p 95.
[884] *Ibid.*
[885] *Ibid.*
[886] *Ibid.* p 96.
[887] *Ibid.* p 97.
[888] *Ibid.*
[889] *Ibid.* p 100.
[890] *Ibid.* p 101.
[891] *Ibid.*

Second, "Roxin's approach does not take account of the latitude inferiors sometimes enjoy in determining the fate of their victims, as the moral relevance of this control type is obvious."[892] This is because: "If a junior officer who murdered a specific detainee could just as readily have freed him or her without fear of rebuke from above, then surely a fact-finder could conclude that the junta members lacked relevant control necessary for liability."[893] Nonetheless, Osiel argues that " 'effective control' by the superior might be exercised through an institution lacking the measure of formal hierarchy that Eichmann enjoyed."[894] This is because:

> Formal organization on the Western bureaucratic model is sometimes unnecessary to co-ordinate an effective fighting force whose members are already united by years of intimate interaction. This may involve growing up together in a single village or nearby villages of common tribal affiliation.[895]

In Osiel's view:

> The high measure of trust among these fighters permits lines of de facto authority to shift quickly in reaction to immediate contingencies without prejudicing operational capacity. Detailed orders from superiors become dispersible in combat because organization in combat arises instead from this intensive camaraderie and other equally intangible elements of 'social capital.' The group's members co-ordinate spontaneously in response to their comrade's immediate cues, which are often unobservable (much less intelligible) to outsiders.[896]

Therefore Osiel predicted that: "International courts may someday conclude that the commander of such force is nevertheless 'acting through' or 'by means of' those who perform the criminal acts, and so perpetrates their wrongs…the law of command responsibility will offer little help in holding him accountable." This is because "such law requires prosecutors to show 'a functioning chain of command, sufficiently developed planning and orders process, and a strong disciplinary system' to punish rule infractors."[897] By contrast, under the law of perpetration, "the institutional components of the system were assembled at the very outset of military rule. Beyond that point, there was no need for any junta members to intercede directly in its quotidian functioning in order to produce thousands of ensuing crimes."[898] Consequently:

[892] *Ibid.* p 102.
[893] *Ibid.*
[894] *Ibid.* p 104.
[895] *Ibid.*
[896] *Ibid.*
[897] *Ibid.*
[898] *Ibid.* p 105.

> The evidentiary burden may even shift towards the defendant, requiring him to show that he could no longer control his forces, rather than requiring the prosecutor to show that the accused continued to control them right until the very moment when, and in the very situs where, they performed their deeds.[899]

Osiel concludes that:

> The developing doctrine of perpetration by organization facilitates the prosecutor's task not only concerning the crime's objective elements, but also its *mens rea*. The International Criminal Court's Statute understands 'intent' for a crime defined in 'relation to a consequence' – such as disproportionate incidental killing of civilians during combat – for instance to refer to a defendant who 'means to cause that consequence or is aware that it will occur in the ordinary course of events.'[900]

3.5.1.3.2. Osiel's Critique of *Täterschaft* and *Organisationsherrschaft*

For Osiel, Roxin seems to distinguish between immediate substitutability in the context of the concrete act and the abstract substitutability as a whole within the structure of the power apparatus. He states that in the concrete situation, as in the *Staschinskij case*, only a few persons need to be involved.[901] This, however, separates the criterion of fungibility from the concrete act and appears to ground domination over the concrete act on a different criterion: the *conception* of the direct executor that if he were to refuse, another person would perform the criminal act in his stead, hence leading to his implementing the elements of the offense. This would, however, make the *Hintermann's* "domination over the act" (*täterschaft*) contingent on his awareness of the belief of the direct executor, which is suspiciously close to a subjective – rather than objective – basis for act-domination.

It would also contradict Roxin's own repudiation of the subjective theory.[902] Osiel is, however, skeptical about Roxin's adherence to a tightly structured and hierarchical organizational apparatus that is harnessed by the military or civilian superior to commit the crimes he intends. As Osiel demonstrates, such an organizational form rarely constitutes the medium through which mass atrocity is planned, incited, and perpetrated. Informal networks of power are often a

[899] *Ibid.* p 107.
[900] *Ibid.* p 108.
[901] Roxin, *Täterschaft, supra* note 130 pp 247-48, cited in Jain, "Control Theory," *supra* note 862 p 209.
[902] Jain, *ibid.* citing Thomas Rotsch (2000) *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 518 p 557; See also Thomas Rotsch, "Tatherrschaft kraft Organisationsherrschaft?" (2000) *Zeitschrift für die Gesamte Strafrechtswissenschaft?* 112 p 218.

more potent force of killings and destruction than hierarchical organizations.[903] Not only can the *de facto* exercise of power deviate from its *de jure* conferment, but no individual or even set of individuals completely exercises authority over the conduct of individuals at the lower levels of the hierarchy, who often enjoy considerable latitude and discretion in the exercise of their functions. This individual initiative may either be wrested reluctantly from subordinates by superiors or indeed they may even deliberately be encouraged. Osiel also challenges the contingency of the superior's control on the subordinate's fungibility.[904] One of the major insights of the doctrine of *organisations-herrschaft* lies in its simultaneous recognition of how individuals who are in control of organizational resources – while avoiding liability for mere organizational membership – can harness these to perpetrate mass atrocity through willing and culpable subordinates. Osiel's concern stems instead from how well individual elements of *organisationsherrschaft* are able to reflect the reality of mass atrocity.[905] The indirect perpetrator's control over the apparatus may be established through use of his position to perform activities ranging from formulating a criminal plan, deciding on the mode of its execution, setting up a framework to achieve the intended outcome, and ordering subordinates to ensure its implementation.

3.5.3. Control Theory of Co-Perpetration

Jain asserts that under German criminal law (outlined in the final section to this chapter), the issue of whether two accused persons can be classified as indirect perpetrators will depend on their objective control measured by the criterion of the will of the perpetrator. "The indirect perpetrator is the person who induces and manipulates conduct he intends by deliberately causing a mistake of law, such that the person laboring under the mistake can still be regarded as his (culpable) tool."[906] Jain cites co-perpetration as "the joint commission of a criminal act"[907] through the knowing and willing working together of the individual co-participants.[908] She explains that it is based on the functional act-domination of each co-perpetrator, which arises from the principle of division of labour and functional role allocation. "This allocation ensures that the success of the criminal act is possible only through the co-operation of all the co-operators,

[903] Osiel, *Mass Atrocity*, *supra* note 164, pp 99-102, cited in Jain *ibid.*.
[904] Osiel, *ibid.* p 101.
[905] Jain, "Control Theory," *supra* note 862 p 209 p 192.
[906] *Ibid.* p 164.
[907] StGB § 25, cited in *ibid.* p 161-2.
[908] *Ibid.* p 165, citing, *inter alia,* Johannes Wessels and Werner Beulke, *Strafrecht, allgemeiner Teil: Die Straftat und ihr Aufbau (Schwerpunkte)* 179 p 186.

so that the plan succeeds or fails depending on the functional contribution of each co-perpetrator."[909]

Collective act-execution requires that: "The act contribution of each co-perpetrator must….be of sufficient weight and importance such that it grounds the necessary co-domination over the act"[910] not merely aiding or helping the act of another. Whether or not the act contribution should be at the stage of execution of the elements of the offence or precedes it is unclear in German law. However, scholars disagree on whether such preparatory acts can ground co-perpetration. Jain gives the example of "a gang leader who conceives of the criminal scheme and decides on its mode of commission, but leaves its execution entirely to the other gang members." On one hand a court may:

> reject liability of the gang leader as a co-perpetrator and hold him responsible only as an accessory, unless he took part in some manner in the execution of the crime – for instance, if he remained in contact with the gang through telephone or radio and thus conducted their deployment.[911]

On the other hand:

> the gang leader is not participating in the act of another, but rather the result of the act is consequent to a willing, collective participation in a joint act. Also, given the role of the gang leader, it would be inappropriate to consider him an accessory – a marginal figure in the course of events.[912]

Because a "person who merely participates in the preparation stage can certainly influence the course of events but can scarcely be said to control it"[913] therefore, dominant opinion favors that "this act contribution must be at the stage of execution of the elements of the offense" rather than that "contributions in the preparation stage may also be sufficient."[914] Whereas: "Mutual consent is essential for the joint realization of the act at the time of, or even before the beginning of, the act. A jointly developed and decided-upon plan is not essential."[915] Jain further argues that: "Co-perpetration is also possible if the individual participants do not know each other, as long as each person is conscious that there are other participants who are likewise working towards a common goal and that those other participants have the same knowledge."[916]

[909] *Ibid.*
[910] *Ibid.* p 166.
[911] *Ibid.* p 167.
[912] *Ibid.* pp 166-7.
[913] *Ibid.* p 167.
[914] *Ibid.* p 166.
[915] *Ibid.* p 168.
[916] *Ibid.*

Ultimately: "The main test is the foreseeability of the deviant course of action."[917]

3.5.4. Olásolo's Material-Objective Approach

A new basis for the criminal liability of superiors is provided under the Rome Statute.[918] Consequently, the Statute[919] departs from ICTY Statute's and ICTR Statute's joint criminal enterprise doctrine. The approach of material-objectivity, according to Héctor Olásolo,[920] adopted by the Rome Statute, attempts to combine the advantages of the two earlier approaches. These two earlier processes were the *Nuremberg precedent* as explained below, as well as the UN *ad hoc* tribunals' subjective approach under JCE (which shall not be explained in detail). The Rome Statute's logic rejects the problems associated with the formal-objective approach as well as the traditional "joint criminal enterprise."

The material-objective approach requires that the superior should not only possess some *knowledge* about the plan or design, but also *participate* at some level in the wrongdoing. For example, either by arming or financing the physical perpetrators. This means that superiors must have joint control of the crime. Additionally, the Rome Statute expressly proscribes physical perpetration, as well as soliciting and inciting, or even financing and arming and additionally prohibits any other form of aiding and abetting. Thus, the liability of persons must be specifically pleaded as indirect perpetration with joint control of the crime.

Following Roxin's approach[921] outlined above, Olásolo begins by recognizing the impossibility of applying an Organized Structure of Power (OSP), to crimes committed through companies. Because those subordinates who technically implement the common criminal plan share the control of the crime, therefore the question arises as to whether the members of the board of directors can be considered as co-perpetrators. Because they are committed through organizations, "which…do not qualify as organized structures of power, therefore the same question arises concerning crimes in which it is not possible to apply OSP."[922] Neither is it possible to apply an OSP to crimes committed by senior political and military leaders through certain military or police units which usually act in accordance with law, so that their members cannot be replaceable for the purposes of carrying out illegal activities. As a result,

[917] *Ibid.*
[918] Article 33, Rome Statute, *supra* note 14.
[919] Article 25, *ibid.*
[920] Olàsolo, *Criminal Responsibility*, *supra* note 134.
[921] Roxin, *Täterschaft, supra* note 130, cited in Olàsolo, *ibid.* p 287.
[922] Olàsolo, *ibid.* p 286.

the criticisms of applying the notion of joint co-perpetration based on joint control to crimes committed through companies are also valid in relation to crimes committed by senior political and military leaders through small paramilitary groups, intelligence units and some military police units. This is because such units members are not interchangeable, because of their small size.[923]

Under Olásolo's material-objective approach:

> perpetration and participation are distinguished on the basis of the level and intensity of contribution to the execution of the objective elements of the crime. Perpetration requires that the contribution be essential for the completion of the crime in the sense that without it the crime would not have been committed.[924]

First, the material-objective approach's proponents emphasize "higher dangerousness of principals to the crime in comparison with accessories due to the different level and intensity of their respective contributions to the commission of the crime." Olásolo illustrates this approach using three cases.

In *Prosecutor v Thomas Lubanga Dyilo*[925] – on the basis of individual criminal responsibility with enlisting and conscripting children under the age of 15 and using those children to participate actively in hostilities – the accused was charged with war crimes by the ICC. He was a key player in the Ituri conflict (1999-2007) by leading the Union of Congolese Patriots (UPC) which he founded. These crimes were allegedly committed in the Ituri region in the north-east of the Democratic Republic of the Congo. On 10th July 2012, Trial Chamber I of the ICC sentenced him to a total period of 14 years of imprisonment. Second, in *Prosecutor v Jean Pierre Bemba Gombo*,[926] the accused was charged with two crimes against humanity (murder and rape) and three war crimes (murder, rape and pillaging), allegedly committed in the territory of the Central African Republic. It is alleged that between 26th October, 2002 and 15th March, 2003, he effectively acted as a military commander within the meaning of article 28(a) of the Rome Statute. Third, in *Prosecutor v Germain Katanga and Mathieu Ngudjulo Chui*[927] the first accused was a former leader of the Patriotic

[923] *Ibid.*
[924] *Ibid.*
[925] *Supra* note 137.
[926] Case no. ICC-01/05-01/08-803 International Criminal Court, Pre-Trial Chamber II, 15th June, 2009.
www.jstor.org/stable/10.5305/amerjintelaw.104.2.0241 <accessed on 3rd June 2013>
[927] Case no. ICC-01/04-01/07 International Criminal Court, Pre-Trial Chamber I, 25th March, 2008.opil.ouplaw.com/browse;jsessionid...?pageSize=10. <accessed on 3rd June 2013>

Resistance Force in Ituri (FRPI). On 17th October 2007, the Congolese authorities surrendered him to the ICC to stand trial on six counts of war crimes and three counts of crimes against humanity. The charges included murder, sexual slavery and using children under the age of fifteen to participate actively in hostilities. The second accused was a colonel in the Congolese army and a former senior commander of the National Integrationist Front (FNI) and the Patriotic Resistance Force in Ituri (FRPI). On 6th February 2008, he was arrested by the Congolese authorities and surrendered to the ICC to stand trial on similar charges. In December 2012, Chui was acquitted of war crimes on grounds that the prosecution had not proven beyond reasonable doubt that he was responsible for the crimes committed. The controversial judgment, conviction and sentencing of Katanga by the majority judges as well as the dissenting opinion shall be comprehensively analyzed in the next chapter to illustrate the problem of characterization of charges.

3.6. Applying Co-Perpetratorship Based on Joint Control of the Crime to Offences Committed through Organizations which do not qualify as Organized Structures of Power

3.6.1. The Origins of Liability for Crimes of Commission under International Law

3.6.1.1. Third Party Crimes: Principal and Accessorial Liability vs. Participation under International Criminal Law

This section shall review the literature of various notions of criminal liability which have been adopted by international criminal law. It commences with strict liability for status crimes at Nuremburg, through criminalization of thoughts under the "guilty intent" requirement as interpreted by the UN *ad hoc* Tribunals on the former Yugoslavia and Rwanda, culminating in the material element under the "joint control" of the crime, the liability under article 25 of the Rome Statute. According to Olásolo,[928] in addition to the material-objective approach discussed previously, we may categorize approaches to corporate wrongdoing under the general part of international criminal law into the formal-objective and the subjective.

3.6.1.2. The Formal-Objective Approach

According to the formal-objective approach, perpetrators or principals to the crime are only those persons who carry out one or more objective elements of the crime,

[928] *Ibid.*

whereas participants or accessories to the crime are those others who contribute in any other way to the commission of the crime.[929]

After World War II, international criminal law faced a double problem of defences by vertical perpetrators of group crimes – superiors and subordinates who each denied responsibility by imputing blame to one another. They did this in order to evade the *concurrence* requirement, which itself constitutes an essential ingredient of collective crime. On the part of the superior, *actus reus* could not be proved. On the part of the subordinate, proving *mens rea* was elusive.[930]

Olásolo observes that the formal-objective approach to the notion of perpetration has been adopted by common law jurisdictions. Both Peter Gillies, as well as David Ormerod, claim that:

> (i) those individuals who physically carry out an objective element of the crime show a higher degree of dangerousness and wrongdoing; and (ii) this approach fits better with the definitions of the crimes and with the common meaning that an average person would give to the language used in such definitions.[931]

Initially, early international military tribunals simply adopted the vicarious liability doctrine from domestic tort law – which made employers liable for personal injuries caused by their employees – to impute *command responsibility* on superior officers for substantive crimes of juniors on account of their superior-subordinate relationship. However this new crime was criticized as contrary to the principle of *legality*.[932]

3.6.2. The Subjective Approach

Both the International Criminal Tribunal for the former Yugoslavia[933] and International Criminal Tribunal for Rwanda[934] adopt a subjective approach.

[929] *Ibid.*
[930] Van Sliedregt, *Individual Criminal Responsibility*, *supra* note 133 pp 17-18.
[931] Peter Gillies, *Criminal Law* (4th edn.) (Sydney: LBC, 1950); See also D. Ormerod, *Smith and Hogan,Criminal Law* (Oxford: Oxford University Press [2006] 2011) cited in *ibid.*
[932] Van Sliedregt, *ibid.* pp 24-30.
[933] Article 7(1) Statute of the International Criminal Tribunal for the former Yugoslavia Security Council resolution 827 (1993), 25th May 1993 establishing a Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
[934] Article 6(1) Statute International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such

Their jurisprudence "uses the terms *actus reus* and *mens rea* to describe objective and subjective elements of the crimes within the tribunals' jurisdiction."[935] This approach regards a superior as criminally liable provided that one is part of a joint criminal enterprise (JCE).[936] By contrast, Miren Odoriozolo-Gurruttxaga argues that none of the three categories of the JCE doctrine is included in article 3(d) of the Rome Statute.[937] The subjective approach has two variants: (i) The "theory of the interest" where the subordinate physical perpetrator should possess the domestic common law *mens rea.* It relies on the interest of the person involved in its commission as evidence of their intent. Consequently, "(t)hose who simply assist in the satisfaction of the interest of third persons are considered participants or accessories to the crime." (ii) The "theory of the *dolus*" where the subjective element must exist at various levels. First, the concept of *dolus* is drawn from the European civil law tradition. Second, superiors should be aware of the existence of a common criminal purpose, or ulterior motive (*dolus specialis*). Third, superiors must either be aware of a plan or design to perpetrate such international crime (*dolus directus* in the first degree) or they must know that their plans are likely to result in perpetration of the crime in due course of events (*dolus directus* in the second degree) or simply they act recklessly (*dolus eventualis*). Fourth, the superior officer must also be aware of the common criminal plan and formulate, incite, solicit or instigate physical perpetrators. Hence while the primary or physical perpetrators are principal offenders, the superiors who aid, abet, finance or equip are secondary offenders or accessories with derivative criminal liability. They are indirect co-perpetrators in a joint criminal enterprise.

Olásolo explains that the subjective approach to the notion of perpetration solves the problems encountered by the formal-objective approach in relation to indirect perpetration. Because irrespective "of the nature and scope of the contribution to the commission of the crime, principals to the crime are only those who make their contribution with the intent to have the crime as their own deed…as opposed to their nearness to the scene of the crime," therefore personal attitude distinguishes perpetration from participation. However, a variety of problems afflicting the traditional joint criminal enterprise notion led to its

Violations Committed in the Territory of Neighbouring States, between 1st January 1994 and 31st December 1994.

[935] Van Sliedregt, *Individual Criminal Responsibility*, *supra* note 133 p 39.

[936] Olàsolo, *Criminal Responsibility*, *supra* note 134 pp 32-3, 166-7 and 281.

[937] Miren Odoriozolo-Gurruttxaga, "The Doctrine of Joint Criminal Enterprise at the ad hoc Tribunals and its Applicability in the Rome Statute of the ICC" (2013) *Revue électronique de l'AIDP/Electronic Review of the IAPL/Revista Electrónica de la AIDP*, A-03:1 http://www.penal.org/?page=mainaidp&id_rubrique=41&id_article=376 <accessed 19th September 2014>

abandonment. The ICTY decision in *Prosecutor v Mitar Vasiljević*[938] provides an illustration. The accused was charged with six counts of crimes against humanity and four counts of violations of the customs of war. He was found guilty on four charges and sentenced to 20 years imprisonment, reduced to 15 years on appeal. Notwithstanding international stigmatization, his domestic popularity was enhanced. A news report of his homecomings is illustrative:

> Tonight, several hundred of Visegrad's residents welcomed Mitar Vasiljevic who was released by the Hague Tribunal after having served two thirds of his 15-year prison sentence...Column of cars, stretching halfway from Sarajevo to Visegrad welcomed Vasiljevic at the Square of fallen soldiers in Visegrad with sirens and orchestra from Uzice (town in Serbia). Vasiljevic stated that he was never happier and that the Hague Tribunal's judgment against him was 100% unjust.[939]

3.6.2.1. Introducing Joint Criminal Enterprise

Both the 1945 Control Council Law no. 10 as well as the International Military Tribunal at Nuremberg "convicted individuals for aiding and abetting a common criminal plan"[940] "or conspiracy as a single atomic concept."[941] Nuremberg declared certain organizations criminal and penalized their members. It attracted much criticism for being "victor's justice." Since then, the development of international criminal responsibility, according to Ohlin, oscillated between three doctrines: (i) imposition of vicarious liability for collective crimes; (ii) a JCE doctrine by the ICTY; and (iii) the control theory of co-perpetration by the ICC (German criminal law theory) "which avoids vicarious liability for actions that fall outside the scope of the criminal plan," Ohlin terms JCE type III.[942] However he disputes that control is the most important criterion for criminalization of collective activities.[943] In order to elaborate an adequate explanation for vicarious liability, he distinguishes it from two other types of JCE. Type I JCE is based on common law conspiracy, while type II is based on the "knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment."[944] For purposes of this book, type III is most relevant.

[938] Appeal Judgment, IT-98-32-A, International Criminal Tribunal for the former Yugoslavia (ICTY) 25th February 2004.

[939] "Monster Mitar Vasiljevic Released From Prison," 13th March 2010. http://srebrenica-genocide.blogspot.fr/2010/03/monster-mitar-vasiljevic-released<accessed 3rd October 2013>

[940] Ohlin, "Joint Intentions," *supra* note 135 p 717, citing the International Military Tribunal at Nuremberg, Indictment, in 1 Trial of Major War Criminals pp 29-41.

[941] *Ibid*. p 712.

[942] *Ibid*. 693.

[943] *Ibid*.

[944] *Ibid.* 694.

3.6.2.2. JCE Type III

Common law liability for a joint criminal enterprise can be traced to the English case of *Regina v Swindal and Osborne*[945] where two racing cart drivers were convicted for manslaughter when one killed a pedestrian, since both negligently agreed to race. The offence of "joint offenders in prosecution of common purpose" is received into Kenyan law under the Kenyan Penal Code as follows:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.[946]

Ronald Dworkin illustrates the dilemma with pharmaceutical market liability in a situation where:

> a judge…must…decide…whether a patient who has been damaged by taking a negligently manufactured drug over many years, but who cannot show which of the several manufacturers of the drug made the pill she took, is entitled to recover compensation from all the manufacturers in proportion to their market share in the years in question. The judge will naturally consider and balance two questions of fairness: whether it is fair to a patient in that position to deny recovery altogether, and whether it is fair to hold a manufacturer liable for damages for injury he has not been shown to have caused.[947]

Ohlin attributes *Pinkerton v the United States*[948] to the displacement of *Regina v Swindal and Osborne* co-conspirator's liability[949] as the origin of JCE III. Similarly Jain accepts that JCE III allows vicarious liability for foreseeable acts of the co-conspirators, which in *Tadić* language is "in vogue in the ICTY and ICTR."[950] The leading UK authority on joint criminal enterprise (vicarious) liability is *Regina v Powell (Anthony) and English*[951] where "the various formulations of the doctrine offered by the House of Lords all included the element of agreement." It followed *Regina v Wesley* which held that:

> The term 'agreement,' 'confederacy,' 'acting in concert' and 'conspiracy,' all pre-suppose an agreement express or by implication to achieve a common purpose, and so long as the act done is within the ambit of that common purpose anyone who takes part in it, if it is an unlawful killing is guilty of manslaughter.[952]

Accordingly, "the best understanding of the domestic liability for joint enterprises is to treat it as a functional analogue to conspiracy as a mode of liability."[953] Thus to remain consistent with the required mental element for international offences, Antonio Cassese restricts the JCE III. Because:

> The danger of convicting a person who associated with (alleged) criminals but did not actually contribute to crimes in any meaningful way should never be underestimated. However it should also be noted that the ICTY has so far shown restraint in its application of JCE to individual cases, declining to attribute responsibility on the basis of this doctrine when the contribution of the accused to the crime was too remote or his *mens rea* could not be established.[954]

Ohlin advises that:

> JCE should be used only in cases where *mens rea* of the underlying offence can be satisfied by recklessness or *dolus eventualis*, since the *mens rea* of the defendant in a JCE III is one of recklessness – he subjectively foresees the resulting crime but willingly participates anyway.[955]

Cassese *et al.* concur that two issues of "(i) the degree of participation in the criminal enterprise of each participant in this type of situation and of (ii) the *mens rea* required to incur liability are indeed valid questions raised in all cases of joint criminal conduct." The "list of specific intent crimes" of humanity "includes torture and murder."[956] For Ohlin:

> the whole category of crimes against humanity should be considered a specific intent crime because not only must the underlying conduct be committed as part of a widespread or systematic attack against a civilian population, the perpetrator must also intend or know that the underlying act is part of the systemic attack.[957]

[945] [1846] 2 Car & K 703.
[946] S 21 Kenyan Penal Code, *supra* note 540.
[947] Ronald Dworkin, *Justice in Robes* (Cambridge Mass.: Harvard University Press, 2006) p 208.
[948] *Supra* note 869.
[949] Ohlin, "Joint Intentions," *supra* note 135 p 705; See also *supra* note 945.
[950] Jain "Control Theory," *supra* note 862 p 160, citing Gideon Boas, James Bischoff and Natalie Reid, *International Criminal Law Practitioner Library Vol. I: Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2007).
[951] [1996] 2 WLR 1195 (UK); [1999] 1 AC (HL).
[952] [1963] 1WLR 1200, cited in Ohlin, "Joint Intentions," *supra* note 135 p 705 footnote 58.
[953] Antonio Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise" (2007) *Journal of International Criminal Justice*, 5, 109–133, cited in Ohlin, *ibid.* p 710.
[954] Cassese, *et al. International Criminal Law, supra* note 851 pp 334-5.
[955] Ohlin, "Joint Intentions," *supra* note 135 p 710.
[956] Ohlin, *ibid.* p 711 referring to articles 7(1)(a) and 7(1)(b), Rome Statute, *supra* note 14.
[957] *Ibid.* pp 711-2.

Ohlin accuses Cassese's new proposal of foreclosing JCE III "since in a JCE III case, the defendant may not be aware that the underlying act is being committed, since he is merely convicted for participating in the enterprise with knowledge that such acts are foreseeable (not actual)."[958] Cassese's proposal "would involve a substantial amendment to the doctrine in *Tadić*, which the Appeals Chamber considers well-settled law."[959]

3.7. Criminalizing an Informal Network in *the Ruto case*

This chapter's hypothesis is that on one hand, pre-Rome Statute international substantive crimes were defined too widely. Command responsibility was designed to criminalize both sub-ordinates and superiors for "crimes of omission" while joint criminal enterprise (JCE) was created was for "crimes of commission." Neither of the foregoing are particularly relevant to the character of liability alleged in *the Kenya cases* and hence their theoretical underpinnings and literature have not been reviewed in this chapter. Nevertheless, it is submitted that, the mode of liability adopted by article 25(3)(a) of the Rome Statute is considerably narrower, in the sense that – this chapter argues – it restricts the ICC to apply it to *de jure* leaders who control *formal*, "state-like" organizations. However, as a result there arises incongruence between the "core of the rule" and reality on the ground. Because senior political leaders may utilize *informal* groups to perpetrate international crimes, therefore the ICC majority judges were forced to innovate by recognizing or inventing a new kind of crime called indirect co-perpetratorship. Under this kind of crime in *the Kenya cases*, the PTC judges Trendafilova and Tarfusser, suggested that individuals who perpetrate offences using informal groups attract individual criminal responsibility under article 25(3)(a) of the Rome Statute. However, contrary to the compromise reached by Member States Parties to the Rome Statute, these majority judges' expansive interpretation, appears either to re-invent the subjective notion of JCE, or worse still, revert to the Nuremberg precedent's formal-objective criminality. The divergent decision in *the Kenya cases* exemplifies disputed attribution of individual criminal responsibility – to four suspects for crimes against humanity committed in Kenya's post-2007 conflicts – notwithstanding a set of facts involving informal groups. While judicial activism by the majority judges, criminalized "the Network" in *the Ruto case* and Mungiki in *the Kenyatta case*, the judicial restraint of Judge Kaul's dissenting decision asserted that the former instance was a fleeting criminal gang, whilst the latter had been effectively contained by the Kenya police and should be dealt with by the ordinary criminal justice system. Similarly, there

[958] *Ibid*. p 712.
[959] *Ibid.*

exists considerable authority in support of the argument that JCE does not apply under article 25(3)(d) of the Rome Statute.[960]

3.8. *The Ruto Case*: ICC Pre-Trial Chamber Majority Judgment on Confirmation of Charges

3.8.1. The Majority Judgment in *the Ruto Case*[961]

In *the Ruto case* the International Criminal Court's Pre-Trial Chamber II was composed of Judges Ekaterina Trendafilova, Hans-Peter Kaul and Cuno Tarfusser. Prosecutor, Moreno-Ocampo alleged crimes against humanity against Ruto, Kosgey and Sang, comprising murder, deportation or forcible transfer and persecution. Ruto and Kosgey were suspected of being indirect co-perpetrators to which Sang allegedly contributed.[962]

This section shall illustrate how that Chamber's majority, Trendafilova and Tarfusser, found that the OTP established substantial grounds to believe that the crimes against humanity of murder, deportation or forcible transfer and persecution, were committed in *Ruto's case*. These crimes resulted in the death of hundreds, and the displacement of thousands of civilians from Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills. They were allegedly perpetrated on 1st January 2008 as part of an attack directed against particular ethnic groups, namely, Kikuyu, Kamba and Kisii, due to their perceived political affiliation to the PNU. The ICC Pre-Trial Chamber's majority decision believed that the OTP's evidence against Ruto and Sang proved criminal responsibility regarding the allegations leveled against them. However, while the charges against Ruto were confirmed as an indirect co-perpetrator with others, allegations against Sang were merely characterized as contribution to the commission of the said crimes against humanity. Nonetheless, both were committed to stand trial.[963]

3.8.2. Case Summary

The three suspects, Ruto, Sang and Kosgey argued that "the Chamber adopted a new liberal interpretation of 'organizational policy,' which is inconsistent with the intention of the drafters and customary international law."[964] They further argued that the Prosecutor:

[960] Odriozola-Gurrutxaga, "The Doctrine of Joint Criminal Enterprise," *supra* note 937; See also Ohlin, "Organisational Liability," *supra* note 195.
[961] *The Ruto case*, *supra* note 146.
[962] Pursuant to article 7, Rome Statute, *supra* note 14.
[963] See Appendix 3.
[964] *The Ruto case*, *supra* note 146 p 14 para 30.

failed to provide sufficient evidence supporting his assertion that there was an organization, sufficient to meet the structural criteria necessary, since there is a lack of detailed information about the operation, purpose, structure and membership of 'The Network'…within the meaning of Article 7(2) of the Statute.[965]

Dismissing preliminary challenges to its jurisdiction,[966] however, the Pre-Trial Chamber insisted that "the determination of whether a group qualifies as an 'organisation' under the Statute must be made on a case-by-case basis."[967] Additionally, "under Article 19(1)…an admissibility determination of the case is not mandatory but discretionary." In the *Ruto-Sang-Kosgey case,* the ICC Pre-Trial Chamber II noted that "none of the parties ha(d) challenged the admissibility of the case."[968] Furthermore, since the PTC's 30th May 2011 admissibility determination "no information with respect to domestic investigations" was availed "to change its previous determination."[969]

The judges then turned to procedural matters and committed themselves to adhere "to the existing jurisprudence of the court" that "the Prosecutor must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning his specific allegations." This is because the purpose of the Statute is primarily "to protect the suspect against wrongful prosecution and ensure judicial economy by distinguishing between cases that should go to trial and those that should not."[970] I note the consistency with Husak's external constraint principle on costs.[971] "Judicial economy" appears to closely resemble the "expediency economy" which the Pre-Trial Chamber invoked to dismiss Kenya's challenge against admissibility upheld by the Appeals Chamber.[972] Ironically, "judicial economy" also seems to be the same principle which Kenya's Supreme Court would adopt at the 2013 presidential election petition to reject additional evidence in the proceedings, explaining that time was of essence.[973] Most remarkably, the PTC appreciated the *right not to be punished.* This is emphasized by the Chamber's reminder that it would "be guided by the principle of *dubio pro reo* as a component of the presumption of innocence,

[965] *Ibid.* p 15 para 31.
[966] *Ibid.* p 17 para 35.
[967] *Ibid.* p 16 footnote 66.
[968] *Ibid.* p 18 para 37.
[969] *Ibid.*
[970] *Ibid.* p 19.
[971] Husak, *Overcriminalization*, *supra* note 639.
[972] Chapter 2, *supra.*
[973] Chapter 5 *post*.

which as a general principle in criminal procedure applies, mutatis mutandis, to all stages of the proceedings…"[974]

The ICC Pre-Trial Chamber II indicated that failure by the Prosecutor "to investigate properly…will certainly have a bearing on the quality and sufficiency of the evidence presented…"[975] It reiterated the Chamber I findings that "an alleged investigative failure on the part of the Prosecution may have an impact on the Chamber's assessment of whether the Prosecution's evidence as a whole has met the 'substantial grounds to believe' threshold."[976] In Husakian terms, criminalization would be justified only if the international community has an interest which is not only *legitimate*, but also *substantial*, as disclosed by the evidence. Overruling defence objections, the Pre-Trial Chamber admitted evidence of Reports prepared by the Waki Commission, Kenya National Human Rights Commission, and Human Rights Watch notwithstanding their opaque investigative processes. Thus the CIPEV, KNCHR and HRW documents all contained information from "non-ICC" witnesses who had provided statements to other entities which entities did not give their consent for their statements of summaries to be used.[977] Yet *viva voce* evidence was held to be not necessarily of higher probative value. Rather the Pre-Trial Chamber's assessment varies "on a case-by-case basis and in light of the evidence as a whole."[978] Nonetheless the Pre-Trial Chamber was "mindful of the difficulties" of heavily redacted witness statements and undertook to exercise caution as to the probative value.[979]

Turning to the alleged facts "there was no requirement for the Prosecutor to spell out the exact composition of the Network in order for the Suspects to challenge the allegations despite other members not being charged with any crime within the jurisdiction of the Court."[980] Unlike Ruto and Sang, Kosgey called no evidence. Ultimately, his alibi was believed.[981] "A large part of the defence strategy focused on challenging the presence of the suspects at the planning meetings, and by implication the very existence of the meetings themselves." Because absence at meetings would undermine the existence of any common criminal plan or agreement which is required for a JCE – but JCE is not provided for in the Rome Statute – therefore, one wonders why this denial strategy was vigorously adopted. Rather, individual criminal responsibility

[974] *The Ruto case*, *supra* note 146 p 19 para 41.
[975] *Ibid.* p 23 para 51.
[976] *Ibid.* para 53.
[977] *Ibid.* p 26 para 63.
[978] *Ibid*. p 72 para 73.
[979] *Ibid*. p 31 para 80.
[980] *Ibid.* p 38 para 101.
[981] *Ibid.* p 39 para 105.

attaches by virtue of the control theory of perpetration. Nonetheless, the Chamber was forced to examine the defence alibi evidence.[982] In so doing, Kosgey's alibi was believed.[983] Conversely, as shown below, the Chamber disbelieved all defence witnesses as they were interested parties who were alleged to have attended the meetings in question and therefore were of low probative value.

3.8.3. Six Alleged Preparatory Meetings of "the Network"

3.8.3.1. On 30th December 2006

Both Reverend Kosgei's and Cheramboss's denials of attendance on 30th December 2006 at Ruto's house,[984] were rejected,[985] together with Sang's alibi of attending a football tournament.[986]

3.8.3.2. On 15th April 2007

On the night of 15th April 2007 at Molo Milk plant, an oath was allegedly administered where dog blood was purportedly sprinkled on Ruto and other important Kalenjin members "to kill the Kikuyus mercilessly, the Kisii's mercilessly, the Kambas mercilessly…"[987] In Ruto's defence, Reverend Kosgey (sic) testified that: First, Kalenjins fear oath. Second, dogs are abominable. Third, sacrifices were done on rams on mountains 60 years ago. While Ruto claimed to be at a public rally at Eldoret that day, Sang claimed to have attended a prominent musician's funeral. However, since the alleged Molo meeting was at night, the Chamber held that the suspects were not precluded from attending by virtue of their daytime commitments. No significance was attached to the identity of animals used at the ceremony, which was believed to have occurred.

3.8.3.3. On 2nd September 2007

On 2nd September 2007, an alleged meeting at Sirikwa Hotel was apparently sponsored by KASS Radio Station. Its purported agenda was to update on (i) weapons (ii) money and fundraising and (iii) transportation of perpetrators to and from the target locations.[988] Because Witness no. 8's redacted evidence was "precise and detailed" including "the speech made by Reverend Kosgei" regarding Cheramboss's role within the Network, therefore it was believed. However, three exculpatory statements by the Sirikwa General Manger denying such meeting were rejected.[989]

[982] *Ibid.* p 41 para 111.
[983] *Supra* note 981.
[984] *Ibid.* p 42 para 113.
[985] *Ibid.* p 44 para 118.
[986] *Ibid.* p 43 para 116.
[987] *Ibid.* p 45 para 120.
[988] *Ibid.* p 48 para 130.

3.8.3.4. On 2nd November 2007

On 2nd November 2007, another preparatory meeting was allegedly convened at Ruto's residence.[990] Cheramboss denied having ever "stepped in (Mr Ruto's) house."[991] As for Mt Elgon MP Fred Kapondi he was still remanded – having been incarcerated from 17th April until 14th December 2007 – and yet was alleged to have attended. Furthermore – as evidenced by "a statement of the Managing Director of Kass FM"[992] – Sang claimed to be at his workplace. Yet Cheramboss was disbelieved. Similarly, since the video evidence that Ruto was at Kapkatet lacked authentication regarding the event's date, the Chamber rejected it. While Kapondi's absence was accepted, nonetheless, the majority judges found that he may have attended the 14th December meeting after release.[993]

3.8.3.5. On 6th December 2007

On 6th December 2007, a meeting was allegedly held from 9:30 a.m.-2:00 p.m. at Kiparren Salient Trading Center. Sang was the master of ceremony, Ruto spoke, while Cheramboss attended.[994] Yet not only did Cheramboss deny being in Ruto's company, but also Ruto's statement under inquiry denied inciting violence or forcible displacement of Kikuyus, while Sang's employer, Kass FM managing director insisted that Sang was at work.[995] However, the Chamber disbelieved both Cheramboss and Sang's employer's statements.[996] Instead it relied on corroborative evidence in support of the meeting.[997]

3.8.3.6. On 14th December 2007

On 14th December 2007 a meeting was allegedly held at Ruto's house which discussed (i) the terms of the alleged eviction plan to return the land to the

[989] *Ibid.* para 129.
[990] *Ibid.* p .49 para 133.
[991] *Ibid.* 49-50 para 134.
[992] *Ibid.* p 50 para 135.
[993] *Ibid.* pp 50-51 para 136.
[994] *Ibid.* p 52 para 142.
[995] *Ibid.* para 143.
[996] *Ibid.* p 53 para 145.
[997] *Ibid.* pp 53-4 para 147.

Kalenjins (ii) the weaponry (iii) finances to attendees.[998] However, Ruto claimed to have been at Amagoro, while Fred Kapondi was only released from prison on that very day, hence their attendance was denied. However, the helicopter video was unauthenticated, while Kapondi's attendance was vividly described.[999] Hence occurrence of the meeting was believed.

3.8.3.7. On 22nd December 2007

On 22nd December 2007, during the alleged final meeting at Ruto's house, he was apparently at Kisumu. Nonetheless, rejecting the defence version of events the Chamber found substantial reason to believe that all the alleged meetings occurred and the Network members attended.

3.8.4. Contextual Elements

The Chamber held that:

> [A]ll crimes against humanity require contextual elements to be satisfied, namely that:
> (i) an attack against the civilian population took place;
> (ii) such attack was widespread or systematic; and
> (iii) such attack was committed pursuant to or in furtherance of a State or organisational policy to commit such attack.[1000]

The majority judges defined "an 'attack' " as "a course of conduct involving the multiple commission of acts."[1001] It may also be defined as a campaign or operation while the phrase "any civilian population" refers to "groups distinguishable by nationality, ethnicity or other distinguishing features."

Therefore "the civilian population targeted can include a group defined by its (perceived) political affiliation."[1002] Between 30th December 2007 and 16th January 2008, Kalenjins armed themselves with pangas (machetes), bows, arrows, petrol cans and firearms. These large gangs identified Kikuyus, Kambas and Kisiis.[1003] Using a unified, concerted and pre-determined strategy they then attacked these perceived PNU supporters at various places.[1004]

[998] *Ibid.* p 56 para 154.
[999] *Ibid.* para 157.
[1000] *Ibid.* p 58 para 163, in accordance with article 7(1) and (2)(a), Rome Statute, *supra* note 14 and with the assistance of the Elements of Crimes.
[1001] Article 7(2)(a), Rome Statute, *ibid.*
[1002] *Ibid.* p 59 para 164.
[1003] *Ibid.* p 60 para 167.
[1004] *Ibid.* para 168.

The Chamber held that on 30th December 2006, maps were distributed by Mr. Ruto himself. According to one witness, these maps identified places at Turbo town, Kiambaa, Kapsabet and Nandi Hills town[1005] densely inhabited by Kikuyus, Kambas and Kisiis. Likewise, Kalenjin-owned houses were allegedly kept selectively safe by markings.[1006] The majority judgment held that systematic attacks display "organised nature of the acts of violence and the improbability of their random occurrence."[1007] The Network to implement the agreed-upon policy was allegedly established comprising eminent ODM political representatives, the media, former police and army members, Kalenjin elders and local leaders.[1008] Notwithstanding that "on a case-by case basis…a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human value,"[1009] for the majority judges, however, "organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population."[1010]

Several criteria were considered to qualify the Network as an organization including, whether the group, first, is under a responsible command, or has an established hierarchy. Second, "possesses…the means to carry out a widespread or systematic attack against a civilian population." Third, "exercises control over part of the territory of a State." Fourth, "has criminal activities against the civilian population as a primary purpose." Fifth, "articulates, explicitly or implicitly, an intention to attack a civilian population." Finally, sixth "is part of a larger group, which fulfils some or all of the abovementioned criteria." However, this list "do(es) not constitute a rigid legal definition, and do(es) not need to be exhaustively fulfilled."[1011]

Furthermore, at the alleged 30th December 2006 meeting, Ruto was accused of reminding the audience "that the lands and farms in Rift Valley, which historically belonged to the Kalenjins, are currently owned by the Kikuyu."[1012] As opposed to "spontaneous or [consisting of] isolated acts," to "satisfy the policy requirement"[1013] under the Rome Statute,[1014] the organizational policy must direct commitment of "such attack"[1015] which is "planned, directed or

[1005] *Ibid.* p 169 para 61.
[1006] *Ibid.* p 173 para 63.
[1007] *Ibid.* p 179 para 65.
[1008] *Ibid.* p 182 para 67.
[1009] *Ibid.* p 184 para 69.
[1010] *Ibid.*
[1011] *Ibid.* p 68 para 185.
[1012] *Ibid.* p 71 para 190.
[1013] *Ibid.* p 80 para 210.
[1014] *Ibid.*
[1015] *Ibid.* para 211.

organized." In this respect, the judges believed that Kapondi – his incarceration between 17th April 2007 and 14th December 2007, notwithstanding – "was in a position to arrange the purchase and supply of weapons to the Network."[1016]

3.8.5. "The Network's" Acts Constituting Alleged Crimes Against Humanity

On 30th and 31st December 2007, perpetrators attacked Turbo town, killing "(a)t least 4 people."[1017] Accompanying "acts of burning, destruction of property and killing targeted PNU supporters resulted in coercing them to flee the area."[1018] "Collectively," attack(s) "in the different estates of Eldoret resulted in 70 to 87 victims"[1019] causing "IDPs (to) fle(e) to Kapsabet town police station which, at its peak, sheltered approximately 7,500 IDPs from Kapsabet town and surrounding areas."[1020] In Kapsabet, "no less than 3 people (were left) dead."[1021]

Similarly, in Nandi Hills town, "(a)t least three people were killed, one person was burned alive in his car, while others were cut into pieces."[1022] Furthermore, "PNU supporters sought refuge at a Nandi Hills police station which eventually hosted approximately 32,000 IDPs."[1023] However for reasons of "judicial economy" the Chamber made no individual assessment of forcible transfer of population.[1024]

3.8.6. Individual Criminal Responsibility in the Ruto Case

3.8.6.1 Objective Elements

3.8.6.1.1. The Suspect is Part of a Common Plan with another Person

The concept of co-perpetration (joint commission) whether direct or indirect, reflected in the words "(committing) jointly with another or through another person," must go together with the notion of "control over the crime."[1025]

[1016] *Ibid.* p 79 para 205-6.
[1017] *Ibid.* p 85 para 224.
[1018] *Ibid.* p 92 para 251.
[1019] *Ibid.* p 86 para 227.
[1020] *Ibid.* p 95 para 258.
[1021] *Ibid.* p 89 para 237.
[1022] *Ibid.* p 90 para 240.
[1023] *Ibid.* p 96 para 263.
[1024] *Ibid.* p 99 para 272.
[1025] Pre-Trial Chamber II, *Bemba Confirmation of Charges Decision*, ICC-01/05-01/08-424, para. 348; Pre-Trial Chamber I, cited in *ibid.* p 105 para 290, embodied in article 25(3)(a), Rome Statute, *supra* note 14; See also *supra* note 926.

3.8.6.1.2. The Suspect with Another must make Essential, Coordinated Contributions

In *Prosecutor v Katanga and Chui,* the Pre-Trial Chamber held that:

> Designing the attack, supplying weapons and ammunitions, coordinating and moving the activities of the direct perpetrators may constitute contributions that must be considered essential regardless of when they are exercised (before or during the execution stage of the crime).[1026]

In *the Ruto case*, the Chamber believed that Ruto created the "Network" or the organization for the purpose of "evicting" PNU supporters. Furthermore, that Mr. Ruto also supervised the overall planning and was responsible for the implementation of the common plan to carry out crimes committed in the entire Rift Valley. His role, according to its majority judges, could be clearly detected throughout the series of meetings carried out between 30th December 2006 and 22nd December 2007.

With respect to the post-election violence period, the morning following the announcement of the electoral results, one Kalenjin leader allegedly received a message from Ruto saying that the "votes had been rigged" and that the Kikuyu should be attacked. The "discussion" was to attack Turbo town. To this end, the majority judges held that Ruto allegedly not only "continued funding the organisation during the attack by sending 200,000 Kenyan Shillings to one of the field coordinators,"[1027] but also "negotiated and supervised the purchase of guns and crude weapons"[1028] and "established a rewarding mechanism,"[1029] thus fulfilling "the second objective element of indirect co-perpetration."[1030]

3.8.6.1.3. The Suspect's Control over an Organized Structure of Power

The judges recalled three objective elements for the satisfaction of indirect co-perpetration. These are first, the suspect must have control over the organization. Second, the organization must consist of an organized and hierarchal apparatus of power. Third, the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect.[1031]

[1026] Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/07-717, para. 526, cited in *ibid*. p 114 para 306; See also *supra* note 927.
[1027] *Ibid.* p 115 para 309.
[1028] *Ibid.* p 116 para 310.
[1029] *Ibid.* para 311.
[1030] *Ibid.* para 312.
[1031] Pre-Trial Chamber I, *Katanga decision*, ICC-01/04-01/07-717, paras 510-518, cited in *ibid*. p 116 para 313; See also *supra* note 927.

To this end, the Chamber's majority found that Ruto established a mechanism of payment[1032] and punishment:[1033] "[T]o kill a Kikuyu was rewarded with 50000 shillings." These perpetrators would also "acquire a piece of land."[1034] One witness "was told that everyman had to go to Turbo," because if he refused to go, he would have "been beaten," therefore he felt this was "compulsory."[1035] Deference was allegedly paid to Ruto because he had been "honoured as an elder" and "as a leader in his time" was "de facto their leader and to this extent he had control over members of this community."[1036]

3.8.6.2 Subjective Elements

As a primary goal of the alleged common plan, Ruto intended to attack particular parts of the civilian population, due to their perceived political affiliation, by way of murdering, forcibly displacing and persecuting PNU supporters in the different locations (*dolus directus* in the first degree). Thus, the Pre-Trial Chamber majority judgment found that the required *mens rea* – including the discriminatory intent required for the crime against humanity of persecution – had been met.[1037] Concerning the suspects' awareness and acceptance that implementing the common plan would result in the realization or fulfillment of the material elements of the crimes, judges Trendafilova and Tarfusser concluded that "Mr. Ruto intended to implement the common plan which involved as its primary goal the commission of the crimes referred to above to the effect that he meant to engage in the conduct and cause the consequence (*dolus directus* in the first degree)."[1038]

3.9. Judge Kaul's Dissenting Judgment in *the Ruto Case*

3.9.1. Summary of the Dissenting Judgments in the Confirmation of Charges Kenya cases

During the Pre-Trial stage of *the Kenya cases*, the dissentient decision of Judge Hans-Peter Kaul rejected the evidence not only against Kosgey and Ali, but also against Ruto, Sang, Kenyatta and Muthaura. Judge Kaul's main reason was that neither the alleged "Network" in *the Ruto case* nor Mungiki in *the Kenyatta case* can qualify as an "organisation."[1039] Therefore, he declined to confirm any

[1032] *Ibid.* pp118-9. 320-3.
[1033] *Ibid.* p 119 para 324-5.
[1034] *Ibid.* para 323.
[1035] *Ibid.* p 120 para 325.
[1036] *Ibid.* p 122 para 331.
[1037] *Ibid.* p 127 para 347.
[1038] *Ibid.* p 128 para 348.
[1039] Within the meaning of article 7(2)(a), Rome Statute, *supra* note 14.

charges. Requirements of a "State" and "organisation" under the Rome Statute indicate that even though the constitutive elements of statehood need not be established, nonetheless, those "organisations" should partake of some features of a State. According to Judge Kaul's decision, three features comprise a "state-like" organisation.[1040] First, "a collectivity of persons established and acts for a common purpose over a prolonged period of time." Second, such an organization should be under responsible command or adopt a certain degree of hierarchical structure and one with the *capacity* to impose the policy on its members and to sanction them. Third, it must have the *capacity* and means available to attack any civilian population on a large scale. Judge Kaul emphasized that: "If this indispensable and quintessential element of the 'organisation' structure is excluded, I remain doubtful whether this case, thus amputated, can be argued and sustained at all."[1041]

Under the Rome Statute, crimes alleged to be part of an attack against any civilian population must be committed pursuant to the policy of a state or "organisation." Kaul J said "non-State actors, which do not reach the level described above, are not able to carry out a policy of this nature, such as groups of organized crime, a mob, groups of (armed) civilians or criminal gangs." They would generally fall outside the scope of the Statute.

3.9.2. Perpetrating Crime through a Group

3.9.2.1. A "State-Like" or "Non-State-Like" Organization?

The notions "State" and "organization" are an indication that even though the constitutive elements of statehood need not be established, those "organizations" should partake of some characteristics of a State.[1042] It is those characteristics which eventually turn the private "organization" into an entity which may act like a State or have quasi-State abilities.[1043] These provisions – to repeat – mean "that non-state actors which do not reach the level described above are not able to carry out a policy of this nature, such as groups of organised crime, a mob, groups of (armed) civilians or criminal gangs." Judge Kaul explained that:

> violence-prone groups of persons formed on an *ad hoc* basis, randomly, spontaneously, for a passing occasion, with fluctuating membership and without a structure and level to set up a policy are not within the ambit of the Statute, even if they engage in numerous serious and organized crimes. A

[1040] Article 7(2)(a), *ibid.*
[1041] Dissenting decisions in the situation in Kenya, *supra* notes 196 and 197.
[1042] Article 7(2)(a), Rome Statute, *supra* note 14.
[1043] *The Ruto case,* confirmation of charges, *supra* note 196 Dissenting Judgment unpaginated para 8.

distinction must be upheld between human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the most serious crimes of concern to the international community.[1044]

Because in *Ruto's case* the "Network" did either not exist in that form or was reflective of the tribal component of the "Network," therefore, Judge Kaul concluded that Kenya's violence during the 2007/2008 was in essence ethnically-driven. He reaffirmed his previous finding that "the 'Network,' as portrayed, is 'essentially an amorphous alliance' of 'coordinating members of a tribe with a predisposition towards violence with fluctuating membership' which existed temporarily."[1045]

3.9.2.2. Issue of Law: Interpretation of "Organizational Policy" as Part of the Jurisdictional Challenge[1046]

Judge Kaul found that the interpretation of "organizational policy" is part of the jurisdictional challenge regarding the acts concerned – which otherwise would fall exclusively under the responsibility of national jurisdictions – of international crimes and sets aside considerations of state sovereignty.[1047]

3.9.2.3. Issue of Fact: An Assessment of Facts, and by Extension Evidence, is Part of the "Jurisdiction Test"[1048]

In Judge Kaul's dissenting judgment, the Rome Statute requires that the investigation undertaken shall cover incriminating and exonerating circumstances equally as the Prosecutor is conceived in the Statute as an objective truth-seeker and not as a partisan lawyer.[1049] Justice demands as "an absolute, indispensable necessity that any such investigation must be as comprehensive, professional, expeditious and thereby as effective as possible."[1050] This standard was not attained. Judge Kaul nonetheless declared that "the charges concerning Mr Ruto and Mr Sang fall within the competence of the Kenyan criminal justice authorities as a matter to be investigated and prosecuted under Kenyan criminal law."[1051]

[1044] *Ibid.* para 12.
[1045] *Ibid.*
[1046] *Ibid.* para 22.
[1047] *Ibid.* para 25.
[1048] *Ibid.* para 36.
[1049] *Ibid.* para 45.
[1050] *Ibid.* para 44.
[1051] *Ibid.* para 60.

3.10. Sadat's Interpretation of ICC Pre-Trial Chamber's II's Split Confirmation Decision in *the Ruto Case*

The ICC's former Vice President Judge Hans-Peter Kaul's dissenting decision in the *Kenya cases* has attracted much scholarly attention. Several scholars have aligned themselves with his position referring positively to his focus on "historical context of the adoption of crimes against humanity" his "careful reasoning" and his "methodological transparency."[1052] Conversely, Leila Sadat finds "the majority view closer to the text, context, and understanding of crimes against humanity in modern international criminal law."[1053]

Sadat disagrees with Judge Kaul's assertion that "only states and quasi state like organizations following criminal policies may commit crimes against humanity."[1054] In her view, not only does Judge Kaul's historical approach, derived from the Nuremberg precedent, "not accurately describe the modern law." But worse, "for the ICC to depart from the customary international law understanding of crimes against humanity in a manner neither required nor implicit in, the text of Article 7 of the Rome Statute could potentially undermine the legitimacy and universality of the Statute itself."[1055] In particular, Sadat argues that Judge Kaul's conclusion "that 'amorphous tribal groups' cannot – as a matter of law – formulate the kind of policies that may engender the commission of crimes against humanity," is wrong. This is because, according to Sadat, such reasoning "would arguably result in an under-inclusive conception of crimes against humanity that fails to encompass the diverse frame that such crimes can take especially outside the political landscape of Europe."[1056] However she concedes that Judge Kaul's dissent raises two legitimate concerns. First, about the ICC's "capacity to absorb the cases being sent to it." Second, about "the prosecutor's overall strategy." Nevertheless, for Sadat "re-shaping the technical requirements of the court's substantive law in order to protect its workload or to correct a perception or prosecutorial overreaching,"[1057] is the wrong solution.

[1052] Claus Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 Kenya Decision" (2010) *Leiden Journal of International Law*, 23, 870.
[1053] Sadat, "Crimes Against Humanity," *supra* note 193 p 335.
[1054] *Ibid.* p 336, citing Judge Kaul's Dissent in the "Investigation into the Situation in the Republic of Kenya" no.ICC-01/09. 1/83. 31st March 2010. *Ruto case* Article 15 Decision http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf<accessed 7th July 2014> Warrants Authorization judgment 31st March 2011, majority judges Ekaterina Trendafilova and Cuno Tarfusser.
[1055] *Ibid.*
[1056] Sadat, "Crimes Against Humanity," *supra* note 193 p 336.
[1057] *Ibid.*

She traces the origins of crimes against humanity, as positive law, back to the Nuremberg, and (subsequently) Tokyo, Tribunal. Although certain initiatives are afoot[1058] to establish a comprehensive statute criminalizing crimes against humanity, none has been adopted.[1059] Sadat notes that departing from the Nuremberg precedent, the *Tadić case* held, that as a matter of customary international criminal law, no armed conflict nexus was required for crimes against humanity prosecutions.[1060] Moreover in *Kunarac,* the ICTY held that "neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan.' " At the adoption of the Rome Statute, two debates revolved around whether the attack should be "widespread or systematic." And these debates led to the inclusion of the "state or organizational policy" element.[1061] Its proponents argued that existence of a policy…unites otherwise unrelated acts so that it may be said that in the aggregate they collectively form an attack."[1062] The addition of the "policy element," according to Sadat, "modified the definition of crimes against humanity under customary international law."

However: "The meaning of organization in Article 7(2) is even less clear."[1063] On one hand, the legendary Bassiouni "has insisted that the policy must be attributable to a state."[1064] On the other hand, others disagree. For example, to Machfeld Boot, Gordon Dixon and Christopher Hall: "Clearly, the policy need not be one of a State. It can also be an organizational policy. Non-State actors, or private individuals, who exercise de facto power can constitute the entity behind the policy."[1065] In not dissimilar terms, in the *Barbie case* more than a decade prior to enactment of the Rome Statute, the French Advocate General put the:

> question whether the notion of a State system or State ideology of which so much has been spoken is not rather too restrictive. Are there not forces and organizations whose powers might be greater and whose actions might be more extensive than those of certain countries represented institutionally…[1066]

[1058] 1996 International Law Commission Draft Code of Crimes against the Peace and Security of Mankind: Titles and Texts of Articles on the Draft Code of Crimes against the Peace and Security of Mankind Adopted by the International law Commission at its Forty-Eighth Session (1996) UN GAOR Int. Law Comm., 48th Sess., UN Doc A/CN.4/L.532

[1059] Crimes against Humanity Initiative launched in 2008; See also Heller, "A Sentence-Based," *supra* note 152.

[1060] Sadat, "Crimes Against Humanity," *supra* note 193 p 345.

[1061] *Ibid.* p 352, citing Darryl Robinson, "Developments in International Criminal Law" (1999) *American Journal of International Law,* 93, 43-51.

[1062] *Ibid.* p 353 citing Herman Von Hebel and Darryl Robinson "Crimes within the Jurisdiction of the Court" in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 79–126.

[1063] Paraphrased in Sadat, *ibid.* p 354.

[1064] Quoted in *ibid.*.

[1065] Machfeld Boot, Gordon Dixon & Christopher K. Hall, "Article 7: Crimes Against Humanity" in Otto Triffterer (ed.) *Commentary of the Rome Statute of the International Criminal Court* (München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 1999) 117 p 123.

In the *Ruto case*, because Judge Kaul "did not agree that the contextual elements of crimes against humanity had been properly established, particularly as regards the notion of 'state or organizational policy'" therefore he "did not agree that a crime falling within the jurisdiction of the Court 'has been or is being committed.'"[1067] Thus Sadat concludes that "the Ruto case provides a particularly helpful analysis concerning which groups could satisfy the 'organizational policy requirement.'"[1068]

Turning to analyze the *Ruto case*, she observes that the PTC majority noted that the "policy requirement" was eventually abandoned by the UN *ad hoc* tribunals. Referencing the ICTY *Blaškić Trial decision*, "the majority noted that the plan or policy to commit the attack may be inferred from the commission of 'a series of events' and noted eleven possible contributory factors."[1069] The majority read "state" and "organizational" disjunctively to conclude that "'the formal nature of a group and the level of organization should not be the defining criterion.' Instead, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values."[1070]

Thus in Sadat's opinion of *Ruto's case*, regarding the broader PTC majority's view, "the organization need not be 'state-like' and the policy need not have been conceived at the highest level of the state, but that 'regional or even local organs of the state could satisfy the requirement of 'state-like policy.' "[1071] Conversely, in Judge Kaul's dissentient view, "the evidence suggested 'chaos, anarchy, a collapse of State authority in most parts of the county and almost total failure of law enforcement agencies' but not a crime against humanity."[1072] Judge Kaul rejected the ICC's use of ICTY case law. Instead, according to Sadat, Judge Kaul endeavored to link crimes against humanity in article 7 of the Rome Statute to the Nuremberg historical experience. His:

> opinion suggests that the majority's view may infringe on State sovereignty,' 'broaden the scope of possible ICC intervention almost indefinitely' and turn

[1066] *Chambre criminelle de la Cour de Cassation, jugement* of 20th *Décembre* 1985.

[1067] *Ibid.* p 364.

[1068] *Ibid.* p 365.

[1069] *Ibid.* p 368.

[1070] *Ibid.* citing *the Ruto case,* Article 15 Decision, majority decision, *supra* note 1054 para 90.

[1071] *Ibid. the Ruto case,* Article 15 Decision Dissent, para 82.

[1072] *Ibid.* Sadat, "Crimes Against Humanity," *supra* note 193 p 369

> the ICC…[into] a hopelessly overstretched, inefficient international court, with related risks for its standing and credibility.'[1073]

Thus for Sadat, on Judge Kaul's decision, suggests that a pure textual and historical exegesis could provide the appropriate test. Conversely, on their part, the Trendafilova-Tarfusser majority defined "organization" broadly. Therefore "the majority focused principally on the gravity of the harm, the brutality of the violence, its widespread and systematic nature, and the preliminary stage of the proceedings"[1074] guided by faithfulness to the ICC's mandate to "protect human values."

Notwithstanding the above conflicting interpretations applied by the majority and dissenting judgments to construe crimes against humanity in *Ruto's case*, nonetheless Sadat emphasizes that the existence of a policy element remains but *one* way to distinguish between ordinary and international crimes, and thereby establish a basis for international jurisdiction. Judge Kaul recognized that jurisdiction can be established on multiple grounds.[1075]

Consequently, Sadat supplies two additional pillars to support his decision rejecting the ICC's jurisdiction in the *Ruto case*. First, reference to: "Article 22's admonition to construe definitions of crimes 'strictly,' with any benefit of the doubt accruing to the accused."[1076] Second, reference to the principles of treaty interpretation found in the Vienna Convention of Treaties. The Convention requires reference to the "ordinary meaning to be given to the terms of the treaty in their context and in light of [the treaty's'] object and purpose."[1077] She accuses Judge Kaul of interpreting the use of state and organizational in the same phrase under article 7(2)(a) of the Rome Statute, to mean that the only organizations that can partake crimes against humanity are those that possess some characteristics of a state.

In absence of a clear interpretation however, "the Vienna Convention… examines 'the preparatory work of the treaty and circumstances of its conclusion.'"[1078] Sadat thus dismisses the importance of the policy element of the definition of crimes against humanity in article 7, since it was merely added as an afterthought to exclude random or isolated acts from falling under ICC's jurisdiction.

[1073] *Ibid.*
[1074] *Ibid.*
[1075] *Ibid.* Sadat, "Crimes Against Humanity," *supra* note 193 p 370.
[1076] *Ibid.*
[1077] Article 31, Vienna Convention on Treaties, *supra* note 936, cited in *ibid.*
[1078] *Ibid.* p 371.

Her analysis of the PTC majority decision in *Ruto's case* is instead based on the notion that the Rome Statute is the constitution of an international organization. Therefore to the extent that it serves as a constitutional instrument its interpretation should not be based on literal reading of its text but using a "broadly purposive and teleological approach"[1079] sensitive to its mandate. Conversely: "Canons of strict construction are the appropriate guide to interpreting the legislation within the Statute…"[1080] such as the Rules of Evidence and Procedure. Given "the complete silence of not only the Statute but also the Elements on this question [of what the drafters of the Rome Statute meant by 'organizational policy' in Article 7(2)(a)] the Statute invites the judges to turn to customary international law pursuant to Article 21(b)."[1081]

3.11. Jalloh's Interpretation of Crimes Against Humanity

Underlying these competing views over how to correctly interpret article 7(2)(a) of the Rome Statute, are contrasting broad and narrow normative visions of the role of international criminal law and differing concerns over the implications of possibly expanding the jurisdiction of the ICC beyond the intent of the framers of the Rome Statute.[1082] Charles Jalloh, referring to Claus Kress's argument, says that the PTC majority approach in *the Kenya cases* can be seen as favoring a teleological understanding of crimes against humanity. It views the goal of international criminal law as promoting basic human values, and a broader or more expansive understanding of the state or organizational policy requirement as an ideal method of accomplishing that goal. Teleology tends to view customary international law as evolving to allow the ICC's jurisdiction to cover an expanding category of mass crimes that perhaps could eventually include even purely private organizations. On the other hand, Judge Kaul's more traditional approach could be seen as focusing the ICC on the narrower path of preventing impunity for truly international crimes sponsored by the State or its organs. His conception of crimes against humanity would seemingly keep the jurisdictional reach of international criminal law within the narrow confines of a set of strictly delineated core crimes and factual circumstances that are not necessarily punishable within the domestic legal system in which they occur, and would additionally ensure that the ICC does not infringe on State sovereignty by overstepping the boundaries of its jurisdiction. This perspective perhaps reflects a realist view to the effect that the challenge of fighting impunity necessarily implies a reasonable burden sharing between states and

[1079] *Ibid.*
[1080] Leila Nadya Sadat, "The Legacy of the ICTY: The International Criminal Court" (2002-2003) *New England Law Review*, 37(4), 1073-1080, cited in *ibid* pp 371-2.
[1081] *Ibid.* p 372.
[1082] Jalloh, "What Makes a Crime," *supra* note 194 pp 410-1.

international criminal tribunals possessing limited jurisdiction and resources like the ICC.[1083] Under this view, the contours of the core crimes would presumably be clearly defined, interpreted narrowly, and applied precisely to situations so obviously within the parameters of the Court's jurisdiction as to be uncontroversial.[1084]

For Jalloh, the problem is that, though hard to prove definitively, both the Trendafilova-Tarfusser majority as well as Judge Kaul's interpretation of the contextual element of crimes against humanity in article 7(2)(a), may be correct from the standpoint of the text and perhaps even the legislative intent of the Rome Statute. We have already seen above that the text of article 7 endorses at least two differing understanding of the core thrust of the crime, presumably to appease states on different sides of the issue during the 1998 Rome Conference negotiations. Nonetheless, the unofficial reports of academics involved in negotiating article 7 offer helpful, but sometimes conflicting, information in terms of which of these views ought to prevail. Some, like Darryl Robinson, suggest that the provision was the result of several pressures that had to be worked through to achieve political compromise between the countries that worried that crimes against humanity could be used as a backdoor to intrude into national sovereignty and those that sought a workable definition that reflected positive developments in the law. On the other hand, others like Cheriff Bassiouni, who chaired of the drafting committee of the Rome Statute negotiations, have weighed in on this particular debate only to assert that the organizational policy requirement was intended to apply only to organs of the State such as the police, military, intelligence, or other similar organizational units. In his view, article 7(2)(a) will therefore not extend to other organizations that are purely non-state actors.[1085] For this reason, in his view, the Kenya Authorization majority decision is a serious cause for concern, because it distorts the intention behind having the "state-like" or "organizational policy" requirement as a jurisdictional trigger by broadening its ambit further than was initially envisaged.

Returning to Jalloh "the bulk of the States focused more on the magnitude and scale of the crime as the core justification of the internationality of the offense as opposed to the organizational nature and character of the entity behind its commission."[1086] Consequently amid the Rome negotiations, "the Sri Lankan delegate" opined that the "state or organizational policy" requirement was "also

[1083] *Ibid.* pp 411-2.
[1084] *Ibid.* p 412.
[1085] *Ibid.* pp 413-4.
[1086] *Ibid.* p 414.

intended to cover the policy of non-governmental entities."[1087] Jalloh alludes to the "Basic Human Values" Test that the majority in *Ruto's case* propounded focuses less on the nature of the group and more on the harm and the capabilities of the group engaging in the proscribed conduct. It implicitly assumes that the existence of a state, state-like organization, or another type of organized entity would suffice to trigger crimes against humanity. This conclusion, from a purposive perspective of wanting to extend the reach of the ICC to cover any organized non-state actors, seems reasonable even if in practice it may pose other types of new challenges. The benefit is that reading the organization requirement liberally, might be more realistic in a non-Western European setting. This is important given that, in certain parts of the world such as Africa where all of the ICC's current caseload is from, the state may be so weak that it is incapable of asserting effective control over the territory and in some instances may even be on the verge of collapse. Therefore:

> In such settings, informally organized armed groups or rebels may have already played a role in undermining the State or could come together at the last minute to fill the vacuum left by the State and, in so doing act for a common nefarious purpose....the Pre-Trial Chamber majority did was nothing more than flesh out and apply a vague word or phrase in a treaty provision to the specific circumstances.....the natural and organic process of the development of statutory provisions and their purposive interpretation and application to concrete situations and cases.[1088]

Judge Kaul, who clearly endorsed what Jalloh terms a "criminal State thesis" of crimes against humanity, which permits the ICC to expand its jurisdiction infinitely to cover any massive or heart-rending human rights violations.[1089] Such:

> expansion, which perhaps is driven by the substantiality of the crimes committed, may reflect the moral outrage that we naturally feel – the kind of push that compels many international criminal lawyers to want to ensure that someone pays for the heinous crimes....unacceptable and thus open to contestation. If the latter, the question might arise whether that judicial position might not generate pushback from States that could undermine the current and future direction of the permanent international penal court.[1090]

Thus, removing what the negotiating countries agreed to in good faith arguably infringes on the principles of State consent and sovereignty by interfering with

[1087] *Ibid.* p 415.
[1088] *Ibid.* p 416.
[1089] *Ibid.* p 417.
[1090] *Ibid.* p 418.

the competence of legal systems that more appropriately have jurisdiction over crimes that have occurred within their own territory.

Proof of the Rome Statute's preference for national action to combat international crimes, is amply confirmed by three features. First, the limited set of core crimes included in its provisions. Second, the endorsement of the principle of complementarity – as opposed to that of primacy, which obtains in the *ad hoc* tribunals – as the cornerstone upon which the entire ICC system was founded. Third, unlike other international criminal tribunals:

A key implication of Judge Kaul's argument in *the Kenya cases* was that having a looser conception of State or organizational policy widens the boundaries of crimes against humanity in such a way that it would likely require the ICC to be involved in infinitely more situations than a narrower interpretation would. In this view, the expectations of victims that the international community will intervene to render justice on their behalf would be heightened.[1091]

But if victims' hopes are raised and dashed, because the ICC cannot realistically investigate or prosecute in every possible crime base within its jurisdiction, there would be even greater pressure on the Court to justify why it is choosing to get involved in some situations but not others. Jalloh concludes that: "This could lead to arbitrary situation and case selection, on the part of the prosecutor, which might in turn leave the institution vulnerable to the perception that it is not capable of rendering justice for all, thereby hurting its legitimacy."[1092] Hence we:

> should try to broaden the justice net and bring such entities to international prosecutions to send the symbolic message that their depredations are totally unacceptable not just to one society, but to all of human society [...] through an amendment to the Rome Statute [...] it allows for a more principled approach to the development of international criminal law. The recent decisions of the ICC in response to the post-election violence in Kenya reveals deep confusion in the Rome Statute definition.[1093]

He recommends first, that to avoid potentially unproductive and endless judicial and academic debates on the issue, the Rome Statute needs to be amended. Second, change through an amendment to the Rome Statute provides for a more coherent and more consistent development of the law.[1094]

[1091] *Ibid.* p 419.
[1092] *Ibid.* p 420.
[1093] *Ibid.* p 435
[1094] *Ibid.* p 436.

3.12. Ohlin's Organizational Criminality

3.12.1. The Search for an Alternative to JCE

Ohlin proposes an amendment to the Rome Statute which "could explicitly reject JCE III and vicarious liability for foreseeable actions falling outside the scope of the agreed plan."[1095] In brief, he codifies JCE and separates it into two separate modes of liability. First, co-perpetrating a joint criminal enterprise.[1096] Second, "aiding and abetting a joint criminal enterprise."[1097] Ohlin's first mode of liability would be limited to individuals who (1) "participate in a joint criminal endeavor at a high level;" and (2) have the intent of furthering the criminal purpose of the group endeavor;" and (3) "are indispensable to the success of the joint criminal endeavor."[1098] His second mode would allocate liability to those who do not satisfy one of the three necessary conditions for co-perpetrating a joint criminal enterprise. These include low-level participants who neither intend to further the criminal purpose of the group, nor qualify for vicarious liability, given their insufficient contributions.

3.12.2. The Common Law and Civil Law Polarity

As Ohlin outlines above, international criminal law oscillates between two modes of perpetration. The pendulum swings from the common law approach of conspiracy, and its functional analogue of joint criminal enterprise, to the civil law approach of co-perpetration. However, "because general principles of domestic criminal law are in a state of radical pluralism therefore harmonization at international level becomes problematic."[1099]

3.12.2.1. The Common Law Influence

3.12.2.1.1. Impact of the *Nuremberg Precedent*

The ICTY, ICTR, and other *ad hoc* tribunals (including, to a certain extent, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia) have applied JCE particularly the JCE III standard of foreseeability

[1095] Ohlin, "Organizational Criminality" *supra* note 195 p 714, citing Andrew Ashworth, "A Change of Normative Position: Determining the Contours of Culpability in Criminal Law" (2008) *New Crim. L Rev.* 11, 2, 232-256, footnote 110 "Rejecting John Gardener's Argument for Justifying Liability for Unintended but Foreseeable Consequences."
[1096] *Prosecutor v Kvočka*, Trial Chamber Judgment Case No. IT-98-30/T, paras 282-4 ICTY 2nd November 2001.
[1097] *Ibid.* cited in Ohlin, "Joint Intentions," *supra* note 135 p 715.
[1098] *Ibid.*
[1099] Ohlin, "Organizational Criminality," *supra* note 195.

applied in *Tadić*,[1100] which is similar to liability of co-perpetrators for acts reasonably foreseeable to the defendant. It originated in the US case of *Pinkerton v US*,[1101] known as the common law doctrine of conspiracy. The distinction between major and minor participants in the common plan or endeavour is irrelevant to the doctrine.[1102] All members are convicted of the same thing, i.e. commission of an international crime through participation in a JCE, whether the defendant contributed to the common plan intentionally (JCE I), or whether a defendant participated when it was reasonably foreseeable that a crime would be committed (JCE III).

"The famous common-sense definition of an accomplice, from Learned Hand, was that an accomplice should 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.' "[1103] Like US law, so also Kenyan law makes it plain that no difference in liability exists between principal and secondary offenders who may aid or abet an offence either before or after the fact.[1104]

For sentencing purposes, therefore, under domestic law any organizer, financier or planner of Kenya's post-2007 conflicts are accomplices to the atrocities and are all regarded as principals.[1105] Because many of the common law military cases from the World War II were relied upon by the ICTY, therefore *Tadić* language referred to individuals who were "concerned in the killing." The common law JCE doctrine therefore eviscerates the distinction between principals and accomplices regarding classification of perpetration in replication of what commentators like Sadat refer to as "the Nuremberg precedent."[1106] Conversely the German Penal Code provides for reduced sentences of accomplices as expressed in a mathematical formula.[1107] Although ICC Trial Judge Adrian Fulford believes, *inter alia*, that a rigorous distinction between principals and accessories is unnecessary in a legal system like the ICC, which lacks different sentencing ranges for principals and accomplices, however, in the *Lubanga case* he rejected the control theory of perpetration.[1108]

[1100] ICTY Appeals Chamber (1999) p 108, cited in Ohlin *ibid.*
[1101] *Supra* note 869; See also *supra* note 948.
[1102] A. Cassese, *International Criminal Law* (1st edn.) (Oxford: Oxford University Press, 2003) p 182, cited in Ohlin, *ibid.*
[1103] *United States v Peoni*, 100 F.2d 401 (2nd Cir. 1938).
[1104] Kenyan Penal Code, *supra* note 540.
[1105] Similarly 18 US Code § 2(a), cited in Ohlin, "Organizational Criminality," *supra* note 195 p 109, footnote 10.
[1106] *Supra* section 3.9.
[1107] § 49(1) Criminal Code of Germany, cited in Ohlin, "Organizational Criminality," *supra* note 195 p 111 footnote 21.
[1108] See Separate Opinion of Judge Adrian Fulford, Judgment pursuant to Article 74 of the Rome Statute, *supra* note 14; See also *Lubanga*, ICC-01/01-01/06-2842, TC I, ICC, 14th March 2012 ("Separate Opinion of Judge Fulford, *Lubanga* Trial Judgment") para. 9 and 11 pp 111-112, cited in Ohlin, *ibid.* footnotes 22 and 23.
[1109] *Ibid.* p 162.
[1110] *Ibid.* p 163.
[1111] *Ibid.,* citing Roxin, *Täterschaft, supra* note 130 pp 298-300.
[1112] Ohlin, "Organizational Criminality," *supra* note 195 p 112.
[1113] *Ibid.* p 113.
[1114] *Ibid.*
[1115] *Eichmann Trial, supra* 855, cited in *ibid.*
[1116] *Ibid.*
[1117] *Ibid.* p 113-4.

3.12.2.2. The Civil Law Influence

3.12.2.2.1. Control Theory under German Criminal Law

Neha Jain explains that under the German law, a principal to the crime commits the offences himself (direct perpetrator) or through another person (indirect perpetrator), or jointly with another principal (co-perpetrator). An accessory either intentionally induces another person to intentionally commit an unlawful act (abettor or instigator) or intentionally renders aid to another in the latter's intentional commission of an unlawful act (aider).[1109] She observes that the most widely endorsed theory is that of act-domination or control, rather than objective or subjective[1110] criminality. Control theory thus recognizes that the perpetrator is the subject of the offence, and his conviction is tied to the unlawfulness of the elements of the offence, rather than the blameworthiness of his intentional attitude.[1111]

For Ohlin's however, the ICC is particularly concerned to find an appropriate sorting between principals and accessories "inspired by the civil law."[1112] He attributes Roxin's initial development of the control theory "as a way of cashing out and defining the concept of co-perpetration, which refers to actors who cooperate along the horizontal level."[1113] Instead, the institutional version of indirect perpetration incorporates "the notion of *Organisationsherrschaft* – perpetration through an organization, or more properly, an organized apparatus of power,"[1114] as witnessed by Roxin while viewing the *Eichmann trial*.[1115] This in turn differs from situations "where an individual uses an underling to accomplish the physical perpetration of the crime,"[1116] although also termed as indirect perpetration.

Unfortunately, because many senior political, military or militia leaders do not physically perpetrate international crimes therefore few of those who appear before international courts as defendants fulfil either criteria for indirect perpetration or co-perpetration. Neither did they *directly* control a vertical military organization as required for indirect perpetrators.[1117] Instead, in the *Kenya cases*, the ICC "developed a brand new […] hybrid mode of liability

known as indirect co-perpetration."[1118] This mode of liability simultaneously maintains "the distinction between perpetrators and accomplices and finds a way to convict culpable parties under the banner that they felt most accurately captured their level of responsibility."[1119]Ohlin concludes that, the only way to avoid the creation of a deformed monster, with mismatching joints, is to recognize the need for a *sui generis* procedural system. However he questions: First, "What would count as a distinctively *international* mode of liability?" Second, "is it really true that international crimes are necessarily committed collectively?"

3.12.3. Collectivism as a Third Way

Every case at the ICC, ICTY, and ICTR has involved multiple perpetrators.[1120] This is because the fictional lone *génocidaire* imagined in the scholarly literature does not exist in actual fact.[1121] Even war crimes contain a collective context which makes such cases important to the international community. Consequently "at the ICTY, where literally almost every case involves either JCE or command responsibility, or at the ICC, where indirect perpetration, co-perpetration, and the mode of liability under Article 25(3)(d) account for all of the cases prosecuted to date."[1122] Hence: "The task is to develop a theory of participation that mediates between two crucial and seemingly conflicting *desiderata*: recognizing that most atrocities are performed by irreducibly collective endeavours, yet convicting individuals solely for their individual participation in these collective projects."[1123] Ohlin argues that "recent doctrinal developments make clear that crimes against humanity are inherently collective. Most courts recognize that one element of the 'widespread or systematic attack' prong is the requirement that the attack be made pursuant to a state or organizational plan or policy."[1124]

"The Kenya cases….demonstrate how the concept of the 'organization' straddles both the mode of liability and the substantive crime itself, thus doing double duty in the analysis."[1125] Ignoring the aspects of the indictments by which some suspects (Sang, Ali) were alleged to have contributed, Ohlin emphasizes that

[1118] *Ibid.* p 114.
[1119] *Ibid.*
[1120] *Ibid.* p 116.
[1121] Jennifer Balint, "Dealing with International Crimes: Towards a Conceptual Model of Accountability and Justice" in Alette Smeulers and Roelof Haveman (eds.) *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008) 311-334.
[1122] *Ibid.*
[1123] *Ibid.* p 117.
[1124] *Ibid.* p 118.
[1125] *Ibid.* p 119.

both *Kenya cases* "were charged by the Office of the Prosecutor under the mode of liability known as indirect co-perpetration" and the Pre-Trial Chamber was thus "required to demonstrate that the defendant or his co-perpetrators had control over a hierarchical organization."[1126]

The PTC held that the indirect co-perpetrator's orders given would be carried out automatically. Concerning *the Ruto case*, its majority judges "confirmed the charges by concluding that the organization consisted of the 'Network', an ad hoc group of perpetrators who co-operated to commit the attacks."[1127]

In both cases, the court confirmed the charges after concluding that the organizations met Roxin's legal standard for what constituted an organization for purposes of *Organisationsherrschaft*, including the fungibility of its members, any one of which could be replaced by another individual. It also concluded that orders given by the indirect co-perpetrator would be carried out automatically, as a matter of course, by virtue of the defendant's authority and control over the organization.[1128]

Not only did the organizations underpin the mode of liability, but they also established the core of the substantive doctrine, i.e. the requirement of an organizational plan or policy. In both cases: "There is a real question here as to whether this type of organization has a sufficiently robust structure to meet the Rome Statute standard for crimes against humanity."[1129] In particular, the "Network" in *Ruto's case*:

> appears to be little more than the mere aggregation of the individuals committing crimes. Thus *any* widespread or systematic attack would necessarily qualify as having an organizational policy, since one can *always* aggregate the individual perpetrators and define them as a Network with a policy to commit the relevant crimes. But that reduces the requirement to a nullity. Whatever 'organizational policy' means, it surely refers to something more than the very criminal behaviour charged.[1130]

Ohlin bemoans the "the very recent trend is to rely on the collective organization both to establish the relevant mode of liability *and* to meet the requirements of crimes against humanity." This is seen from the fact that the 'Network' "does not

[1126] *Ibid.*
[1127] *Ibid.;* See *Ruto et al*. Confirmation Decision majority judges January 2013, *supra* note 196 paras 314–15 pp 116-7.
[1128] *Ibid.* However, the ICC declined to confirm the charges against Kosgey, *ibid.* para. 293.
[1129] *Ibid.* p 120.
[1130] *Ibid.*

appear to have a definite and continuing structure that is distinct from the criminal acts alleged in the charging document."[1131] Doctrinally:

> the organization features prominently *as an actor*, in the sense that international criminal law already recognizes that an organization of individuals, configured in a particular manner and with certain attitudes, is capable of exercising rational agency. This rational agency includes the formation of goals and desires (a policy), as well as the formation of a rational plan of action to achieve that result (a plan).

3.12.4. Collective Attribution

The "collective approach entails multiple elements. First, it recognizes that international crimes are committed not just through an organization, but sometimes by an organization."[1132] Both co-perpetration as well as Roxin's control theory of perpetration under the civil law approach are problematic. Their accounts "of the co-operation among the leadership-level defendants residing at the horizontal level" is insufficient. Indeed, "to describe mass criminality, Roxin's account focuses on the vertical organization that is used as an instrument of power at the behest of a single, indirect perpetrator."[1133] Equally problematic is "the common law approach" of "identifying everyone in the fact pattern, regardless of mental state, hierarchical position or level of contribution, as being a member of a massive JCE or conspiracy." Such conspiracies, however are "not an organization at all" but "it is an undifferentiated mass without internal structure."[1134]

Instead it is essential for international criminal law to "theorize about action by an organization without completely losing the individual."[1135] First, consider the notion of collaboration and joint intentions. Ohlin deploys rational choice theory to infer that "groups that exhibit these joint intentions necessarily engage in rational deliberation and planning. The notion of planning is implicit in the construction of joint intentions because the intention for the group to commit the crime is directly related to a consideration of how the crime will be performed."[1136] It is essential to distinguish organizational criminality from "an

[1131] *Ibid.;* See also T.O. Hansen, "The Policy Requirement in Crimes Against Humanity: Lessons From and for the Case of Kenya" (2011) *George Washington International Law Review,* 43(1), 1-41 pp 22–3.
[1132] *Ibid.* p 122.
[1133] *Ibid.*
[1134] *Ibid.*
[1135] *Ibid.* p 124.
[1136] *Ibid.* On the relationship between rational agency and planning, footnote 76, citing M.E. Bratman, *Intention, Plans, and Practical Reason* (Cambridge, MA: Harvard University Press, 1987) 14–27.

ersatz joint intention" or spontaneous social disorder since "there must be *some* co-ordination and the parties must be consciously aware of the co-ordination"[1137] so as to "mesh sub-plans." Second: "In Bratman's terms, "meshing of sub-plans, or the idea that division of labour must be considered lest the same individuals perform inconsistent actions and therefore *inadvertently* frustrate the completion of the crime."[1138] Hence: "This co-ordination (or attempted co-ordination) is essential for collective criminality to occur."[1139]

Third, in international criminal law, the meshing of sub-plans (and the division of labour it entails) invariably brings with it a division of labour regarding who will direct which subordinates. Ohlin explains how some individuals bring to the collective effort a very special talent, i.e. "the ability to control a vertical organization under their disposal" It is precisely for this reason that the recent ICC cases have relied so heavily on indirect co-perpetration as a mode of liability."[1140] Because:

> *co-ordination* and division of labour does not dictate which defendant will commit which *actus reus*– that would represent small-scale criminality more appropriate for the domestic context. Rather, division of labour entails that each defendant will be tasked with *indirectly* accomplishing various results, depending on the tools, and human capital, at his or her disposal.[1141]

It follows that "members of the vertical organization who carry out the wishes of the organization that deploys them are not part of (nor privy to) the deliberation and co-ordination carried out by the horizontal organization. As such, it cannot be said that they share a joint intention with the others in the horizontal organization."[1142]Instead: "They simply receive orders."[1143]

3.12.5. Critique of Ohlin's Joint Intentions Theory

For Jain, Ohlin's "'joint intentions' is a necessary but not sufficient account of perpetration. It has nothing to say…on the objective or *actus reus* elements required for criminal liability." Rather "[t]his proposition is that each participant must have the direct intent to commit the crime and that mere *dolus eventualis*

[1137] *Ibid.*
[1138] *Ibid.*
[1139] *Ibid.* p 125, citing M.E. Bratman, "Shared Valuing and Frameworks for Practical Reasoning" in R.J. Wallace, R. Kumar and S. Freeman (eds.) *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2006) 10.
[1140] *Ibid.*
[1141] *Ibid.*
[1142] *Ibid.*
[1143] *Ibid.* p 126.

would not suffice."[1144] Ohlin's first mode of liability would be limited to individuals who (1) "participate in a joint criminal endeavor at a high level." (2) "have the intent of furthering the criminal purpose of the group endeavor;" and (3) "are indispensible to the success of the joint criminal endeavor."[1145] The second mode would allocate liability to those who do not satisfy one of the three necessary conditions for co-perpetrating a joint criminal enterprise. These include low-level participants who neither intend to further the criminal purpose of the group, nor qualify for vicarious liability given their insufficient contributions. For Jain, Ohlin's "'joint intentions' is a necessary but not sufficient account of perpetration. It has nothing to say…on the objective or *actus reus* elements required for criminal liability." Rather "(t)his proposition is that each participant must have the direct intent to commit the crime and that mere *dolus eventualis* would not suffice."[1146]

3.13. Conclusion

The Akiwumi Commission of Inquiry held that various atrocity crimes had been committed in Kenya throughout the 1990s. Hence it recommended, *inter alia*, prosecution of suspects who included high-ranking government officials. However, no action was taken. Consequently, by 2007 as people were emboldened, the clashes became more spontaneous. I distinguish between Husak's test of criminalization, Kenyan criminal law and international criminal law. Husak's minimalist theory of criminalization insists on *a right not to be punished*. Hence the prosecutor should show that the state shall substantially gain from prosecuting. Conversely, under domestic criminal law, the state possesses a *power to punish*. An indigent accused's right to be provided with an advocate at state expense under article 50(2)(h) of Kenya's new Constitution accrues only where a substantial right is at stake. Hence the individual must show that he shall substantially lose from the prosecution. Which of the two standards *is* reflected in the Rome Statute? Which one *should* be reflected? Some contend that the international community should not require a substantial interest to prosecute, as this would be too underinclusive. To others, the Rome Statute should provide guidelines to explicitly guide the ICC Pre-Trial Chamber and ICC Prosecutor regarding the criteria to consider in determining whether or not to prosecute. So as to be neither underinclusive, nor to overcriminalize, an intermediacy test should be required.

The problem with Roxin's control theory of perpetration is that the meaning of control depends on incomplete actions which create an opportunity for other

[1144] Jain, "Control Theory," *supra* note 862 p 191.
[1145] *Ibid.*
[1146] *Ibid.* p 191.

low-level actors to complete the crime. Such notions of "risk" are culturally-relative. In the Kenya situation the ICC Pre-Trial Chamber II was divided regarding the interpretation of the facts. For the majority judges, "the Network" in *Ruto's case* as well as Mungiki in *Kenyatta's* is a "state-like organization." Conversely, the dissenting judge in both found that the alleged Kenyan crimes can be redressed by the domestic criminal justice system.

This chapter focused on the fact that Kenya's post-2007 conflicts were apparently caused by informal organizations. Increasing risks of harms to others is criminalized by the law of endangerments. Depending on a given culture, people who associate with violent informal groups may be accused of generating anxiety to bystanders, contrary to public order law. Does such an offence fall within the provisions attributing individual criminal responsibility under the Rome Statute? Should endangerments be the concern of international criminal justice? Or does "associational" informal violence amount to overcriminalization? The issue of whether the ICC Trial Chamber can re-characterize indirect co-perpetration and convict an offender for a different crime shall be addressed in the next chapter. The current chapter's ethical dilemmas are attributable to:

> [(t)he perpetrator (being) part of and act(ing) within the consciousness that he is part of a common project not rank-and-file perpetrators but rather persons in positions of authority…whose role in bringing it about is sometimes greater than that of the physical perpetrator.[1147]

This chapter traced the background to "invisible violence" in Kenya, by comparing the post-2007 Waki Report with the decade earlier Akiwumi Report. These respective official commissions had different compositions, mandates and ultimately arrived at distinctly different conclusions and recommendations. Most significantly, most analyses recognize the retributive components in the Waki Commission's recommendations which *directly* endorse *inter alia* a special criminal tribunal as an escalating response to post-2007 conflicts. In this respect, the Waki Commission provided ratcheted timelines with escalating sanctions so that parliament was effectively bound to either enact enabling legislation to prosecute mass atrocities or risk the prosecution seeking extradition of the suspects to the ICC. In lieu of domestic tribunals by mid-July 2009, Judge Waki therefore transmitted a secret envelope containing names of various suspects to the ICC Chief Prosecutor. The chapter identifies a problem with the Rome Statute which lacks a clear rule attributing individual criminal responsibility to suspected persons who perpetrate certain forms of what Fletcher calls, derivative crimes.[1148] There are two kinds of derivative crimes. First, "crimes of omission"

[1147] *Ibid.* E.g. *Eichmann, supra* notes 855 and 1115.
[1148] Fletcher, *Rethinking, supra* note 40.

– defined under article 28 of the Rome Statute as "command responsibility." These situations of failing to punish subordinates are not relevant to the ICC Chamber's judgments in *Kenya cases*, so far. The second kind, are "crimes of commission," i.e. by accessories. Here, under article 25, the analogy of common law varieties ranging from aiding and abetting to counseling were considered. The chapter observed that, while the earlier international criminal law tribunals were strongly based on common law varieties, such joint criminal enterprise types are not available under the Rome Statute.

Instead, the Statute adopts Roxin's lay control theory of perpetration was invented in Germany to criminalize formal organizations, i.e. systemic industrialized violence. Its features were explained. Fungible persons-up-front are used interchangeably as tools to implement plans of the rearguard. International criminal law is concerned to attribute responsibility to the planners, financers and organizers – notwithstanding their lack of *actus reus* for the physical crimes. This is problematic to the common law principle of substantive legality. This chapter is justified because only three characterizations of individual criminal liability are expressly provided under article 25(3)(a) of the Rome Statute, namely perpetration, indirect perpetration and co-perpetration. The hypothesis was that the ICC Pre-Trial majority judges Trendafilova and Tarfusser in *the Kenya cases* – both at the *Warrants Authorization* as well as in their *Confirmation of Charges* judgments – invented a new characterization of individual criminal responsibility, namely "indirect co-perpetration." An expansive interpretation was deemed necessary – according to the conceptual interpretation of the majority judges – because the purpose of the ICC is to protect human values of victims by punishing offenders. The chapter set out the detailed PTC findings of *the Ruto case* and contrasted the conflicting interpretation in the minority dissenting judgment of Judge Kaul. Some scholars including Sadat and Jalloh, describe Judge Kaul's reasoning as being based on the Nuremberg precedent. Others, like Ohlin, argue that Judge Kaul's literal or historical interpretation is legitimate, since the Rome Statute is limited to "state-like" organizations, not ordinary criminal violence by informal groups. In this respect, the normative framework, drawing from May's "international harm principle," was useful in circumscribing the limits of Roxin's control theory of perpetration.

Whether the role of the ICC judges demands activism or restraint shall be the subject of chapter six. This third chapter concludes that reasonable divergent interpretations are available for interpreting the rule under article 25 of the Rome Statute. The arguments applied to evaluatively interpret *the Ruto case* Pre-Trial Chamber judgments can be applied *mutatis mutandis* to those in *the Kenyatta case*. The next chapter focuses on the latter which has been suggested,

on one hand, to have been selected from PNU for ICC prosecution to balance the ethnic profiles with those of ODM suspects in *the Ruto case,* so as to sustain political stability in Kenya. On the other hand, the *raison d'être* of a court, and also a prosecutor, is to follow the evidence objectively. Indeed, the ICC prosecutor's public relations campaigns insist that even-handedness informs his or her functions. Why then did the prosecutor neglect to investigate exculpatory evidence in support of the suspects? Worse still, why did the prosecutor knowingly rely on false evidence before the ICC Pre-Trial Chamber in *the Kenyatta case*? The role, capacity and motivations of the international prosecutor are scrutinized in the next chapter.

PART TWO

THE POLITICAL CHARACTER OF THE INTERNATIONAL CRIMINAL COURT'S PROSECUTOR AND ITS JUDICIAL ACTIVISM CONCERNING COMPLIANCE WITH ROME STATUTE OBLIGATIONS

CHAPTER FOUR

PROSECUTORIAL NEGLIGENCE AND THE SPECTRE OF RE-CHARACTERIZATION OF CHARGES IN *THE KENYATTA CASE*

4.1. Competing Prosecution Theories at the ICC Pre-Trial Chamber

4.1.1. The Prosecution's "Guilt-by-Association" Theory

After cross-examination by the ICC's Chief Prosecutor Luis Moreno-Ocampo, at the close of Uhuru Kenyatta's defence,[1149] the ICC Pre-Trial Chamber II's presiding judge Ekaterina Trendafilova inquired as to why Kenyatta had not sued Peter Kagwanja (The Party of National Unity's [PNU's] political adviser) for defamation, if indeed Kagwanja's scholarly articles (dated 2002 and 2005) portrayed him in a defamatory manner.[1150] In his reply to the judge, Kenyatta asserted that he had not come across Kagwanja's allegedly offensive articles, which the Prosecutor argued portrayed Kenyatta as being a covert Mungiki member, but added that he intended – to forthwith instruct his lawyers – to institute a legal claim for defamation. Outside the court proceedings, through an Internet posting, Kagwanja subsequently publicly rebutted the prosecutor's alternative hypothesis propagated at the ICC in the *Kenyatta case.* He rebuked it as a "selective invocation of my work (which) portrays a monumental case of a shamefully unethical and predatory tactic of an unprofessional prosecution that many now fear is putting the international justice system to ridicule."[1151] Moreover, Kagwanja disclosed that the prosecutor, "Mr. Ocampo never contacted (him) as an author to share or clarify issues raised in the cited publications. He instead proceeded to base weighty claims on frightfully thin ice."[1152]

[1149] ICC Pre-Trial Chamber Live Proceedings of *Prosecutor v Muthaura, Kenyatta and Ali, the Kenyatta case*, *supra* note 147, televised live on all national television stations in Kenya. 21st-29th September 2011. The live proceedings were monitored by the author of this book.
[1150] ICC Pre-Trial Chamber Live Proceedings televised live on all national television stations in Kenya from 21st-29th September 2011. The information used here is recalled by the author from the live T.V. proceedings.
[1151] Peter Kagwanja, "Statement" http://fr.scribd.com/doc/66933570/PROF-Kagwanja-Press-Statement-on-Icc-29-9-2011<accessed 27th August 2013>
[1152] *Ibid.*

The prosecutor's conjecture was not the basis for the Chamber's attainment of the requisite standard of "substantial reason to believe" that Kenyatta perpetrated the alleged crimes against humanity. Furthermore, none of the ICC Pre-Trial Chamber judges made any explicit reference to Ocampo's "guilt by association" hypothesis. Nonetheless, this chapter highlights the fact that that line of reasoning is telling. Pursuing a "guilt by association" hypothesis displays the prosecution's lack of professional ethics. The academic knowledge in Kagwanja's articles may have had a prejudicial impact – not only on the judges' opinion regarding whether or not the suspect was a Mungiki member – but even on the description of whether or not Mungiki is an "organization" in the meaning of the Rome Statute. While, as shown below – regarding the question of the Prosecutor's indirect co-perpetratorship allegations – the majority judges relied on direct eye-witness evidence, the dissenting judge found that Mungiki is an ordinary, criminal gang. Nevertheless, the question lingers as to the suggestive impact which Kagwanja's scholarly articles may have had to influence the ICC Pre-Trial Chamber majority's judgments.

4.1.2. Kagwanja's Articles in African Affairs

Kagwanja's first article[1153] in 2002, compares and contrasts how:

> Like the urban youth gangs and vigilantes in Nigeria which draw on pre-colonial idioms of organization based on hierarchical age systems, Mungiki leaders re-traditionalized the demand for a generational transfer of power by reinventing the Kikuyu idea of *ituika* as an idiom for mobilizing its rank and file in support of the Uhuru candidacy. But to the movement's leadership and to urban-based criminal elements, the generational change of guard was an idiom for reinforcing clientelist relations with the KANU elite to ensure continued power and control over Kenya's criminal underworld.[1154]

However, Kagwanja's public statement rebutting the Office of the Prosecutor's interpretation of his article discloses not only that he was not consulted by the OTP and gave no prosecution statement, but also that his works were distorted, to wit:

> none of the references made by the prosecution based on these articles is supportive of the prosecution effort to establish a link between Mr. Kenyatta and Mungiki. Clearly, the intellectual objective of both publications was never to establish such a linkage. Rather, they sought to investigate how criminal youths, as agents in their own right, manipulate politics for their own ends. Specifically, the prosecution refers to a 3 March 2002 Mungiki fund-raiser in Nyahururu where Mr. Kenyatta was reportedly invited.[1155]

This chapter makes no sinister claim that any of the ICC suspects perpetrated any of the incidents alleged against them. Its aim is to analyze the triple prosecution theories commencing with its hypothetical "guilt by association" theory. It is necessary to understand why the OTP construed African ethnic culture in a negative, rather than positive, perspective. Yet Kagwanja considers ethnicity from different standpoints since:

> In the 1930s and 1940s, the role of *iregi* in the *ituika* was concretized by the speeches and writings of nationalists like Jomo Kenyatta, who redirected it to the moral dictates of ethnic nationalism. Critics saw the Mau Mau as a re-enactment of the *ituika*, which Jomo Kenyatta had projected as revolution in his book *Facing Mount Kenya*. Indeed, Mau Mau's fighting oath, *batuni*, was sprinkled with *ituika* symbols.[1156]

However, that:

> Both the Mau Mau and the *ituiki* narrative provided the political text for Mungiki youths in their interpretation of politics in multi-party Kenya. Mungiki began to imagine Kenya as a country immersed in a generational struggle between elders and youths. They accused the generation of elders of overstaying in power, repressing the youth and looting the Kenyan nation.[1157]

Therefore:

> Mungiki ideologues came to believe that youth has a duty to restore the generational system. The process begins with the youth (Mungiki) assuming the role of the *iregi* generation and initiating the revolution that will usher the *Mwangi* generation to power.[1158]

Because of their ethnic belief in the need for intergenerational transfer of power, "Mungiki's leaders claimed that their endorsement of Uhuru's 2002 presidential bid was based on generational interests rather than ethnic affiliations."[1159] Thus Kagwanja, first, debunks the prosecutor's poor research powers since:

> While reference is derived from one of the ubiquitous media articles published by the *Daily Nation* and *East African Standard*, namely, 'Mungiki to support KANU, Saitoti and Uhuru in poll,' *East African Standard*, 4

[1153] Peter Mwangi Kagwanja, "'Power to Uhuru': Youth Identity and Generational Politics in Kenya's 2002 Elections" (2005) *Journal of African Affairs*, 105, 418, 51-75, citing Charles Gore and David Pratten, "The Politics of Plunder: the Rhetorics of Order and Disorder in Southern Nigeria" (2003) *Journal of African Affairs,* 102, 407, 211–40.
[1154] *Ibid.* pp 59-60.
[1155] Kagwanja, "Statement," *supra* 1151 see also "ICC televised proceedings," *supra* note 1392.
[1156] Kagwanja, "Power to Uhuru," *supra* note 1153 p 61.
[1157] *Ibid.*
[1158] *Ibid.* p 62.
[1159] *Ibid.* p 63.

> March 2002, it would have helped Mr Ocampo to validate whether Uhuru attended the said meeting. The fact of the matter is he did not![1160]

Second, Kagwanja accuses the prosecutor of lacking impartiality because:

> the prosecution opts to apply unethical and predatory interpretative tactics, projecting the view that these articles are entirely about Mr Kenyatta intent become manifest when he refuses to cite evidence in the articles that are exonerating or favourable to Mr. Kenyatta, as required of his Office by the Rome statutes (sic). For instance, the articles document that:
>
> - In November 2002, Uhuru publicly denied being a member of Mungiki declaring that: 'I am a catholic and so is my whole family.'
> - In August 2000, the sects (sic) members accused him of being used by the government to harass them and burned his effigy.[1161]

Kagwanja concludes that some positive information regarding the context in which Kenya's ethnic conflicts arise would have counter-balanced the prosecution's decision to prosecute, which as shown in the previous chapter in relation to *the Ruto case,*[1162] ought to be objective and professional to seek the truth as to whether or not an informal group constitutes a "state-like organization" with an individual in control. In a second article published in 2005 Kagwanja writes that "Mungiki is also heir to a long tradition of historical religio-political revivalism that dates back to the early stages of colonial resistance."[1163] This is because: "The term Mungiki implies that all people are entitled to a particular place of their own in the ontological world."[1164]

Because law tends to travel badly,[1165] and further because the Rome Statute comprises two traditions – common law and civil law – to the exclusion of Islamic, Talmudic, Hindu, Oriental or Chthonic – therefore the selection criteria of an international criminal prosecutor are even more likely, than a domestic prosecutor, to colour facts from a perspective which is insensitive to the local situation. In Kagwanja's opinion:

> During his 2002 campaign, (Kenyatta) constantly drew attention to youth poverty, unemployment and hopelessness as the root cause of criminality, making it his crucial agendum. A diligent and evidence-driven investigation would have revealed the complex, well organized and resourced nature of the

[1160] Kagwanja, "Statement," *supra* 1151.
[1161] *Ibid.*
[1162] *The Ruto case, supra* note 146.
[1163] Peter Mwangi Kagwanja, "Facing Mount Kenya or Facing Mecca? The Mungiki, Ethnic Violence and the Politics of the Moi Succession in Kenya, 1987-2002" (2003) *Journal of African Affairs*, 102, 25-49.p 29.
[1164] *Ibid.*
[1165] Twining, *General Jurisprudence*, *supra* note 78.

> Mungiki movement that is not under the thumb of the political elite, but that is able to manipulate, extort and pursue its agenda.[1166]

During the ICC Pre-Trial Chamber II confirmation proceedings in the Kenya situation, as seen in relation to *the Ruto case* in the previous chapter, Judge Kaul perhaps most accurately assessed the character of Mungiki as a "non-state-like" organization. This approach adopts Kagwanja's assertion that: "Aside from its task of defending the displaced" Mungiki indeed has a positive "moral crusade aimed at restoring justice in communities, especially in Nairobi's suburbs and shanties where its members live."[1167]

4.2. Are Tribal Groups "State-Like" Organizations?

4.2.1. Subjective Elements

Regarding subjective elements, in *the Kenyatta case*, the prosecutor alleged that both Muthaura and Kenyatta intended that the Mungiki – in coordinated groups and using crude weapons and guns – carried out retaliatory attacks upon unarmed civilian residents in or around Nakuru and Naivasha during Kenya's post-2007 conflicts. Therefore, the ICC Pre-Trial Chamber's majority judges, Trendafilova and Tarfusser, concluded that these two suspects "intended the killings, displacement and the severe physical and mental injuries which took place in or around Nakuru and Naivasha, i.e. that they intended both to engage in the conduct and to cause the consequences (*dolus directus* in the first degree)."[1168] That is, "they meant to cause the consequences"[1169] and were not merely aware that these consequences would "occur in the ordinary course of events." Similar unfortunate finding were made regarding the rape incidents.[1170] The majority judges further found that both Muthaura and Kenyatta allegedly "defined the targeted population of the attack on political grounds, i.e. by reason of their perceived political affiliation to the ODM." Accordingly, the Chamber held that both these suspects "intended to commit the crime of persecution."[1171] This was inferred from the fact that they could have frustrated the plan's implementation by "refusing to activate mechanisms that led to the commission of the crimes."[1172]

[1166] Kagwanja, "Statement," *supra* note 1151.
[1167] Kagwanja, "Facing Mount Kenya," *supra* note 1163 p 37.
[1168] *Ibid.* p 149 para 414; See also chapter three section 3.6 regarding *dolus*.
[1169] Article 30(1), Rome Statute, s*upra* note 14.
[1170] Article 30(2)(b), *ibid.* cited in *Kenyatta Pre-Trial Chamber,* Confirmation of Charges Judgment, 23rd January 2012, majority judges Ekaterina Trendafilova and Cuno Tarfusser, p150 para 415.
[1171] *Ibid.* para 416.
[1172] *Ibid.* para 419.

The definition of control theory appears from the ICC Pre-Trial Chamber's majority judges' test that:

> the mode of liability of indirect co-perpetration consists of the following elements: (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other coperpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (iii) the suspect must have control over the organization; (iv) the organization must consist of an organized and hierarchal apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).[1173]

4.2.2. Objective Elements

The word "organization" appears under criterion numbers "(iii) the suspect must have control over the *organization*" and, *"*(iv) the *organization* must consist of an organized and hierarchal apparatus of power." The problem is that African customary law knew no elections.[1174] Moreover, as explained in chapter one, leadership in most of Kenya's forty-two tribes was acephalous, without any king. For example, Duncan Ndegwa explains how:

> The government and social organization of the Agikuyu recognized that shutting out change would lead to atrophy…The great *Itwika*, a once in a generation event, was an all inclusive constitutional review convention. It solemnized the handing and taking over of the responsibility of ruling the community, thus marking the devolvement of power by the older generation to the younger one after a period of about 30 to 40 year(s)….The generation on the handing over power would do so at about the age of 55 years…A council of elders whose tenure of office changed during *Itwika* oversaw the day to day governance guardianship.[1175]

Conversely, for Charles Jalloh on a Euro-centric view, tribes are not states:

> Whether a tribe, for example, is a sufficiently State-like structure to constitute an organization within the meaning of Article 7(2)(a) is open to debate. Considering that a tribe is more akin to a group and does not necessarily have the legal capacity to enter into formal relations with other States, and that it may or may not be organized into a 'recognizable government,' it would at first blush seem that a tribe would potentially not have some of the legally recognized characteristics of a State…However, many tribes would almost certainly fall within the ordinary customary international law understanding of an organization, body, or group with State-like characteristics, as they can be entities with a permanent population, occupying a specific territory, and having their own internal government.[1176]

However, he recognizes on the other hand:

> ...tribes or ethnic groupings in Africa or other parts of the world usually have the ability to enter into relations with other tribes or groups that may or may not also occupy a specific geographic area or have control over it. Thus, a case can be made that, at least certain types of tribes, bear a sufficient degree of 'organization' to constitute State-like entities, even if they do not meet the classical customary international law definition of a State. Regardless of how State-like or un-State-like a tribe is, the potential that you have a group that will be capable of committing atrocities against civilians without international accountability still remains.[1177]

As shown in the previous chapter, international criminal law proscribes harm which is perpetrated either against or by groups, or both. Given that an informal group can cause mass harm, therefore it is necessary for the prosecutor to clarify whether a suspect is charged on the basis of belonging to a group. Consequently, as shall be shown in the *Kenyatta case*, the concurring ICC Trial Chamber opinion of Judge Christine Van Den Wyngaert criticizes situations where re-characterization of charges should subsequently occur, without sufficient notice, and results in a suspect not having known the case which he has already faced during the trial. Uncertainty of charges contravenes the substantive principle of legality.[1178] The rule permitting the Trial Chamber to convict an accused on a re-characterized charge may also undermine a suspect's right to due process.[1179] The function of the Pre-Trial Chamber is therefore to determine the sufficiency of evidence and confirm the nature of charges which a defendant must face before the Trial Chamber. Were the charges incorrectly characterized by the ICC's Pre-Trial Chamber?

[1173] *Ibid.* p 103 para 297.
[1174] Kagwanja, "Statement," *supra* note 1151.
[1175] Duncan Ndegwa, *Walking in Kenyatta's Struggles: My Story* (Nairobi: Kenya Leadership Institute, 2006) pp 15-17.
[1176] Jalloh, "What Makes a Crime," *supra* note 194 p 430 (footnote omitted).
[1177] *Ibid.*
[1178] Articles 22 and 23, Rome Statute, *supra* note 14.
[1179] Article 67, *ibid.*

4.3. Did the ICC Correctly Confirm the Charges in *the Kenyatta case*?

The purpose of this chapter is to examine the interpretation and impact of various provisions of the Rome Statute – as well as broad rules under the ICC Rules of Procedure and Evidence[1180] – which permit an international criminal prosecutor to adduce vague charges, and false evidence whether at the pre-trial or trial phase. The Pre-Trial Chamber's false confirmation of charges may be based on one set of facts, while simultaneously facilitating adducing of different evidence at trial. This incongruence strategically invites exercise of discretion on the part of the Trial Chamber to re-characterize the charges so as to tailor them to suit the evidence on record at any time before judgment. This chapter's objective is, first, to show that in *the Kenyatta case* – although one prosecution theory advanced during the confirmation of charges proceedings before the Pre-Trial Chamber appeared based on "guilt by association" – that speculative theory was not discussed by the Pre-Trial Chamber in its confirmation of charges judgment. Instead, the Pre-Trial Chamber confirmed the charges based on a second theory based on *manifest criminality*, i.e. eye-witness evidence alleging indirect co-perpetration. Even before the trial commenced however, that second, *manifest criminality* theory purportedly supported by direct eye-witness evidence, became unsustainable. The first indication of its unraveling was on 31st March 2013, when: "Having considered the totality of the evidence, the Prosecution consider(ed) that, at this stage, it ha(d) no reasonable prospect of conviction were it to proceed to trial against Mr Muthaura on the charges as confirmed."[1181]

Following withdrawal of the case against Muthaura – an alleged co-perpetrator – and further in light of, *inter alia,* the withdrawal of OTP witness no. 4's crucial eye-witness evidence, Kenyatta's defence team sought the Trial Chamber's reconsideration regarding whether or not the Pre-Trial Chamber majority's confirmation decision remained valid. In its unanimous judgment, the Trial Chamber strongly criticized the Prosecutor's shoddy, tardy and negligent investigations, so much so that one judge – Christine Van Wyngaert not only appended a concurring opinion, but later even recused herself from the *Kenyatta Trial Bench*. She expressly cited her pressing workload – but in the context of her concurring opinion it may be inferred that she withdrew to ostensibly express exasperation at failure by the prosecutor to adhere to its obligations under the Rome Statute and also its unacceptable violation of the suspect's

[1180] Rules of Procedure and Evidence, Rome Statute, supra note 14. Under article 51(5) the rules are subordinate to the provisions of the Statute's provisions.

[1181] *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11 11th March 2013; Prosecution notification of withdrawal of the charges against Francis Kirimi http://www.icc-cpi.int/iccdocs/doc/ICC-01-09-02-11-687.pdf <accessed 8th July 2014> See also Fletcher, *Rethinking*, *supra* note 40.

rights. This chapter argues that the prosecutor's pre-confirmation investigation strategy seemed to deliberately neglect conducting independent investigations – so as to shift the burden onto the Trial Chamber to re-characterize the charges upon which to convict the defendants – upon the prosecution possibly discovering new evidence. Therefore, the second phase of such strategy entailed re-opening (post-confirmation) investigations in search of such new evidence to support a third prosecution theory, one based on circumstantial evidence. Chapter six shall show, however, that the prosecution's belated request for Kenyatta's financial records and other dissenting and concurring judgments on advancing such a third theory – based on circumstantial evidence. In this regard, it is remarkable that Judge Wyngaert not only rebuked the prosecutor's pre-confirmation investigations in *the Kenyatta case*, she subsequently wrote a strong dissent against a majority decision in which the ICC Trial Chamber re-characterized charges in *the Katanga case.* Most recently, Judge Wyngaert declined to confirm poorly-investigated charges in the *Gbagbo Pre-Trial Judgment*. Therefore the methodology of this chapter shall seek to compare and contrast the Pre-Trial Chamber's dichotomous confirmation of charges decisions in *the Kenyatta case*, and also evaluatively interpret the subsequent difficulties arising from the Prosecution's failures to investigate exonerating evidence in favour of the suspects. In order to evaluate the prejudice of re-characterization of charges on a suspect's rights it is necessary for the chapter to first construct a normative framework. Then, as an example, by way of comparison – not only of the prosecution's late notice of intention to re-characterize, but also of changing the entire substratum of its case – the chapter shall review Judge Wyngaert's strong dissenting judgments in both *the Katanga* and the *Kenyatta cases* as well as the former's implications for the latter.

This chapter thus notes the Office of the Prosecutor's emerging notoriety – of conducting inadequate pre-confirmation investigations – as shown in the case against deposed Côte d'Ivoire President Laurent Gbagbo. Furthermore, the ICC Trial Chamber has criticized the prosecutor's negligence in *the Kenyatta case*. Therefore this chapter is justified in evaluating the extent to which Kenyatta's charges were correctly confirmed by the Pre-Trial Chamber, in the first place. Curiously, clear parallels are drawn between the *Kenyatta case*, and the trial of Uhuru's father, over half a century ago in *Jomo Kenyatta v five others*.[1182] In the mid-20th century, Kenya's founding father was wrongly convicted at Kapenguria during Kenya's historical independence struggle. Dennis Pritt has shown that that in political cases the prosecution first selects the accused persons, before choosing which charges to bring against them and looking for evidence to

[1182] *Jomo Kenyatta and Five Others* v *R* [1953] 20 E.A.C.A. 339 Chief Magistrate's Court at Kapenguria.

support the trumped up charges.[1183] This chapter claims that striking similarities exist between the colonial prosecutor's abuse of process at *the Kapenguria precedent* and the international prosecutor's early negligence in *Uhuru Kenyatta's case*. On one hand, the international procedure of re-characterization before judgment seeks to cure miscarriages of justice attributable to procedural technicalities or prosecution mishaps – which are staple trial defence tactics in common law systems. It shall be shown that the reason why the Rules of Procedure and Evidence under the Rome Statute confer the Trial Chamber with re-characterization discretion is to prevent opportunistic accused persons – who are "guilty" of perpetrating mass atrocities – from benefitting unduly from an acquittal based on technicalities. On the other hand, if both the suspect's presumption of innocence as well as rights to even-handedness are taken seriously, then a limit to re-characterization of charges is essential. In light of the foregoing tension between the search for substantive justice and the potential to abuse the criminal process through procedural uncertainty of charges, this chapter describes the Kenyatta defence's challenge against the ICC prosecution's continuing with its poorly investigated case. The chapter concludes by distinguishing between – not only the adversarial and inquisitorial functions of common law and civil law prosecutors – but more importantly the prejudice which tends to emerge from the motivations of international prosecutors as opposed to those of their domestic counterparts.

4.4. The Uncertainty of Charges in International Criminal Law Trials

In Dov Jacobs's interpretation: "The purpose of confirmation of charges is to provide the Chamber with 'sufficient evidence to establish substantial grounds to believe that a person committed each of the crimes charged.' "[1184] On one hand, the prosecutor has a duty to generally investigate both sides of a case and specifically, to disclose exonerating evidence which may favour the defence case. On the other hand, discretion is permitted to the Trial Chamber to re-characterize the charges at any time before judgment. This re-characterization enables the ICC to avoid acquittals on technical grounds where an element of the charge is not strictly proved, but nonetheless the evidence reveals that another offence has been committed. In such cases, the Trial Chamber may exercise its discretion to convict on an alternative count or for another offence. Because all crimes under the Rome Statute are considered to equally comprise

[1183] Pheroze Nowrojee, defence counsel in the case of *R v A.R. Kapila* (1978) (unreported) informal interview; See also Dennis Nowell Pritt, *Law, Class and Society (Book Three) Law and Politics and Law in the Colonies* (London: Lawrence and Wishart, 1971) chapters 9 (pp 114-125) and 10 (pp 133-138).
[1184] Article 67(7); Rome Statute, *supra* note 14; See also Dov Jacobs, "A Shift in Power: Who's in Charge of the Charges at the International Criminal Court?" in Schabas, McDermott and Niamh (eds.) *Ashgate Research Companion*, *supra* note 152, 205-222 p 208.

the worst crimes known to mankind, therefore there is no hierarchy depicting some as "lesser" than others.

There has to be some certainty of the charges facing the accused. This substantive legality requirement militates against the risk of multiple amendments to the charge sheet. It seems, for legitimacy purposes, that criminal justice must balance between legal certainty and judicial efficiency. According to Jacobs: "The former allows as few amendments as possible be allowed the more advanced the proceedings are while the latter opens the door to some flexibility to avoid acquittals based on faulty determination of the charges.' "[1185] He however, questions whether judges should have the final say in legislative, rather than judicial, matters. At pre-trial proceedings control over the charges essentially rests on the prosecutor, with the final decision as to their confirmation given to the Pre-Trial Chamber. However, at the trial phase, judges have discretion to re-characterize.[1186] Given prosecutorial principles and judicial economy, what then does a "charge" mean? According to Jacobs, the interpretation preferred by the ICC:

> posits that a charge is composed of two elements, a factual description of the crimes and a *legal characterization* of the facts. Under this interpretation, the legal characterisation covers both the definition of the crimes and the form of participation. It would therefore follow that any change to any of these elements, be it to the facts, legal characterization or form of participation, would qualify as an amendment of the charge.[1187]

Conversely, a second interpretation – not preferred by the ICC – holds that "not all elements mentioned are actually part of the charge *stricto sensu*, which would mean that a change to one element would not necessarily imply an amendment to the charge itself."[1188] Whichever way, the prosecutor may continue the investigation and amend or withdraw the charges prior to their confirmation.[1189] Significantly, however, a notice requirement precedes either withdrawal or amendment. Such prosecutor's notice to amend must be given, not only to allow the defence reasonable time, but also to give the relevant Chamber reasons for the withdrawal.

Apart from deciding whether to "confirm the charges where there is sufficient evidence, (or) decline to confirm the charges where there is insufficient evidence,"[1190] the Pre-Trial Chamber has two options. Alternatively, the Pre-

[1185] *Ibid.* p 205.
[1186] *Ibid.* p 206.
[1187] *Ibid.* p 207 (emphasis in original).
[1188] *Ibid.*
[1189] *Ibid.,* citing article 61(4), Rome Statute, *supra* note 14.
[1190] *Ibid.,* citing article 67(7)(b), citing Rome Statute, *ibid.*

Trial Chamber has the flexibility of either requiring the prosecutor to furnish further evidence in support of a particular charge[1191] or – if the "evidence submitted appears to establish a different crime"[1192] within the ICC's jurisdiction – of indulging the prosecutor to amend the charge accordingly. A new confirmation hearing need only be held[1193] where the purpose of the change is to add more charges or substitute more serious ones. Conversely, in the latter case, Jacobs cautions that: "The concept of 'more serious charges' could be problematic given the fact that the ICC Statute does not provide for a hierarchy of crimes within the jurisdiction of the court, all of them being considered as 'the most serious crimes of international concern.' "[1194]

As shall be shown towards the end of this chapter, while common law prosecutors defer to a procedural *opportunity principle,* European prosecutors abide by a procedural *legality principle*. Upon combination of these two procedures under the Rome Statute, a "third way" emerges. Jacobs explains that the international prosecutor's discretion – in determining the content of the charges – diminishes the closer the procedure moves towards actual trial. As the trial approaches, the authority of the Pre-Trial Chamber – without having any powers over the actual content – nonetheless regulates the prosecutor's decision to amend. "In addition to the Chamber's supervisory role regarding the prosecutor's reasons for amendment, both the pre- and post-confirmation hearing procedures, expressly impose the requirement of reasonable notice to safeguard suspects against ambush."[1195]

In the *Lubanga case*, a curious precedent was set where the newly emerging facts disclosed the presence of Uganda occupying the Democratic Republic of Congo, during the war crimes – prior to Uganda's withdrawal from the DRC – to re-describe the offences from being a non-international, instead as an international armed conflict therefore these new facts demanded re-characterization of the charges. Yet, no adjournment was allowed to the defence.[1196] Rather, according to Jacobs, "the ICC Pre-Trial Chamber usurped the prosecutor's power to amend the charges directly and did so itself." This "changed the distribution of competences (as between the prosecutor and the Pre-Trial Chamber) foreseen by the drafters of the Rome Statute, thus reflecting

[1191] *Ibid.* article 67(7)(c)(i).
[1192] *Ibid.* article 67(7)(c)(ii).
[1193] *Ibid.* article 61(9).
[1194] *Ibid.* p 208.
[1195] *Ibid.* pp 208-9.
[1196] *Prosecutor v Lubanga* Decision on the Confirmation of Charges 29th January 2007, http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF <accessed 8th July 2014> paras 200, 220 and 227-229.

a flexible approach to statutory interpretation."[1197] Conversely, in William Schabas's interpretation, a rigid approach argues that after confirmation, the Pre-Trial Chamber is technically *functus officio* regarding the prosecutor.[1198] Consequently, the prosecutor may ignore the Pre-Trial Chamber's unilaterally amended charges. Effectively, "he cannot be under an obligation to investigate and prove certain charges simply because the confirmation decision has added them."[1199]

Confirmation of the charges triggers the constitution of the Trial Chamber by the ICC Presidency.[1200] Notwithstanding confirmation, there still exists latitude for the amendment of charges. On one hand, before commencement of trial – with permission from the Pre-Trial Chamber – the prosecutor may amend.[1201] On the other hand, after commencement of trial, with permission from the Trial Chamber – the prosecutor may withdraw.[1202] Such fates would befall both *Muthaura's* and *Kenyatta's* cases. However, Jacobs asserts that "once the trial has begun…neither (the prosecutor) nor the trial chamber have any power to modify"[1203] the charges. He is quick to add, however, that under the ICC Rules of Procedure and Evidence, "Regulation 55 grants the Trial Chamber authority to modify the legal characterisation of facts under certain circumstances." Some scholars contend that "change in the legal characterization of facts does not necessarily amend the charges."[1204] Nonetheless, in this chapter I examine the impact of the uncertainty generated by the possibility that the Trial Chamber may re-characterize the facts. It is contended that such looming possibility not only usurps the role of the prosecution – but ultimately operates to the detriment of a suspects rights. In *the Kenyatta case*, consequently, notwithstanding that the trial was yet to commence, the defence team approached the Trial Chamber to dismiss or permanently stay the confirmed charges or alternatively to return the case to the Pre-Trial Chamber for re-hearing of the confirmation of charges issues.

Various arguments justify the inclusion of the legal re-characterization provision. First, because "it fills a gap of something that was not settled in the

[1197] Jacobs, "A Shift in Power" *supra* note 1184 p 210 (brackets supplied).
[1198] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) p 743, cited in *ibid.*
[1199] *Ibid.*
[1200] *Ibid.,* citing article 67(11) Rome Statute, *supra* note 14.
[1201] *Ibid.* article 67(9).
[1202] *Ibid.*
[1203] *Ibid.* p 213
[1204] C. Stahn, "Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55" (2005) *Criminal Law Forum,* 16, 1-31 p 17; See also G.M. Pikis, *The Rome Statute of the International Criminal Court* (Leiden: Martinus Nijhoff, 2010) pp 141-2 cited in *ibid.* p 215.

founding documents of the Court. However, critics including Carsten Stahn, opine that if the elements in the confirmed charges are not proved by the facts then the answer is to acquit the accused."[1205] Second that "an accused person could be acquitted, even though it had clearly been demonstrated that he or she committed a crime within the jurisdiction of the Court."[1206] Thus Regulation 55's discretionary re-characterization power thus avoids an "impunity gap." However, Jacobs dismisses these arguments wondering whether a "broad teleological *policy* approach can be an adequate legal justification for a statutory provision."[1207] He bastardizes the slippery slope – which emerges upon extrapolating the "need to increase accountability" argument – by likening it to odious practices such as allowing the trial judges to simply take notice of new facts, or not having a charge document at all, or admitting incredible evidence or even allowing torture as a mode of interrogation. Jacobs not only questions whether or not the Rome Statute's objectives allow for Regulation 55's creation. He even rejects the argument that an absence of judicial flexibility would result "in charging strategies whereby the Prosecutor 'burdens the Chambers with an overload of alternative cumulative charges in order to avoid the risk of acquittal.' "[1208]

Jacobs rebuts the latter argument by the contrary one, namely that "the Prosecutor could rely on the fact that Regulation 55 might be used as justification for imprecision in his charging policy because any 'mistake' in the legal characterisation could be corrected at trial."[1209] It is in this respect that during *the Kenyatta case* the problem of justifying the Pre-Trial Chamber majority's confirmation of charges judgment, was potentially prejudicial to the accused person's rights in two respects. First, because the prosecutor's admitted mistake in permitting OTP witness no. 4's withdrawn affidavit to influence the Pre-Trial Chamber. Second, because the alternative prosecution theory advanced a "guilt by association" notion.

Conversely, Jacobs contends that:

> it is perfectly possible to imagine that rules be provided compelling the Prosecutor to adopt a minimalist charging policy, as an objective in and of itself, independently of whether the Trial Chamber has the power to change the chosen and confirmed legal classification during the trial.[1210]

[1205] Stahn, *ibid.* p 3, cited in Jacobs *ibid.* p 217.
[1206] *Ibid.*
[1207] Jacobs, *ibid.*
[1208] *Ibid.* pp 217-218.
[1209] Article 64, Rome Statute, *supra* note 14, cited in *ibid*. p 217.
[1210] *Ibid.* p 218.

Yet this is only so:

> If one accepts the idea that the legal characterization of facts is indeed an element of the charge, there is in fact no room for the Prosecutor to take into account the policy of Regulation 55 being applied, because a flexible charging policy would not meet the requirements of the confirmation of charges proceedings.[1211]

Instead under common law:

> adversarial approach, 'the judge is an observer in and an umpire' and the prosecutor has the burden of correctly preparing his case and bears the full responsibility for the results of the choices made in the charges, therefore leading to the result that any mistake in that respect profits the accused.[1212]

Jacobs argues that the charging practice of the ICC departs from the formal statutory requirements. Practice, "especially the adaptation of Regulation 55 essentially shifts the balance away from the adversarial approach to an inquisitorial approach to international criminal procedure."[1213] In the civil law inquisitorial approach "the judge is the ultimate guarantor of the trial achieving specific objectified goals of truth and justice."[1214] He concludes that "now the risk of an inadequate legal characterisation rests with the accused, which is the consequence of Regulation 55."[1215] In this modified approach, "the judge has a 'managerial role' "[1216] and "a corrective power over the elements of the trial, thereby relieving the Prosecutor of some of his obligations and increasing the likelihood of conviction of the accused."[1217]

Under the inquisitorial approach, "the legal characterization of the facts is crucial to the question of applying the criteria of complementarity: for the accused to be able to challenge admissibility on this ground, he must be fully aware, at the time that this challenge is possible, what he is being prosecuted for."[1218] This is because, as seen in chapter two, under the principle of

[1211] *Ibid.*
[1212] *Ibid.,* citing S. De Smet, "A Structural Analysis of the Role of the Pre-Trial Chamber in the Fact Finding Process of the ICC" in Stahn and Sluiter, *Emerging Practice, supra* note 32 p 409.
[1213] Jacobs, *ibid*. p 219.
[1214] R. Heinsch "How to Achieve a Fair and Expeditious Trial Proceedings before the ICC: Is it Time for More Judge Dominated Approach?" in Stahn and Sluiter, *Emerging Practice, supra* note 32 p 490, cited in Jacobs, *ibid*.
[1215] *Ibid.* citing *The Situation in the Democratic Republic of Congo: Prosecutor v Mbarushimana* (Decision on the Prosecutor's Application for an Arrest Warrant, Article 58) 10th February 2006, paras 37-39.
[1216] De Smet "A Structural Analysis," *supra* note 1212 p 41, cited in Jacobs, *ibid.*
[1217] Jacobs, *ibid.* p 219.
[1218] Article 19(1), Rome Statute, *supra* note 14, at the commencement of the trial.

complementarity, a case is likely to be inadmissible before the ICC if it "is being investigated or prosecuted by a State which has jurisdiction over it."[1219] Chapter two demonstrated however, that contrary to Kevin Jon Heller's proposal for a sentence-based approach to complementarity, the current provision has been "held to apply not only to the same person but also if the national proceedings relate to the same conduct, which includes the legal characterization of that conduct."[1220] A similar approach was followed in *Ruto's case.*[1221]

Jacobs further bemoans that:

> the possibility that the Trial Chamber could change the legal characterisation of the facts up until the judgment, through the operation of Regulation 55, raises the question of whether this could not be deemed to be a way to circumvent the requirements of complementarity, therefore violating the rights of the defence because a challenge on this ground is no longer possible at the commencement of the trial.[1222]

Moreover, a "second challenge which can only be raised at the start of the trial could also be affected by the current framework on the legal re-characterisation of facts: that is *ne bis in idem*."[1223] Under this rule, as seen in chapter two, no person can be prosecuted twice for the same crime. In the Rome Statute, this applies both to national proceedings in relation to the ICC and *vice versa*.[1224] Hence Jacobs cautions that: "Article 20(3), in its reference to the 'same conduct' clearly implies that legal characterization of facts is a key element in mounting a challenge to admissibility based on the *ne bis in idem* principle."[1225] He concludes that: "It therefore follows that a subsequent change in legal characterisation during the course of the trial might pave way for a challenge to admissibility based on a prior conviction relying on that specific new crime."[1226]

This chapter examines the impact of the uncertainty generated by the possibility that the ICC Trial Chamber may re-characterize the facts in *the Kenyatta case*.

[1219] Article 17(1) *ibid.,* cited in *ibid.*
[1220] Jacobs, *ibid.,* citing *The Situation in the Democratic Republic of Congo: Prosecutor v Mbarushimana* (Decision on the Prosecutor's Application for an Arrest Warrant, Article 58) 10th February 2006, paras 37-39.
[1221] *The Situation in the Republic of Kenya: Prosecutor v Ruto, Kosgey and Sang* [The Decision in the Admissibility Challenge pursuant to Article 19(2)(b)] 30th May 2011, cited in *ibid.*; See also Appeal Chamber majority decision, *supra* note 153; compare with minority dissenting decision, *supra* note 689.
http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf <accessed 8th July 2014>
[1222] Jacobs, "A Shift in Power," *supra* note 1184 p 220, citing article 19(4), Rome Statute, *supra* note 14.
[1223] *Ibid.,* citing article 20(2) *ibid.*
[1224] *Ibid.,* citing article 20(3) *ibid.*
[1225] *Ibid.,* citing article 17(1)(d) *ibid.*
[1226] *Ibid.*

Indeed, as shown below, the prosecutor had lodged a notice of intention to apply for the Trial Chamber to re-characterize the charges. It is contended that such looming possibility not only on usurps the role of the prosecution – but ultimately operates to the detriment of a suspects rights. Moreover I argue that – the prosecutor's negligent pre-confirmation investigations and collection of facts, in *the Kenyatta case*, as well as the Pre-Trial Chamber's confirmation of the charges of indirect co-perpetration – *may* have prejudiced Kenyatta's rights as a suspect.

Allegations of prejudice led the Kenyatta defence team to apply to the Trial Chamber to consider whether the charges confirmed against him by the Pre-Trial Chamber, were invalid. Therefore, it is necessary to set out the Pre-Trial Chamber's version of facts in *the Kenyatta case* as well as the arguments advanced by both the majority and dissenting judgments. This analysis shall illustrate how the charges were characterized in the first place, and why, before returning to exhaust the legal issue of re-characterization. A review of the Pre-Trial Chamber's dichotomous judgments shall also highlight the significance of eye-witnesses testimonies which claimed that Kenyatta attended various meetings at which violence was allegedly planned. Ultimately, in hindsight it is most unethical that the ICC prosecutor knew full well that that its witness no. 4 had already withdrawn his affidavit, but nonetheless, blatantly misled the Pre-Trial Chamber and suspects regarding its validity.

4.5. The Re-Characterization of Charges: Lessons from *the Katanga Judgment*[1227]

4.5.1. Similarities of Katanga's Trial Judgment *with the* Kenyatta case

The concurring opinion of Judge Christine Van den Wyngaert in *the Kenyatta challenge against confirmation* discussed in section 4.10 below,[1228] was "of the view that there are serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation."[1229] She emphasized that given "the overwhelming number of post-confirmation witnesses and the quantity of post-confirmation documentary evidence, as well as the very late disclosure of the latter" therefore "the

[1227] The author acknowledges insights for this section from lectures by Colleen Rohan and Marie O'Leary's Seminar on International Criminal Law Defence sponsored by UNICRI in collaboration with the International Criminal Court Office of Public Counsel for the Defence (ICC-OPCD) together with the support of the International Association of Lawyers (*Union Internationale des Avocats* – UIA) held from 5th-8th May, 2014, at Turin, Italy.
[1228] *Kenyatta Trial Chamber* concurring Judgment by Judge Christine Van Den Wyngaert, *supra* note 202 p 1 para 1.
[1229] *Ibid.*

Prosecution had not complied with its obligations under article 54(1)(a)."[1230] Additionally, "the Prosecution ha(d) also violated its obligation under article 54(l)(c) of the Statute to fully respect the rights of persons arising under the Statute."[1231] Worse still, the Prosecutor's explanation "d(id) not adequately justify the extent and tardiness of the post-confirmation investigation."[1232] Such "insufficient justification" was because "the Prosecution also did not offer cogent reasons for what led it to believe, prior to confirmation, that the situation of each of these persons would significantly change after confirmation or indeed that such a change actually occurred."[1233]

It is submitted in this book that, although *the Kenyatta challenge against confirmation* decision did not expressly articulate the background to *the Kenya case*, chapter one interrogates theories as to why The Hague suspects formed the Jubilee Coalition to contest for the Kenyan presidency in 2013. That contest would be waged against Odinga of ODM who had complained about being rigged out of the 2007 election by the ECK at the behest of Kibaki and PNU. Consequently, chapter five shall analyze the impact of the Kenyan 2013 presidential electoral outcome on The Hague proceedings in *the Kenya cases*. One implied explanation for the inadequate pre-confirmation investigations may be seen as being that Ocampo anticipated an Odinga victory at the next elections which may have facilitated co-operation by the Kenya government with the OTP's post-confirmation investigations. However, upon Odinga's defeat, the new prosecutor, Bensouda was embarrassed and unable to offer adequate evidence – having relied on strategic speculation – as a justification for her predecessor's omission. Such new evidence could provide grounds for re-characterization of charges at trial.

4.5.2. The Katanga case: *Introduction*

In *Prosecutor v Katanga*[1234] not only did Judge Wyngaert believe that the timing and manner in which the re-characterization had been implemented was "fundamentally unfair and had violated several of the accused's most fundamental rights," she was also of the view that the evidence in that case simply did not "support the charges against him."[1235] This was because: "The new charges exceed(ed) the facts and circumstances of the case, contrary to article 74. In addition, the re-characterization was made in repeated violation of the accused's fair trial rights under article 67 of the Statute and regulation 55(2)

[1230] *Ibid.*
[1231] *Ibid.* p 3 para 5.
[1232] *Ibid.* pp 1- 2 para 2.
[1233] *Ibid.* p 2 para 3.
[1234] *Supra* note 927, cited in *ibid.*
[1235] *Ibid.* p 5 para 1.

and (3) of the Regulations."[1236] In that case "the Prosecutor's case (was) that the objective of the attackers of Bogoro was to 'wipe out' the village and its Hema population."[1237] Conversely, in Judge Wyngaert's view "an objective and dispassionate reading of the evidence (led) to the conclusion that the attack, as such, was intended to dislodge the UPC camp and that the harm inflicted on the civilian population was incidental to this objective."[1238] Not only did she "not believe the evidence show(ed) that the attack was conceived and planned with this purpose (to 'settle scores') in mind,"[1239] but also:

> it (was) entirely plausible to assume that, if the military position in Bogoro had still been held by the UPDF and if no Hema civilians had been present in the village, the Ngiti fighters of Walendu-Bindi would still have participated in the attack if they thought that by doing so they could win control over Bogoro and the strategically important Bunia-Kasenyi route.[1240]

Consequently, "it (was) clear that their conduct (could) not be relied upon to draw any inferences whatsoever about the purpose of the attackers under article 25(3)(d)(ii) of the Statute."[1241] This was because "the real purpose…was to chase the UPC soldiers from Bogoro."[1242] Moreover, because the Prosecution failed to prove Germain Katanga's responsibility as initially charged, i.e. as an indirect co-perpetrator "to the Bogoro attack under article 25(3)(a) of the Statute"[1243] therefore, Judge Wyngaert would have acquitted the accused.

4.5.3. The Re-characterization of the Facts Violated Article 67 of the Rome Statute

Regulation 55 of the Regulations of the Court provides as follows:

> 1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
> 2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the

[1236] *Ibid.* para 2.
[1237] *Ibid.* p 6 para 4.
[1238] *Ibid.* p 7 para 5.
[1239] *Ibid.*
[1240] *Ibid.*
[1241] *Ibid.*
[1242] *Ibid.* p 8 para 6.
[1243] *Ibid.* p 9 para 8.

> opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
> 3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:
> a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1(b); and
> b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1(e).[1244]

As stated earlier, the rule of recharacterization "is said to serve two broad purposes. The first is to allow more focused trials on clearly delineated charges." The second is to avoid "impunity gaps" that may be caused by technical acquittals in the "fight against impunity."[1245] Yet: "Recharacterisation must not render the trial unfair."[1246] Hence when making a regulation 55 assessment, the:

> Chamber must ensure that the accused: receives prompt notice of the specific facts within the 'facts and circumstances described in the charges' which may be relied upon; is given adequate time and facilities for the effective preparation of his or her defence; is afforded the right to examine and have witnesses examined; and that the accused's right not to be compelled to testify is not infringed.[1247]

Instead, according to Judge Wyngaert, at the late stage of the *Katanga* proceedings, the majority "mould(ed) the case against the accused in order to reach a conviction on the basis of a form of criminal responsibility that was never charged by the Prosecution."[1248] The dissenting Judge Wyngaert was convinced, *inter alia*, that "there (had) been a serious misapprehension of Germain Katanga's right to remain silent pursuant to article 67(1)(g)."[1249] She found "most troublesome the failure to afford the Defence a reasonable

[1244] Regulation 55, Rules of Procedure and Evidence, *supra* note 1180.
[1245] *The Katanga Trial Judgment*, Dissenting Minority Opinion of Judge Christine Van Den Wyngaert, p 10 para 10 www.icc-cpi.int/iccdocs/doc/doc1783397.pdf<accessed 24th June 2014>
[1246] *Lubanga* Regulation 55 Appeals Judgment, para. 85; Appeals Chamber, *Prosecutor v. Germain Katanga*, "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21st November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons,' " 27th March 2013, ICC-01/04-01/07-3363, ("*Katanga* Regulation 55 Appeals Decision"), para. 95 all cited in *ibid.* p 11 para 11.
[1247] *Ibid.*
[1248] *Ibid.* para 12.
[1249] *Ibid.* p 12 para13.

opportunity to conduct further investigations to respond to the new form of criminal responsibility, instead restricting the Defence to providing submissions on article 25(3)(d)(ii) on the basis of the existing record."[1250] Consequently, "the accused was not afforded a fair chance to defend himself against the charges under article 25(3)(d)(ii)."[1251] Judge Wyngaert concluded that "these infringements…present a case of overwhelming strength against the legality and legitimacy of (*the Katanga*) judgment."[1252]

4.5.4. Katanga Trial Judgment *transformed the Facts and Circumstances Described in the Charges*

Judge Wyngaert's dissenting opinion in *Katanga* held that "the Chamber may only change the legal characterisation of facts and circumstances described in the charges."[1253] However "not every word, sentence or phrase that may be contained in the Confirmation Decision qualifies as 'facts and circumstances'. More importantly, the Majority…introduced totally new factual elements into the charges under article 25(3)(d)(ii)."[1254] For example the:

> 'anti-Hema Ideology'…allegation (was) nowhere stated…in the Confirmation Decision…nor even the Prosecutor's Document Containing the Charges made any explicit reference to ethnic hatred or a desire for vengeance on the part of the Ngiti fighters of Walendu-Bindi.[1255]

From Judge Wyngaert's interpretation of the confirmation of charges in *Katanga* similarities shall be drawn with the decision in *the Kenyatta case,* to wit:

> there is nothing that would permit one to infer from the alleged *mens rea* of the physical perpetrators that there already existed a criminal common purpose at the time when Germain Katanga made his alleged contribution to the group, much less that he knew about it.[1256]

"There (was) no mention (in the *Katanga* Confirmation Decision) of the mental state of the physical perpetrators, let alone of the accused's knowledge thereof."[1257] Thus the Majority Judgment's "introduction of Germain Katanga's alleged knowledge of the alleged criminal common purpose of the Ngiti fighters of Walendu-Bindi (was) a completely new fact."[1258] However, Judge Wyngaert's

[1250] *Ibid.*
[1251] *Ibid.* p 12-13 para 13.
[1252] *Ibid.* p 13 para15.
[1253] *Ibid.* para 16, citing regulation 55 which "mirrors" article 74(2), Rome Statute, *supra* note 14.
[1254] *Ibid.* p 15 para 19.
[1255] *Ibid.* p 16 para 19.
[1256] *Ibid.* p 19 para 24.
[1257] *Ibid.* p 20 para 25.
[1258] *Ibid.* p 21 para 26.

dissent concluded that: "It cannot reasonably be argued that an accused is put on notice of every possible inference that can be made from the raw facts of the Confirmation Decision. Such a position would render trials entirely unfocused and the charges would be nothing more than a moving target."[1259] This was the outcome because "the (re-characterized) charges under article 25(3)(d)(ii) involve(d) such a fundamental change in the narrative."[1260] In changing Katanga's charges, the majority's aim was "to reach a conviction on the basis of a crime or form of criminal responsibility that was not originally charged by the prosecution."[1261] Consider for example:

> Whereas the Ngiti fighters of Walendu-Bindi were originally said to have been mere gears in a giant machine and, as such, to have been merely fungible individuals, they are now said to have collectively decided, of their own volition, to attack Bogoro for the sole purpose of committing crimes against the Hema civilians present there.[1262]

Judge Wyngaert defined the function of charges as to "represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to, and were influenced by, a particular context."[1263] Conversely: "Taking an isolated fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a 'change in the statement of facts.' "[1264] For Judge Wyngaert: "Accordingly, a defendant may have chosen not to devote scarce resources to such a fact because it could not be expected to have any tangible effect on the outcome of the case."[1265] Therefore "it would be grossly unfair to ignore the standpoint of the accused"[1266] in re-characterization.

Just as in the cases of Muthaura and Kenyatta – i.e. in the *Kenyatta case,* confirmation of charges judgment in relation to Mungiki as shall be seen below – so also "the Katanga Defence sought primarily to refute the Prosecution's allegation that Germain Katanga had organisational control over the FRPI and that he made essential contributions to the implementation of a common plan between himself and Mathieu Ngudjolo that would result in the commission of crimes."[1267] However, in the latter, according to Judge Wyngaert, what "the Majority fail(ed) to recognise (was) that proof of an essential contribution *to a*

[1259] *Ibid.*
[1260] *Ibid.* para 27.
[1261] *Ibid.* p 22 para 28.
[1262] *Ibid.* p 24 para 31.
[1263] *Ibid.* p 25 para 32.
[1264] *Ibid.* p 25-6 para 32
[1265] *Ibid.* p 26 para 33.
[1266] *Ibid.* p 27 para 34.
[1267] *Ibid.* p 28 para 37.

plan (article 25(3)(a)) does not necessarily mean proof of a non-essential contribution *to a specific crime* (article 25(3)(d)(ii)).."[1268] Moreover, not only is the latter provision "not a 'lesser included' form of criminal responsibility" but also "the fairness in convicting someone of a lesser included offence fundamentally depends on the defence having had sufficient certainty of this possibility."[1269] "It was not permissible," in Judge Wyngaert's view, "to simply lift out a particular factual proposition (The events at both Beni and Nyankunde) and use this as part of a significantly different factual claim."[1270]

Just as Germain Katanga testified (unsworn) at the trial so also Uhuru Kenyatta testified (sworn) before the Pre-Trial Chamber at his confirmation of charges hearing. Wyngaert observed that: "Had Germain Katanga known that the Majority deemed it 'permissible' to force him to answer questions that could incriminate him under a different form of criminal responsibility, he might well have decided to remain silent."[1271] In her opinion:

> Germain Katanga enthusiastically answered the many questions about his role as a coordinator. Undoubtedly, he was under the impression that the Chamber was interested in his *defence* against the Prosecutor's allegation that he was the top commander of the Ngiti fighters of Walendu-Bindi and that he had total control over their actions. This allegation was crucial for him to be considered an indirect perpetrator under the control theory interpretation of article 25(3)(a). The facts concerning his role as coordinator, about which Germain Katanga testified, were, viewed in this context, purely exculpatory as they undermined the Prosecutor's thesis that he had 'control over the crimes' committed by his subordinates.[1272]

Similarly, as shown in section 4.10 below, confirmation of charges against Kenyatta were contested retroactively on grounds that a different characterization of charges by the prosecutor during the confirmation of charges hearing may have altered his defence team's strategy to call witnesses. Judge Wyngaert explained in *Katanga* that "the devil is always in the detail and this is why the Defence is entitled to know the charges in as much detail as possible."[1273] Further: "The issue of notice perfectly illustrates, in (her) view, how problematic it is when chambers (re)formulate charges, especially when this happens at the end of a trial. By doing so, the entire balance and structure of the proceedings was upset."[1274] In inquisitorial systems, the main responsibility

[1268] *Ibid.* p 29 para 38.
[1269] *Ibid.* p 30 para 40.
[1270] *Ibid.* p 31 para 41.
[1271] *Ibid.* p 37 para 55.
[1272] *Ibid.* p 38 para 57.
[1273] *Ibid.* p 47 para 73.
[1274] *Ibid.* p 52 para 84.

for fact-finding is centralised in the hands of a neutral magistrate and the evidence is largely collected before the start of the actual trial. Thus, "applying the different legal recharacterisation in that kind of system is not likely to give rise to the same concerns as the ones voiced in (Judge Wyngaert's) Opinion."[1275]

By contrast, in adversarial proceedings, the spectrum of available evidence is more limited and, crucially, determined by what the parties actually proffer. What evidence the Defence will present is determined entirely in function of what the charges are and how the Prosecutor has substantiated them.[1276]

In Jacob's theoretical framework discussed under section 4.4 earlier in this chapter, it was noted how the ICC system, as pertaining to control of the charges, tends to shift from adversarial to inquisitorial as the trial progresses. However, Judge Wyngaert's dissenting opinion in *the Katanga case* recommends a case-by-case approach, to wit:

> The Majority's reference to cases from the European Court of Human Rights, concerning late recharacterisations in particular, domestic procedural contexts that are different from how this case has been conducted, is therefore of limited interest. In the end, all that matters is whether *this* proposed recharacterisation is fair in light of the way in which *this* trial has been conducted.[1277]

Judge Wyngaert added that: "even if none of these procedural considerations were relevant, it would still be strange for an inquisitorially-minded Majority to close its eyes to additional evidence."[1278] However "as the Defence had no precise idea about how the Majority would formulate its conclusions under article 25(3)(d)(ii), the best that could be expected from the accused was for him to formulate general denials."[1279] Just as *the Kenyatta case* challenged the Pre-Trial Chamber's confirmation of charges, so also the *Katanga defence* requested the Trial Chamber for either acquittal or a permanent stay of proceedings in event that the chamber would be minded to prequalify the charges. Just as the arguments in support of *Kenyatta's article 64 application*, was dismissed so also was *Katanga's motion*.[1280] Hence given the admittedly "tardy" investigations and the attempts by the prosecution to re-open investigations – which shall be further examined in chapter six – I submit that a real possibility of re-characterization of charges looms if the *Kenyatta trial* were to proceed to full

[1275] *Ibid.* p 58 para 94.
[1276] *Ibid.* p 59 para 95.
[1277] *Ibid.* para 96, citing *Katanga Trial Majority Judgment* by Judge Bruno Cotte and Judge Fatoumata Dembele Diarra para. 1553.
[1278] *Ibid.* para 97.
[1279] *Ibid.* p 61 para 100.
[1280] *Ibid.* p 69 para 113.

hearing and judgment. My hypothesis is that such vague charges, and an uncertain or incomplete prosecution case, tends to delegitimize the ICC for a variety of reasons. One reason which undermines the process is the attendant delay which accompanies postponement of the trial to enable further investigations. Another reason emanates from perceived prejudice.

4.5.5. Emergent Problems from Inadequate Pre-Confirmation Investigations

Judge Wyngaert, in *Katanga's case,* explained that:

> The right to be tried without undue delay is clearly laid out in major international human rights instruments, stemming from the fundamental basis that prolonged proceedings 'can put a considerable strain on accused persons' and potentially 'exacerbate existing concerns such as uncertainty as to the future, fear of conviction, and the threat of a sanction of an unknown severity.'[1281]

Because the evidence in *Katanga's case* was evaluated after full hearing, it therefore attracted a higher standard of proof of "beyond reasonable doubt" than *the Kenyatta "Article 64" application* for an acquittal or permanent stay. Nonetheless, Kenyatta's defence was entitled to challenge the issue regarding whether or not the *prima facie* evidence before the Pre-Trial Chamber attained the lower "substantial reason to believe" standard. As shall be explained later, much emphasis, in *Kenyatta's article 64 application*, was placed on the non-disclosure of the withdrawal of witness no. 4's statement. What does such an approach suggest about the prosecution's conduct? That it was "shoddy," "tardy" and "negligent." Fully conscious that different standards of proof apply to the two cases, nonetheless, useful lessons may be drawn from the general principles which discredit witnesses as were set out in the *Katanga case*. After all, if a witness's facts are totally unreliable, then it matters not whether the applicable standard is "beyond reasonable doubt" or "substantial reason to believe." The issue in *Kenyatta* was whether, in absence of witness no. 4 – and given the prosecution's misconduct and what it suggested about the future of the trial – the alleged individual criminal responsibility against Kenyatta could be sustained. In *Katanga*, even the majority judges agreed that: "The Prosecution case was indeed extremely weak."[1282] In the end "neither Germain Katanga nor Mathieu Ngudjolo ha(d) been proven to have had anything near the level of authority ascribed to them in the charges and the allegation that they concluded a common plan ha(d) also totally evaporated."[1283] This was because "a number of crucial sites…were never visited; essential forensic evidence was lacking; and a number

[1281] *Ibid.* p 72 para 120 (footnote omitted).
[1282] *Ibid.* p 80 para 137.
[1283] *Ibid.*

of potential witnesses were either not interviewed….or not called to testify."[1284] These shortfalls, it is submitted, bear resemblance with the *Kenyatta case* investigation where similarly and: "Importantly, the accused himself was never interviewed." Further, the prosecutor failed "to cross-examine the accused more effectively."[1285] Rebuking Ocampo's "lack of due diligence" as "highly disappointing," not only in *Katanga* but also, generally as Judge Wyngaert remarked:

> under the leadership of the new Prosecutor and Deputy Prosecutor, the Office of the Prosecutor seems to have acknowledged past shortcomings and has demonstrated a greater willingness to critically assess the strength and weaknesses of the cases that are brought before the Court.[1286]

In *Katanga's case,* Judge Wyngaert appeared to praise Ocampo's successor prosecutor, Fatou Bensouda for reviewing the Muthaura situation and electing to withdraw the charges. The dissenting Judge scathingly concluded that because "the Prosecution has both a legal and ethical obligation to make all reasonable efforts to ensure that the evidence it presents is reliable and…complete" therefore "it might never have brought the charges in this case to begin with."[1287] Given that – unlike the unending conflict situation prevailing in the DRC, post-conflict Kenya was not a war zone but relatively tranquil aftermath – this chapter thus raises the question as to why the *Kenyatta* investigations were delayed or postponed. Proceeding "on a hypothetical basis only"[1288] Judge Wyngaert criticized the weakness of the Majority decision in the *Katanga case* regarding the burden of proof turning on the missing evidence. As shall be seen:

> most of the witnesses who were called by the Prosecution to give evidence about the role of Germain Katanga and the structure of the Ngiti fighters of Walendu-Bindi during the relevant time-period were persons whose knowledge about these matters *was second hand or incomplete at best*.[1289] (emphasis added)

The same malady afflicts the Kenyatta confirmation of charges decision which relied on second-hand hearsay from *inter alia*, the Kenya National Commission on Human Rights, Kenya Human Rights Commission etc. However, "testimony in this respect is based on anonymous hearsay….is therefore highly unreliable"[1290] which the Trial Court has since rejected in the *Ruto case*.[1291]

[1284] *Ibid.* p 81 para 138
[1285] *Ibid.* para 139.
[1286] *Ibid.* p 82 para 141.
[1287] *Ibid.*
[1288] *Ibid.* p 83 para 143.
[1289] *Ibid.* pp 85-6 para 148.
[1290] *Ibid.* pp 93 para 170.
[1291] *Ruto case, Trial Chamber* KNCHR Report inadmissible.

The general evidentiary assessment rule is explained as follows: "whenever there are reasonable doubts about the trustworthiness of a witness or the precise meaning of a certain document or other exhibit, the Chamber should refrain from relying on such evidence."[1292] On this high standard of proof required during trial: "It suffices that there (wa)s reasonable *doubt* about the testimony's accuracy or trustworthiness"[1293] in *Katanga*. This is because "a witness ha(d) knowingly provided the Court with false information, this show(ed) willingness on his or her part to pervert the course of justice, which render(ed) the entire testimony highly suspect."[1294] The question of: "Whether or not such doubt exists can only be determined on a case-by-case basis." Nonetheless, Judge Wyngaert's view in *Katanga's case* was that "if it has been found that a witness has given false testimony about a matter that is directly relevant to the charges, then the entire testimony should, in principle, be discarded."[1295] Yet, Judge Wyngaert allowed for an exception thus:

> a witness who has been willfully dishonest in one material part of his or her testimony should not be trusted with regard to other parts of it unless there are very strong indications that the witness' mendacity was confined to a particular part of his or her testimony or in case certain parts of the testimony are corroborated by independently strong and reliable evidence.[1296]

First, in *the Kenyatta* confirmation of charges decision, the untrustworthy actor OTP witness no. 4 was not merely a lying witness, but the prosecutor was also negligent. Second, these evidentiary defects may not only have caused the Kenyatta defence team to incur unnecessary expenses in needless counter-investigations but may even have prejudiced the defence's approach before the Pre-Trial Chamber. At the trial stage, the "missing evidence may be a ground for reasonable doubt, if it is likely that this evidence may have an influence on the Chamber's findings."[1297]

4.5.6. Implications of the Katanga Dissent for the Kenyatta Article 64 Application

In the *Kenyatta* confirmation decision, the credibility problems and withdrawn affidavit of key OTP witness numbers 4 and 11 appeared to create a yawning gap in the prosecution case. Because of the exceptional circumstances of that

[1292] Concurring minority opinion of Judge Christine Van Den Wyngaert, *supra* note 202 p 87 para 151.
[1293] *Ibid.*
[1294] *Ibid.* pp 89-90 paras 156-7.
[1295] *Ibid.* p 87 para 153.
[1296] *Ibid.* p 91 para 157.
[1297] *Ibid.* p 94 para 162.

case, however, the Trial Chamber held that the witness's withdrawal did not justify permanent stay or acquittal. Chapter six shall show that – even before Uhuru Kenyatta's election as Kenya's 4th president – many other witnesses withdrew their pre-confirmation statements. Others died or disappeared mysteriously. The ICC Prosecutor therefore attributed her crumbling case to interference with, intimidation of, or bribery of witnesses. Given a litany of problematic circumstances, the legal issue which may be considered is whether or not, in the first place, a criminal trial was an appropriate response to Kenya's post-conflict situation. The argument of this chapter is that Judge Wyngaert seems to suggest – by her conduct of excusing herself from *the Kenyatta case* – that the accused's rights had been compromised by shoddy investigations and unsustainable charges of indirect co-perpetratorship aimed at permitting the Trial Chamber to recharacterize the legal facts before judgment, by relying on post-confirmation acquired evidence.

Unless supplementary investigations unearth new evidence to replace the missing evidence, it is possible to reasonably interpret *the Kenyatta* facts at the confirmation decision – as not providing "substantial reason to believe" that the suspect is an indirect co-perpetrator under article 25(3)(a) of the Rome Statute – of the alleged incidents at Naivasha and Nakuru during Kenya's post-2007 conflicts. This chapter lays the basis to explain why the ICC Prosecutor not only withdrew charges against Muthaura, but also requested for more time to re-open investigations into the charges facing Kenyatta, predicated upon a pending application to re-characterize the charges to perhaps support an alternative charge under article 25(3)(d). In 2013, for similar reasons to those advanced by Judge Wyngaert's dissenting opinion in *the Katanga case*, the prosecutor conceded that the current state of the evidence in *the Kenyatta case* could neither support a charge based on "control theory of perpetration," nor one based on "common criminal purpose." Likewise, in the *Kenyatta defence's article 64 application* challenging the Pre-Trial Chamber's majority confirmation of charges judgment, the crucial witnesses who claimed to have observed the planning meetings at which Kenyatta allegedly collaborated with Muthaura, were found to have lied. Hypothetically, the question arises as to whether a recharacterized broader-based charge based on "common criminal purpose" (joint criminal enterprise) liability could be sustained.

Just as in *the Kenyatta case* at the confirmation of charges judgment, where on a "substantial reason to believe" evidentiary standard, Judge Kaul disagreed that Mungiki is an "organization" so also in *Katanga*, Judge Wyngaert considered that "the evidence did not show, beyond reasonable doubt that the Ngiti-fighters

of Walendu-Bindi constituted a 'group' or an 'organisation' within the meaning of article 25(3)(d) and article 7, respectively."[1298] She explained that:

> A 'group' only exists by virtue of the fact that *all* of its members share the common purpose. In other words, unless there is evidence to suggest that *every* member of a particular existing group/organisation agreed to a common criminal purpose, it is not permissible to equate existing groups/organisations with 'groups acting with a common purpose' in the sense of article 25(3)(d).[1299]

In *the Kenyatta case,* as shown in section 4.8 below, it could not be shown who the Mungiki are. It is possible that, its group criminality may be attributed to the few individuals who participated at the alleged retaliatory attacks at Naivasha and Nakuru. For:

> it is perfectly conceivable that a limited number of members of an existing group or organisation agree to commit a crime together without the consent (or perhaps even knowledge) of the rest of the group. In such a scenario, the 'group acting with a common purpose' is constituted *only* by those individuals who share the common purpose.[1300]

The evidence of various planning meetings in *Kenyatta* seems directed at suggesting that a policy was adopted by all members of the organization. However, according to Judge Wyngaert's consideration of article 25(3)(d) liability, in *Katanga*, "even if there were evidence of an organisational policy to attack the Hema civilian population, this would not automatically prove the existence of a group acting with a common purpose."[1301] The Pre-Trial Chamber *Kenyatta confirmation* judgment is discussed in section 4.8 below.

The majority decision construes the similar manner of the Naivasha and Nakuru attacks using machetes and targeting ODM members as evidence that they were organized. By comparison in the *Katanga case*, although "the fighters of the 'network' of camps in Walendu-Bindi 'numbered in the thousands' " nonetheless, Judge Wyngaert doubts "that these thousands of *unidentified* persons all shared the common purpose."[1302] One prosecution theory in *Kenyatta's case* was based on a theoretical connection between Kenyatta and Mungiki derived from Kagwanja's above quoted academic articles. Yet it was not relied upon in the confirmation judgment, which decision was based on mere "guilt by association." The prosecutor attributed knowledge on the part of

[1298] *Ibid.* p 100 para 173.
[1299] *Ibid.* p 109 para 191.
[1300] *Ibid.*
[1301] *Ibid.* pp 109-10 para 193.
[1302] *Ibid.* p 110 para 195.

Kenyatta of Mungiki activities and implied that *subjective* knowledge of the group's collective crimes imputes individual criminal responsibility. However, the Chamber's decision ignored that theory and did not even refer to Kagwanja's articles in its confirmation judgment.

The second prosecution theory in *Kenyatta* was based on what George Fletcher calls *manifest criminality*.[1303] The OTP alleged that, at several meetings planning retaliatory attacks, direct eye-witness observed Kenyatta and Muthaura. The defence denied Kenyatta's involvement in all of these. To prove that one Maina Njenga transferred authority over the Mungiki militia to Kenyatta, redacted eye-witness evidence was adduced before the Chamber. However, in Judge Kaul's dissenting Judgment, the legal definition of whether or not Mungiki is a "state-like" organization within the meaning of the Rome Statute faced serious difficulties. Nonetheless, on the basis of a modified version of Claus Roxin's control theory of perpetration, the charges were confirmed in the *Kenyatta case* by the majority of Pre-Trial Chamber judges.[1304] As explained in chapter three in relation to "the Network" in *Ruto's case*, so also in *Kenyatta's*, the Pre-Trial Chamber found existence of Mungiki's hierarchical power structure, with fungible membership and detachment from the state. Simultaneously, the majority judges declined to confirm charges against former Police Commissioner Ali. They ruled that harm resulting from failure by the police to prevent Mungiki's attacks could not be attributed to an *intentional*, but *negligent*, act. The police and Mungiki were not one and the same organization, as the prosecutor alleged. Nonetheless, the majority judgment confirmed the charges, alleging indirect co-perpetratorship of crimes against humanity against both Muthaura and Kenyatta. However, in April 2013 Muthaura's charges were subsequently withdrawn, in December 2014 Kenyatta's followed.

Ironically, upon withdrawal of Muthaura's charges, a curious co-perpetratorship allegation of crimes against humanity remained against President Kenyatta "with others not before the court." This was so notwithstanding that direct evidence alleging *manifest criminality* by attendance at planning meetings was withdrawn even prior to the confirmation proceedings as being based on lies. These fabricated facts were used to build the elements of the indirect co-perpetratorship character of the charge. Yet they were concealed by an admittedly negligent or unethical prosecutor. Additionally, despite breach of the prosecutor's obligations to investigate exculpatory evidence and notwithstanding the consequent violation of the suspect's rights, it shall be shown how the Trial Chamber merely reprimanded the prosecution and required it to disclose any post-confirmation evidence in its possession. However it held that, no judicial

[1303] Fletcher, *Rethinking, supra* note 40 p 116.
[1304] Roxin, *Täterschaft, supra* note 130*;* See also chapter three, *supra* section 3.5.

notice[1305] can be taken of official records such as the Kenya National Commission on Human Rights Report.[1306]

Because, soon after April 2013, one Trial Chamber Judge, Christine Van Wyngaert no longer desired to preside over *the Kenyatta case*, therefore the prosecutor frantically sought to rely on a third theory at the trial. The new prosecution theory would be based on *subjective criminality* or circumstantial evidence. Chapter six shall argue that this third prosecution theory prompted additional investigations to acquire new evidence in an attempt, for example, to construe that it is no coincidence that cash flowed from Kenyatta's bank accounts around Kenya's post-2007 conflicts. Further that such cash flows would seem consistent with his alleged financing of the Mungiki militia's retaliatory attacks. Due to extenuating circumstances, this latest prosecution argument – as well as the problematic issue regarding the extent to which the ICC may compel involuntary witnesses to testify before it – shall be considered only until September 2014 during the writing of this book, which is under consideration here.

The current chapter hypothesizes that, in *the Kenyatta case,* the prosecutor was unclear or uncertain of its case, *ab initio*. It therefore characterized the case as based on indirect co-perpetration. Yet the new facts do not remove doubts regarding the interpretation of the existing facts during the Confirmation Judgment before the Pre-Trial Chamber. The majority in *Katanga* were accused "of presenting things (in a way that) grossly oversimplify a very complex situation." Instead Judge Wyngaert's dissent opined that "hating ones enemy for being the enemy is not the same as denying their right to exist. Indeed, the wish to prevail over one's enemy cannot simply be equated with intent to erase them from the face of the earth, as the Prosecutor and the Majority seem to suggest."[1307] She concluded that:

> Whatever sociologists and anthropologists may be able to teach us about the collective characteristics of social and ethnic groups, it is not permissible in a judicial context to extrapolate from such collective traits any firm conclusions about how individual members of the group acted or behaved in a particular context. Even though international criminal law deals with what is sometimes described as 'group' or 'mass criminality,' its ultimate concern is with specific individuals and their personal criminal behaviour. It is therefore inappropriate to lump together entire populations and attribute

[1305] Dissenting minority opinion of Judge Christine Van Den Wyngaert *supra* note 1245 p 134 para 244, *Katanga Judgment Trial Chamber* is not entitled to take judicial notice of findings by the UN Special Report.
[1306] *Republic v the Kenya National Commission on Humans Rights ex-parte Hon. Uhuru Muigai Kenyatta* [2010]eKLR www.kenyalaw.org <accessed 23 July 2014>
[1307] *Katanga Trial Judgment*, *supra* note 1245 p 138 para 255.

collective criminal intentions to all their members. Individuals are not predetermined to act or think in a particular way simply because they belong to a certain social or ethnic group, even if a considerable majority of the group does act or think that way. Accordingly, without very solid and sufficiently specific evidence showing that particular members of a certain social or ethnic group actually shared the intent to commit crimes, it is not possible to speak of a 'group acting with a common purpose' in the sense of article 25(3)(d).

4.5.7. Judge Wyngaert's Dissent finds Insufficient Evidence of Crimes against Humanity in Katanga

"Without wishing to minimise the seriousness of even a single death, I do not believe that such a relatively small number rises to the level of a crime against humanity."[1308] Judge Wyngaert disagreed as far as the "Multiple Commission Requirement" [article 7(2)(a)] is concerned, "that a casualty count of 33 satisfies the minimum threshold."[1309] Instead, "the Prosecutor must be able to point to a sufficient number of instances of crimes under article 7(1) that have been committed by the perpetrators pursuant to or in furtherance of a State or organisational policy."[1310] Consequently, the judge did "not think that a policy in the sense of article 7(2)(a) ha(d) been proved."[1311] Additionally, she argued "that the contextual circumstances of article 7 had not been satisfied because (she) d(id) not believe that whatever corporate shape the so-called 'Ngiti-fighters of Walendu-Bindi' took qualifie(d) as an 'organisation' in the sense of article 7(2)(a)."[1312]

Furthermore for Judge Wyngaert, *Katanga's* acquittal on indirect co-perpetratorship automatically "follow(ed) from the acquittal of Mathieu Ngudjolo that the charge of 'indirect co-perpetration' has been rejected."[1313] Significantly, only three forms of responsibility are "laid down under article 25(3)(a) namely perpetration, co-perpetration and perpetration through another person."[1314] Therefore, Judge Wyngaert considered "indirect co-perpetration to be an expansive interpretation which is inconsistent with article 22(2) of the Statute and therefore should be rejected."[1315]

[1308] *Ibid.* p 143 para 264.
[1309] *Ibid.* p 142 para 264.
[1310] *Ibid.* para 265.
[1311] *Ibid.* p 144 para 268.
[1312] *Ibid.* para 269.
[1313] *Ibid.* p 147 para 278.
[1314] *Ibid.* p 148 para 278.
[1315] *Ibid.*

One key finding of this chapter is that Judge Wyngaert's dissenting opinion in the *Katanga Judgment* applied a literal or textual (and perhaps also contextual and historical) interpretation of the Rome Statute similar to Judge Kaul's dissenting judgments in the Kenya confirmation judgments in *Ruto and Sang's case* as well as *Muthaura and Kenyatta's case*. Both Judge Wyngaert's as well as Judge Kaul's textual (and perhaps also contextual and historical) readings of the Rome Statute concurs with that provided by Jens David Ohlin[1316] but differs from the human values, teleological or purposive reading of the majority judges in both the *Katanga Trial* (Bruno Cotte and Fatoumata Dembele Diarra) and *Kenya cases* (Ekaterina Trendafilova and Cuno Tarfusser) at confirmation of charges, as well as the "constitutional interpretation" of international organizations, preferred by Leila Sadat[1317] and Charles Jalloh,[1318] examined in chapter three.

Like Judge Fulford, Judge Wyngaert believes "that we should adopt the ordinary meaning of the language of article 25(3) and interpret its terms accordingly."[1319] In her concurring opinion in *Ngudjolo*, she "concluded that a plain reading of article 25(3)(a) requires, for the purposes of joint perpetration, that only those individuals whose acts make a direct contribution to bringing about the material elements of the crime can be said to have jointly perpetrated the crime."[1320] Thus, Judge Wyngaert's rejection of control theory in Ngudjolo is based on adopting "the ordinary meaning of the language of article 25(3) of the Statute in light of its object and purpose, which is the interpretive standard for every other provision in the Statute."[1321] However, as to the applicable law for article 25(3)(d) liability, Judge Wyngaert is not only in agreement with the approach taken by the majority but also "with Pre-Trial Chamber I in *Prosecutor v Mbarushimana.*"[1322] She observed that "there is not a single reliable item of evidence in this case which refers to a single utterance by Germain Katanga that could be interpreted as anti-Hema."[1323] Similarly, in the *Kenyatta confirmation judgment*, it shall be seen below that, no "ethnic argument" was used to attribute Kenyatta's alleged mobilization of retaliation. On the contrary, some video evidence portrayed him as visibly restraining PNU supporters from retaliation. Indeed, the very fact that both Kenyatta and Ruto were even permitted to contest Kenya's 2013 presidential election, suggests a sociological fact that neither of

[1316] Ohlin, "Organizational Liability," *supra* note 195; See also chapter three, *supra* section 3.12.
[1317] Sadat, "Crimes Against Humanity," *supra* note 193.
[1318] Jalloh, "What Makes a Crime," *supra* note 194.
[1319] *Ibid.* para 280.
[1320] *Ibid.* pp 148-9 para 280.
[1321] *Ibid.* p 149 para 281.
[1322] *Prosecutor v Mbarushimana, supra* note 1220.
[1323] *Ibid*. p 155 para 291.

them were publicly perceived as ineligible to hold state office or as persons lacking integrity under Kenyan law.[1324]

Judge Wyngaert concluded that:

> on the human level. Sympathy for the victims' plight and an urgent awareness that this Court is called upon to 'end impunity' are powerful stimuli. Yet, the Court's success or failure cannot be measured just in terms of 'bad guys' being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just.[1325]

She continued that:

> Considerations about procedural fairness for the Prosecutor and the victims and their Legal Representatives, while certainly relevant, cannot trump the rights of the accused. After all, when all is said and done, it is the accused – and only the accused – who stands trial and risks losing his freedom and property. In order for a court of law to have the legal and moral authority to pass legal and moral judgment on someone, especially when it relates to such serious allegations as international crimes, it is essential, in my view, to scrupulously observe the fairness of the proceedings and to apply the standard of proof consistently and rigorously. It is not good enough that most of the trial has been fair. All of it must be fair.[1326]

Ultimately, therefore:

> Regulation 55 may well exist in order to stop the much-invoked 'impunity gap', in the sense that it allows Chambers to avoid so-called 'technical' acquittals. However, it is not a licence to turn the entire factual and legal framework of a case upside down just in order to avoid an acquittal.[1327]

4.6. Lessons from the Dissenting Opinion in *the Katanga Notice to Re-Characterize*

4.6.1. Introduction

According to Judge Wyngaert's dissenting decision in *Katanga's Recharacterization Notice*: "Instead of pronouncing itself on whether or not the evidence establishes beyond reasonable doubt that Germain Katanga is guilty as charged, i.e. under Article 25(3)(a) of the Statute, the Majority…propose(d) to consider whether he is guilty under Article 25(3)(d)(ii) of the Statute."[1328] The Judge insisted that "the principle of 'fair labeling' " required "that, ideally, a Trial Chamber must accurately label an accused's individual criminal responsibility in the final judgment."[1329] In her view, "Regulation 55 is intended to serve two purposes. The first is to allow for more focused trials. The second is to avoid impunity gaps that may be caused by 'technical' acquittals as part of the 'fight against impunity.'[1330] Since recharacterization of charges is "not a licence for trial chambers to find at all costs a stick to hit the accused with,"[1331] therefore, Judge Wyngaert dissented from the majority decision. Indeed, "it should be obvious that a proposed recharacterisation under Regulation 55(2) may not exceed the facts and circumstances of the charges (and any amendments thereto), as required by Regulation 55(1)."[1332]

4.6.2. The Notice Decision Exceeded the Facts and Circumstances of the Charges

Rejecting the prosecutor's late notice to re-characterize charges in *Katanga's case*, Judge Wyngaert asserted that:

> First, the Majority cannot rely on allegations, which, although mentioned in the Confirmation Decision, do not constitute factual allegations that support the legal elements of the crimes charged. Second, the Majority may not change the narrative of the facts underlying the charges so fundamentally that it exceeds the facts and circumstances described in the charges.[1333]

In her view: "The Majority (wa)s therefore misguided when it suggest(ed)…that Regulation 55 allows Chambers to pick and choose any fact from the Confirmation Decision in order to meet the legal requirements of a different form of criminal responsibility."[1334] Her minority dissenting opinion was categorical that:

> Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to and were influenced by a particular context [....] Taking an isolated material fact and

[1324] Chapter six, Constitution, *supra* note 13; See also *post*, section 5.1
[1325] *Ibid*. p 166 para 309.
[1326] *Ibid*. p 166-7 para 311.
[1327] *Ibid*. p 167 para 314.
[1328] Katanga Trial Chamber 25(3)(d) Notice Decision Dissenting Opinion of Judge Christine Van Den Wyngaert, dated 7th March, 2014 www.icc-cpi.int/iccdocs/doc/doc1744372.pdf <accessed 16th July 2014> pp 2-3 para 2.
[1329] *Ibid*. p 3 para 5.
[1330] *Ibid*. p 5 para 7 (footnote omitted).
[1331] *Ibid*. para 8.
[1332] *Ibid*. p 6 para 9.
[1333] *Ibid*. p 7 para 13 (footnote omitted).
[1334] *Ibid*. pp 8-9 para 15.

> fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a 'change in the statement of facts.'[1335]

In Judge Wyngaert's dissenting conclusion dismissing the prosecutor's belated re-characterization notice, she was aghast that "the Majority's proposed migration to Article 25(3)(d)(ii) inevitably forces it to engage in extensive factual acrobatics."[1336] Re-characterization in *Katanga's case* "was the kind of 'drastic change' which the ICTY Appeals Chamber warned against."[1337]

4.6.3. Unfairness of the Notice Decision

Judge Wyngaert's dissenting opinion in *Katanga's Notice 25(3)(d) decision* argued that "triggering Regulation 55 at this point in the proceedings create(d) an undue delay under Article 67(1)(c) and is incompatible with the Trial Chamber's obligation under Article 64(2) to ensure that the trial is expeditious."[1338]

4.6.3.1. The Right to a Fair and Impartial Proceeding

According to Judge Wyngaert, "the prosecution, whose role it is to provide the charges, made no efforts to incorporate Article 25(3)(d) into its charges. The arrest warrant application regarding Germain Katanga was based solely on Article 25(3)(b)."[1339] Hence: "If the prosecution did not bring its charges on the modes of liability most likely to lead to a conviction, then the Chamber should be particularly wary of doing this work instead."[1340] Rather "triggering Regulation 55 at the very end of the deliberations at least risks creating a perception of partiality."[1341] She was "not persuaded that trial chambers have an unqualified truth seeking mission."[1342] In any event: "such an objective cannot justify an encroachment by the Trial Chamber on the role of the prosecution. In fact, by moving the factual goalposts of the case in the name of pursuing the truth, the Majority is essentially stepping into the shoes of the prosecution, a position no judge should ever find him or herself in."[1343]

[1335] *Ibid*. pp 10-11 para 20.
[1336] *Ibid*. p 11 para 21.
[1337] *Ibid*. p 12 para 22.
[1338] *Ibid*. pp 13-14 para 26.
[1339] *Ibid*. p 15 para 30 (footnote omitted).
[1340] *Ibid*. pp 15-16 para 30.
[1341] *Ibid*. p 16 para 32.
[1342] *Ibid*. p 17 para 34.
[1343] *Ibid*. p 17-18 para 35.

4.6.3.2. The "Lesser Included Offence" Argument

Judge Wyngaert's dissenting view in *Katanga* held that:

> proof of an essential contribution to a plan (Article 25(3)(a)) does not necessarily mean proof of a non-essential contribution to a crime (Article 25(3)(d)). Accordingly, Article 25(3)(a) liability can be proven without proving Article 25(3)(d)(ii) liability; the latter provision is therefore not a 'lesser included' mode of liability.[1344]

Further: "Even if charges under Article 25(3)(d)(ii) could be classified as lesser included offences under Article 25(3)(a)[...] Unless the defence is put on clear notice that the lesser included offence is in play, then it cannot be blamed for concentrating its efforts at rebutting the allegations actually charged."[1345] In her interpretation: "There (wa)s nothing 'lesser' about any of this; it (wa)s nothing short of the Chamber co-opting a valid defence and turning it against the accused." She felt "extremely uncomfortable with a Chamber, however inadvertently, setting an accused up for failure in this way."[1346] Specifically because: "The amount of time needed to effectively respond to the 25(3)(d) Notice Decision would necessarily create an unfair delay Article 67(1)(b) of the Statute gives the accused the right to have adequate time and facilities for the preparation of the defence."[1347] Therefore, "the Majority's application of Regulation 55 can only be understood as a consequence of a fundamental misconstruction of the adversarial process."[1348] "What evidence the defence will present is a direct reaction to what the charges are."[1349] Conversely: "In inquisitorial systems," she distinguished, "the entire evidence of the case is centralised in a shared dossier, the contents of which are known to the parties and participants right from the start of the proceedings."[1350]

4.7. Competing Prosecution Theories at the Kapenguria *Trial of Jomo Kenyatta*

I have explained elsewhere how during the 1950s the Kapenguria court undermined African scholarship and writing.[1351] At Kapenguria, the British

[1344] *Ibid*. p 21 para 43.
[1345] *Ibid*. p 22 para 44.
[1346] *Ibid*. p 23 para 46.
[1347] *Ibid*. p 24 para 48.
[1348] *Ibid*. p 27 para 54.
[1349] *Ibid*. p 28 para 56.
[1350] *Ibid*. pp 27-8 para 55.
[1351] I am grateful to John Lonsdale for this idea; Part of this sub-section of the book is transcribed verbatim from Charles Khamala, "The Criminalization of Culture: Deconstructing Psychological and Legal Language in Kenya" in Ruth Bett, Marie Elisabeth Mueller and Cay

prosecution argued validly that the blood oath had particular significance is "symbolic of the adoption of one person by another or even brotherhood." Further, that earth and blood "also have significance in Kikuyu ceremonies concerning land," and was similar to "birth, death, marriage and circumcision" are generally known in anthropological circles as rites de passage. Ceremonies which take place as the life of the individual progresses, "where the individual is passing to another stage of life…" which are significant not only to all ceremonies connected with the Mau Mau but also with the rites de passage of the Kikuyu. In hindsight perhaps, the colonial prosecution were justified in advancing a theory based on the principle that "the accumulation of information creates a demand for its use;"[1352] and that because Jomo Kenyatta was the author of the book entitled *Facing Mount Kenya: The Tribal Life of the Gikuyu*[1353] and further because "knowledge is power therefore Jomo Kenyatta must be the leader of the Mau Mau unlawful society." However, ignoring Ian Henderson's anthropological testimony, Judge Ransley Thakker instead convicted for *manifest criminality* based on Rawson Macharia's eye-witness evidence, without need to re-characterize the legal charges. It is also uncanny that as explained at the commencement of this chapter, the ICC prosecutor similarly attempted to rely on African scholarship of Peter Kagwanja's articles on Mungiki to criminalize Uhuru Kenyatta on the basis of "guilt by association."

This chapter's hypothesis is that the fact that in *the Uhuru Kenyatta case*, the ICC prosecutor appeared to have attempted an alternative theory – of "guilt by association" based on academic articles, itself suggests that he failed to conduct proper and independent investigations to establish either a *manifest criminality* or a circumstantial evidence case.[1354] To this end, Ocampo appears to have pursued a political crime.[1355] Furthermore, buoyed by the fact that under international criminal procedure, various witnesses were entitled to adduce redacted evidence, therefore the evidence before the Pre-Trial Chamber attained the lower threshold of having "substantial reason to believe" which enabled them to *confirm the charges*. However the law demands a higher standard of proof of "beyond reasonable doubt" at the trial. That perhaps accounts for why it became necessary for the new ICC prosecutor to review the inadequate evidence

Etzold (eds.) *Across Borders: Benefiting from Cultural Differences* (Nairobi: DAAD/Goethe/University of Nairobi, 2005) 250-264.

[1352] Claus Mueller, *The Politics of Communication: A Study in the Political Sociology of Language, Socialization and Legitimation* (New York: Oxford University Press, 1974).

[1353] Jomo Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu* (London: Secker & Warburg, 1938).

[1354] Obuya Bagaka, "Striking Similarities between Uhuru Kenyatta's Trial at The Hague and Jomo Kenyatta's Kapenguria case" *East African Standard*, 29th September 2014.

[1355] Reichel, *Comparative Criminal Justice, supra* note 155; See also Pakes, *Comparative Criminal Justice, supra* note 157; And Pritt, *Law Class and Society, supra* note 1183.

in her possession and withdraw the case against Muthaura. Additionally, in conceding the insufficiency of the investigations, in relation to trial, the prosecutor may have re-evaluated the evidence at the higher standard, and found it to be inadequate to sustain proof of crimes against humanity so as to justify *conviction after trial*. This chapter concludes, moreover, that it was more difficult for the Trial Chamber to justify continuing with *the Kenyatta case* not only after the defence discredited key prosecution witness statements, but also upon withdrawal of other key witnesses. Latent uncertainty nonetheless remained for the accused in that the Trial Chamber may re-characterize the charges at any time before judgment and the real possibility of a conviction on alternative charges – constructed on the basis of the prosecutor's post-confirmation investigations – which may discover new evidence which was not before the Pre-Trial Chamber. Increased uncertainty during trial dilutes a suspect's rights to a fair trial. Yet, "unique circumstances" apparently warranted President Kenyatta's continued prosecution, notwithstanding absence of sufficient evidence.

4.8. The Confirmation-of-Charges Majority Judgment in *the Kenyatta case*

4.8.1. Summary

The Office of the Prosecutor alleged that in *the Kenyatta case*, crimes against humanity were committed by Kenyatta, Muthaura, and Ali. Particularly, mass murder, deportation or forcible transfer, rape and other forms of sexual violence, other inhumane acts and persecution. While Muthaura and Kenyatta were allegedly indirect co-perpetrators, Ali was suspected of being a mere contributor.

The Pre-Trial Chamber majority decision, upon confirmation of charges, found substantial grounds to believe that between 24th and 28th January 2008 there was an attack against civilians belonging to the Luo, Luhyia and Kalenjin ethnic groups residing at Nakuru and Naivasha. Victims were targeted on account of being perceived as supporters of the ODM. Those attacks resulted in a considerable number of killings, displacement of thousands of people, mass rape, severe physical injuries and mental suffering. The majority judgment found substantial grounds to believe that both Kenyatta and Muthaura were criminally responsible for the alleged crimes, as indirect co-perpetrators, not only for having gained control over the Mungiki, but also directing them to commit the crimes. The two were committed to trial, where along with those in *the Ruto case* the victims would also have the right to request reparations, should the accused persons be convicted.

4.8.2. The Kenyatta case: *Preliminary Objections, Definitions and Interpretations*

Regarding the situation involving Muthaura, Kenyatta and Ali, it is not necessary for this chapter to repeat the jurisdictional objections raised by the suspects, as set out in the previous chapter, which considered *the Ruto case*. Ultimately, the Pre-Trial Chamber held that "admissibility (wa)s not mandatory but discretionary."[1356] The defence questioned whether or not the case against former Police Commissioner Hussein Ali was of sufficient gravity, because first, "it concern(ed) an alleged omission; and, independently." Second, "Ali (was) not being charged as a principal or a direct perpetrator." However, because Ali was primarily alleged to have taken *positive* steps to ensure the inaction of the Kenya Police during and for the purpose of the commission of the crimes charged – rather than "command responsibility" – therefore these objections were unimpressive.[1357] In his official capacity as Commissioner of Police, he was alleged to have committed crimes in two locations over a number of days which resulted "in numerous deaths and brutal injuries, massive displacement and sexual violence." Worse still "(t)he alleged manner of commission of the crimes featured particular brutality, such as beheading victims and also burning victims alive."[1358] The incongruent arguments and dichotomous judicial interpretations of the *Kenyatta confirmation hearing* shall be described below.

Right from the outset, Kenyatta's objection charged that two witnesses who had been in contact with his Defence lawyers were " 'criminals' and 'extortionists', who gave a 'fully inculpatory account to the Prosecutor after having given a wholly exculpatory account to the Defence.' "[1359] However their statements were undated, unsigned, unverified and incomplete notes. Another defence witness Lewis Nguyai, the MP for Kikuyu constituency, admitted giving petty cash to a Mungiki member, although he vehemently denied disbursing significant amounts, and also denied that these installments of funds were disbursed on Kenyatta's behalf. He claimed to have received threatening messages, from one of the so-called extortionist individuals in question, demanding money. However, Nguyai's testimony was rejected as irrelevant and inconsistent.[1360] Under the principle of *nullum crimen sine lege*[1361] Kenyatta's defence argued that "the term 'organizational policy' must be strictly construed." It further submitted that the drafters of the Rome Statute "intended to create a clear boundary between crimes against humanity and national crimes, and for this

[1356] *The Kenyatta Pre-Trial Chamber* majority judges, *supra* note 1170.
[1357] *Ibid.* p 46.
[1358] *Ibid.* 10 p 24 para 49.
[1359] *Ibid.* p 39 para 93.
[1360] *Ibid.* p 41 para 96.
[1361] Article 22, Rome Statute, *supra* note 14, cited in *ibid.*

boundary to be dependent not on the abhorrent nature of the crimes but on the entity and policy behind them." Because the Statute refers to "an 'organization' and not to 'groups,' 'bodies' or other less clearly defined entities" therefore "the drafters of the Statute 'clearly intended the formal nature of the group and the level of its organization to be a defining criterion.' " Kenyatta basically requested for "a narrower interpretation of the term 'organization.' "

The facts, according to Pre-Trial Chamber majority judges Trendafilova and Tarfusser, were that on 24th January 2008, violence erupted at Nakuru:

> lasting until 27th January 2008. Mungiki's violent acts were directed at the perceived ODM supporters resident in Nakuru. Eye-witnesses testified that 'the violence [in Nakuru] started after the election on 25 January 2008' and that it was 'planned and committed by persons from outside of the area.'[1362]

The same witness explained that "most of the people killed during the violence were (of) Luo and Luhya ethnic origin."[1363] Conversely, according to the District Commissioner for Nakuru, Wilson Wanyanga, the attack by "pro-ODM youths of mixed ethnicity" on PNU supporters in Githima was the trigger of the 'general violence' that took place on 25th January 2008.[1364] Curiously, Wanyanga, referred to "spontaneous groups of Kikuyu, some armed with sticks and stones." However, "the evidence available to the Chamber reveal(ed) that a number of Luo, Luhya and Kalenjin fatalities were caused by gunshots."[1365] Therefore, his attribution of the source of violence to ODM youths was rejected. The evidence showed that: First: "43 Luo, Luhya and Kalenjin victims (were) recorded between 24 and 27 January, and a peak in recorded killings of these ethnic groups is discernible exactly during the time when the Mungiki attack is alleged to have taken place." And: "Second, sharp object injuries and gunshot wounds (we)re the two most frequent causes of death listed for Luo, Luhya and Kalenjin victims in the relevant time period." Third, that all gunshot deaths between the said dates were of Luo, Luhyia and Kalenjin victims.[1366]

Another witness observed the events unfold. However, the "condition of the pangas (machetes) could not be seen." Nonetheless, "other…evidence… refer(ed) explicitly to the use of pangas by the attackers"[1367] (brackets supplied) upon "the targeted population." What "(was) being planned (were) retaliatory attacks [...] to fight any other person who (was) not supporting Kikuyus."[1368] For

[1362] *Ibid.*
[1363] *Ibid.* p 49 para 120.
[1364] *Ibid.* p 51 para 121.
[1365] *Ibid.* para 126.
[1366] *Ibid.* p 53 para 132.
[1367] *Ibid.* p 56 para 141 (brackets supplied).
[1368] *Ibid.* p 57 para 143.

this purpose, a planning meeting was allegedly convened "in a certain hotel." It was not only alleged that "arrangements… (were) made so that weapons and uniforms would be provided from Nakuru State House,"[1369] but also that "the persons in charge of the local planning arranged for the administration of Mungiki oath to new members 'in the forest of Menengar (sic) Crater', for the specific purpose of increasing the fighting capacity on the ground."

4.8.3. National Security Intelligence Service (NSIS) Situation Reports

Additional corroborating evidence relating to the planning of the attack emanated from a number of National Security Intelligence Service (NSIS) Situation Reports. An NSIS Situation Report for 7th January 2008, stated that "Mungiki sect leader John Maina Njenga ha(d) directed sect coordinators to carry out recruitment and oathing ceremonies in preparation to joining the current skirmishes in some parts of the country." Furthermore, on 9th January 2008, "the NSIS reported 'speculations that Mungiki members would attack' the Kalenjin, Luhya and Luo communities residing in Nakuru.' "[1370] SMS messages warned members of the communities of an impending attack by "Mungiki adherents dressed in Police gear." Similar reports on 14th and 21st January "state(d) that these new members joined those coming from Thika and Limuru, and participated in the attack in Naivasha."[1371] The NSIS Situation Report for 28th January 2008 "explicitly mention(ed) the use of Administrative Police uniforms by the attackers in Nakuru."[1372] They allegedly "resolved to get individuals from Mungiki whom they thought [to be] better placed to help them"[1373] (the Mungiki) attack in Nakuru and Naivasha which was planned and organized.[1374]

4.8.4. The Mungiki "Organization"

Curiously, at the time of the events under consideration, to the Pre-Trial Chamber's majority judges, the Mungiki qualified as a "state-like" organization.[1375] The PTC's conclusions were, first, that "the Mungiki was a hierarchically structured organization under the control of Maina Njenga." Second, that "there existed an effective system of ensuring compliance by the members with the rules and orders imposed by higher levels of command." Third, that "the Mungiki was a large organization and included a trained quasi-military wing; controlled and provided, in certain parts of Kenya, essential social services, including security."[1376] On one hand, the prosecution alleged that "(i)t (was) Maina Njenga who (had) all the real power. The other leaders can have different titles, but all the decisions and powers come from Maina Njenga."[1377] Furthermore:

> [t]he Mungiki (was) organized into local and regional branches. In every local area, there (was) a local Chairman who has his own office and his own people. There (was) a Chairman for every region. The Chairmen of the different regions are equals in the hierarchy. They (were) the next level after the Higher Office.[1378]

On the other hand, Kenyatta's defence vigorously protested, claiming that Mungiki was "no more than an amorphous group with disparate aims, shifting politically, as its changing aspirations dictate,"[1379] therefore it was "far from being under responsible command with an established hierarchy." Some non-criminal features of the group include the facts that "the Mungiki (had) sought to alleviate crime in Nairobi slums and invested in social programmes and campaigned against 'drunkness, rent hikes, drug use, prostitution.' "[1380] The most significant "non-state-like" feature was that "the Mungiki did not have the means at its disposal to commit a large-scale attack directed against the civilian population."[1381] Nevertheless, that Chamber's majority judges opined that "the evidence indicate(d) clearly that Mungiki activities must generally be seen as criminal, because they involve acts of violence and extortion of the population in areas of Mungiki activity." Neither were Mungiki's activities widespread. For Kenyatta, "Mungiki activities 'remain(ed) limited in nature and are territorially restricted, in particular to the slums of Nairobi.' " Not only was the existence of an "organization" not a rigid legal criterion, but also, "no link exist(ed) between Mr. Kenyatta and the Mungiki."[1382] To its credit, all three judges ignored the alternative prosecution theory based on a misinterpretation of academic literature – as explained in introducing this chapter – which attempted to conjecture that Kenyatta is associated with the Mungiki.[1383] Nonetheless, the majority judges invoked a provision which referred:

> to 'knowledge of the attack' as a legal requirement of crimes against humanity, thereby making clear that examination of any tighter link between

[1369] *Ibid.* p 58 para 147.
[1370] *Ibid.* p 60 para 155.
[1371] *Ibid.* p 63 para 155.
[1372] *Ibid.* p 65 para 170.
[1373] *Ibid.* p 70 para 183.
[1374] *Ibid.* p 71 para 185.
[1375] Within the meaning of article 7(2)(a), Rome Statute, *supra* note 14, cited in *ibid.*
[1376] *Ibid.* para 186.
[1377] *Ibid.* p 73 para 192.
[1378] *Ibid.* p 76 para 201.
[1379] *Ibid.* p 77 para 205.
[1380] *Ibid.* p 81 para 220.
[1381] *Ibid.* p 82 para 222.
[1382] *Ibid.* p 83 para 223.
[1383] See *supra* Introductory section of this chapter and section 4.7.

> the person charged and the organization bearing the policy to commit a widespread or systematic attack (was) unnecessary.[1384]

The Pre-Trial Chamber majority judges in their *Kenyatta case* confirmation-of-charges judgment found that adherents were forcefully recruited into the Mungiki, that the content of the oath was to "abide by the rules of the Kikuyu organization" and never to "betray the Kikuyu community." One witness feared that "he would be killed if he did not respect the oath."[1385] He found the Mungiki oath to be " 'degrading' and its purpose as being to 'instill fear' in the new members, further confirming that a pledge of secrecy forms part of this oath." In sum: "This amount(ed) to a quasi-judicial system of enforcement of Mungiki rules." Because "before a person (wa)s killed, he (was) taken before the Mungiki judicial system, where the Chairman is the judge,"[1386] and further because a "special class of Mungiki members…who were used for killings and received training in martial arts, self-defence and shooting,"[1387] therefore the Chamber concluded that "the Mungiki is a large, hierarchically structured organization with a trained military wing, and with access to regular income."

4.8.5. The Allegation of Police Involvement in the Mungiki Attack

Against Brigadier Ali, the Prosecutor alleged "a deliberate failure to act or a creation of a 'free zone.' "[1388] However, the Chamber found that:

> such failure mainly occurred as a result of ethnic bias on the part of individual police officers as well as of ineptitude and failure of senior police officers to sufficiently appreciate the violence in Nakuru and Naivasha, leaving the police officers on the ground often overwhelmed and outnumbered by the attackers.[1389]

Mungiki allegedly carried out a planned and coordinated attack against perceived ODM supporters at Nakuru and Naivasha between 24th and 28th January 2008, 431 which involved the commission of a number of crimes perpetrated on a large scale. Consequently the Pre-Trial Chamber majority decision found four criteria which qualify Mungiki as an "organization."[1390] One, because "Mungiki was hierarchically structured." Two, "there existed an effective system of ensuring compliance by the members with the rules and

[1384] *The Kenyatta Pre-Trial Chamber* majority judges, *supra* note 1170 p 84 para 223, article 7(1), Rome Statute, *supra* note 14.
[1385] *Ibid.* p 77-8 para 212-3.
[1386] *Ibid.* p 79.
[1387] *Ibid.* para 213.
[1388] *Ibid.* p 84 para 224.
[1389] *Ibid.* p 84 para 226.
[1390] Article 7(2)(a), Rome Statute, *supra* note 14, cited in *ibid.*

orders imposed by higher levels of command." Three, "the Mungiki was a large organization and included a trained quasi-military wing." Four, "it controlled and provided, in certain parts of Kenya, essential social services, including security."[1391]

4.8.6. Alleged Crimes against Humanity

The Pre-Trial Chamber majority judgment in *Kenyatta's case* graphically described how in Nakuru, between 161 and 213 people were killed, including 48 people during the night of 26th January 2008 alone. "The majority of killings and injuries were caused by sharp objects or instruments." Based on a list of reported deaths compiled by the CIPEV,[1392] out of approximately 112 people killed in Nakuru between 24th and 27th January, at least 90 were perceived ODM supporters, including 43 people of Luo, Luhya and Kalenjin origin.[1393] Additionally, the attacking Mungiki "forcibly displaced thousands (of ODM supporters) from their homes into IDP camps."[1394]

Furthermore, as of 31st January 2008, at least 50 people – the majority ODM supporters[1395] – had been killed during the post-2007 conflicts in Naivasha of which 39 were from the Luo, Luhya and Kalenjin communities.[1396] It was further alleged that "about 9,000 perceived ODM supporters were forced to seek"[1397] refuge. They were of Luo, Luhya and Kalenjin ethnic origin[1398] and allegedly forcibly transferred contrary to international law.[1399]

Additionally, rape evidence[1400] indicated that, in Naivasha, "men were forced to remove their underwear to confirm their ethnicity and forcibly circumcised if they were identified as Luo."[1401] They were "rounded up and forcefully circumcised using pangas and broken bottles."[1402] Controversy emerged as to whether the acts in question were of a sexual nature, as is essential for classification of a certain act as "other forms of sexual violence."[1403] However, the "forcible circumcision and penile amputation visited upon Luo men" were

[1391] *Ibid.* pp 84-5 para 228.
[1392] *The Waki Report, supra* note 12.
[1393] *The Kenyatta Pre-Trial Chamber* majority judges, *supra* note 1170 p 87 para 238.
[1394] *Ibid.* p 88 para 241.
[1395] *Ibid.* p 86 para 232.
[1396] *Ibid.* p 88 para 238.
[1397] *Ibid.* para 241.
[1398] *Ibid.* p 90 para 249.
[1399] *Ibid.* p 89 243.
[1400] *Ibid.* p 93 para 259.
[1401] *Ibid.* para 261.
[1402] *Ibid.* para 262.
[1403] Pursuant to article 7(l)(g), Rome Statute, *supra* note 14, cited in *ibid.* p 94 para 264.

"motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other," consequently these were instead classified as "(o)ther, or serious injury to body or to mental or physical health,"[1404] without establishing their sexual nature. Additionally acts of brutal killings and mutilations in front of the eyes of the victims' family members caused serious mental suffering[1405] on the basis that the victims were targeted by reason of their identity as perceived ODM supporters representing a distinction on political grounds.[1406] Accordingly, "the objective elements of persecution constituting a crime against humanity" were proved.[1407]

4.8.7. Individual Criminal Responsibility

4.8.7.1. PNU Superiors Allegedly Met Mungiki

In certain respects the facts giving rise to the elements of the offence in the *Kenyatta case* resemble those in relation to *Ruto's*. Both alleged that there were preparatory meetings prior to the post-2007 conflicts. Peculiar to *Kenyatta case*, preliminary contacts were allegedly made between Muthaura and Kenyatta's intermediaries and the Mungiki[1408] through which both of them allegedly redefined the PNU Coalition's relationship with that militia not only culminating into the Mungiki's support in the 2007 election campaign, but also degenerating into its deployment for the Nakuru and Naivasha attacks.[1409]

4.8.7.2. On 26th November 2007, Allegedly at State House, Nairobi

The ICC Pre-Trial Chamber majority judges held that Muthaura and Kenyatta allegedly, first, on 26th November 2007, participated in various meetings with Mungiki members[1410] at Nairobi State House, in a tent. Further that "Muthaura introduced the Mungiki members to the President – referring to them, throughout the entire meeting, as 'the youth' – and encouraged them to inform the President of their demands in exchange for their support for his electoral campaign." One of the Mungiki representatives then allegedly presented – on behalf of Maina Njenga – a number of demands to the PNU Coalition. Those alleged demands included: (i) the cessation of extrajudicial killings of Mungiki members; (ii) the release from prison of Maina Njenga; and (iii) the recruitment of Kikuyu youths into the security and armed forces.

[1404] *Ibid.* p 96 para 269 under article 7(l)(k), *ibid.*
[1405] *Ibid.* p 98 para 275.
[1406] Article 7(1)(h), Rome Statute, *supra* note 14.
[1407] *Ibid.* p 99 para 283.
[1408] *Ibid.* p 104 para 301.
[1409] *Ibid.* p 107 para 307.
[1410] *Ibid.* para 308.

The subsequent aspect is crucial to this chapter, since it concerns one key witness whose exonerating testimony was not only withheld from the defence, but also from the judges. It was ultimately withdrawn. Redacted witness OTP-no. 4 had stated that – after hearing the Mungiki demands – the president allegedly addressed Muthaura telling him "something to the effect of: 'You have heard what the youth want, so now it is upon you.' "[1411] According to that prosecution "star witness," Kenyatta was alleged to have told the Mungiki "to fully support 'the President' invoking their allegiance to the same community."[1412] Further, that key witness falsely alleged that Muthaura gave money to the Mungiki representatives. " 'Operation Kibaki Again' was a lobby group created by the Mungiki to allow campaigning while concealing their identity as Mungiki." In his defence, Kenyatta insisted that on the morning of 26th November 2007 together with PNU parliamentary candidates, he was at the Kenyatta International Conference Centre from 9.00 a.m. until 12.00-12.30 p.m. "when he went to the Intercontinental Hotel for a luncheon with the President."[1413] Therefore according to Kenyatta's alibi, it was not possible for him to have attended the alleged planning meeting at State House at the same time. However, notwithstanding the fact that Mungiki do not have any distinguishing feature that would permit any such identification,[1414] nonetheless, the Pre-Trial Chamber disbelieved the defence assertion that it would be impossible to identify a Mungiki member by sight alone. Despite defence claims that "Operation Kibaki tena" were presented as a group of Kikuyu youth, the majority judges disbelieved the defence.

4.8.7.3. On 30th December 2007, Allegedly at State House, Nairobi

During a purported 30th December 2007 meeting, Kenyatta allegedly "gave some MPs and Mungiki coordinators 3.3 million KSh each"[1415] to supervise the Mungiki attack in Naivasha. Part of the money distributed at this meeting was allegedly later spent to buy the guns that were used in the attack in Nakuru. However, Kenyatta's defence protested that:

> on 30th December 2007 he was at the KICC until the election results were announced and that, at around 5 p.m., he went to State House for the swearing-in ceremony of the President, which lasted around one hour and after which he went home to sleep.[1416]

[1411] *Ibid.* p 108 para 311.
[1412] *Ibid.* p 108 para 311.
[1413] *Ibid.* p 117 para 330.
[1414] *Ibid.* p 119 para 333.
[1415] *Ibid.* p 120 para 334.
[1416] *Ibid.* p 121 para 339.

The Pre-Trial Chamber found this defence to be vague.[1417]

4.8.7.4. On 3rd January 2008, Allegedly at Nairobi Club

A redacted Mungiki representative who provided a detailed account of an alleged 3rd January 2008 meeting states that it commenced at around 9 a.m. with about 12 people present. That eye-witness specifically mentioned the presence of Muthaura, Kenyatta and George Saitoti on the side of the PNU Coalition and Maina Diambo on the side of the Mungiki.[1418] Its purpose was allegedly to "revenge or retaliate." Kenyatta was alleged to have asked whether the Mungiki "had plans." Confirming that "the 'youth' were ready," the witness recounted how "Muthaura called Mr. Ali, telling him in Kiswahili, and sounding like he was giving him instructions, 'Our youth will be going to the Rift Valley and we don't want them to be disturbed.' "[1419] However, Nairobi Club manager, David Waters "did not provide the names of the people who they recall having had breakfast that morning 'because of the club policy,' which, according to him, 'does not permit disclosure of any information relating to members activities to third parties.' "[1420]

Around mid-December 2007, it was alleged that "Maina Njenga was given 8 million KSh from 'State House,' " i.e., according to the witness, "from Mr. Kenyatta." The witness further clarified that, "out of this money, 2 million KSh was supposed to be shared by the Mungiki leaders who were directly in contact with the PNU Coalition,"[1421] and alleged "that Mr. Kenyatta gave 13.3 million KSh in order for her to coordinate the commission of the crimes (in Naivasha)."[1422]

4.8.7.5. Muthaura and Kenyatta's Alleged Preparatory Roles of Crimes in Nakuru and Naivasha

Muthaura and Kenyatta were alleged to be criminally responsible as indirect co-perpetrators[1423] for the post-2007 conflict crimes committed in or around Nakuru and Naivasha."[1424]

[1417] *Ibid.* p 122 para 340.
[1418] *Ibid.* para 341.
[1419] *Ibid.* p 123 para 342.
[1420] *Ibid.* p 126 para 350.
[1421] *Ibid.* p 131 para 363.
[1422] *Ibid.* p 139 para 386.
[1423] Article 25(3)(a), Rome Statute, *supra* note 14.
[1424] *The Kenyatta Pre-Trial Chamber* majority judges, *supra* note 1170 p 143 para 398.

4.8.7.6.1. Objective Elements

Objective elements of the charges included, first, "the alleged common plan between Mr. Muthaura, Mr. Kenyatta and Maina Njenga to commit the crimes in Nakuru and Naivasha."[1425] Second, "their alleged essential contribution to the commission of the crimes in or around Nakuru and Naivasha"[1426] was triple-pronged: *One*, alleged control over the Mungiki for the purpose of the commission of the crimes. *Two*, the execution on the ground of the common plan by the Mungiki in Nakuru and Naivasha.[1427] *Three*, as stated above, the Pre-Trial Chamber majority judges, Trendafilova and Tarfusser, found that Mungiki is a hierarchical and organized apparatus of power, capable of alleged execution of the crimes ensured by automatic compliance with the orders. For example, "when a number of Mungiki members who were mobilized in Thika left the group before arriving in Naivasha, the execution of the common plan was not frustrated as they were promptly replaced."[1428]

4.8.7.6.2. Subjective Elements

Regarding subjective elements, according to the interpretation of the Pre-Trial Chamber's majority judges, both Muthaura and Kenyatta allegedly intended that the Mungiki – in coordinated groups and using crude weapons and guns – carried out the attack upon unarmed civilian residents in or around Nakuru and Naivasha. Therefore, the Chamber concluded that these two suspects: "intended the killings, displacement and the severe physical and mental injuries which took place in or around Nakuru and Naivasha, i.e. that they intended both to engage in the conduct and to cause the consequences (*dolus directus* in the first degree)."[1429] That is, "they meant to cause the consequences"[1430] and were not merely aware that these consequences would "occur in the ordinary course of events." Similar finding was made regarding the rape incidents.[1431] Both Muthaura and Kenyatta allegedly "defined the targeted population of the attack on political grounds, i.e. by reason of their perceived political affiliation to the ODM." Accordingly, the Chamber's majority held that they "intended to commit the crime of persecution."[1432] This was because they could have frustrated the plan's implementation by "refusing to activate mechanisms that led to the commission of the crimes."[1433]

[1425] *Ibid.* para 400.
[1426] *Ibid.* p 145 para 404.
[1427] *Ibid.* p 147 para 409.
[1428] *Ibid.* p 148 para 411.
[1429] *Ibid.* p 149 para 414.
[1430] Article 30 (1), Rome Statute, s*upra* note 14.
[1431] Article 30 (2)(b), 150 para 415.
[1432] *Ibid.* para 416.
[1433] *Ibid.* para 419.

Conversely, the Chamber did not believe that Brigadier Ali, the then Commissioner of:

> the Kenya Police participated in the attack in or around Nakuru and Naivasha, i.e. that there existed an identifiable course of conduct of the Kenya Police amounting to a participation, by way of inaction, in the attack perpetrated by the Mungiki in or around Nakuru and Naivasha.[1434]

Charles Jalloh concludes that:

> The police force, for example, was implicated in the Kenyan post-election violence. However, whether the police were acting at the instigation or under the direction of the State or its organs, or whether they were acting independently as hired guns for politicians acting for private purposes, or even worse in cahoots with militia organizations for ethnic reasons, seems to be unsettled.[1435]

4.9. Judge Kaul's Dissenting Opinion in *the Kenyatta case*

4.9.1. Summary

Regarding *the Kenyatta case*, Judge Kaul held that Mungiki – like many other criminal gangs in Kenya or elsewhere – remain a somewhat structured, outlawed, violent criminal gang engaged in organized crime and deriving revenues from the illegal provision of certain community services to the local population, mainly in the slums of Nairobi. Nonetheless, Judge Kaul had "serious doubts whether, having been deprived of the second pillar in the 'organisation' structure the Mungiki could have launched on their own a widespread or systematic attack against civilians, as the prosecutor maintains." The dissenting judge was not satisfied to the "degree of certainty" that the crimes were committed pursuant to the policy of a "state-like" organisation. He skeptically concluded by remarking that: "I remain doubtful whether this case can be argued and sustained at all."[1436] Additionally, the prosecutor presented the same case theory and line of argument both in the amended document containing the charges and at the hearing as he did when requesting the Chamber to summon Muthaura, Kenyatta and Major General Hussein Ali. However, Judge Kaul insisted that the right place to try the suspects was in Kenya under the local criminal laws. He further held that there is need to make a clear demarcation – between the ICC and domestic criminal courts – and that the latter should not be downgraded.

[1434] *Ibid.* p 152 para 425.
[1435] Jalloh, "What Makes a Crime," *supra* note 194 p 437.
[1436] *Kenyatta Pre-Trial Chamber,* Confirmation of Charges decision dissenting Judge Hans-Peter Kaul, *supra* note 197.

Judge Kaul adopted his earlier decision regarding the unsuitability of issuing investigative warrants in both Kenya situations affirming that "I continue to believe – and after having heard the arguments of all parties and participants at the hearing I am even more firmly convinced – that the International Criminal Court lacks jurisdiction *ratione materiae*" – "otherwise known as subject-matter jurisdiction (which) refers to the court's authority to decide a particular case. It is the jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things" – "in the situation in the Republic of Kenya, including in the present case." He concluded that:

> The Chamber cannot satisfy itself solely with the evidence, which the prosecutor claims to be relevant and reliable, in order to effectively and genuinely exercise its filtering function. Such a general approach would have, in my view, the untenable consequence that prosecution evidence would be considered as credible almost by default through the *formal* act of its presentation.[1437]

In Judge Kaul's opinion, this lack of cogent evidence would have the equally untenable consequence that the role and rights of the defence would be dramatically and unfairly curtailed. A careful reading of the words used in his decision reveals that Judge Kaul expressly rejected the application of the formal-objective approach of the Nuremberg and Far East International Military Tribunals to incidents perpetrated during Kenya's post-2007 conflicts. Although there was widespread harm, he found no evidence of the commission of any positive act by causal control through a state-like organization over which the suspects possess what may be termed as capacity control.[1438] He thus reached a different interpretation of the evidence from that of the majority. The question which lingers is whether or not his reasoning is more persuasive than theirs. All three judges are of European descent. Although nomination from their respective countries is a prerequisite for appointment as ICC judges, once appointed, they serve the interests of justice independently and do not represent their countries of origin. Being German, Judge Kaul would presumably be most familiar with Claus Roxin's control theory of perpetration which – as seen in the previous chapter – finds origin and application in German criminal law. Also Judge Kaul may be expected to have the strongest insight into the organizational requirement which was applied at Nuremberg. It is remarkable that of the three Pre-Trial Chamber judges who presided over confirmation of charges in *the*

[1437] *Ibid.* (emphasis added).
[1438] Dworkin, *Hedgehogs*, *supra* note 177. See also Douglas Husak, "Does Criminal Responsibility Require an Act?" in R.A. Duff. (ed.) *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press, 1998) 60-100, p 76; See also R.A. Duff, *Answering for Crime:* Responsibility and Liability in the Criminal Law (Oxford: Hart Publishing, 2007).

Kenya cases, only Judge Kaul's interpretation appears assertive in his application of a retrained interpretation of the material-objective complementarity approach required by article 25 of Rome Statute.

4.9.2. Regarding the Role of the Kenya Police

The celebrated dissenting opinion of Judge Kaul in *the Kenyatta case* is almost identical to that in respect of *the Ruto case*, not only as regards upholding the defence's procedural challenges against jurisdiction, but also in the definition of an organization. Hence the analysis below shall not repeat what has already been said in *Ruto* in these respects. Judge Kaul categorically failed "to see how an 'organisation' could have existed in which the primary actors were the Mungiki gang and the Kenyan Police Forces."

In Judge Kaul's dissenting opinion, "a series of meetings with facilitators and the Principal Perpetrators does not transform a limited partnership of convenience into an 'organisation.' "[1439] Rather, "forging an opportunistic partnership of convenience for a specific purpose, namely the upcoming 2007 presidential elections, tends to demonstrate that the coalition between the Mungiki and the Kenyan Police Forces was created ad hoc in nature." If anything, "the fact that the 'cooperation' between the Mungiki gang and the Kenyan Police Forces was established (demonstrates) the temporary character of this partnership of convenience." Furthermore "a series of police operations were directed against the Mungiki gang before and after the 2007/2008 violence." Therefore "the Mungiki gang and the Kenyan Police Forces do not share a common hierarchy but rather maintain separate structures."[1440]

4.9.3. Regarding Mungiki Role

The reactions of the police during the 'post-election violence' range from being mere passive observers, assisting civilians, being overwhelmed with the situation to actively engaging in the violence. In many areas of Kenya, the police had to be assisted by the military to re-gain control.[1441]

Judge Kaul expressly disagreed "with the majority finding that the Mungiki gang as such does not qualify as an 'organisation.' " despite the fact that:

> the Mungiki gang appears to control core community activities and to provide services, such as electricity, water and sanitation, and transport. However, the activities of the Mungiki gang remain limited in nature and are territorially restricted, in particular, to the slums of Nairobi. Moreover, as noted above, the evidence reveals that a series of police operations were directed against the Mungiki gang before and after the 2007/2008 violence and that it could only have committed the crimes alleged with the support of certain individuals within the Kenyan political elite and the police apparatus.[1442]

According to the defence: "The Mungiki, (was) a violent and organised criminal gang operating mainly in the slums of Nairobi," which "primarily engage(d) in illegal economic activities and organised crime" similar to "other well-known criminal organisation in other countries." Provision of services such as: "The provision of illegal electricity connections, sanitation and protection in certain slums, however, does not place them on a par with a State which provides a broad range of services to its population."[1443]

Furthermore, "so-called 'Mungiki courts' cannot be equated in any way with a State's judicial apparatus, which covers all aspects of litigation for the entire population." Moreover:

> the Mungiki are normally subjected to severe crackdowns by the Kenyan Police. Regardless of questions as to their legality, these are police operations as conducted against any criminal gang. In this context, the Mungiki arguably required the extra-judicial killings and arrests to cease in order to be able to operate outside their very limited sphere of influence (mainly the slums of Nairobi). This is a further clear indication that their capacity to act is far more limited than that of a State.[1444]

Paradoxically, Judge Kaul held that "had the Mungiki not received money, uniforms and weapons, and had they not been transported to different parts of the country, they would not have been able to launch the alleged large-scale attack against Kenyan civilians over a large geographical area."[1445] Therefore "their need for financial support, regardless of its extent, shows that they (did) not have sufficient means to commit crimes on a large scale." Ultimately, he was:

> at pains to understand how this 'organization', heavily dependent on outside logistical support, could satisfy the criteria….to the extent of qualifying as a

[1439] Article 7(2)(a), Rome Statute, *supra* note 14.
[1440] *Kenyatta Pre-Trial Chamber,* Confirmation of Charges decision dissenting Judge Hans-Peter Kaul, *supra* note 197 unpaginated para 12.
[1441] *Ibid.* para 13.
[1442] *Ibid.* para 15.
[1443] *The Kenyatta Pre-Trial Chamber* majority judges, *supra* note 1170 p 80 para 218.
[1444] *Kenyatta Pre-Trial Chamber,* Confirmation of Charges decision dissenting Judge Hans-Peter Kaul, *supra* note 197 para 16.
[1445] *Ibid.* para 18.

> State-like 'organization' or any other 'organization' with the capability, including the means, to target the civilian population on a large scale.[1446]

4.10. *The Kenyatta Defence's* Article 64 Challenge against the Confirmation of Charges

4.10.1. Four Key Issues

Four issues arose from *Kenyatta's Article 64(4) Application*. First, "the Prosecution's (mis)conduct with respect to the non-disclosure, prior to the Confirmation Hearing, of Witness 4's Affidavit." Second, "the validity of the Confirmation Decision as a result of 'deficiencies' in the Prosecution's evidence, including the alleged lack of credibility of witnesses." Third, "alleged 'new and radically altered allegations' against (Kenyatta) as a result of the Prosecution's removal of Witness no. 4 from its witness list and its reliance on a substantial body of new evidence collected after the Confirmation Hearing." Fourth, the impact of the withdrawal of the charges against Mr Muthaura on the case against Mr Kenyatta."[1447]

Judge Wyngaert held that "there can be no excuse for the Prosecution's negligent attitude towards verifying the trustworthiness of its evidence. In particular, the incidents relating to Witness no. 4 are clearly indicative of a negligent attitude."[1448] This resulted in "grave problems in the Prosecution's system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff."[1449] Consequently, by "the Prosecution's failure to investigate properly prior to confirmation, the Prosecution has infringed upon the accused's rights under article 67(1)(a), (b) and (c) as well as article 67(2) of the Statute."[1450] On one hand, Judge Wyngaert concurred with the majority judgment "that there are mitigating circumstances *in this case* which lessen the need to resort to […] the Prosecution's failure to fulfil (sic) its obligations under article 54(l)(a)." In this respect, she agreed with the majority judges. Nevertheless, Judge Wyngaert voted with her feet. She withdrew from hearing *the Kenyatta case*. Further, her extensive scathing attack on the majority decision in *the Katanga case* defence illuminates the gravity of an accused's rights to a fair trial.

[1446] *Ibid.*
[1447] *The Kenyatta Trial Chamber* Defence Article 64(4) Application, *supra* note 206 p 10 para 21.
[1448] *Ibid.* para 4.
[1449] *Ibid.* pp 2-3 para 4.
[1450] *Ibid.* p 3 para 5.

4.10.2. Non-Disclosure of Witness no. 4's Affidavit

In *Kenyatta's Article 64(4) Application*, neither prosecutor nor defence disputed the fact that:

> Witness 4's Affidavit, which was received by the Prosecution on 27 September 2010, but not disclosed to the Defence until after the Confirmation Decision, on 19 October 2012 (yet proceedings began in September 2011 and confirmation judgment was delivered in January 2012) may have affected the credibility of the Prosecution's evidence.[1451]

Kenyatta's defence team asserted that the Prosecutor's "failure to disclose the Affidavit" attributed to "an 'oversight' by two reviewers, (was) 'a misleading account' of the events that led to the non-disclosure, which – in the view of the Defence – was 'a clear and systematic failure' of the investigatory procedure, which involved senior Prosecution lawyers."[1452] Crucially, "potentially exculpatory information"[1453] of "Witness 4 'admitted that he was not present at the 3 January 2008 meeting."[1454] Because "good investigative practices" and the legal obligations under the Rome Statute require that "competent prosecutors and investigators should have reviewed the Affidavit at various moments prior to and after the Confirmation Hearing,"[1455] therefore, according to the defence, non-disclosure exposed the fact that " 'a systemic and fundamental problem' exists in the Prosecution's review process." Further, because "the Prosecution 'misled' the Pre-Trial Chamber"[1456] regarding "Witness 4's evidence as to Mr Kenyatta's alleged attendance at a meeting at the Nairobi Members' Club on 3 January 2008," therefore Kenyatta's defence concluded that "the Prosecution's 'fraud' render(ed) the Confirmation Decision 'necessarily unsound and affect(ed) the entirety of the proceedings before the Court.' "[1457] The prosecutor's systematic problem "whether intentional or as a result of negligence….continue(ed) to have far reaching and negative effects on the fairness of the proceedings and the credibility of the Court as an institution.'"[1458] It "casts doubt upon its approach to disclosure of potentially exculpatory material in its possession" relating to witnesses 11 and 12, two other "key witnesses."

[1451] *Ibid.* p 11 para 24.
[1452] *Ibid.* pp 11-12 para 26.
[1453] *Ibid.* p 13 para 29.
[1454] *Ibid.* p 12 para 27.
[1455] *Ibid.* p 12 para 28.
[1456] *Ibid.* para 29.
[1457] *Ibid.* p 13 para 29.
[1458] *Ibid.* p 14 para 33.

The prosecutor belatedly acknowledged and regretted that "it 'erred in not disclosing the affidavit at the pre-trial stage,' and in not having alerted the Single Judge to the potentially exonerating component […] through an oversight.'"[1459]

4.10.3. On the Validity of the Confirmation Decision

Based on "the evidence underlying each of the headings in Section VII of the Confirmation Decision dealing with individual criminal responsibility" Kenyatta's Defence argued "there was a need for the case against Mr Kenyatta to be terminated, stayed or referred back to the Pre-Trial Chamber for reconsideration as a result of 'deficiencies' in the confirmation process."[1460] Additionally: "Witness 4's evidence 'c(ould) no longer be sustained' "[1461] not only because "in a statement given to the Prosecution after the Confirmation Hearing, on 25 May 2012, Witness 4 recanted his evidence relating to a meeting at the Nairobi State House on 26 November 2007,"[1462] but even because that witness "also admitted lying about another meeting at which he alleged he was present with Mr Kenyatta and Mungiki personnel on 17 November 2007." The upshot is that given:

> attendance at a meeting on 30 December 2007, which was confirmed on the basis of accounts from Witnesses 11 and 12, the Defence states that the evidence is 'wholly insufficient to attach individual criminal responsibility to Mr Kenyatta,' and that it is 'not capable of supporting the alleged common plan, because it does not disclose a plan with the Mungiki to commit post-election violence through an organisational policy.'[1463]

The prosecutor's rebuttal was that witness no. 4's evidence was superfluous so that "even to reject all of Witness 4's evidence, this possibility would not be sufficient to 'undo' the Confirmation Decision,"[1464] because of "other events (e.g., Mr Kenyatta's presence at the 30 December 2007 Nairobi State House meeting), which go to his role in the common plan, did not at all rely on Witness 4's evidence."[1465]

[1459] *Ibid.* p 14 para 37.
[1460] *Ibid.* p 14 para 38.
[1461] *Ibid.* p 15 para 39.
[1462] *Ibid.* p 16 para 39.
[1463] *Ibid.* p 17 para 42.
[1464] *Ibid.* p 18 para 46.
[1465] *Ibid.* p 19 para 46.

4.10.4. Alleged New and Altered Allegations

Kenyatta's Defence contended that it had "not been afforded adequate time to prepare for trial."[1466] Due to:

> the Prosecution's 'ongoing and protracted' investigation, as well as the manner in which it has disclosed the evidence to the Defence (e.g. in various versions of redactions, 'hindered by technical difficulties and logistical problems') and the 'inclusion of new or radically altered post confirmation allegations.'[1467]

These "led to an 'ever-shifting case' which (had) put pressure on the Defence and required it to 'expend considerable investigative resources.' " The Kenyatta Defence insisted that "all of the witnesses that the Prosecution intend(ed) to call at trial were available prior to the Confirmation Hearing"[1468] only "had the Prosecution exercised 'reasonable diligence.' "[1469] Inordinate delay therefore demonstrated "the Prosecution's inappropriate approach to investigation and its failure to respect 'the rights of the Defence, in particular the right to adequate time to prepare for trial.' "[1470] In reply, the prosecutor asserted that "nothing in the statutory framework of the Court limits the Prosecution's ability to conduct post-confirmation investigations, and that in fact the relevant provisions…'are aimed at uncovering the truth.' "[1471] Indeed, the prosecutor's excuse for conducting inadequate pre-confirmation investigation was that "it only expanded its investigations on the ground in Kenya after confirmation due to risks to witnesses, and the security situation on the ground."[1472]

4.10.5. On Withdrawal of the Charges against Muthaura

During its *Article 64 application* challenging the ICC Pre-Trial Chamber's confirmation of charges decision, the Kenyatta defence contended that "withdrawal of charges against Mr Muthaura destroy(ed) 'the factual and legal matrix of the common plan' as it was confirmed by the Pre-Trial Chamber."[1473] This was because "[t]he Prosecution had alleged that Mr Kenyatta and Mr Muthaura were the sole principal perpetrators who devised the common plan, which they then took to Maina Njenga who 'eventually agreed' with it in return for concessions." Because the alleged plan "was dependent upon the alleged initial agreement between two individuals," therefore "there (wa)s no longer sufficient evidence to provide grounds to believe that Mr Kenyatta was a co-

[1466] *Ibid.* p 20 para 48.
[1467] *Ibid.* p 19 para 48.
[1468] *Ibid.* p 21 para 51.
[1469] *Ibid.* p 20 para 50.
[1470] *Ibid.* p 21 para 51.
[1471] *Ibid.* p 22 para 54.
[1472] *Ibid.* pp 22-3 para 55.
[1473] *Ibid.* p 25 para 60.

perpetrator in a common plan to commit crimes." Moreover, " 'the most important contribution' to the crimes made by Mr Kenyatta and Mr Muthaura was the precise instruction given during the 3 January 2008 meeting…'now wholly unsupported' as a result of the withdrawal of Witness 4."[1474] However, both the prosecutor and the legal representative for the victims, *inter alia,* rejected the suggestion that "the withdrawal of charges against one alleged indirect co-perpetrator [...] has (any) legal consequence with respect to a co-accused, who is also charged as an indirect coperpetrator and against whom charges remain in place."[1475]

Most significantly, as regards this chapter and particularly the hypothesis which I advance, the Prosecutor argued that: "*the case could still proceed on alternative modes of liability as Regulation 55 of the Regulations of the Court ("Regulations") permit(ed) the Chamber to consider different modes of liability without an amendment to the charges*."[1476]

4.10.6. The ICC Trial Chamber's Decision Regarding the Validity of the Confirmation Kenyatta's Charges

The *Kenyatta Trial Chamber* held that the defence's request to either "terminate" or unconditionally "stay" the proceedings (were) indistinguishable "as they would have the effect of permanently halting the proceedings without prospect of recommencement."[1477] It noted that the Appeals Chamber, in *Lubanga*, ordered a stay of proceedings in June 2008 "for nondisclosure of potentially exculpatory material to the defence."[1478] Despite the Kenyatta defence team invoking the *Lubanga case* argument "that a fair trial is 'impossible' now or at any stage in the future,"[1479] the Trial Chamber however agreed with the Prosecution that, given the circumstances it "would be an error to grant such relief here."[1480] Ultimately: "Referring to a stay as a 'drastic' remedy which 'potentially frustrate(s) the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute,' "[1481] the *Kenyatta Trial Chamber* subsequently dismissed his defence's request. It ruled that "stay of proceedings should only be ordered if it 'would be "repugnant" or "odious" to the

[1474] *Ibid.* para 61.
[1475] *Ibid.* p 26 para 62 see also p 28 para 66.
[1476] *Ibid.* p 27 para 64 (emphasis supplied).
[1477] *Ibid.* p 30 para 70.
[1478] *Ibid.* p 32 para 75.
[1479] *Ibid.* p 30 para 71.
[1480] *Ibid.* p 31 para 72.
[1481] *Ibid.* pp 33-4 para 77.

administration of justice' to allow the case to continue."[1482] Consequently, to merit such "permanent stay" the Kenyatta defence had to meet a high threshold to establish grounds for a termination or stay of proceedings.[1483]

In considering "whether referral of the Confirmation Decision for reconsideration (was) 'necessary for its effective and fair functioning' "[1484] the Trial Chamber held that:

> It is only if it is self-evident that no reasonable Pre-Trial Chamber could have come to the same conclusion, had it been adverted to the Affidavit, that the Chamber could consider it necessary for its 'effective and fair functioning' to refer the Confirmation Decision back to the Pre-Trial Chamber for reconsideration.

Instead, the judges unanimously (Judge Wyngaert concurring) held that:

> the authority to issue a reprimand and warning for failure to identify and disclosure of materials which may affect the credibility of Prosecution evidence, whilst not expressly provided for in the statutory framework of the Court, falls squarely within the Chamber's broad discretionary powers.[1485]

The Trial Chamber then considered the prosecutor's obligations[1486] on a first issue "to 'investigate incriminating and exonerating circumstances equally' and that it (had) to '[t]ake appropriate measures to ensure [...] effective investigation.' " And on a second, "to disclose potentially exonerating evidence in its possession to the Defence as soon as practicable. Such potentially exonerating evidence include(d) information that 'may affect.' "[1487]

Regarding controversy surrounding OTP Witness no. 4's withdrawn affidavit, however, the Trial Chamber found no evidence that: "the Prosecution purposely tried to withhold the Affidavit from the Defence until after the Confirmation Decision. Nevertheless, it is clear from the parties' submissions that the Prosecution made a grave mistake when it wrongly classified the Affidavit."[1488] Moreover, the prejudice the non-disclosure caused can be rectified at trial as the Prosecution no longer intends to call Witness 4 and the Defence will have the opportunity to challenge the credibility of other evidence relied upon by the Prosecution at confirmation in corroboration of Witness 4's evidence.[1489]

[1482] *Ibid.* pp 34 para 77.
[1483] *Ibid.* pp 35 para 79.
[1484] *Ibid.* pp 38 para 85.
[1485] *Ibid.* pp 39 para 89, citing articles 64(2) and 64(6)(f), Rome Statute, *supra* note 14.
[1486] Article 54(1), *ibid.,* cited in *ibid.*
[1487] *Ibid.* p 40 para 92.
[1488] *Ibid.* p 40 para 93.
[1489] *Ibid.* p 41-2 para 96.

Because "it would be disproportionate to terminate or stay the proceedings as a result of the non-disclosure" instead the "appropriate remedy was for the Chamber to reprimand the Prosecution for its conduct and to require it to conduct a complete review of its case file…"[1490] Further because "these Defence submissions constitute an impermissible attempt to have the Chamber effectively entertain an appeal of the Confirmation Decision,"[1491] therefore, the Chamber rebuffed the Kenyatta defence team. Yet admittedly: "The Chamber ha(d) no appellate jurisdiction over decisions of the Pre-Trial Chamber."[1492] In the Trial Chamber's view, contradictory "questions or the information contained in the screening notes for Witness 4 would not self-evidently have resulted in a reasonable Pre-Trial Chamber coming to a different conclusion as to Witness 4's credibility."[1493]

On a third issue concerning the prosecutor's attempt to introduce allegedly new evidence, the ICC Trial Chamber found that "the Prosecution (was) not necessarily required to rely on entirely the same evidence at trial as it did at the confirmation of charges stage."[1494] It is shall be shown in chapter six, that the prosecutor was eventually forced to obtain orders to compel the Kenya government's co-operation regarding discovery and disclosure of Kenyatta's financial records and other documents. By so doing, the prosecutor was effectively pursuing a third hypothesis which was rejected at the confirmation stage. During cross examination before the Pre-Trial Chamber, Ocampo suggested that because substantial funds were allegedly disbursed from Kenyatta's bank accounts – coinciding with the post-2007 conflicts – this implied that such funds were used to sponsor the retaliatory attacks. This third prosecution theory appears highly speculative. Nonetheless it's pursuit through post-confirmation investigations shall be revisited in chapter six. It is submitted that what emerged from the shoddy investigations and consequent half-baked characterization of charges was a situation where – notwithstanding confirmation, the suspect remains uncertain not only about the precise charge which he would answer at the trial proper – but also about the legal characterization of the facts on which the judgment shall be based. However the Trial:

> Chamber (was) not satisfied that the developments in the case postconfirmation discussed under this heading (Issue 3), either alone or combined with the other issues raised by the Defence, '[destroy] the factual and legal matrix' of the case as confirmed by the Pre-Trial Chamber and thereby invalidate the Confirmation Decision and render a fair trial impossible.[1495]

Contrary to Judge Wyngaert's dissenting opinion in her decision on *Katanga Trial Chamber 25(3)(d) notice*, the *Kenyatta Trial Chamber* concluded that: "The shifting evidence does not 'cast sufficient doubt on the integrity of the proceedings or amount to such a gross violation of the accused's rights that it is impossible for a fair trial to take place.' "

Ultimately: "Whether the Prosecution can prove its case against Mr Kenyatta and whether the evidence supports the alleged mode of liability of Mr Kenyatta as an indirect co-perpetrator are matters for trial."[1496] Consequently, the Prosecutor "could give notice pursuant to Regulation 55 of the Regulations that the other modes of liability contained in Article 25(3) of the Statute may be considered with respect to the accused."[1497] From the perspective of suspect's rights, the *Kenyatta Trial Chamber* majority, including Judge Wyngaert's concurring opinion, lambasted the prosecution made a chilling conclusion when it state that:

> if the Prosecution can establish that (a) it could not have taken a particular investigative step prior to confirmation without unduly endangering the security of particular individuals or (b) that it had justifiable reasons for believing that this situation would significantly change after confirmation, it may be appropriate for the Prosecution to postpone such an investigative step until after confirmation.[1498]

Altogether, the Trial Chamber cautioned that "the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation….to allay any potential prejudice caused to the accused."[1499] Nonetheless, the judges merely invited "the Prosecution to submit an updated Pre-Trial Brief by 6 May 2013."[1500] Thus, the situation remained sufficiently fluid for re-characterization of charges at any time before judgment.

[1490] *Ibid.* p 42 para 97.
[1491] *Ibid.* p 43 para 99.
[1492] *Ibid.* p 44 para 100.
[1493] *Ibid.* p 45 para 102.
[1494] *Ibid.* p 46 para 105.
[1495] *Ibid.* p 48 para 110.
[1496] *Ibid.* p 50 para 114.
[1497] *Ibid.* para 115.
[1498] *Ibid.* p 53 para 120.
[1499] *Ibid.* pp 53-4 para 121.
[1500] *Ibid.* p 56 para 128.

4.11. Prosecutor's Notices to Prepare for Re-Characterisation at Trial

4.11.1. Notices in the Ruto *and* Kenyatta cases

Over a year after the ICC Pre-Trial Chamber's confirmation of charges against Kenyatta and Muthaura, on 26th April, 2013, Judge Wyngaert criticized the prosecutor's preparation for *the Kenyatta case* as follows: "(T)here are serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation."[1501] She concluded that: "In fact, I believe that the facts show that the Prosecution had not complied with its obligations under article 54(1)(a) at the time when it sought confirmation and that it was still not even remotely ready when the proceedings before this Chamber started."[1502] This chapter is justified not only because Judge Wyngaert pulled out of the Trial Chamber in *Kenyatta's case*, citing work pressure while criticizing the prosecution. It is also justified because she has subsequently criticized fellow judges in *the Katanga Trial Judgment* and therefore it is possible that the ICC Rules of Procedure and Evidence require amendment or clarification by the Appeals Chamber. Curiously, in June 2014 within two weeks of Judge Wyngaert's dissenting decision, Katanga withdrew his appeal.[1503] Nonetheless Judge Wyngaert declined to confirm charges in another insufficiently investigated case against deposed Côte d'Ivoire President Laurent Gbagbo.[1504]

In both *the Ruto case* and *Kenyatta case*, respectively, the evidence of various prosecution witnesses on behalf of the suspects before the Pre-Trial Chamber II, included individuals put forward as experts on both Kalenjin culture and Kikuyu cultural practices. In rebuttal, both Ruto and Kenyatta relied upon oral testimony by witnesses from their respective ethnic communities. However, in *the Ruto case,* the ICC dismissed Ruto's cultural witnesses including a Chemistry lecturer from Moi University – not mentioned in the Chamber's judgment – as well as the oral testimony adduced by Reverend Kosgei (sic).[1505] As set out in chapter three, Rev. Kosgei's (sic) expert evidence contesting use of oathing practices

[1501] Catherine Mullin, "Judge Christine Van den Wyngaert is Excused and Dissents from Uhuru Kenyatta Case," *AMICC*, 8th May 2013. http://amicc.blogspot.fr/2013/05/judge-christine-van-den-wyngaert-is.html <accessed 21st October 2013>

[1502] Keith Herting, "ICC judge withdraws from case against Kenya president" *The Jurist*, 28th April 2013http://jurist.org/paperchase/2013/04/icc-judge-withdraws-from-case-against-kenya-president.php<accessed 21st October 2013>

[1503] Defence and Prosecution discontinue respective appeals against judgment in *Katanga case* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1021.aspx<accessed1st July 2014>

[1504] Judge Christine Van den Wyngaert http://icc-cpi.int/iccdocs/doc/doc1783397.pdf<accessed 1st July 2014>

[1505] The *Ruto Pre-Trial Chamber majority judgment* confirmation of charges, *supra* note 1170; See also Chapter three, *supra*, sub-section 3.8.3.1

among Kalenjins, was disbelieved together with the oral testimony of retried General Cheramboss. Ruto's witnesses were regarded as interested parties, since they themselves were accused of being part of the "Network," which allegedly was responsible for organizing, *inter alia*, the burning of Kiambaa church in Eldoret on 1st January 2008.[1506]

The Trial Chamber V(A) decision in accepting the Prosecutor's *application for Notice of Recharacterization* in *Prosecutor v Ruto and Sang*[1507] was rendered three months after the trial hearings started on 10th September 2013. Even at this relatively early stage, the Chamber felt it prudent to justify why notice was not given earlier still, stating:

> The Chamber acknowledges that Regulation 55(2) Notice could have been given at an even earlier point during the trial proceedings than now. However, this is the first extended break in the proceedings since the Prosecution Additional Submission was filed and the Chamber required additional time to deliberate on the legal and factual complexity raised by the relief sought.[1508]

Trial Chamber V(A) emphasised that, "despite any additional preparation time which comes from giving regulation 55(2) Notice, waiting to provide such notice increases the chances of prejudice to the Defence."[1509] It further stated that:

> [t]he remediation of this prejudice may involve pressures either to reopen the case in certain respects, recall witnesses that have already testified or, out of respect for the rights of the accused, to forego legal recharacterisation that might otherwise have been in the interests of justice in the case. Such pressures are highly undesirable, and if earlier notice is given then they are avoidable.[1510]

Trial Chamber V(A) in *Prosecutor v Ruto and Sang* alluded to the importance of detailed notice in its decision of 12th December 2013, providing notice that, with respect to Mr Ruto, there is a possibility that the legal characterisation of the facts may be subject to change to accord with article 25(3)(b), (c) or (d). On 9th

[1506] *Ibid.*; See also *The Ruto case, supra* note 146

[1507] *Prosecutor v Ruto and Sang, ibid.* note 146.

[1508] *Prosecutor v Ruto and Sang* Notice decision, *post* note 1510 para 28.

[1509] *Kenyatta* Decision on Article 64 Application, *supra* note 206 p 42 para 65.

[1510] *Ruto and Sang* Notice Decision. See also discussion of the issue prior to the commencement of trial: ICC-01/09-01/11-T-15-ENG ET page 25, line 16 to page 30, line 18; "Order scheduling a status conference," 14th May 2012, ICC-01/09-01/11-413", para. 5; "Order setting the deadline for submissions on Regulation 55 and Article 25(3)", 15th June 2012, ICC-01/09-01/11-426, para 27.

July 2012, the Chamber had already directed the Prosecution to file a pre-trial brief "explaining its case with reference to the evidence it intends to rely on at trial."[1511] "In their Notice Decision, Trial Chamber V(A) directed the Prosecution to file an addendum to this brief wherein the Prosecution was to explain its case, with accompanying evidence, under each of the proposed legal characterisations."[1512] In *Prosecutor v Thomas Lubanga Dyilo*, "Regulation 55 notice on the re-characterisation of the nature of the armed conflict was given thirteen months prior to the start of trial. Notice of re-characterisation regarding sexual offences was given the day the Prosecution closed its case."[1513] In *Prosecutor v Jean-Pierre Bemba,*[1514] Trial Chamber III gave notice at the close of the prosecution case.

4.11.2. Plea-Bargaining and Charge-Bargaining in Criminal Law

Originally, under common law, aggrieved private individuals brought their own prosecutions.[1515] Accordingly Nils Christie decries that "property in conflicts" was "stolen" by the English monarch who took over prosecutions to prevent disturbance of his own peace.[1516] As the adversarial system and evidence law developed, trials became convoluted. Plea-bargaining evolved from a practice whereby suspects would often bribe the prosecutor to avoid – not only torture – but also trial. This has given plea-bargaining a bad name. By favouring wealthy accused persons and victimizing the poor who cannot afford to negotiate effectively, charge-discounts, and in turn, sentencing-discounts apparently amount to leniency. According to Oren Gazal-Ayal and Limor Riza,[1517] to vindicate the prescribed goals of criminal justice, whether utilitarian or retributive, common law prosecutors should ideally prosecute in the public

[1511] Trial Chamber V(A), *Prosecutor v. William Ruto and Joshua Sang,* "Decision on the schedule leading up to trial" 9th July 2012, ICC-01/09-01/11-440; See also "Prosecution's Updated Pre-Trial Brief," 9th September, 2012, ICC-01/09-01/11-625-AnxB-Red.
[1512] *Ruto Trial Chamber,* Notice Decision, *supra* note 1510 para 45.
[1513] See Trial Chamber I, "Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted,"13th December, 2007, ICC-01/04-01/06-1084; "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 14th July 2009, ICC-01/04-01/06-2049.
[1514] "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," 21st September, 2012, ICC-01/05-01/08-2324, para. 5.
[1515] J.S. Cockburn, *Crime in England 1550-1800* (London: Methuen & Co. Ltd., 1977) p 15; See also J.M. Beattie, *Crime and the Courts in England 1660-1800* (New Jersey: Princeton University Press, 1986) p 35.
[1516] Nils Christie, "Conflicts as Property" (1977) *British Journal of Criminol*ogy, 17, 1-15.
[1517] Oren Gazal-Ayal and Limor Riza, "Plea-bargaining and Prosecution" in Nino Garoupa (ed.) *Criminal Law and Economics* (UK and USA: Edward Elgar Publishing, 2009) 145-70.

interest. If the prosecution's discretion is abused, then certain schools of thought hold that – in order to uphold the ideal of treating like cases alike – the judiciary should review the prosecutorial discretion.

Nowadays, under Kenyan law, as shall be shown in the next chapter, the Director of Public Prosecutions is an independent constitutional office.[1518] The DPP is employed through a competitive process involving public participation and undertakes pubic interviews before nomination to parliament for approval and finally, presidential appointment. Hence Kenyan prosecutors would – applying Gazal-Ayal and Riza's arguments – appear to be motivated to maximize – not only public interest – but also favourable public perception, that is, a desire to avoid embarrassing trial loss and to maintain their relationship with successful trial practitioners.[1519] Nonetheless, Kenyan courts can regulate a decision to enter a *nolle prosequi* to terminate cases.[1520] Similarly – subject to deferral and referral provisions – the ICC retains ultimate authority to reject prosecution of frivolous cases.

Frank Easterbrook[1521] compares the prosecutor to the role of an agent on the market. In the domestic context, although private prosecutions are permitted, they are less likely to be successful. Worse still, in the international context, private individuals are not competent to commence prosecution. The ICC's jurisdiction can only be invoked by Member State Parties, the UN Security Council or *proprio motu* by the Office of the Prosecutor,[1522] "if the Pre-Trial Chamber…considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court."[1523] Either way, all prosecutors have less than perfect knowledge regarding the chances of a successful conviction. As a result, both plea-bargaining and charge-bargaining are practiced. This saves resources which can be used to prosecute other cases.

Because limited resources are available to prosecute cases which are unlikely to yield positive results, therefore if conviction appears certain to the prosecutor, then prosecution ought to be justified. However, given the impact of one case on

[1518] Article 157, Constitution, *supra* note 13.
[1519] Gazal-Ayal and Riza, "Plea-bargaining," *supra* note 1518.
[1520] S 87A, Penal Code *supra* note 540.
[1521] Frank H. Easterbrook, "Criminal Procedure as a Market System" (1983) *Journal of Legal Studies*, 12, 289-332.
[1522] Article 15(4) as read with article 15(1), Rome Statute, *supra* note 14,
[1523] Stephen J. Sculhofer, "Is Plea-Bargaining Inevitable?" (1984) *Harvard Law Review*, 17, 43-82; See also Stephen J. Sculhofer, "Plea Bargaining as Disaster" (1988) *Yale Law Journal*, 101, 1979-2009.

another, cases possess "neighbourhood effects."[1524] Consequently, in order to compel suspects to accept an offer of plea-bargain, the prosecutor may be warranted in prosecuting some cases where conviction is not entirely certain. Gazal-Ayal and Riza conclude that a trial can only take place if the defendant's evaluation of the probability of acquittal is higher than the prosecutor's, or the defendant is a risk-lover.[1525] This chapter notes that *Kenyatta's case* before the ICC was criticized as being a prosecution based on balancing ethnicities to support political equilibrium for *the Ruto case* by way of a "neighbourhood effect."

4.12. Comparing Domestic and International Prosecutions

4.12.1. The Core Functions of a Prosecution Service

The prosecution stands between the police and the courts. It ensures that the police cannot bring cases to the court without merit. It protects the public against "an overzealous police." According to Francis Pakes, two approaches regulate prosecutorial policy. One regulatory approach favors the prosecution service "guiding and controlling police investigations as they occur."[1526] The other approach "advocates that such control can be established by way of an independent body that reviews the police case after the fact." He concedes that comparing different countries or systems is virtually impossible. However, the solutions to problems of unfair or unnecessary prosecutions are "essentially the same."

Pakes opines that prosecution is about filtering out which cases should not go to court. Further, screening of cases requires rules and guidelines to decide how cases should be processed once they have reached the prosecution stage. Levels of prosecution discretion are low in France, Belgium and the Netherlands where the *principle of opportunity* holds. This means that, "prosecutions should only be brought if they serve the public interest."[1527] Wide discretion is used to determine *to* prosecute. It is however, sometimes unclear "what constitutes the public interest – unlike in England and Wales – where the relevant guidelines are

[1524] Economic term connoting "spillover" effects.
[1525] Gazal-Ayal and Riza, "Plea-Bargaining, *supra* note 1518.
[1526] Pakes, *Comparative Criminal Justice, supra* note 157 p 72.
[1527] *Ibid.* p 64, citing C. Brandts and S. Field "Discretion and Accountability in Prosecution: A Comparative Perspective on Keeping Cases out of Court" in P. Fennel, C. Harding, N. Jörg and B. Swart (eds.) *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995) 127-56.

on the public record."[1528] It fits better with the adversarial tradition. Conversely, the *principle of legality*, also known as the *ex-officio* principle, is preferred in other European countries. Inquisitorial "prosecutions should be brought for every crime that comes to the attention of the prosecution for which there is sufficient evidence." Instead, other mechanisms e.g. plea-bargaining or mediation, divert trivial or otherwise unsuitable cases away from the court. Discretion is used to determine whether *not* to prosecute. Most authors thus generalize that civil law countries propagate a legality principle of mandatory prosecution, unlike the common law tradition which prefers the opportunity principle, where high prosecutorial discretion is used to determine not to prosecute a case in the public interest.

Under international criminal law, the prosecutor's decision to prosecute is regulated by the Court through its Pre-Trial Chamber which determines admissibility. Chapter two analyzed the criteria that the ICC used when it faced a dilemma in the situation in Kenya. The Court would either apply admissibility standards under articles 53(1)(a) as read with article 17 – where the prosecutor is bound by the mandatory *principle of legality* – provided there exists sufficient evidence. Alternatively, the Court may emphasize an *opportunity principle* under article 53(1)(c) where the prosecutor has discretion to consider the interests of justice. Besides the pursuit of pure retributive justice, to what extent is the ICC Office of the Prosecutor permitted to consider truth commissions, national accords or other non-judicial considerations such as lustration processes or de facto amnesties?

4.12.2. Motivation of an International Prosecutor

According to Kathryn Sikkink's justice cascade, trial skeptics make at least four different claims about the harm of prosecutions. (1) That prosecutions destabilize democracy and lead to military coups; (2) that human rights prosecutions can increase human rights violations; (3) that prosecutions can increase or prolong conflict; and (4) that prosecutions might impede the consolidation of the rule of law, or that rule of law must be constructed first before such prosecutions can be attempted. However data clearly indicates that transitional justice continues to be pursued for many years after the transition itself.[1529]

[1528] *Ibid.* p 71, citing J. Fionda, *Public Prosecutions and Discretion: A Comparative Study* (Oxford: Clarendon, 1995). I appreciate discussions with Nedžad Smailagić clarifying this point.
[1529] Sikkink, *Justice Cascade*, *supra* note 26 p 142.

4.13. Conclusion

There is need for independent oversight of the ICC Office of the Prosecutor's decision to prosecute. Initially, in the *Kenyatta case* the OTP advanced a "guilt-by-association" proposition. It suggested that because Mungiki perpetrated the retaliatory violence by PNU and further because as Kagwanja apparently alleged Kenyatta is a member of Mungiki, therefore the OTP, inferred that Kenyatta may be construed as an indirect co-perpetrator of crimes against humanity perpetrated by Mungiki during Kenya's post-2007 conflicts. This argument was reminiscent of that adopted by the colonial prosecutor under the Kenyan Penal Code criminalizing belonging to an unlawful organization. Coincidentally, Uhuru's father, Jomo Kenyatta was convicted at Kapenguria of managing the Mau Mau during the 1950s state of emergency. Ultimately, the pre-independence violence has been classified as an independence struggle.

This chapter has evaluatively interpreted the ICC Trial Chamber's curious decision in 2013 to unanimously decline to permanently stay or terminate *the Kenyatta case*. Despite criticizing the prosecutor – for failing to disclose and further notwithstanding the prosecutor's lax attitude of late disclosure and non-disclosure of false statements together with apparent lies, both to the defence and to the Pre-Trial Chamber – nonetheless, majority judges Ozaki, Eboe-Osuji and concurring Judge Wyngaert declined to discharge the suspect. In addition to the false evidence of OTP witness no. 4, more prosecution trouble emanated from the withdrawal of two statements from OTP witness number's 11 and 12, upon which the prosecution's *manifest criminality* theory rested. However, the Trial Chamber's face-saving reprimand of the new prosecutor's conduct diverted blame for poor investigations to the person of the previous occupier of that position, Ocampo. Hence the majority judges gave credit to his successor, Bensouda, in apparent reward for her bold decision to withdraw the case against Muthaura. Regarding the latter, the new prosecutor admitted that she lacked sufficient evidence to satisfy the required "beyond reasonable doubt" standard. Conversely, it was the *Kenyatta Trial Chamber* majority's unanimous constitutive approach to permit the possibility of convicting Kenyatta on the basis of a re-characterized charge akin to that which ultimately sustained *the Katanga case*.

This chapter compared the circumstances in *Katanga* where the majority judges Bruno Cotte and Fatoumata Dembele Diarra, radically re-characterized an indirect co-perpetrator charge which had been confirmed by the Pre-Trial Chamber. In *Katanga*, dissenting Judge Wyngaert was horrified by the Trial Chamber's use of Regulation 55 as "a stick to hit the accused with." Yet in *Kenyatta's case*, the judges upheld the prosecutor's pursuit for new

investigations to support her case – what this book calls a third prosecution theory – based on circumstantial evidence. Kenyatta's defence further contended that when the new prosecutor herself conceded inadequate pre-confirmation investigations, her request to conduct post-confirmation investigations generated uncertainty on the part of the suspect.

This chapter argues that similar multiple prosecution theories – as those at Kapenguria 50 years earlier – faced the ICC Pre-Trial Chamber II, when the OTP requested for investigative warrants and confirmation of charges accusing the suspects in *Kenyatta's case* of being indirect co-perpetrators of crimes against humanity. The elements of indirect co-perpetration constitute risk-prevention or endangerment crimes, based on inchoate, soliciting and conspiracy activities. Therefore the prosecutor first identified a suspect against whom the Pre-Trial Chamber found "reasonable suspicion to believe," but subsequently it was found that the prosecution case was not even remotely ready for trial, notwithstanding confirmation by the Pre-Trial Chamber.

The prosecution clutched at circumstantial evidence. It shall be argued in chapter six that while Uhuru Kenyatta may reasonably have contributed finances for *resettlement* of Kikuyus who were displaced from the North Rift by Kalenjin aggressors, doing so would not in itself constitute the ingredients of a crime. Assume such disbursement of funds to IDPs to be a fact for the sake of argument. Nonetheless, it is possible for recipients of such financial assistance to have misapplied such resources – to retaliate criminally against innocent ODM members – without having received explicit instructions to do so. For Fletcher's manifest criminality to apply, then a crime should be discernable to a neutral third-party observer even if he had no special knowledge of the suspect's action. However – without proof that Kenyatta attended planning meetings – it seems too remote to assume he must have known that his resources would reasonably be turned into weapons of ethnic cleansing. Neither does it flow from a chain of causation that supplying of funds to persons in distress is *proximate* to the crimes against humanity which ensued during Kenya's post-2007 conflicts. Donating financial assistance – in itself – does not necessarily render benevolent individuals guilty of a crime against humanity. Chapter six shall thus show why the Kenya government would hardly be inclined to facilitate such a speculative line of post-confirmation investigation. Similarly, as chief campaigner of "Operation Kibaki Tena," Kenyatta would be expected to incur expenditure by way of disbursing funds to Kikuyu youth (not Mungiki) towards legitimate electioneering purposes.

This chapter concludes that international criminal prosecutions are distinguishable from domestic prosecutions, particularly from those in common

law countries. Jacobs's theoretical framework shows that as international criminal charges progress, their character is controlled not by the prosecution, but by the court. This shift of power is borrowed from civil law inquisitorial systems where an investigative magistrate facilitates preparation of an investigative *dossier*. Although re-characterization is ostensibly incorporated under the ICC Rules and Procedure and Evidence to facilitate conviction "on a lesser charge," nonetheless, it introduces great uncertainty and diminishes the suspect's capacity to prepare his defence.

Judge Wyngaert's dissenting opinion in *Katanga's Notice 25 Application* categorically interpreted article 25(3)(a) of the Rome Statute as only criminalizing perpetration, indirect perpetration and perpetration through another. It seems clear therefore that the Pre-Trial Chamber often uses the indirect co-perpetration charge as a "holding charge." The prosecutor may thereafter apply to re-characterize the charge based on post-confirmation investigations. Indeed, such notices to re-characterize were given in both *Kenya cases*. Ultimately, the Trial Chamber possesses jurisdiction to recharacterize charges based on the evidence adduced during trial. The Pre-Trial Chamber's role is thus potentially redundant and the suspect's rights are at peril.

Because the suspects faced such a precarious judicial environment, and further because the prosecutor would require state co-operation to facilitate its post-confirmation investigations, therefore, if the Kenya government changed its policy and a new regime began to co-operate with the ICC, then the defences of the Kenyan suspects would be significantly disadvantaged. All Hague suspects, including Kenyatta and Ruto would presumably have an interest in ensuring that ODM leader Odinga did not succeed retiring President Kibaki. The outcome of Kenya's 2013 presidential election would have double significance. It would not only determine the next sovereign. It would simultaneously serve as a referendum on the ICC process. The purpose of chapter five is to evaluate the legitimacy of Kenya's closely-contested and hotly-disputed 2013 presidential election. That election provided the culmination of both the transitional justice, as well as the post-conflict justice, stream.

CHAPTER FIVE

THE KENYAN SUPREME COURT'S JUDICIAL RESTRAINT IN THE 2013 PRESIDENTIAL ELECTION PETITION

5.1. "Alliance of the Accused"

In *The International Centre for Policy and Conflict and 5 others v Attorney General and 4 others*,[1530] some Kenyan civil society organizations sued the Independent Electoral and Boundaries Commission (IEBC) seeking to prohibit it from receiving nomination forms for "soon-to-be-accused" Uhuru Kenyatta and William Ruto. These two candidates were brought together under the Jubilee Alliance coalition which united Kenyatta's The National Alliance Party (TNA comprising mostly GEMA) and Ruto's United Republican Party (URP supported by Kalenjins). Because under Kenya's 2010 Constitution, Chapter Six regulates "leadership and integrity" and further because the International Criminal Court had confirmed charges of indirect co-perpetration in crimes against humanity against Kenyatta and Ruto – along with two other Kenyan suspects – arising from the post-2007 conflicts, therefore the civil society activists claimed that the "coalition-of-the-accused" failed "the integrity test." However, on 15th February 2013, the High Court sitting as a Constitutional Court, dismissed that claim citing two procedural, and one substantive, ground.

Procedurally, first, the constitution vests jurisdiction concerning all matters challenging the validity of a presidential election in the Supreme Court. Consequently, the High Court's original jurisdiction over all disputes in Kenya is specifically ousted. Second, *obiter dicta*,[1531] even assuming that the High Court had requisite jurisdiction to preside over the disputed integrity of presidential candidates, nevertheless, the judges ruled that the civil society organizations had not exhausted the prescribed administrative avenues of redress. At best, the High Court may only review an IEBC's or Ethics and Anti-Corruption Commission's administrative decisions declining a complaint against eligibility of a candidate, if such complaint had been lodged to them. However, because the aggrieved

[1530] Nairobi High Court Petition no. 552 of 2012.
[2013]eKLR http://www.kenyalaw.org/newsletter1/Issue072013.php <accessed 8th September 2014>

[1531] "Remarks of a judge which are not necessary to reaching a decision, but are made as comments, illustrations or thoughts."
http://legal-dictionary.thefreedictionary.com/obiter+dicta<8th September 2014>.

civil society organizations had neither complained to the IEBC or EACC, therefore the High Court's judicial review jurisdiction did not accrue.

Substantively, in further *dicta*, regarding the demerits of civil society's challenge against Kenyatta and Ruto's eligibility to contest the 2013 presidential elections, the five-judge bench[1532] declined to "give a holistic and purposive interpretation to the chapter (on leadership and integrity) but an interpretation that would enhance good governance, the observance of the rule of law and human rights."[1533] They rejected pleas to make an expansivist interpretation based on national values under the constitution. Essentially, the Constitutional Court interpreted the literal meaning of the rule which imposes conditions on candidates seeking to hold constitutional office. The judges concluded that: "It had neither been alleged, nor had any evidence been placed before the High Court that (Kenyatta and Ruto) have been subjected to any trial by any local court or the ICC that had led to imprisonment for more than 6 months."[1534] Additionally:

> By virtue of the principle of complementarity under Article 1 of the Rome Statute, the ICC and the Kenyan courts could not simultaneously adjudicate over the same matter. Upon confirmation of the charges against both (Kenyatta and Ruto) only the ICC could bar them and it could not, because the Rome Statute had no such provision.[1535]

Instead:

> Article 1 of the Constitution of Kenya place(d) all sovereign power on the people of Kenya which shall be exercised only in accordance with the Constitution. It shall not be, and can never be the role of the High Court to exercise that power on behalf of the people of Kenya. That right must remain their best possession in a democratic society and is inalienable.[1536]

Consequently, the civil society organizations were saddled with a bill of costs of 166 million. "While costs ordinarily follow the event, the first disadvantage of the Court's decision is that it may have a crippling effect on PIL (public interest litigation)."[1537] In the appeal set to be heard from 22nd October, 2014 "the applicants (we)re contesting the decision by (the) five-judge bench directing ICPC, Public Corruption Ethics and Governance, Kenya Human Rights Commission, International Commission of Jurists, Charles Ndung'u Mwangi

[1532] Mbogholi-Msagha, Luka Kimaru, Hellen Omondi, Pauline Nyamweya and George Kimondo JJ.
[1533] *ICPC v AG, supra* note 1530: see also Khamala, "Legal Aid," *supra* note 606 pp 149-150.
[1534] *Ibid.*
[1535] *Ibid.*
[1536] *Ibid.*
[1537] Khamala, "Legal Aid," *supra* note 606 p 150.

and Henry Nyakundi to bear costs of the suit."[1538] It is notable that even before the High Court's formal judgment upholding the eligibility of the "alliance-of-the-accused,"[1539] Senior Counsel Pheroze Nowrojee conceded that no constitutional rule bared the candidature of the Hague suspects.[1540] In his interpretation: "The 'office' of a presidential candidate is not included in" those who hold "State office." Moreover: "As is obvious, a candidacy is not an office and would not attract Chapter Six. As candidates, Uhuru and Ruto are not State Officers. And Chapter Six does not apply to those who might become State officers in the future."[1541] Further, Nowrojee's interpretation was that:

> Art. 75(1) is an important gauge for the conduct of candidates. It provides that a State officer shall conduct himself in a manner that avoids conflict of interest between personal interests and public official duties; avoids compromising any public interest in favour of a private interest; avoids demeaning a State office. But an important gauge is not a bar....There is no such express statement against candidates.[1542]

Consequently, his conclusion was that: "It is for the people to decide" whether or not the soon-to-be-accused deserved to be elected. Having hurdled that preliminary barrier, Kenyatta and Ruto joined the 2013 presidential campaigns officially which commenced on 4th December 2012 and concluded on 2nd March 2013. Although their Jubilee Alliance[1543] trailed in most early opinion polls, on 23rd February 2013, Ipsos Synovate's final pre-election opinion poll reported that Jubilee (45.1 %) was slightly ahead of the Coalition for Reforms and Democracy (CORD) (44 %)[1544] combining Odinga (ODM) and Musyoka (Wiper Party). As had been in 2007, between Kibaki and Odinga, so also the 2013 presidential election race between Kenyatta and Odinga, was too-close-to-call. Another similarity with the previous event is that Odinga also lost the 4th March election. However, unlike in 2007, the 2013 election was – for a variety of reasons – conducted peacefully. Moreover, this time round, Odinga petitioned.

[1538] "NGOs Setback Over Sh 170 mn Uhuru Case Costs" http://www.capitalfm.co.ke/news/2014/09/ngos-setback-oversh170mn-uhuru-case-costs/ <accessed 22nd September 2014>
[1539] Gabrielle Lynch, "Electing the 'Alliance of the Accused': The Success of the Jubilee Alliance in Kenya's Rift Valley," (2014) *Journal of Eastern African Studies*, 8 (1), 93-114.
[1540] Pheroze Nowrojee, "Chapter 6 Doesn't Bar Uhuru and Ruto," *The Star Newspaper,* 7th November 2012 http://www-ke.the-star.co.ke/news/article-94589/chapter-six-doesnt-bar-ruto-and-uhuru <accessed 22nd September 2014>
[1541] *Ibid.*
[1542] *Ibid.*
[1543] The National Alliance (TNA) and the United Republican Party (URP).
[1544] Ipsos Synovate, http://www.nairobiexposed.com <accessed 20th July 2013> CORD comprised the Orange Democratic Movement (ODM Luos) and his running mate Kalonzo Musyoka's Wiper Party of Kenya (Wiper Kambas) together with Moses Wetangula's New Ford Kenya (Luhyias [apart from Musalia Mudavadi's Maragoli's who were drawn to the Amani Coalition]).

Four interconnected processes explaining why "Kenya avoided disaster" are summarized by Nic Cheeseman, Gabrielle Lynch, and Justin Willis as follows:

> First, the decision of the International Criminal Court (ICC) to prosecute Kenyatta and William Ruto for crimes against humanity for their alleged role in the postelection violence of 2007/08 had the unexpected effect of bringing these former rivals together in the Jubilee Alliance, which reduced the prospect for violence between their respective Kikuyu and Kalenjin communities. Second, a pervasive 'peace narrative' emerged that was associated with a plethora of monitoring and early-warning mechanisms, but which also delegitimized election protests and political activity seen to challenge the status quo and encourage instability. Combined with the heavy deployment of security forces in potential 'hot spots', this significantly constrained the options available to the losing candidate: civil disobedience was both less popular, and more risky, than in 2007/08. Third, the partial democratic reforms implemented in the run up to the election worked to undermine Odinga's position. Because many key democratic institutions had been reformed in line with Odinga's own demands in the years leading up to 2013, he came under great pressure to accept the outcome of the process despite significant problems with it. Finally, the creation of a new constitution with 47 new county governments in which many Odinga supporters were able to secure county-level seats, meant that, while CORD lost nationally, they often won locally, softening the blow of the controversial presidential elections.[1545]

This chapter shall return towards its end, to emphasize the fact that due to the "silencing of the legal complex," Odinga did not call for mass protests. Instead, the unsuccessful candidate was butressed at the Supreme Court by two civil society activists, Gladwell Otieno and Zahid Rajan, in petitioning the IEBC's delayed and disputed declaration of Kenyatta's victory. On 30th April, the Supreme Court controversially dismissed the relevant petitions and upheld the poll result. To the extent that the electoral outcome was "a referendum on the ICC charges," this chapter argues that through the Supreme Court's verdict – simultaneously, albeit indirectly – Kenyans effectively traded-off the continued physical presence of Kenyatta and Ruto at The Hague. This is because day-to-day participation in their imminent criminal trials would contradict their weighty obligations of presiding over national affairs. During their election campaigns Kenyatta said: "A vote for us is a vote of no confidence in the ICC."[1546] Ruto agreed that: "Presidential victory for the Jubilee Alliance may indicate there is something wrong with the charges its two leaders are facing at The Hague."[1547]

[1545] Cheeseman, Lynch and Willis, "Democracy and its Discontents," *supra* note 34, pp 3-4.
[1546] *Daily Nation*, 1st February 2013, quoted in *ibid.*
[1547] *The East African Standard*, 1st February 2013 quoted in *ibid.*

Thus "Kenyatta and Ruto present(ed) the ICC as an arm of Western powers, as well as develop(ed) the message that foreign nations should not interfere with Kenya's elections and the country's sovereign affairs."[1548]

5.2. Kenya's 2013 Presidential Election as a "Referendum" on The Hague

Under Kenyan law, the "coalition-of-the-accused"[1549] were not prohibited from contesting Kenya's 2013 presidential election. As shown above, "Uhuru Kenyatta and William Ruto (were) not barred by the Constitution from standing as presidential candidates in the (2013) election. It (was) an error to think that Chapter Six of the Constitution bar(red) them."[1550] The Constitutional Court upheld the sovereign right of the people of Kenya to vote. Yet the International Criminal Court sits at The Hague. Procedurally, moreover, the ICC presidency had scheduled the Kenyatta and Ruto trials to commence on 11th and 9th April 2013, respectively. Practically, however, it would not be possible for a sitting president to effectively discharge the functions required of his office from a distant foreign country. Legally – at the domestic level – on one hand, under the Kenyan constitution: "Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office."[1551] However, on the other hand: "The immunity of the President…shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."[1552]

Similarly, legally – at the international level – the Rome Statute applies:

> equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility…[1553]

The supremacy of international law ousts any amnesty as follows: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the (ICC) from exercising its jurisdiction over such a person."[1554] Nonetheless, assuming that Kenyatta's and Ruto's Jubilee coalition would be successfully elected into the office of the Kenyan presidency in 2013, then there would arise an acute conflict

[1548] Brown and Raddatz, "Dire Consequences or Empty Threats?" *supra* note 37 p 52.
[1549] Cheeseman, Lynch and Willis, "Democracy and its Discontents," *supra* note 34.
[1550] Nowrojee, "Chapter 6 Doesn't Bar," *supra* note 1540.
[1551] Article 143(1), Constitution, *supra* note 13.
[1552] Article 143 (4) *ibid*.
[1553] Article 27(1), Rome Statute, *supra* note 14.
[1554] Article 27(2) *ibid*.

between their domestic mandate to *effectively* uphold the public interest, as against Kenya's *legitimate* international obligations to co-operate with requests by the ICC to facilitate prosecution in order to vindicate post-2007 conflict victims' interests.

Out of a total of 12,338,667 votes cast (including spoilt ballots), The IEBC declared that Kenyatta garnered 50.07 % (6,173,433 votes), against Odinga's 43.70 % (5,340,546 votes).[1555] Most significantly, Kenyatta's victory exceeded the 50 + 1 threshold by some 8,400 votes. Kenyatta avoided a problematic run-off – which would have been required "but for" a margin of victory over and above the cumulative votes of all other candidates combined and over 25% in at least half the counties.[1556] His Jubilee party achieved legislative majorities both at the Senate as well as National Assembly, thus appointing Speakers to both houses and controlling parliamentary business.

Upon the ICC suspects taking oaths of office to defend the Kenyan constitution, in order to balance – harmonize or co-ordinate looming incongruent obligations – an urgent reconciliation between the legal demands of the Kenyan constitution and international criminal law was therefore required. Unsurprisingly, from the speeches delivered by visiting dignitaries on the 9th April 2013 at Kenyatta's inauguration day[1557] – pressure began to build up in the Kenyan Parliament, the East African Community and African Union – against the ICC's continued prosecution of the new Kenyan President and Deputy President. Accusations of being a neo-liberal institution engaging in "race-hunting" through *the Kenyan cases,* brought the ICC's legitimacy into sharp focus.[1558] Consequently, before the end of 2013, the Assembly of States Parties amended the Rome Statute, *inter alia*, to confer the ICC judges with discretion to excuse public officials with extraordinary duties – who are simultaneously accused persons – from continuous attendance at The Hague, albeit on a case-by-case basis.[1559] Criticisms leveled against this unique amendment argue to the effect that this is

[1555] Supreme Court Judgment, *supra* note 220 para 6.
[1556] Article 138(4), Constitution, *supra* note 13.
[1557] Jessica Hatcher, "Controversy as Kenya Salutes Uhuru Kenyatta as new Leader: Ugandan Ruler Yoweri Museveni Astonishes Diplomats at Ceremony with Fierce Attack on Hague Court," *The Guardian,* 9th April, 2013.
http://www.theguardian.com/world/2013/apr/09/controversy-kenya-uhuru-kenyatta-uganda <accessed 22nd September 2014>
[1558] "African Union Accuses ICC of 'Hunting' Africans" http://www.bbc.com/news/world-africa-22681894; See also "African Leaders Accuse ICC of 'Race Hunt' AU urges Hague-Based Court to Stop Upcoming Trials of Kenyan President and his Deputy over Crimes Against Humanity;" See also *post* section 6.14.
http://www.aljazeera.com/news/africa/2013/05/201352722331270466.html <accessed 22nd September 2014>
[1559] "The Assembly of States Parties" *post* note 2260.

the first time in the history of the criminal law that suspects have been permitted leave of absence, thus facilitating avoidance of their accusers.[1560]

5.3. The 2013 Kenyan Elections as a Post-2007 Conflict Response

The purpose of this chapter is therefore to develop a theoretical framework to evaluatively interpret the Kenyan Supreme Court's controversial decision dismissing the petitions challenging Kenyatta's first-round victory at Kenya's 2013 presidential election. Because Kenyatta had already been sworn-in on 9th April and further because civil society were silenced – by the gagging order handed down by the Supreme Court and hitherto upon its conservative interpretation dismissing Odinga's belated "incriminating" evidence – therefore the objective of this chapter is to critically analyze whether or not the Court's reasoning was substantively sound. Given that the judgment itself held that there was insufficient evidence, a variety of questions also emerge regarding whether or not the Supreme Court's exclusion of Odinga's voluminous affidavit, was procedurally fair. Third, whether silencing of civil society was justified according to a correct interpretation of the Kenyan constitution.

Apparently, a majority of Kenyans – as evidenced by the support which Kenyatta and Ruto received at the 2013 presidential election – interpret the post-2007 conflicts as partly involving political activity which may not warrant a criminal trial response. Further – as corroborated by their supermajority ratification of the new constitution in 2010 – the Kenyan people effectively interpreted the post-2007 conflict situation as constituting spontaneous widespread social disorder precipitated by a collapse of the old dysfunctional constitution whose institutions were unable to reproduce the state officials at the closely-contested 2007 presidential election. In these circumstances, post-conflict bargaining became necessary to reestablish the state. PNU-ODM's power-sharing under a Government of National Unity[1561] provided a transitional framework. The new social contract was expressed in the August 2010 constitution.[1562] Because: "Democracy is pivotal in establishing a system in which differences are managed without recourse to violence,"[1563] therefore as an "opinion poll" of Kenyans, the 2013 presidential election may be seen as a

[1560] Thomas Obel Hansen, "Caressing the Big Fish? A Critique of ICC Trial Chamber V(a)'s Decision to Grant Ruto's Request for Excusal from Continuous Presence at Trial" (2013) *Cardozo Journal of International and Comparative Law*, 22, 1, 101-19.
[1561] NARA, *supra* note 8.
[1562] Kofi Anaan with Nader Mousavizadeh, *Interventions: A Life of War and Peace* (London and New Delhi: Allen Lane, 2012).
[1563] Liban, "Kenyan Elections," *supra* note 222 p 2.

ratification, adoption or endorsement any alleged harmful actions by The Hague suspects, as having been morally justified in the circumstances.[1564]

Certain varieties of retributive justice accord some consideration to victim's rights while respecting communities. According to the ICC's first Prosecutor, Luis Moreno-Ocampo in 2013: "Everyone was worried about eruption of another violence but the cases that were still at the ICC prevented warlords and tribal chiefs from igniting it. They were cautious."[1565] However as the former international prosecutor admitted, "lack of proper investigations has undermined the prosecutions ability to secure convictions for suspects facing crimes against humanity." Given that the ICC's partial failure is "because of lack of co-operation," therefore, this chapter shall instead not only describe the Supreme Court's interpretation of Kenyan electoral law, but also lay a foundation for assessing the impact of the Supreme Court's decision on the ICC proceedings in *the Kenya cases*.

5.4. Packer's Crime Control and Due Process Models

5.4.1. Comparing Domestic and International Perspectives to Criminal Procedure

At domestic level, during the election petitions against Kenyatta and Ruto's surprising first round victory in Kenya's 2013 presidential contest, the Kenyan Supreme Court refused to admit potentially-relevant evidence on grounds of lack of time. By way of comparison, as seen in chapter two, in 2011 albeit by a split decision, the ICC *Kenyatta Appeals Chamber* contradictorily conferred its complementary jurisdiction over the situation in Kenya. But then – as seen in chapter four – in 2013 the *Kenyatta Trial Chamber* subsequently permitted the prosecutor more time within which to investigate for incriminating evidence to prove crimes against humanity "beyond reasonable doubt." Because the Supreme Court construed the election petition evidence by using standards familiar to criminal procedure, therefore a theoretical framework which elucidates diverse models of criminal process is useful. It facilitates an illustration not only of these different models which informed the Supreme Court's interpretation of the Kenyan constitution, but also a comparative understanding of the ICC's procedural jurisdiction. For the past fifty years, the leading theory of criminal procedure is Herbert Packer's Crime Control vs. Due Process models. In this section, each shall be described.

[1564] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).
[1565] Kipchumba Kimei, "The Work I did was Impressive, Says Ocampo" *East African Standard* 22nd September 2014, p 18.

An election petition in Kenya's common law jurisprudence deploys an adversarial procedure. The binary approach places the onus on an aggrieved person to establish irregularities by the electoral body or malpractice by a respondent. Curiously, because the Kenyan Supreme Court construed the petitioners' complaints at the 2013 presidential petition as alleging criminality on the part of the IEBC, and further because criminal allegations always require a standard of proof of "beyond reasonable doubt," therefore the Kenyan Supreme Court elevated the standard of proof in the 2013 presidential election petition – from one of slightly above "a balance of probabilities" as normally required in quasi-criminal cases – to one of "beyond reasonable doubt." Although the successful candidates – Kenyatta and Ruto – were not themselves accused of conniving in the alleged illegalities or irregularities, nonetheless, because they were interested parties whose rights as president-elect and deputy president-elect would be affected by the petitions' outcomes, therefore, procedural law required that they be cast as co-respondents so as to be accorded a fair hearing during the petition. It is remarkable, however, that although the government was not a party to the suit, nevertheless, the Supreme Court permitted the Attorney General to join in and participate as *amicus curiae*. However, civil society organizations, including the Law Society of Kenya, were excluded.

5.4.2. Enhanced Standard of Proof in Electoral Malpractice Cases

5.4.2.1. Test for Determining an Election Petition

In *Addo and two others v Mahama and two others*, Atuguba, JSC President of the Ghanaian Supreme Court stated: "As to the general principles for determining an election petition, various tests have been formulated…(as) the Kenyan Supreme Court did in *Raila Odinga v the Independent Electoral and Boundaries Commision (sic) and Others* namely:

> Did the petitioner clearly and decisively show the conduct of the election to have been *so devoid of merits, and so distorted as not to reflect the expressing of the people's electoral intent*? It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election."[1566] (emphasis in original)

In *Shri Kirpal Singh v Shri V.V. Giri* the Supreme Court of India stated that:

> There can be no doubt that a charge of undue influence is in the nature of a criminal charge and must be proved by cogent and reliable evidence, not on the mere ground of balance of probability but on reasonable certainty that the

[1566] *Addo and two ohers v Mahama and two others*, 29th August 2013, Superior Court of Judicature in the Supreme Court Accra – A.D. 2013 Atuguba, JSC (Presiding) p 43.

> persons charged therewith have committed the offence, on the strength of evidence which leaves no scope for doubt as to whether they have done so.[1567]

Although there are inherent differences between the trial of an election petition and that of a criminal charge in the manner of investigation, concerning Kenya's post-2007 conflicts, "the vital point of identity for the two trials (wa)s that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice."[1568] The English approach was extensively evaluated in *Evo v Supa.*[1569] Essentially, the test is that the results should substantially reflect the will of the people.

5.4.2.2. Unproved Criminal Charges

The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 138(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.[1570]

Furthermore: "It (wa)s not evident, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such."[1571] It is trite law that he who alleges must prove. The petitioners were therefore bound to investigate their claim and lead evidence to prove the facts of alleged malpractice upon which they relied at the Supreme Court. Hence to the extent that CORD failed to adequately avail polling agents to detect potential wrongdoing at rival candidate Kenyatta's (or Ruto's) "strongholds" in Central Province and North Rift Valley respectively, the petitioners may be construed as the authors of their own misfortune. Without concrete proof, their allegations of inflated voter turnout, were but speculative. Conversely, the IEBC Chairman:

> proceeded from the following foundation of fact: The Presidential election took place in a context of perfect peace; as many as 86% of the electorate – a high turnout by any standards – did vote; no case of loss of life in the course

[1567] [1970] INSC 191: AIR [1970] SC 2097; [1971](2) SCR 197; [1970](2) SCC 567.
[1568] Supreme Court of Kenya Judgment, *supra* note 220 para 186.
[1569] [1986] LRC (Const.) 18 (Sol Is HC).
[1570] Supreme Court of Kenya Judgment, *supra* note 220 para 203.
[1571] *Ibid.* para 306.

> of the election was reported. So the will of the electorate…ought to be upheld.[1572]

It is the argument of this chapter that a plea in bar of trial[1573] estops a prosecutor from adducing certain kinds of evidence. These include, for example, confession evidence obtained through torture or deception or from adducing illegally-obtained evidence. The Court imposed the burden – with a high standard – of proof on the petitioners who failed to discharge it. To reiterate: "In cases of data-specific electoral requirements (such as those specified in article 138(4) of the constitution for an outright win in a Presidential election), the party bearing the legal burden of proof must discharge it beyond reasonable doubt."

5.4.3. Packer's Models

5.4.3.1. The Crime Control Model

Packer's[1574] crime control model assumes that repression of criminal behaviour is the most important function performed by the criminal justice process. The objective is to abuse criminal freedom and secure citizens and property. These aims are efficiently achieved by screening suspects, determining guilt and appropriate sanctions. The process depends upon high number of arrests and convictions that emphasize speed and finality. It is analogous to an assembly-line conveyer-belt moving an endless stream of cases to workers at fixed points who each perform their operations. Provided that no cluttering occurs to delay movement, then each case moves to successful resolution in a routine manner. It is administrative and managerial without review or second-guessing for fear of veto. By relying on decisions of police and prosecutor to investigate and release "probably guilty suspects," a "presumption of guilt" permits bulk-processing. All those charged should be convicted since they are "probably guilty." Hence a summary trial process is used to discover "factual truth." It advances a "green light" administrative theory.[1575]

5.4.3.2. The Due Process Model

Packer's due process model emphasizes the due process or fair hearing rights of an accused person. Hence such a trial resembles an obstacle course. Procedural

[1572] Supreme Court Judgment, *supra* note 220 paras 171-173 *ibid.*
[1573] James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh: Thompson W. Green, 2006).
[1574] Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).
[1575] Carol Harlow and Richard Rawling, *Law and Administration (Law in Context)* (3rd ed.) (Cambridge University Press, 2009) Chapter one, "Red" and "Green Light" theories.

technicalities are emphasized and objections are encouraged to dispute the admissibility of otherwise incriminating evidence. This model assumes that a suspect's freedom is so important that every effort must be made to ensure that government intrusion follows legal procedure. It is appropriate for "who-done-it" cases. This model seeks to make decisions that will identify "legal" guilt. It follows rules that emphasize constraining the government's level of intrusion into citizen lives and the legitimacy of action (constitutionality). It insists on a formal, adjudicative, adversarial fact-finding process and recognizes a "presumption of innocence." Even though such restraints may keep the process from operating with maximum efficiency, nonetheless, it permits review and appeal. In administrative law terms it is equivalent to a "red light theory" [1576] – where courts prefer to prevent overzealous police from abusing suspect's rights – as explained more elaborately towards the end of chapter six. Such non-instrumentalist approaches burden an administrator to prove – on "a balance of probabilities" – that the benefits of violating the citizen's right to a fair hearing, outweigh the costs.

5.4.3.3. Who is the Greater Threat to Freedom?

According to Philip Reichel,[1577] balancing between crime control (safety) and due process (liberty) models demonstrate that good values are to some degree always at odds. For the crime control model the criminal trying to harm us and our property is a greater threat to social freedom. For the due process model it is the government agents, like police officers and prosecutors, who manipulate unreliable information. While one goal is emphasized over another, neither can be identified as qualitatively better. The next section shall attempt to briefly review various interpretive techniques which the courts use in determining whether to emphasize either a crime control (judicial activism) or due process (judicial restraint) model.

5.5. Relevant Techniques of Constitutional Interpretation

5.5.1. Introduction

As seen in the introductory chapter, Githu Muigai argues that: "Many judges and academics seek to justify a certain view of the constitution as the objectively correct one. They do so by creating the illusion of technical precision and predictability in the common law tradition, while actually expressing a political preference."[1578] This is "partly because constitutional interpretation in Kenya is

[1576] *Ibid.*
[1577] Reichel, *Comparative Criminal Justice*, *supra* note 157 pp 68-9.
[1578] Muigai, "Political Jurisprudence," *supra* note 46 p 3.

essentially political jurisprudence, hinged on the personal preference of judges and responses to 'public' pressure."[1579] Additionally, Lackland Bloom explains that: "Almost by definition, the (Supreme) Court tends to decide hard cases."[1580] The interpretive techniques are rarely solely singularly responsible for the results that the judges reach. They are often used in aggregate.

5.5.2. The Textual Approach

With respect to textual or precedential analysis "the Constitution is a legal text in the most literal sense...As such a close reading has always played an important role in constitutional interpretation. Textual analysis played a most prominent role during the era of the (US) Marshal Court"[1581] This approach entails "in the context the expansive interpretation of the text, reliance on a plain meaning, understanding terms of art, resolving linguistic ambiguities, avoiding surplus and redundancy, implying negative, defining a category by its exceptions, and construing the text as written."[1582]

5.5.3. Intratextualism and Textual Purpose (Teleological)

Akhil Amar describes intratextualism as reading the text as a whole.[1583] It requires reading constitutional text in light of its purpose. He poses such questions as: when is it justified to deviate from what would appear to be the relatively plain meaning of the text? What is the deviation of the textual meaning from other sources, for example the original understanding, tradition, practice, and constitutional structure? In the context of Kenya's 2013 presidential election petition, just like inaugural US Chief Justice John Marshal, so also the Kenyan Supreme Court had not yet accumulated a large body of precedent, doctrine and practice to rely upon. It is shown below that the court had ample access to material disclosing original understanding, not limited to the Kriegler Report.[1584]

5.5.4. The Originalist Understanding

According to Gerard Conway: "What is meant by the original understanding (is) understood...with the concept of original intent."

[1579] *Ibid.* p 2.
[1580] Lackland H. Bloom Jr., *Methods of Interpretation: How the Supreme Court Reads the Constitution* (Oxford/New York: Oxford University Press, 2009) p xix.
[1581] *Ibid.* p xxi.
[1582] *Ibid.*
[1583] Akhil Reed Amar, "Intratextualism" (1999) *Harvard Law Review*, 112, 747-827 cited in *ibid.*
[1584] The Kreigler Report, *supra* note 9.

5.5.5. Dworkin's Interpretivism

In Ronald Dworkin's anti-originalist position, "empirical observation of how judges actually decide shows that they do not always rely on determinate legal rules, which can be applied syllogistically to facts to produce an outcome without a need for moral evaluation by the judge."[1585] Instead, "they rely on and invoke more abstractly formulated principles that underlie the legal system overall, i.e. that are already *part* of the law, to reach the correct outcome." His view is that: "Abstract moral reasoning by judges in hard cases should be geared towards achieving equal respect. Any system of constitutional review entails an element of counter-majoritarianism, whereby a legislature is prevented from trespassing those individual, fundamental rights, entrenched in the Constitution."[1586]

5.5.6. Consequential Reasoning or the Prudential Argument

The Supreme Court relies on arguments from "consequentialist constitutional adjudication...by taking account of the possibility of adverse consequences in determining whether to interpret the constitution in a particular manner." For example, the likelihood of occurrence as well as the court's ability to prevent the occurrence of such consequences. Muigai explains that:

> this argument is actuated by the political and economic circumstances surrounding a decision….for balancing competing interests at times represented by competing texts in the constitution….with no guidance as to how to prioritize them…becomes one of prudence based on a cost-benefit analysis.[1587]

He concludes that: "If there exists a national emergency prudentialists would…ignore even the plainest constitutional constraints if…the national interest demanded so."

5.5.7. The Structuralist Argument

The structrualist argument is inspired by logic and coherence of the constitutional arrangement. For example, the centrality of the electorate in the constitutional process etc.[1588]

[1585] Conway, *Limits of Legal Reasoning*, *supra* note 178 p 120, citing Ronald Dworkin, *Law's Empire* (Cambridge, M.A.: Harvard university Press, 1986) pp 31-3.
[1586] *Ibid.,* p 121, Ronald Dworkin, *Freedom's Law* (Cambridge, M.A.: Harvard University Press, 1986) 34 and 191.
[1587] Muigai, "Political Jurisprudence," *supra* note 46 p 5.
[1588] *Ibid.* p 6.

5.5.8. The Ethical Argument

An ethical argument is not a moral argument, but is rather based on "the character or ethos, of the...polity." However, it may pose an unacceptable danger of the appearance of subjectivity, e.g. the death penalty debate. In Muigai's rendition, the ethical argument "appeals to the ethos of the polity in which the decision is being made. Thus: "the defining characteristics of the people and their society, i.e. 'to who we are' locating the legitimacy of constitutional adjudication in the expectations of the people."[1589]

5.5.9. Synthesis of Constitutional Interpretation in Kenya

It:

> is useful, indeed necessary to create understanding of the details of these (interpretive) methods and the ways in which they are employed by the Court. It is rare, however, for the Court to rely on only one methodology in deciding a major case. All of these methods of interpretation have long been and continue to be influential because they can be quite persuasive.[1590]

Often, techniques that are best illustrated in a dissenting or concurring opinion are also employed in a majority of the Court on other occasions. Likewise, the interpretive techniques employed in an overruled opinion may remain quite valid even when the specific result has been rejected. But even in those instances in which the approach of a concurring or dissenting justice has not been adopted by the Court as a whole, it may still provide valuable insight into the thinking of one or more justices as to how constitutional interpretation should be approached. Muigai concludes that: " 'Difficult cases' in which the law is not necessarily ascertainable" are those "which necessitates judges balancing competing interests by making value choices."[1591]

Turning to constitutional interpretation in Kenya, he identifies both a conservative and a liberal tradition. The nature of the legal argumentation that supports their conclusions are the same. Historically the Kenyan constitutional judges have been "result-oriented." They lack a purposeful interpretation of the constitution. This is because "an exceedingly powerful Presidency weakens the judiciary" which:

> perceives its role as maintenance of the status quo…promoting political stability and continuity without which the Republic…would be plunged into chaos and anarchy….the average judge will assess the consequences of any

[1589] *Ibid.*
[1590] Bloom Jr., *Methods of Interpretation: supra* note 1580 p 419.
[1591] Muigai, "Political Jurisprudence," *supra* note 46 p 8.

> decision he is required to make…the judicial process is not neutral or doing blind justice.[1592]

Ultimately:

> In justifying the abdication of its constitutional responsibilities, the judiciary usually has several strategies whose purpose is either to divest itself of jurisdiction or to deny the applicant *locus standi*. To achieve this end the courts attempt to dispose most matters at an interlocutory stage at the point of preliminary objections. In addition they adopt a methodology of construction that is narrow and pedantic…(or) ignore clear and binding precedent...(to) subvert not only the spirit but the letter of the constitution.[1593]

Nonetheless, Muigai recognizes that because "reasoned judicial decisions are good for the integrity of the judiciary and for the legitimacy of the constitutional interpretation process,"[1594] therefore: "Both conservative and liberal jurists must strive to reconcile the *goals* with the methods."[1595] Theoretically, proper canons of constitutional construction balances or rationalizes popular will, on one hand, and the institutional limitations on governmental power, on the other. However, Muigai explains that lawyers trained in the common law tradition "are uncomfortable with technical garb of legal theories with political character."[1596] It is for this reason that: "The interpretation of the Kenyan constitution over the last 40 years (i.e. as at 2004) has been largely unprincipled, ad hoc, eclectic, vague, pedantic, inconsistent, contradictory and confusing."[1597]

The historical evolution of the interpretation of presidential election petition law from 1992 until 2000 would elucidate why Odinga declined to lodge an election petition challenging the disputed presidential electoral result in 2007. Election petition history also facilitates a comparison with the Mutunga Court judgment in the 2013 presidential election petition. However space limitations curtail a comprehensive explanation of Kenya's election petition law. A gap in Kenya's presidential election petition literature arises from the fact that the post-2007 conflicts resulted in the establishment, *inter alia* of the Kriegler Report. Kriegler recommended various amendments to Kenyan electoral law, including electronic vote-tallying and real-time transmission to facilitate the values of transparency and accountability. Other reforms included the establishment of a Supreme

[1592] *Ibid.*; See also Pheroze Nowrojee, "Why the Constitution needs to be changed" in Kivutha Kibwana, Chris Maina Peter and Oloka-Onyango (eds.) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) 386 p 389.
[1593] Muigai, *ibid.* p 9.
[1594] *Ibid.* p 16
[1595] *Ibid.* p 15.
[1596] *Ibid.* p 2.
[1597] *Ibid.*

Court conferred with original jurisdiction over presidential election disputes. On one hand, these amendments infused pre-2013 electoral confidence in the institutions. However, in the aftermath of the 2013 presidential election petition, the high hopes of half of the country had been dashed, not only by the IEBC's shenanigans but also by the Supreme Court of Kenya.

5.6. Pre-2013 Demands for Reforms in Kenya's Electoral Petition Law

5.6.1. The Incumbency Problem

One significant problem which the post-2007 reform to Kenya's presidential election petition law was generally aimed at avoiding is the perception that the president is above the law. The Chairman of the Committee of Experts on Constitutional Review, Nzamba Kitonga,[1598] accepts that the purpose of the new rules was to overcome the incumbency problem. Unlike the situation under the old National Assembly and Presidential Elections Act[1599] – the new legislation postpones the swearing into office of a Kenyan president-elect – until after finalization of any challenge against the legitimacy of his mandate. In this respect – considering that the 2010 national referendum has reduced the incumbency advantage – it was difficult for the petitioners against the 2013 presidential election to justify reverting to the former unsatisfactory situation. Supreme Court Judge Mohamed Ibrahim has suggested that a possible compromise may be found by increasing the current 14-day constitutionally-entrenched petition time-line for hearings (after the petition has been filed within 7-days of the declaration of result) to perhaps 45 days, so as to accommodate more evidence and arguments:

> Judge Mohamed Ibrahim, one of the judges who made the ruling, is rooting for a constitutional amendment to increase the days the court should listen to future presidential petitions from 14 to 45 days. The judge argued that if the court had enough time, it could have handled the petition differently.[1600]

[1598] Unstructured interview with Nzamba Kitonga SC conducted by the book's author in April 2013.
[1599] National Assembly and Presidential Elections Act (Chapter 7 Laws of Kenya) revised edition 2009 (2008).
[1600] "Jurists Fault Supreme Court Ruling on Presidential Petition," *East African Standard*, 6th September 2013
http://www.standardmedia.co.ke/m/?articleID=2000092900&story_title=Jurists-fault-Supreme-Court-ruling-on-presidential-petition <accessed 4th October 2013>; See also Andrew Teyie, "Judge: How we came to Conclusion Uhuru Poll Victory was Valid" *Daily Nation*, dated 23rd August 2013.
http://mobile.nation.co.ke/News/Judge+Why+we+ruled+Uhuru+defeated+Raila+++/-/1950946/1965922/-/format/xhtml/-/dw77d9/-/index.html <accessed 4th October 2013>

As it stands, it is trite Kenyan law that not even extenuating circumstances can permit extension of time or confer jurisdiction – within which to lodge and conclude an election petition – beyond the constitutionally prescribed date. In this regard, given the Supreme Court's evaluative interpretation of their practice which required a restrained approach, the petitioners were constrained by a narrow, literal interpretation of the rule regulating presidential petitions.

5.6.2. The Institutional Problem

5.6.2.1 Introduction

Another significant problem is that of removing a sitting president – after he has consolidated his powers through appointments of significant government personnel. In sum, Kenya's previous election petition processes were "due process" modeled, replete with *procedural technicalities* resulting in lack of public confidence and violent conflict. The Kriegler Report's reforms aimed at *substantive justice*. The new regulations instead liberally permit substituted service through the national print media. In *Orengo v Moi and 12 others (No. 3)*[1601] the petitioner argued that – given that new section 9(2) of 1991, the provision of the Constitution of Kenya introduced a two-term limit and further given that the incumbent President Moi had already served three terms prior to its entry into force – the respondent was ineligible to serve to a third term. However judges O'Kubasu, Mbito and Mwera JJ construed the statute using its plain, natural and ordinary meaning. Given that statutes are intended to operate prospectively, hence no retrospective operation of that constitutional amendment could be inferred. Significantly, the petition went to full trial after a bold decision by judges Torgbor, Amin and Couldrey JJ ratified substituted service of the petition on the president through the Kenya Gazette.

The revised National Assembly and Presidential Elections Act[1602] and the new Constitution postpone the swearing into office of the president-elect – until finalization of any petition challenging the legitimacy of his or her mandate. The IEBC substituted the Electoral Commission of Kenya (ECK) – including an insulated the process of appointing Commissioners – to confer them with independence from the appointing authority and impartiality.

Under Kenya's new constitution, the judiciary was restructured to provide that the Supreme Court judges should be appointed by a Judicial Service Commission from sophisticated applicants. The Kenyan Supreme Court presides

[1601] [2008] 1 KLR (EP) 715; Election Petition no. 8 of 1993.
[1602] *Supra* note 353, last amended on 2nd December 2011 http://www.ipu.org/parline/reports/2167.htm <accessed 4th October 2013>

over presidential elections. By the National Cohesion and Integration Commission Act,[1603] the National Cohesion and Integration Commission is mandated to "facilitate and promote a Kenyan society whose values are harmonious," by monitoring, regulation and prosecution of "hate speech." These reforms represent a tiny sample of the comprehensive constitutional and structural reforms legislated and implemented since the post-2007 conflicts. As shown in chapter one, scholars argue that in 2013, on one part, the ICC's general deterrence of potential planners, financiers or inciters to violence were deterred by the real prospect of international criminal prosecution. The Political Parties Act even outlaws ethnic alliances which exclude others on a national scale.[1604] On the other part – the relatively peaceful, albeit closely-contested 2013 presidential election – may be attributable to other factors, such as the devolved governance structure. The prospect of devolved power placated many individuals in CORD which sponsored the unsuccessful presidential candidate. This is because many of such lieutenants successfully won their own campaigns for Senate offices or became Governors. Moreover, greater checks against impunity fetter the post-2010 executive powers allocated under the new constitution.

5.6.2.2. The Electoral Commission

The function of an electoral commission is to transform, divide or separate the political "raw material" of nominated aspirants into finished products comprising successful and the unsuccessful candidates. Its mandate is to organize, conduct and manage the selection of persons eligible to hold elective public offices. However, after Kenya's post-2007 voting, the Kreigler Commission[1605] found that it was not possible to determine – as between Kibaki (PNU) and Odinga (ODM) – who actually won. Given that the Electoral Commission of Kenya's Commissioners comprised Kibaki's appointees, it was perceived as partisan. Therefore, among the raft of reforms which the Kriegler Report recommended, the IEBC[1606] substituted the ECK – including an insulated process of appointing Commissioners – to confer them with independence from the appointing authority. Significantly, no rule expressly or impliedly barred The Hague "soon-to-be-accused" suspects from contesting the 2013 presidential election.[1607]

[1603] NCICA, *supra* note 1324.
[1604] Liban, "Kenyan Elections" *supra* note 306 p 5; See also Political Parties Act 10 of 2007, which Act was repealed by the Act no. 11 of 2011.
[1605] The Kriegler Report, supra note 9.
[1606] *Ibid.*
[1607] *ICPC v AG, supra* note 1530; See also Nowrojee, "Chapter 6 Doesn't Bar," *supra* note 1540.

5.6.2.3. The Judiciary

As shown in chapter one, in 2008, ODM declined to petition the disputed presidential election result. Instead, to protest the Electoral Commission's swearing-in of president Kibaki for a second term, the opposition resorted to political mass action. The judiciary thereafter was restructured with the Supreme Court[1608] judges not only being appointed – by a Judicial Service Commission – from sophisticated applicants. But also, applicants were interviewed in a transparent manner. It is vested with original and exclusive jurisdiction to preside over presidential election disputes.[1609] On one hand, the constitutional chapter on the judiciary even recognizes African traditional dispute resolution processes.[1610] However as demonstrated below, on the other hand, the Supreme Court's jurisdiction over presidential election petitions is truncated by a rigid 21-day limitation.

5.6.2.4. Civil Society

In 2002, because the presidential election was contested within a single ethnic group [Kiambu Kikuyu (Kenyatta) vs Nyeri Kikuyu (Kibaki)], therefore Kibaki's NARC (68%) decisively and peacefully defeated Kenyatta's KANU (31%).[1611] In 2013, however, moral panics about a repeat of post-2007 election violence demanded the establishment of an institution mandated with the responsibility of proactively preempting riots among an anxious public. Nowadays, freedom of expression is regulated by enactment of hate-speech legislation which has a double-effect. To regulate negative ethnicity, a National Cohesion and Integration Commission[1612] is mandated to "facilitate and promote a Kenyan society whose values are harmonious." Monitoring, regulation and prosecution of "hate speech" by the NCIC[1613] can promote political responsibility and deter the media from spreading alarming messages. Hate speech prosecution contributes to safeguarding public security against potential escalation of peaceful campaigns or protests into violent conflicts. Commendably, Kenya's closely-contested 2013 presidential election was peaceful.

[1608] Article 163, Chapter 10, "The Judiciary," the Constitution, *supra* note 13.
[1609] *ICPC v AG, supra* note 1530.
[1610] Makau Mutua, "The Ideology of Human Rights: Towards Post Liberal Democracy?" in E.K. Quashigah and O.C. Okafor (eds.) *Legitimate Governance in Africa* (The Netherlands: Kluwer Law International, 1999).
[1611] Hervé, Maupeu, Katumanga Musambayi and Mitullah Winnie (eds.) *The Moi Succession: Elections 2002* (Nairobi: Transafrica Press, 2005).
[1612] NCICA, supra note 1324.
[1613] *Ibid.*

5.7. In Election Petitions: Time is of the Essence

Nowadays, the rules regulating a Kenyan presidential election petition are governed to a considerable extent by the constitution. Furthermore, because constitutional interpretation differs from statutory interpretation, therefore – in order to be able to evaluate the Kenyan Supreme Court's approach of applying the constitutional provisions in respect to *the Odinga petition* – an understanding of the principles of constitutional interpretation is necessary. At one extreme, a judge who believes that the constitution imposes a crime control model, would be inclined to repress electoral malpractice using an efficient, swift, process with guilty pleas (presumption of guilt), mitigated sentences and no right of appeal. At the other extreme, a judge whose ideology is attracted by a due process model would tend to insist on elaborate, dilatory procedural safeguards, replete with obstacles, a presumption of innocence, and allow appeal procedures. Any judgment itself sometimes reflects use of combined interpretive techniques by the judges to persuade the public regarding a chosen decision. Hence as shown below, literal readings may be combined with historical or other techniques to resolve ambiguous or vague constitutional provisions. This chapter concludes that the post-2007 constitutional amendments, judicial and electoral reforms were designed to shift away from the previous due process model and towards a crime control model.

The Committee of Experts on Harmonizing the 2010 Constitution[1614] regarded the incumbency status of a sitting president as the major impediment to election petition procedures. This was because the sitting president wields sufficient power to potentially frustrate petitions lodged against him. In sum, this section argues that the recommendations in the Kreigler Report should be interpreted in light of the evolution of Kenyan election petition laws and practices. Akin to the US model – by preventing the president-elect from being sworn into office before any petition lodged against him is heard and determined – the main purpose of the new electoral laws and petition procedures is to prevent incumbency advantage.

While the new constitution's crime control model is highly repressive to a president-elect, it is only advantageous to petitioners in situations of *manifest criminality*. This procedure is amenable where the culprit is "caught-in-the-act," "hand-having," "red-handed," or with a "smoking gun." It is significant that in Odinga's initial petition theory, he could not produce clear-cut evidence of rigging or malpractice so as to move the Supreme Court to come down on the IEBC like "a ton of bricks." Whether or not Odinga's further affidavit contained

[1614] Committee of Experts on Constitutional Review, Reviewed Harmonized new Constitution (Nairobi: The Government Printer, 23rd February 2010); See also *supra* note 11.

such *manifest criminality* cannot be known as its substantive contents did not form part of the Court's judgment. The fact that the further affidavit was lodged out-of-time suggests that it advanced a case based on circumstantial evidence. Such a "who-done-it-case" would entail lengthy cross examination of witnesses, fraught with procedural objections and argumentation in order to ensure that the respondents are accorded their due process rights. However, in the Supreme Court's interpretation, the Kenyan constitutional timeline restricting presidential election petition procedure expressly departs from such due process model. By having fidelity to the letter of the law – and by making reference to the need to avoid the potential risk of chaos which may ensue if the country is without a chief executive during the period when the petition is prolonged beyond the 21-day timeline – the Supreme Court judges unanimously avoided the temptation to expand the deadline. Most significantly, it is observed that the judges reinforced their decision by reference to a consequentialist interpretation.

5.8. The 2013 Presidential Election and its Result

5.8.1. External Influence in the Prelude to the Election

Ironically, while from the period from 2008 to 2013, Western countries claimed to pressure "for peace, justice and democracy,"[1615] and further notwithstanding that the coalition between Kikuyus and Kalenjins would promote, as argued above, elections as a tool for reconciliation, nonetheless, external Western pressure opposed a vote for the Jubilee candidates. To that extent, this chapter infers that the Western donors preferred retributive justice (for the post-2007 conflicts victims) over peace or democracy. Initially, "in a February telephone briefing, US Assistant Secretary of State Johnny Carson stated that while the United States was not officially backing a specific candidate, 'choices have consequences.' "[1616] This was interpreted as a veiled threat cautioning Kenyans against voting for ICC suspects, since so doing may attract a backlash by way of diplomatic or other foreign sanctions. Soon afterwards, Western diplomats, including the EU representative, echoed that in event of a Jubilee victory their dealings with Kenya would be limited to "essential contacts."[1617] French Ambassador Monsieur Étienne de Poncins said: "It is Kenyans who will decide its leaders but those decisions have consequences."[1618] This was because: "The position of France is clear that we only have essential contact with people who are indicted by the ICC."[1619]

[1615] Brown and Raddatz, "Dire Consequences or Empty Threats?" *supra* note 37 p 43.
[1616] *Ibid.* p 51.
[1617] *Ibid.* p 52.
[1618] *Ibid.* p 51.
[1619] *Ibid.* pp 51-2.

5.8.2. Balloting and Declaration of Results

4th March was polling day. From 5th-9th March 2013 the voting and tallying process ensued. Arguably, assuming a neutral and efficient voter-registration, counting and tallying process, even then it would be unlikely that the GEMA (Gikuyu, Embu, Meru Association comprising 25 per cent of the population) and Kalenjin (11%) ethnic communities can outvote the remaining 40 Kenyan tribes (60 per cent), for perpetuity. On one hand, Stephen Brown and Rosalind Raddatz conclude that "it is certainly possible that Carson's comment echoed by other outspoken donors, drove many undecided Kenyans to the polls to rally behind Kenyatta or increased the voter turnout among Jubilee's ethnic constituencies." As the campaign progressed, "a growing number of Kenyans became disenchanted with the ICC process and as one aid official noted, 'Donor's comments around the ICC….played in Jubilee's favour.' "[1620] However, even assuming a highly improbable voter turnout of over 86% as the IEBC claimed,[1621] nonetheless, if voter registration were demographically efficient, then the second most probable electoral result – other than a CORD victory – would have required a run-off between the two leading candidates i.e. a second round of voting to choose between the two leading presidential candidates Kenyatta and Odinga.

Indeed, a run-off result is precisely what an exit poll conducted by two Harvard University political scientists, including James D. Long, indicates actually happened. They put Odinga ahead at 40.9 per cent while Kenyatta received 40.6 per cent.[1622] Yet the IEBC declared that even counting spoilt ballots, Kenyatta, exceeded the requisite 50 + 1 threshold, in round one. It is observed that the odds favouring such a resounding Jubilee victory were so unlikely as to culminate in an eerie and prolonged silence among the CORD half of the Kenyan population – whose disbelief persisted several weeks after the election – notwithstanding the Supreme Court's judgment that dismissed the presidential poll petitions on grounds of insufficient evidence.[1623]

For the ordinary Kenyan, the 2013 presidential election petition process drew heightened attention for three reasons. First, because of the IEBC's delay in announcing the election result, amid controversial and conspicuous failure of its Electronic Voter's Identification (EVID) system and Biometric Voter's

[1620] *Ibid.* p 52.
[1621] Supreme Court of Kenya Judgment, *supra* note 220.
[1622] Felix Olick, "US Don says Neither Uhuru nor Raila Attained 50 pc Vote," *East African Standard*, 4th May 2013.
[1623] Lydia Matata, "Kenya: Africog Unveils People's Court," *The Nairobi Star*, 12th April 2013. http://allafrica.com/stories/201304121191.html<accessed 29th September 2014>

Registration kit (BVR). Second, because no explanation had (or has) been given to account for how technology purchased at a cost of over 6.4 billion shillings (approximately 50 million Euros) in taxpayer's money, malfunctioned on the first day of an important national process. Third, because as one, second petitioner, Otieno stated in her petition – regarding the five-day long delay in announcing the election results: "The electronic transmission of results create a vote-count that maintained a *consistent, spurious gap between the leading two presidential candidates*."[1624] And further because:

> it is scientifically impossible to maintain such a consistent disparity in results that are randomly relayed…the 'rejected votes' generated were so considerable in number as to be inaccurate…IEBC occasioned undue delays in publicly acknowledging the evident failures in the electronic transmission system.[1625]

Jubilee was victorious. Furthermore:

> Eight candidates contested the presidential election in 2013. Uhuru Kenyatta was declared President-elect on 9 March, having received 6,173,443 votes (50.07 per cent of the total votes cast) including over 25 per cent in 32 counties. Raila Odinga obtained 5,340,546 votes (43.31 per cent). Uhuru Kenyatta qualified for a first round win by 8,419 votes, a close margin given the number of discrepancies and errors in voting and tallying. In third place was Musalia Mudavadi, who obtained 3.93 per cent; and the other five candidates each received less than 1 per cent of the vote.[1626]

Buttressed by two civil society activists Otieno and Zahid, Odinga petitioned the 2013 presidential election result at the Supreme Court. Crucially, however, as shall be shown below, the Supreme Court rejected the petitioners' belated attempt to introduce a *circumstantial evidence* theory – which required enlargement of the time within which to collect inculpatory evidence. The IEBC, its Chairman Issack Hassan, Kenyatta and Ruto who were the respondents to the petitions argued that Odinga's further affidavit – by instead protesting the result-tallying process which the petitioners claimed ought to have been electronic so as to satisfy electoral law's transparent and verifiable requirements – attempted to amend his publicly-acclaimed *manifest criminality* theory. However, at the interim stage, the Supreme Court's "judicial restraint" approach held that time was of the essence. All six judges unanimously declined to order a forensic audit

[1624] Supreme Court of Kenya Judgment, *supra* note 220.
[1625] *Ibid.*
[1626] Office of the Panel of Eminent African Personalities, *Back from the Brink: The 2008 Mediation Process and reforms in Kenya* ([Nairobi]: The African Union, undated) p 225; Musalia Mudavadi, Peter Kenneth, Mohamed Dida, Martha Karua, James Ole Kiyaiapi and Paul Muite, also ran.

of the IEBC's electronic equipment, thereby confining the petitioners to their original claim which facts disclosed procedural technicalities that exaggerated the IEBC's manual errors.

Odinga's initial petition did not claim that he had won. Rather, it amounted to a half-hearted, but desperate attempt to trigger a run-off. First and foremost – in order to reduce the victory margin below the critical 50 per cent threshold – it aimed at subtracting at least 8,419 votes from Kenyatta's margin. The IEBC derisively referred to this approach as a "first world petition" strategy. Second, Odinga had initially attacked the IEBC's so-called secret "Special Register" which contained slightly over 36,000 voters and further emphasized mathematical discrepancies in various constituencies. However, as shall be shown below, the Supreme Court not only held that the Special Register told no lie, but "also found no proof that the 'Special Register' served any improper cause in favour of any of the candidates." Third, the petitioners cast aspersions over the existence of a "green book" thus imputing impropriety on IEBC's use of a multiplicity of registers. Once again, the Supreme Court found nothing strange in the multiple form of the Principal Voter's Register. In conclusion, although Kenya's 2013 presidential election process was closely-contested and peaceful, it raised complaints. Fatefully, however, the unsuccessful candidate and civil society petitioners merely complained of technical unfairness in the election process in a variety of general aspects without providing *timely* proof of specific substantive malpractice.

5.9. The Supreme Court's Dismissal of the Petitioner's "Trivial Technical Objections"

5.9.1. Complaints about Voter Registration

5.9.1.1. The Secret "Special Register"

The IEBC's secret "Special Register" contained names of persons with disabilities. Complaints about it may be seen as a strategic fall-back position adopted by Odinga after the Kenyan Supreme Court's stuck out his additional evidence. Yet the judges found "no mystery about the 'Special Register' which was indeed used throughout the country in diverse areas."[1627] Moreover, the six judges "also found no proof that the "Special Register" served any improper cause in favour of any of the candidates." By implying that IEBC's failure of disclosure to the petitioners caused no prejudice, the Court ignored the oppressive aspect of that register's secrecy.

[1627] Supreme Court of Kenya Judgment, *supra* note 220 para 252.

Odinga further alleged that the "Special Register" was mischievous for three reasons. First, because it was secret. Second, because it was not part of the Principle Voter's Register. Third, because it was allegedly compiled – not only after the registration deadline of 18th December 2012 – but even after the 18th February 2013 publication date of the Principal Voter's Register. One purpose of publishing a voter's register is that it enables voters to confirm whether their names appear on the register. Another purpose is that by depriving candidates about knowledge of the existence of eligible voters, secrecy of the register violates a candidate's right to campaign or to appeal for that category of voters. Nonetheless, apart from its non-disclosure, however, the Supreme Court found that the contents of the "Special Register" told no lie.

5.9.1.2. Claimed Multiplicity of Registers

The voter registration exercise took place from 18th November 2012-18th December 2012. Given absence of *in flagrante* or *manifest criminality* cases; or even "who-done-it" or circumstantial evidence, the Supreme Court proceeded *suo motu* (of their own motion) in search of a third type of crime – known as a "victimless crime."[1628]

In this respect, the Supreme Court's *suo motu* inquisitorial search for "factual truth" gave the petitioners' cases a second leg on which to stand. On its part, the Supreme Court suggested that: "The purpose of the re-tally was to better understand the vital details of the electoral process, and to gain impressions thereof."[1629] It held that: "The purpose of the re-tally was to establish whether the number of votes cast in these (22) polling stations (featured in the petitioners' grievances) exceeded the number of registered voters as indicated in the Principal Register."[1630] Yet the question arises as to why its partial vote-recounting and re-tallying was conducted *in camera*[1631] – albeit witnessed by nominees of the petitioners – but out of sight not only from the other presidential candidates' agents,[1632] but also from the media and therefore public glare. No explanation was offered.

When invited by the Court to comment on its *suo motu* Report findings, Kenyatta and Ruto submitted that:

> The 22 constituencies mentioned by the first petitioner are spread across the country showing that no advantage was being sought from a particular candidate's stronghold. Therefore while IEBC officials may have made some clerical errors, no mischief or advantage can or should be attributed thereto…to a substantial extent, the voting, counting and tallying of votes was carried out with a high degree of accuracy.

Ultimately, the Kenyan Supreme Court accepted its *suo motu* inquiry Report – which found no existence of a "victimless crime" – and therefore retained the presumptions based on legal fiction or "legal truth." Significantly, the Supreme Court declined to embark on a search for forensic, empirical or "factual truth" based on circumstantial evidence.

If the petitioners could convince the Court that the benefits of disclosure of IEBC's information outweighed the the Latin maxim that "all acts (by public bodies) are presumed to have been done rightly and regularly" (*ominia praesumuntur rite et solemn esse acta*), then a new police power would have been born.[1633] They could not.

5.9.2. Public Officials "Can do no Wrong"

As explained in the preceding paragraphs, two 2013 presidential election petitions sought to invalidate the declaration of the Jubilee Coalition's Uhuru Kenyatta as Kenya's 4th President. They were dismissed. The decision[1634] was mainly justified by two reasons. The Supreme Court judges[1635] unanimously held that the petitioners' evidence was thin and their legal arguments were wrong. Therefore all four respondents benefitted from the doubt. Their presumption of innocence was upheld. The new Kenyan constitution expressly prescribes an expedient procedure for dispensing with presidential election petitions. For reasons explained above, petitioners are constrained to litigate within a 21-day time-line.[1636] This "procedural economy" principle[1637] rejects belated evidence, notwithstanding the consequences. In Packer's parlance, under a crime control model, unless the culprit is caught red-handed, the Supreme Court lacks jurisdiction to determine a presidential election petition. Instead, the petitioners' claims alleged an electoral malpractice case based on "who-done-it" or circumstantial evidence, invoking a due process model. This chapter therefore argues that the Supreme Court's decision was narrow, conservative and constrained by fidelity to the letter of the supreme law. Pragmatically, the judges

[1628] Stephen C. Thaman, *Comparative Criminal Procedure: A Casebook Approach* (2nd edn.) (Durham, NC: Carolina Academic Press, [2002] 2008) ch. 6.
[1629] Reichel, *Comparative Criminal Justice*, *supra* note 155.
[1630] Supreme Court of Kenya Judgment, *supra* note 220 para 170.
[1631] At the Kenyatta International Conference Centre, adjacent to the Supreme Court building.
[1632] *Supra* note 1556.
[1633] Supreme Court of Kenya Judgment, *supra* note 220 para 196.
[1634] *Ibid.*
[1635] Hereafter, in this chapter, arguments by advocates acting for parties are attributed to the parties themselves.
[1636] Article 140, Constitution, *supra* a note 13.
[1637] Thaman, *Comparative Criminal Procedure, supra* note 1628.

opted to avoid the uncertainty which would have ensued from a prolonged petition process. It was more.

An alternative decision – one purporting to nullify the 2013 presidential election outcome – would only have been likely if the constitutional structure was threatened by civil disobedience. Instead, Kenya's closely-contested 2013 electioneering process was peaceful and without widespread social disorder. In this respect, the Supreme Court complemented efforts by the executive branch – including the Secretary to the Cabinet[1638] and the Director of Public Prosecutions[1639] – for sustaining the constitution's legitimacy. The Constitution provides that: "The Attorney General shall have the authority, with the leave of the court, to appear as a friend of the court in any *civil* proceedings to which the government is not a party"[1640] (emphasis added). Curiously, a petition is not a pure *civil* action, but a semi-criminal proceeding. Nonetheless, before the petitions commenced, the judges permitted the government's principal legal advisor, the Attorney General,[1641] to join the proceedings in the capacity of *amicus curiae* (friend of the court).

Confoundingly, on one hand, the Supreme Court not only upheld the Latin maxim *ominia praesumuntur rite et solemn esse acta* (all acts are presumed to have been done rightly and regularly),[1642] it also found that the IEBC[1643] had neither a duty to provide for an electronic election nor did the public have a legitimate expectation. On the other hand, the Supreme Court interpreted IEBC's technological failure as "involving impropriety or even criminality." In the end, the six judges recommended the IEBC to the "*relevant state agency for further investigation and possible prosecution.*"[1644] That is, that the DPP should investigate the "acquisition process of technology" which "stalled and crashed." In its broad terms, the judgment diagnosed not only a *capacity* problem but also an *accountability* problem – "how well a state answers to its people."[1645]

[1638] Article 154, Constitution, *supra* note 13.
[1639] Article 157, *ibid.* (hereafter the DPP).
[1640] Clause (5), *ibid.*
[1641] Article 156, *ibid.*
[1642] Supreme Court of Kenya Judgment, *supra* note 220 para 196.
[1643] The Independent Electoral and Boundaries Commission Act, no. 9 of 2011, revised edition 2012 [2011]
[1644] Supreme Court of Kenya Judgment, *supra* note 220 para 234.
[1645] See for example, *The Blair Report*, *Our Common Interest* (London: Report of the Commission for Africa, 2005) p 14.

5.9.3. Absence of Threat to Public Safety to Warrant Police Powers

As stated earlier, the IEBC Chairman: "proceeded from the following foundation of fact: "The Presidential election took place in a context of perfect peace; as many as 86% of the electorate – a high turnout by any standards – did vote; no case of loss of life in the course of the election was reported. So the will of the electorate…ought to be upheld."[1646] Because the election was peaceful, and further because no evidence warranted seizure or search, therefore it is hypothesized that there would be no benefit from penalizing the individual rights of the president-elect and his deputy by interfering with the presumption that that public body acted legally.

5.10. Odinga's Attempt to Enlarge Time to Investigate Circumstantial Evidence

5.10.1. Blaming Technological Malfunction

Criticism against the Supreme Court's decision disallowing Odinga's "further affidavit" – which sought to expand or re-orient his petition's scope – are misplaced. The Court attributed contributory blame to the DPP for his failure to investigate, refusal to interrogate suspects or seize the IEBC's technology. Ideally, IEBC should volunteer public information to account for technology failure.[1647] Instead, it denied knowledge. The Court gave IEBC the benefit of doubt because: "From case law and from Kenya's electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has only been incremental, over time."[1648] Yet, the judges neither cited any case law nor was evidence adduced in support of this speculative observation. Yet, IEBC's director of technology admitted that preparations were grossly inadequate. Instead, the Court's "judicial notice" unjustifiably buttresses the presumption that "all acts (by public bodies) are presumed to have been done rightly and regularly." Was this good faith presumption justified?

The Supreme Court concluded that "the applicable law has entrusted *discretion* to the IEBC, on the application of such technology as may be found appropriate."[1649] Hence "this negates the petitioner's contention that...injustice,

[1646] Supreme Court of Kenya Judgment, *supra* note 220 paras 171-173; See also *supra* section 5.4.2.2.
[1647] Article 35, Constitution *supra* note 13.
[1648] Supreme Court of Kenya Judgment, *supra* note 220 para 237.
[1649] *Ibid.*

or illegality in the conduct would result if the IEBC did not consistently deploy electronic technology."

It is submitted that a diligent petitioner with an *in flagrante* case may have applied earlier to the Court to impound evidence of the alleged faulty tallying. The petitioners were aware that delay in impounding incriminating evidence could result in it being tampered with. Why did they not effectively pre-empt IEBC from alleged interference or concealment? Delay in seeking conservatory remedies operated against the petitioners[1650] who can only blame the Court's strict interpretation of the constitutional time-line rules.

5.10.2. The Kenyan Supreme Court's "Judicial Restraint" Approach

The Kenyan Supreme Court emphasized the Constitution's article 140 time-line scheme which made expediency "all important." The judges held that "timelines in the lodgment of evidence in a case such as this, the scheme of which is laid down in the constitution, were, in their view, most material to the opportunity to accord the parties a *fair hearing*, and to dispose of the grievances in a judicial manner."[1651] Simultaneously, the judges unanimously concluded that "the terms of article 159 are not applied in a manner that ousts article 140 as regards the fourteen-day time-limit within which a petition challenging the election of a president is to be heard and determined."[1652] Consequently, prior to the petition hearing, the Court laid down a meticulous and rigid submission timetable schedule and restricted all advocates to making two-hour submissions free from interruptions or raising of technical objections.

The petitioners – as the prosecutors – brought no compelling evidence before the Supreme Court within the requisite 7-days of the declaration of Kenyatta's victory. They failed to prove the IEBC's allegedly fraudulent acquisition of defective technological equipment or even its allegedly deliberate failure – if not intentional sabotage, during the presidential voting and tallying process – leave alone the allegedly manipulated state of the Principal Voter's Register or altered forms 34 or 36. More significantly – in the context of the argument being developed in this chapter – not only did both petitioners lack police powers to search the IEBC's premises, arrest suspects, seize documents, or interrogate witnesses. But also, improper or belated investigations are not permitted by the strict time-line entrenched into the new Kenyan Constitution. Indeed, several due process rights would emerge to protect the respondents at a lengthy petition.

[1650] Before the declaration of the result the 2nd petitioner approached the High Court to stop the IEBC in from continuing with the process. No discovery or inspection order was granted.
[1651] Supreme Court of Kenya Judgment, *supra* note 220 para 218.
[1652] *Ibid.*

The respondents invoked the principle of their entitlement to equal liberty. Conversely, the petitioners asserted that the "factual truth" should be unconstrained by article 140 time-lines. The petitioners invoked the principle of the Supreme Court's broad function to do substantive justice without regard to procedural technicalities. These contending interpretations cannot both be correct. In order to arrive at "one right answer" a normative theory is required by making an evaluative interpretation of the practice – of resolving a political dispute in a transitional society – in which the Supreme Court was engaged.

5.10.3. "Truth:" Factual vs. Legal

The crucial issue before the Kenyan Supreme Court at the 2013 presidential election petition was whether to seek the "factual truth" in the main petitioner Raila Odinga's 839-page "further affidavit." Can a principled or progressive court disregard article 140's 21-day time-line as a mere *guideline* and instead exercise its discretion to invoke article 159(d) to do substantive justice? The Supreme Court concluded that "the terms of article 159 are not applied in a manner that ousts article 140 as regards the fourteen-day time-limit within which a petition challenging the election of a president is to be heard and determined." The Court's interpretation is that article 140 is a *rule*.[1653] Hence it retained the fictional "legal truth."

5.10.4. Of Supreme Court Rules

The Kenyan Supreme Court Rules provide in pertinent part that "the Court is empowered to give preparatory directions touching on the scheme of any further affidavit, or the calling of some particular kind of evidence…..attuned to the constitutional imperatives of the forthcoming proceedings: efficiency, expedition, fairness and finality."[1654] The Kenyan Supreme Court thus properly excluded illegal evidence under a "judicial restraint" approach which it calls "fidelity to the constitution." This was what the Court meant by "steering clear of a 'political contest' and preserving its 'political capital' for those rare occasions when as history unfolds, it may become appropriate to deploy it."[1655]

The Kenyan Supreme Court's main reason for dismissal of the petitioners' claim was hinged on the technical constitutional rule which excluded illegally-acquired evidence from consideration. Basically, the Kenya Supreme Court

[1653] Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, [1975] 1999).
[1654] Supreme Court of Kenya Judgment, *supra* note 220 para 210; See also Rule 10(1)(f), The Supreme Court (Presidential Election Petition) Rules 2013.
[1655] Judgment *ibid.*, paras 219-230.

considered the consequences of permitting the fragile state of having a vacuum in the chief executive's office during the period which comprehensive dispute resolution would take. The Supreme Court judges considered that the social costs of potential ethnic conflicts outweighed the benefits of having a drawn out election petition. Hence the six Supreme Court judges unanimously interpreted the ambiguity in the Kenyan constitution as strictly limiting the time within which to conclude the petition process.

Time enlargement may enhance investigatory capacity of future petitioners.[1656] Similarly, another solution to overcoming the ICC's handicap for determining presidential election results – in addition to empowering the prosecutor to conduct professional investigations and thereby acquire necessary evidence – is to empower the Victim's and Witnesses Unit to protect witnesses from interference. This chapter recognizes that different legal traditions prefer different legal procedures regarding presidential election petitions. Abovementioned comparative examples are the Ghanaian full-blown trial (due process model) and the US model of time-bound petition exemplified by *Bush v Gore*[1657] (crime control model). The ultra-conservative example is Tanzania, where it is not possible to petition against a declared presidential election result, because "the validity of a Presidential election can be questioned in no Court after the Commission declares the winner."[1658]

The Kenyan Supreme Court was "charged with the obligation to assert the supremacy of the Constitution and the sovereignty of the Supreme Court Act 2011…to administer law and justice in relation to a matter of the expression of the popular will – election of the president."[1659] Did the Court pass the test of its enabling Act "to develop rich jurisprudence that respects the history and traditions and facilitates social, economic and political growth?"[1660]

The Mutunga Court expressly invoked its own "recently made and published Supreme Court (Presidential Election Petition) Rules 2013 (which) constitute the court's detailed norms for operationalizing the terms of Article 140 of the

[1656] "Jurists Fault Supreme Court Ruling on Presidential Petition," *East African Standard,* 6th September, 2013.
[1657] 531 U.S. 98 (2000); See also Arthur Jacobson and Michel Rosenfeld (eds.) *The Longest Night: Polemics and Perspectives on Election 2000* (Berkeley and Los Angeles: University of California Press, 2002).
www.juridicas.unam.mx/wccl/ponencias/1/1.pdf <accessed 27th September 2014>
[1658] Article 41(7), the Constitution of the United Republic of Tanzania (Chapter 2, Laws of Tanzania); See also Edwin Odhiambo Abyua, "The Role of the Judiciary in Promotion of Free and Fair Elections" 1-16.
[1659] Supreme Court of Kenya Judgment, *supra* note 220 para 210.
[1660] Section 3(c) *supra* note 1138.

Constitution."[1661] Hence a conservative approach is contemplated, not only by the Constitution, but also by the new Rules. In pertinent part:

> …the Court is empowered to give preparatory directions touching on the scheme of any further affidavit, or the calling of some particular kind of evidence…..attuned to the constitutional imperatives of the forthcoming proceedings: efficiency, expedition, fairness and finality.[1662]

Qualitatively, under the new Rules, the first three principles for constructing presidential poll petitions are: *efficiency*, *expedition* and *finality*. They all import repressive, crime control features, but are counter-balanced against a single due process requirement of *fairness*. Time matters. Hence, it was held that "the court shall within two days of the pre-trial conference, commence the hearing of the petition."[1663]

Assuming the existence of electoral malpractice, then the crime control model weighs decisively in favour of a petitioner who possesses the *capacity* to conduct *efficient* investigations, *speedily* collect sufficient evidence so as to *finalize* the issues in dispute – at best, before lodging the initial petition – or at worst, before the pre-trial conference which is held nine days after the dissatisfactory result is declared. Only then may the Court – if informed in good time – permit the adversary to lodge a reply thereto. This reformed jurisprudence through "judicial economy" represents but second-best justice. First-best justice confers both "factual" as well as "legal" truth. Third-best justice, under the former Election Petition Rules were deficient in procedure – while appearing to confer substantive justice – on paper. The pre-2007 worst case scenario was characterized by neither procedural nor substantive justice.

Thus, Kenya's new electoral laws are significantly advantageous to a presidential poll petitioner than a respondent, but only in circumstances where there is an *in flagrante* breach of the constitution or election rules e.g. involving kidnapping of candidates or blatant ballot-stuffing or similar obvious misconduct such as the were seen during the 1988 queue-voting where candidates with shorter queues were declared as successful or even in 2007 where the judiciary totally lacked public confidence.

In expressing the finesse with which he performed his duty, the IEBC Chairman ridiculed the 2013 petitions as merely "technical" or "boardroom" trivia, in nature.[1664] Indeed, the new electoral petition procedures are certainly more

[1661] Supreme Court of Kenya Judgment, *supra* note 220.
[1662] *Supra* note 1655, cited in *ibid.* para 210.
[1663] Rule 11, *ibid.*
[1664] Supreme Court Judgment, *ibid.* para 122.

petitioner-friendly than the previous personal service procedures were. Yet it was the petitioners who themselves delayed or waived their constitutional right to summon and cross-examine any IEBC official regarding alleged falsehoods or to discover evidence, thus acquiescing in their own misfortune. The Kenyan Supreme Court decision dismissing Odinga's 2013 election petition was based on technicality-excluded evidence. Nonetheless ODM not only lost that electoral battle, but also lost the maximalist war in search of retributive justice at the ICC. The Supreme Court's consequentialist prosecutorial choice traded-off the petitioners' crime control rights by prioritizing the collective interests in both domestic and international peace and security

Fortunately, the election petitioners were spared an order of costs. Tellingly, the Constitutional Implementation Commission failed to criticize the Supreme Court's "exclusionary" decisions. Going forward, pre-2017 presidential petition law reform initiatives could range from, *inter alia*, first, instituting an electoral college to cure the "tyranny of numbers." Second, reconstituting the Judicial Service Commission so as to appoint progressive judges. Third, replacing the IEBC Chairman and Commissioners to overcome perceptions of bias. Fourth, reforming the article 140 constitutional 21-day timeline to revert to a "limited" due process model of 45 days rather than the current crime control model. Fifth, enhancing civilian oversight to monitor IEBC and internal discipline of its officers e.g. in procurement etc. Sixth, civil damages may be paid to victims of electoral irregularities. Thus, after the 2013 elections, the opposition began campaigning for a constitutional referendum seeking reforms.

5.11. Limits of the Common Law "Ancillary Powers" Doctrine

5.11.1. Excluding Illegally-Obtained Evidence: A Comparative Study

This chapter's literature review in section 5.5 undertook a descriptive interpretation of the common law cases involving the issue of exclusion of evidence in Commonwealth countries. Criminal sanctions against private consensual behaviour tend to be ineffective and counterproductive.

5.11.2. Protection against Unreasonable Search and Unlawful Seizure[1665]

By comparison with the ancillary powers doctrine, an evaluation can be made as to the extent to which the Kenya Supreme Court's presidential election petition decision rejecting Odinga's further affidavit was justified. This doctrine is applied in situations where police require an expansion of their powers of arrest,

[1665] Article 31, Constitution, *supra* note 13.

search, seizure or detention – beyond the powers granted by positive law. Under a liberal constitution the function of the Bill of Rights is to safeguard the liberties of suspects against encroachment. Thus the onus of proof represents a duty on complainants, or in this case, on petitioners, to demonstrate the need for new powers in a given situation. The role of courts invariably, under one of Packer's models is to defend the due process. This is because the courts are unsuitable for expanding police powers for various reasons.

The US Constitution 4th Amendment for example states:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, without probable cause, supported by an oath and affirmation, and particularly describing the place to be searched and the person or to be seized.[1666]

In *Terry v Ohio*[1667] an officer observed and searched three prowlers outside a store window. After he found guns on two of them, the US Supreme Court upheld the search as a "reasonable precaution" for the officer's safety.

However, in *Mapp v Ohio*[1668] the US Supreme Court held that illegally-obtained evidence could be excluded from criminal trial since constitutional privileges guarantee the exclusionary rule for evidence obtained in the absence of a warrant, lack of probable cause to arrest, or use of defective warrant. Similarly, under the "fruits of a poisonous tree" doctrine, to deter police misconduct illegal search evidence is also excluded. On one hand, conservatives argue that exclusion is ineffective against police misconduct and exacts a high price from society. On the other hand, liberals argue that it is better for a few guilty people to go free than to permit the police to engage in misconduct. The UK "stop and search" laws which unfairly targeted immigrants, have recently precipitated riots.[1669]

[1666] Bloom Jr, *Methods of Interpretation*, *supra* note 1590 pp 206-211.
[1667] 392 U.S. 1 (1968).
[1668] 367 U.S. 643 (1961).
[1669] Alex Wheatle, "Tottenham 2011 and Brixton 1981 – Different Ideals, Similar Lessons: There is no More Faith in Police than when I fought in the Brixton Riots. Now we must Demand Answers in Non-Violent ways" *the Guardian* 9th August 2011 http://www.theguardian.com/profile/alex-wheatle<accessed 22nd September 2014>

5.11.3. Judicial Restraint to save Political Capital

According to James Stribopolous,[1670] notwithstanding Packer's due process model, it is not possible for the judiciary to protect individual liberties against low-visibility police crimes. This is because informal rules and organisational culture which cause bureaucratic malpractice do not yield evidence of criminal wrongdoing and harassment by police investigators or prosecutors. Therefore without legislative regulation, judges encounter difficulties in excluding illegally obtained evidence. The crime control task should ordinarily be reserved for the legislature. In exceptional situations, the court will confer ancillary police powers according to two criteria.

5.11.4. The "Ancillary Powers Doctrine"

When confronted with requests for enhanced police powers, Commonwealth courts have often been willing to use their law-making authority in order to fill them. The device developed by the courts for creating "common law" police powers is known as the "ancillary powers doctrine."[1671] This law-making device is a cost-benefit analysis which has two parts: First, do the impugned actions fall within the broad scope of the police's duties? In election petition terms, does a petitioner have a right to information (article 35 of Kenya's Constitution) to compel the IEBC to produce its records or ICT equipment for verification? In the next chapter, this test shall be applied to the question of whether or not any domestic law imposes police duties on the state to facilitate attendance by non-voluntary witnesses before the ICC and disclose public records.

Second, the apparent benefits of law enforcement and public safety are weighed against resulting interference with individual liberty interests in privacy. In the Kenyan 2013 presidential election petition, it is submitted that the first limb of the ancillary powers doctrine was not satisfied. This was because Odinga delayed in requesting the Supreme Court to exercise its powers of discovery against the respondents. Erroneously, during the vote-tallying process, the petitioners approached the High Court seeking to stop the continued tallying on grounds of failure of electronic transmission. It was only after the final results were conclusively declared, that Odinga first filed an unsubstantial affidavit, followed belatedly by further affidavit, before requesting for the court to assist

[1670] James Stribopolous, "Packer's Blind Spot: Low-Visibility Encounters and the Limits of Crime Control versus Due Process" in François Tanguay-Renaud and James Stribopoulos (eds.) *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart Publishing, 2012) 193-216.
[1671] Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012) *Supreme Court Law Review*, 58 (2d) 225.

the petitioners in their investigations. Had such request for public documents been made timeously, then in all likelihood (following procedures of scrutiny and recount) the Supreme Court may well have been justified in ruling that the petitioner is entitled to receive information regarding the public register or even the electronic transmission processes. Regarding the second limb with respect to public interest outweighing private interest, since the IEBC is a public body, it could neither claim any rights to privacy nor invoke confidentiality or privilege of the Official Secrets Act.[1672] Whether or not private bodies such as Safaricom, Kencell or Google which hosted the IEBC's websites can invoke privacy defences, remained moot.

5.12. Censuring Formal Organisational Activists

5.12.1. The Ghost of Locus Standi: *Civil Society Barred from 2013 Presidential Election Petition*

Chapter one of this book demonstrated how, in the late 1980s and early 1990s, individual activists generated a *culture of resistance* against authoritarian rule. Their aim was to protest human rights violations. In the 1990s, when formal organized civil society groups joined the struggle, the new aim of the *culture of resistance* became a pursuit of democracy. Fatefully, however, civil society was excluded from the 2008 negotiations and bargaining, *inter alia*, to establish a power-sharing National Accord. Hence prospects of a criminal trial response to post-2007 conflicts were undermined. A similar question thus arises as to why the activist class or civil society failed to sustain the demand for "democratization" at the 2013 presidential election petition. At the 2013 presidential election petition, the Law Society of Kenya wanted "to determine circumstances that led to the alleged failure of the technology system used for voter identification and transmission of results."[1673] However, during the proceedings, Chief Justice Dr. Willy Mutunga warned that "petitioners and respondents, their agents, supporters and advisors are directed to desist from prosecuting the merits of their cases in any forum other than this court."[1674] Public participation by civil society was thus suppressed. Subsequent extra-judicial initiatives sought to discredit the Court's decision as a "miscarriage of justice"[1675] before the court of public opinion. An NGO consortium comprising The African Centre for Open Governance (AfriCog), Inform Action (IFA) and Kenyans for Peace, Truth and Justice (KPTJ) resorted to mobilizing civil society

[1672] Chapter 187 Laws of Kenya Revised Edition 2009 (1970).
[1673] "LSK Committee to Probe Election Failures," *East African Standard,* 27th March, 2013.
[1674] "Supreme Court Summons LSK Chair over Remarks," *East African Standard*, 28th March 2013.
[1675] Richard Nobles and David Schiff, *Understanding Miscarriages of Justice: Law, The Media, and the Inevitability of Crisis* (Oxford: Oxford University Press, 2000).

in a "people's court"[1676] in a discussion forum on social media. Proponents of the "miscarriage of justice" theory sought to demonstrate the existence of incongruence between the "legal truth" – sustained by the Court – and a "factual truth" based on empirical research. By contrast, this chapter suggests that the controversial judgment may be seen as supporting basic legal rights. Nevertheless, the Kenyan Supreme Court's conservative, constitutional interpretation was facilitated by a highly repressive environment which excluded actors of the legal complex – the LSK and even a human rights organization (Katiba Institute) – from participating in the petition hearings since they were perceived as partisan.[1677]

It appears as though there is need for third party, i.e. the public voice in election disputes. Election petitions are not binary contests between unsuccessful aspirants and those declared duly elected, but their constituencies also require closure in order to "accept and move on." Punishment of LSK for contempt of court would fetter public participation in political debate contrary to the United Nations Declaration on Human Rights.[1678] No attempt was made by the petitioners to challenge Kenya's presidential election outcome before a regional forum such as the East African Court of Justice or even seek an interpretation or authoritative recommendation from the African Commission on Human and Peoples' Rights[1679] regarding Kenya's obligations to uphold democratic obligations under these human rights instruments.

5.12.2. Silencing the Legal Complex

On the debit side, while peace was maintained, legitimate protests were stifled. Extreme repression of political speech denied the public an opportunity of accessing important relevant information and stifled their right to choose. Neither could the legal complex[1680] mobilize civil society to peacefully protest their displeasure against the Supreme Court's decision dismissing the petitions against the 2013 presidential poll result. Truth was distorted. The restriction against freedom of expression may have contributed to the Court's conservative interpretation of its judicial authority and adherence to the article 140

[1676] www.thepeoplescourt.co.ke <accessed on 20th July 2013>.
[1677] Ruling dated 25th March, 2013.
[1678] UNDHR, *supra* note 66.
[1679] ACHPR, *supra* note 74; See also East African Cooperation Treaty. The author acknowledges Vincent Suyianka Lempaa for proposing the possibility of innovatively appealing to regional human rights institutions with authority to consider review of allegedly undemocratic practices.
[1680] Gad Barzilai, "The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent" in Terrence C. Halliday, Lucien Karpik and Malcolm M Feeley (eds.) *Fighting for Political Freedom* (Oxford: Hart Publishing, 1998) 247-280; See also Harlow and Rawling, *Law and Administration, supra* note 1575.

constitutional time-line restriction, ousting the inherent power to do substantive justice without technicalities provision under article 159(d). Judicial restraint was based on the crime control model or "green light" theory. Under the constitution, a narrow interpretation meant that – like the US constitution – so also the Kenyan constitution straddles a mid-way position. Unlike the Ghanaian constitution which permits a drawn out presidential election petition or the Tanzanian model which does not permit any petition at all, Kenyan drafters specifically permitted a "limited" authority to the Supreme Court to determine only clear election disputes. Hence the Supreme Court interpreted their jurisdiction as resolving only those disputes which can be completed within 21-days from the declaration of the result. The argument of this chapter is that the historical context of the rule of law in Kenya is cognizant that election petitions generally take a long time. Yet Kenyan society cannot tolerate uncertainty in the chief executive position for long periods. Therefore in a different society, with a different political economy, there may exist justification for judicial activism to enlarge time.

5.12.3. Political Legitimacy through "Judicial Economy"

When the Supreme Court decided to dismiss both 2013 presidential poll petitions,[1681] its reasons were reserved for two weeks.[1682] With baited breath, whilst the civil society awaited delivery of the Supreme Court's full reasons behind its judgment, Jubilee's victory could not attract criticism. During this delay, CORD's unsuccessful candidate, his constituents and sympathizers were urged "to peacefully accept the results of the election"[1683] and "move on." To add insult to injury, when the 16th April 2013 delivery day arrived, the Judges merely signed their judgment in open court condemning a dumbfounded public to the arduous task of private reading. The Supreme Court effectively delegated the duty to other actors of the legal complex who must demystify, assimilate and simplify the "legal truth" contained in its 312-paragraph judgment for the masses. Only professional practitioners with power to peruse legal jargon and academic public lawyers interested in the inter-connections between law, morality – and their social foundations – can decipher the judgment's contextual meaning and communicate its ramifications to the society-at-large. Human rights activists attempted to establish debating forums in the wider local and international context to expose the "factual truth" which contradicts the Court's

[1681] 30th March 2013.
[1682] 16th April 2013.
[1683] Tom Odula and Rodney Muhumuza, "Kenya Election Results: Uneasy Calm after Court Ruling on Vote" *Huff Post World*, 31st March 2013.

exclusion of Odinga's 839-page "further affidavit."[1684] The Court subsequently issued corrections.[1685]

On 9th April 2013, amid pomp and fanfare attended by over 15 African Heads of State plus other government representatives and dignitaries, President Kenyatta and Deputy President Ruto were sworn-in by Chief Justice Mutunga, flanked by his Judges, at a colorful ceremony in the Kasarani National Stadium, Nairobi.[1686] Was the Mutunga Court's decision principled or pragmatic? On one hand, the judges asserted that *expediency* was all important. Thus, the utilitarian public goods of peace and security – not the petitioner's rights to justice and fairness – are pre-requisites for realizing the national goals. They interpreted their "limited" presidential election petition jurisdiction to promote a "judicial economy" principle, which – taken to its logical conclusion – allows the DPP wide *discretion* to ignore the existence of more serious crimes and prosecute for lesser offences in order to convict an accused person of an offence by avoiding rigorous procedural protections which the law accords to the more serious crime. This is because: "Upon finding of criminality, the Director of Public Prosecutions has power to take over and continue (or discontinue) any criminal proceedings that have been instituted or undertaken by any other person or authority."[1687]

On one hand, if the Court's inherent power had been invoked on time, then its half-hearted attempt to investigate *suo motu* could have instead been repressive against the four respondents – the IEBC, its Chairman, the president-elect and his deputy-elect. The Supreme Court judges instead remained sensitive to the primacy of *basic legal rights* of disabled persons without biometrics to a livelihood – which minorities the Court gave priority – over the positive rights of *universal suffrage*. These may be regarded as progressive features of the new electoral laws. On the other hand, they rejected the petitioners' progressive suggestion to ignore procedural technicalities. Thus, ambiguities and inconsistencies abound. The sophisticated judges appear to oscillate selectively between political conservatism to political liberalism at the convenience of expediency rather than principle. However, neither the LSK nor human rights activists were able to efficiently mobilize public opinion of civil society to

[1684] Mutuma Mathiu, "Uhuru/Ruto Won Fair and Squarely and Raila Odinga Lost Badly……" *Daily Nation*, 12th April, 2013.
[1685] Oder correcting judgment of 16th April 2013 issued on 30th April 2013 pursuant to section 21(4) of the Supreme Court Act, communicated through certified letter of Deputy Registrar Supreme Court, Anne Asugah, dated 6th May 2013.
[1686] Jessica Hatcher, "Museveni Rails against the ICC during Kenyatta's Inauguration, *Mail and Guardian*, 12th April 2013. http://mg.co.za/article/2013-04-12-00-museveni-i-rails-against-the-icc <accessed on 20th July 2013>.
[1687] Article 157(5)(b), Constitution, *supra* note 13.

criticize the Court's application of double-standards. The Court's ultimate objective was to avoid the potential chaos which was likely in event of a vacuum in the chief executive's office after lapse of the 21-day timeline.

On a technical level, the Court attributed the petitions' incompetence to pedestrian arguments – such as the Principal Voter's Register must comprise one single document or that there is something mysterious about a secret "Special Register." In its wider context, the Court's dismissal decision may be read as an endorsement – on narrow conservative grounds – of a presidential electoral petition process which legitimized Kenyatta's and Ruto's 2013 first round election victory.

5.13. *The Muthaura Defence's Problems at the ICC and Respite*

5.13.1. Introduction

What is meant by "effective representation"?[1688] According to ICC suspect Francis Muthaura's lawyer, Karim Khan writing with Anand Shah:

> the typical defense team is outnumbered, out-resourced and overworked, and is defending individuals very often already convicted, by one-sided media coverage and popular sentiment in the court of public opinion. In the case of a client suspected or accused of committing international crimes, the public perception of the client's guilt is often further magnified by the assistance of well-financed civil-society groups, nongovernmental organizations, and international media pushing a narrative that becomes accepted as the 'truth.'[1689]

Khan and Shah show how the nature of "the ICC's jurisdiction and its organizational structure impact the decision-making and practice of the defense in certain general respects. These encompass issues such as the allocation of limited personnel and material resources, the conduct of evidence review and investigations, and broader strategy."[1690] They make three observations: First that "the ICC prosecutor's single but lengthy term of appointment has, arguably, made the court less dynamic and less capable of amending and revising procedures and practices once established. Such a long term for prosecutor hampers the ability of the Assembly of State Parties."[1691] Second "in nine years. The risk of such a 'rogue' or 'inept' prosecutor would be somewhat mitigated by

[1688] Karim A.A. Khan and Anand A. Shah, "Defensive Practices: Representing Clients before the International Criminal Court" (2013) *Law and Contemporary Problems*, 76, 3 & 4, 191-233, p 1. <accessed on 10th September 2014>
[1689] *Ibid.* p 2.
[1690] *Ibid.* p 195.
[1691] *Ibid.* p 196 (footnote omitted).

having the prosecutor elected for a shorter (but renewable) term." Third that "there is only one person – the prosecutor – who sets the policy of his or her office." Consequently they submit that:

> the manner and timing of prosecution disclosure, the legal regime for disclosure at the ICC, and, to a lesser extent, the process of defense disclosure at the confirmation-of-charges stage, place a heavy burden on defense resources and unnecessarily hinder the defense's ability to efficiently and effectively carry out its primary duty as the legal advocate of a suspect or accused person facing the most serious of criminal charges.[1692]

This is due to "the potential risks and benefits arising from putting forth a robust and evidence-heavy defense at the confirmation stage as well as the uncertain legal position of suspects against whom judges have declined to confirm any charges."[1693] "On an average day, the work of a defense team practicing before the ICC at the preconfirmation or pretrial stage of a case may involve" numerous tasks.

5.12.2. Defence Practices

Muthaura's Pre-Trial defence workload for Khan and Shah entailed:

> consultation with the client on case strategy, evidence analysis, or team administration matters; receipt, organization, and analysis of prosecution disclosure; drafting of a motion seeking particular relief or responding to a motion from another party or participant; drafting of legal memoranda on procedural or substantive-law issues; communications with the prosecution seeking disclosure of information or items relevant to the defense's preparation; communications with the court's Registry on legal aid, third-party cooperation, or witness protection matters; interviewing a potential witness in person or over the phone; and interteam discussion and decision-making on investigative and legal strategy and work distribution.[1694]

5.13.3. Disclosure of Documents between Parties at the ICC

Thus "each future defense counsel will need to take into account the record of the outcomes of actual confirmation hearings and, if applicable, subsequent trial proceedings when considering the appropriate case strategy."[1695] In *the Kenyatta case* "the defense of Ambassador Muthaura placed the prosecution and pre-trial chamber on notice more than five months prior to the start of the confirmation

[1692] *Ibid.* p 196-7.
[1693] *Ibid.* p 197.
[1694] *Ibid.* p 198.
[1695] *Ibid.* p 199.

hearing regarding the concerns of the defense as to the prosecution's approach to disclosure."[1696] Yet:

> exactly at the thirty-day deadline, the prosecution disclosed to the defense its DCC, a more than 6600 page 'in-depth' analysis chart, purportedly meant to assist the defense and judges in understanding the evidentiary basis of the prosecution's case, and an additional 1300 pages of incriminatory disclosure, including more than 1200 pages of transcripts of witness interviews.[1697]

Consequently:

> in addition to continuing its ongoing investigations...the defense now had fifteen days to analyze the DCC and the 6600-page analysis chart, review hundreds of pages of new interview transcripts of a key prosecution witness, and, after this, undertake new or adapt ongoing investigations in Kenya based on these late disclosures.[1698]

Procedurally:

> in the above submissions of the Kenyatta team, the timing and continuation of prosecution investigations after the issuance of a summons to appear or arrest warrant, or the occurrence of the confirmation-of-charges hearing, is a major factor in the prosecution's practice of disclosing a significant amount of substantive material on the eve of, if not the day of, the final deadline for such disclosure.[1699]

It follows that "the defense must be vigilant regarding and devote significant resources toward the litigation of disclosure-related issues to protect the fundamental fair-trial rights of their clients." And: "Lead counsel for Mr. Kenyatta in the Kenya II case (herein *the Kenyatta case*) recently expressed the difficulties inherent in attempting to analyze disclosed materials and conduct investigations thereon, when the item in question is so heavily redacted."[1700] Another danger is that "the process of application for, judicial review of, and imposition of redactions has become so unwieldy and unmanageable that outright miscarriages of justice may occur."[1701]

Regarding alleged meetings: "With respect to Muthaura: The [pre-trial chamber] relied principally on the evidence of Witness 4 to establish these meetings. Indeed, the Majority stated at paragraphs 311 and 342 respectively of the Confirmation Decision" that "the occurrence of this meeting is established to the

[1696] *Ibid.* p 202 (footnote omitted).
[1697] *Ibid.* p 202-3 (footnote omitted).
[1698] *Ibid.* p 203.
[1699] *Ibid.* p 204.
[1700] *Ibid.* p 208.
[1701] *Ibid.*

requisite threshold by the testimony of Witness OTP-4 who was present as a Mungiki representative and who provides a detailed account thereof." Muthaura's defence team complained that additionally:

> It is clear, on any fair reading of the evidence or the Confirmation Decision, that without the evidence of Witness 4, there would not have been any sufficient basis to find the existence of a common plan to commit the crimes alleged in Nakuru and Naivasha, or accordingly, to confirm the case against Ambassador Muthaura.[1702]

Furthermore: "witness 4 was the principal source of evidence that supported the Prosecution's charges against Mr Muthaura at the confirmation stage. . . . [T]here would not have been sufficient evidence to confirm the charges against Mr Muthaura without Witness 4's evidence."[1703]

Accordingly, charges against at least one individual who appeared as suspect before the ICC were very likely wrongly confirmed for trial, resulting in concomitant stress and mental anguish to the individual and his family, damage to the individual's reputation, and the unnecessary expense of time and resources by the court, prosecution, and non-legal aid-funded defense.[1704]

Moreover:

> The above-mentioned reflexive, if not cavalier, attitude toward redactions by the ICC prosecution, and the wide scope and imposition of redactions at the ICC – beyond merely witnesses and their families – has resulted in a bureaucratic, overbroad, and resource-draining redaction regime. At its worst, such a regime risks resulting in a fundamental miscarriage of justice, and otherwise greatly hinders the work of the defense.[1705]

As mentioned previously "the practice of the prosecution to disclose significant and substantial items of evidence, as well as the DCC, close to or at the thirty-day deadline for pre-confirmation disclosure, leaves the defense with scant time to process this information and modify and conduct additional investigations thereon."[1706] "Under these circumstances, errors in the electronic processing of evidence and the entry of metadata are to be expected, and the defense may find it necessary to request extensions of time to submit its evidence due to these

[1702] *Ibid.* p 209, citing *The Kenyatta Trial Chamber* Defence Article 64(4) Application *supra* note 313 p 14, http://www.icc-cpi.int/ iccdocs/doc/doc1549410.pdf (internal citations omitted). <accessed on 25th July 2015>
[1703] *Ibid.* p 210.
[1704] *Ibid.*
[1705] *Ibid.* p 212.
[1706] *Ibid.* p 217.

severe time and resource constraints."[1707] Including "the case of Ambassador Muthaura, against whom all charges have now been withdrawn, the prosecution has had a success rate of below sixty-five percent in those cases in which a confirmation decision has been rendered."[1708]

5.13.4. The Metamorphosing ICC Prosecutor's Theories

In *the Kenyatta case* "it appears the chambers of the court have thus far been willing to give the prosecution leeway in continuing its investigations after the confirmation-of-charges hearing and are reluctant to pass final judgment on whether the prosecution is properly fulfilling its article 54(1)(a) obligations."[1709] According to Khan and Shah, "the prosecution's case theory in the (*Kenyatta*) case at confirmation was centered on three meetings during which the common plan was hatched and implemented."[1710] The defence decried that of "twelve witnesses at the confirmation-of-charges hearing...(who) allegedly attended these supposed meetings....name other individuals who also supposedly attended these meetings."[1711] Yet the prosecution never "attempted to contact the numerous individuals named by these witnesses as allegedly attending the meetings to verify the occurrence and content of these meetings." Instead, the defence contacted and took "sworn statements from almost every individual named by the prosecution's witnesses as allegedly attending these meetings" who "informed the defense that they were not aware of any attempt by the Office of the Prosecutor to contact them."[1712] They "refuted the fact that two of the meetings had taken place, and with respect to the third meeting, stated that the content of the meeting was not what the prosecution's witnesses claimed it to be."[1713] Thus the skepticism expressed in both dissenting decisions of Judge Kaul in the *Kenya cases* and Judge Wyngaert, in the Kenyatta Trial Chamber, were valid.

5.13.5. A Suspect's Pre-Trial Rights under International Criminal Procedure

Although an accused person is not obliged to participate in the proceedings, co-operation of the accused should never be a criterion for the trial to proceed. Essentially, however, the Anglo-Saxon trial process demands that information be tested through confrontation of two contending parties. Trials are competitive processes not designed to reveal the truth. Rather courts ensure that public

[1707] *Ibid.*
[1708] *Ibid.* p 219.
[1709] *Ibid.* p 221.
[1710] *Ibid.*
[1711] *Ibid.*
[1712] *Ibid.* (footnotes omitted).
[1713] *Ibid.* p 221-2.

judicial power is based on the safest evidence. Hence Salvatore Zappalà[1714] argues that "the ICC Rome Statute is largely based on adversarial inspiration with important inquisitorial elements." Although there exists a possibility for the accused to apply for a prosecutor's disqualification as prosecutor, nonetheless the investigation and presentation of the case remain entirely within the prosecution's purview. As "ministers of justice public prosecutors must place before the court all evidence whether it supports his case or whether it weakens it and supports that of the accused."[1715] Similarly, the ICC Chief Prosecutor is constrained from ambushing suspects. On the contrary, the OTP was bound to even-handedly seek evidence in favour of persons suspected of perpetrating crimes against humanity in Kenya's post-2007 election violence. Moreover, African customary criminal justice is reconciliatory, rather than punitive.

Zappalà lists five reasons which require an impartial and objective investigative phase.[1716] First, as shown in the next chapter, the ICC lacks police of its own. Consequently, it is forced to rely upon state co-operation, which however, is based on carrying out specific requests. An investigation may need general activity of collection of information that is difficult to perform in normal conditions and may prove almost impossible where an accused person refuses to offer any defence. Second, because of the complexity of international cases. International criminal investigations aim at demonstrating the individual responsibility of certain persons. Yet they often require the collection of evidence on the more complex local socio-economic and cultural context in which the individual crimes were committed. Third, as shown in chapter two, there exists considerable risk of unfair actions by national authorities to limit the chain of responsibility to the low-ranking physical perpetrators. Yet, substantial pressure mounts on high-level suspects to resign from pubic positions to facilitate investigations. Fourth, because the "political" character of the cases may lead to serious difficulties in obtaining co-operation of the state authorities, or in certain cases *de facto* authorities, governing certain territory, this could be an insurmountable barrier. Fifth, the costs of defence investigations may be so high that even the "well-heeled" suspects could find them prohibitive.

To lift the sovereign veil, the ICC Pre-Trial Chamber thus plays an additional scrutiny role in the investigative process. This inquisitorial role,[1717] provides continuous power to: "issue and the task of issuing all necessary orders and warrants that may be required for the purpose of the investigations; take

[1714] Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003).
[1715] *Thomas Patrick Gilbert Cholmondeley v Republic* [2008]eKLR HCA No. 116 of 2007, Omolo, O'Kubasu and Onyango-Otieno, JJA.
[1716] Zappalà, *Human Rights, supra* note 1714.
[1717] Article 57(3)(a), Rome Statute, *supra* note 14.

measures for protection of witnesses and victims; authorize the prosecutor to take specific investigative steps within the territory of a State Party"[1718] "issue warrants of arrest or a summons to appear in the name of a person subject to an investigation; obtain an accused person's appearance before the Court; and hold the hearing for confirmation of charges."[1719] Suspect's rights during the trial proper are beyond the scope of this book.

ICC suspects have rights to be informed of whether they are being investigated. Yet international legal services are infrequently used. Nevertheless, given their knowledge of local cultures and politics, Kenyan judges or lawyers would possess superior expertise than foreigners in determining the quality of political offences committed in their home country. While the ICC Pre-Trial Chamber may consider and evaluate evidence before commencement of the trial proper, the defence may challenge evidence at confirmation hearings. According to Zappalà, all Continental European elements of criminal procedure introducing an inquisitorial model tend to undermine the Anglo-Saxon procedural protections of the rights of an accused in the adversarial model where judges sit as detached umpires. Therefore, another important tenet regarding international crimes is that of assigning an advocate to represent the accused when the interests of justice so require. In *the Kenya cases*, only one suspect radio journalist Joshua Sang benefitted from legal aid. The right to representation may be the best way to reconcile the victim's interests of justice with the right of the accused to a fair trial.

Not only does the ICC's operations of combining an inquisitorial civil law system as contrasted with Kenya's adversarial common law system, appear to lower standards of fairness for accused persons. But also, to the extent that international justice is territorially distant, it remains inaccessible to its potential beneficiaries, the bystander constituency. ICC sits at The Hague, Netherlands. During the investigations of the situation in Kenya, its inaugural Chief Prosecutor Ocampo had not established temporary offices in Kenya to oversee investigations. The ICC has since established offices to facilitate prosecutions. However, as shown in the next chapter, the status of the ICC's investigative facility remains contingent upon the co-operation by the host country – including its remaining a signatory to the Rome Statute. Suzanne Mueller has forcefully argued that the political strategy of the Kenya government has evinced a tacit stance of non-co-operation against criminal response to Kenya's post-2007 conflicts.[1720] Conversely, Kenyatta's Jubilee administration insisted that the government has technically complied with the Rome Statute's

[1718] Article 57(a), *ibid.*
[1719] Article 58, *ibid.*
[1720] Mueller, "Kenya and the International Criminal Court," *supra* note 36.

requirements. Nonetheless, the cultural difference of the ICC's "universal" justice as contrasted with perspectives of the local population may further alienate its political legitimacy. The prosecutor's basic strategy apparently lay in defining which ethnic militia groups bore "the greatest responsibility for crimes" and then selecting suspects from across the political and ethnic divide to attribute criminality on those associated with the planning, organizing or financing the political campaigns. While there may be some suspicion which points in the direction of the selected suspects, the standard at a criminal trial requires proof "beyond reasonable doubt." Therefore it is preferable for the ICC to urgently recruit domestic advocates to provide legal assistance not only to counter-balance the Attorney General's support for government, but also to sustain a legitimate link between the ICC and Kenyan society, i.e. the bystander community.

5.14. Conclusion

This chapter commenced by outlining the run up to Kenya's 2013 presidential election race. For Kenyatta and Ruto, the collateral stakes were extremely high. Either they would succeed – by presenting the ICC as an imperial court – and benefit from state support to defend their prosecution at The Hague or they would lose and risk cancellation of their bond terms or even extradition and possible conviction. Their international criminal defences would receive less state support under an Odinga presidency. This chapter notes that the "coalition of the accused" – not only overcame legal challenges from certain civil society organizations which disputed the constitutional eligibility of their candidacy, but also surprised Western donors, by receiving overwhelming support from their respective ethnic communities, which united to save them from prosecution. The problem was the extent to which Kenya's 2013 presidential elections would either consolidate ethnic reconciliation – thus furthering transitional justice (upon a victory by the "alliance of the accused") – or demand post-conflict justice for the post-2007 victims (by an Odinga victory).

The chapter constructed a normative framework based on Packer's crime control and due process models. Neither is technically superior or inferior to the other. Nonetheless the models are useful in explaining how judges either emphasize repression of crime or defend suspects' fair hearing rights, respectively. Earlier chapters in the book relied on relatively significant ICC decisions, but often omitted footnotes unless they have proven particularly illustrative of a given point. This chapter makes extensive reference to the Supreme Court's 2013 Presidential election petition judgment issues in relation to international law or constitutional doctrine. "Judging is a skill that invokes weaving together these

interpretations into a coherent justification for a decision."[1721] The selection of issues or subject matter thus depends on their relation to the early jurisprudence in *the Kenya cases*. This chapter reviewed the literature on constitutional construction typologies ranging from the textual, intratextual or teleological, historical, doctrinal, structural, consequential (or prudential) and ethical. Muigai concludes that:

> There is a middle ground between those who want a neutral rules-objective jurisprudence and those who want a more results-oriented jurisprudence. The middle ground lies in the judiciary acknowledging and developing a system of values in a rational and consistent manner. These values can only be developed on the basis of an urgent theory of the constitution. The challenge of our scholars is to contribute to the refinement of this theory.[1722]

The justification for this chapter was based on the distinctly conservative history of the Kenyan courts in responding to presidential election disputes. Yet the post-2007 conflicts gave rise to unprecedented need for structural reforms including constitutional, judicial and electoral reforms based *inter alia*, on the Kreigler Report. This chapter was justified in evaluating the legitimacy of the arguments which rationalized which Supreme Court's judgment in *the Odinga case.*

The hypothesis was that Odinga's petition was based on a theory founded on *manifest criminality,* but lacked incriminating evidence to substantiate its claims. The Supreme Court's conservative or consequentialist interpretation of the Constitution rejected belated evidence. In any event, whether or not such forensic evidence would have assisted the petition is a moot point. The judges applied a cost-benefit analysis – by weighing the possibility of chaos and anarchy which may erupt if the chief executive position were to remain vacant – after the expiry of the 21-day constitutional time-line. The Supreme Court's insistence on the "fidelity of the law" to justify judicial restraint may be rationalized under the common law's "ancillary police powers" doctrine.

The importance of this chapter is that it contrasts international and domestic interpretations of legal rules affecting the Hague suspects. The Muthaura defence team complained that international criminal prosecution generated manifold problems for the defence case. Eventually, in April 2013, ICC's new prosecutor Bensouda withdrew the charges facing Muthaura, for lack of sufficient evidence. It suggests that the outcome of Kenya's 2013 presidential election operated to significantly diminish any chances of co-operation by the

[1721] Bloom Jr, *Methods of Interpretation*, *supra* note 1590 p xvii.
[1722] Muigai, "Political Jurisprudence," *supra* note 46 p. 16.

Kenya government with the ICC regarding post-confirmation investigations against The Hague four.

The Kenyan Supreme Court combined literal and consequentialist approaches to interpret the constitution and resolve Kenya's 2013 presidential election dispute. The real question was the consequence of permitting Odinga's belated evidence to permit a potentially explosive run-off to determine the legitimacy of president-elect Kenyatta and deputy president-elect Ruto's victory. In the context of potential revival of electoral-related conflicts – to which low-income, ethnically-heterogeneous populations emerging from previous conflicts, are prone – the prudent decision was to reject Odinga's application to enlarge time within which to examine the circumstantial evidence to be belatedly-adduced in support of his new evidentiary findings, accept the IEBC's result, and move on.

This chapter finds that the ICC would be well advised to similarly consider a consequentialist approach to Kenya's post-2007 conflict situation which was not based on *manifest criminality* of indirect co-perptratorship, but has deteriorated into an expedition to unearth circumstantial evidence. In the different circumstances of a stable liberal state, the polity would withstand a prolonged absence of its chief executive officer while he is away on trial at The Hague. In the Kenyan situation, however, the Rift Valley inhabitant communities appear unpersuaded about the value of the ICC's distant criminal "justice." The potential for renewed conflicts suggests that criminal trials are ineffective in applying a teleological interpretation, unless dealing with a rogue state. Furthermore, in the absence of *manifest criminality*, prosecution of the Kenyan suspects resulted in declining legitimacy of the ICC. Instead, it is recommended that where political disputes persist in low-income, ethnically-heterogeneous, low-literacy societies in transition from authoritarianism to democracy, domestic country judicial processes should influence the ICC prosecutor's selection of cases for investigation or prosecution. The next chapter thus argues that the ICC should not only revamp its prosecution office to empower its selection of situations based on a thorough review of investigated evidence, but should also promote outreach to educate domestic populations regarding the virtues of "universal" values of the international community. This "third way" departs from the dichotomy between victims and suspects rights. It even goes beyond state sovereignty versus individual rights, instead prioritizing bystanders' and witnesses' interests of the survivor society. It seeks to draw attention to collective interests in "Ubuntu" as both a legitimate and more effective communitarian response to resolve post-conflicts in certain situations.

CHAPTER SIX

RATIONALIZING KENYA'S (NON) COMPLIANCE WITH ITS ROME STATUTE DUTY TO CO-OPERATE

6.1. Judicial Activism and Judicial Restraint

6.1.1. Legitimacy and Effectiveness

As the theoretical framework of the previous chapter indicates, the US experience of constitutional history evinces a dichotomy between conservative and progressive interpretations corresponding to judicial restraint and judicial activism, respectively. "Irrespective of constitutional design, the task of interpretation shares certain common features across legal systems: it is the act of attributing meaning to legal texts. Legal reasoning is regarded by many scholars as necessarily having a universal character to justify the general normative claim to obedience it makes."[1723] These approaches derive their orientations from the traditional separation of powers doctrine. The traditional judicial function is to settle disputes through impartial adjudication. Judges, in theory, are presumed to find the law already there and have no law-making role. Yet in practice, it is not possible for the legislature to anticipate all scenarios. Hence hard cases comprise situations which fall outside the core of the rule. Good (doctrinal) judges are thus required to refer to "principles, policies and other sorts of standards" to find the "one right answer" – which best fits with the practices of that legal system – to resolve the case at hand. "Only a judge who substitutes their own personal opinions or ideological leaning for the law are not good judges."[1724] A poor judge is one who, rather than reaching a reasoned decision which is justifiable according to an independent "second best" objective criterion, instead resorts to substituting a "first best" subjective morality of his own for that required by the political society in question.

Yet criticism of any decision depends on the standards or benchmarks laid down by a given interpretive community, of which according to Ronald Dworkin – as seen in the introductory chapter – there are three. First, *collaborative interpretation* depends for its validity on the expectations of the community which laid down the rule which the judge is engaged in interpreting, as well as

[1723] Conway, *Limits of Legal Reasoning, supra* note 174 pp 9-10; See also Dworkin, *Hedgehogs*, *supra*, Introduction, section 0.8.
[1724] Zappalà, "Judicial Activism," *supra* note 171.

those involved in making interpretations i.e. precedents. Second, *conceptual interpretation* targets the community of legal scholars and academicians who practice critical scholarship by conceptualizing the reasoning contained in various decisions. Third, the *explanatory interpretation* of the community to which the rule in the decision is directed. This target community is therefore expected to internalize the norm to change their behaviour and to comply with its requirements. This chapter shall attempt an evaluative interpretation of various decisions by International Criminal Court judges in *the Kenya cases* with respect to the judges' interpretation of two rules. First, the rule of international criminal law which prescribes a duty of co-operation. Explanatory interpretation entails examining not only the ICC's interpretation of the rule, but also that of the Kenya government. Furthermore an assessment is necessary to compare the actual behaviour of the Kenya government with the requirements of the rule to determine whether or not compliance has occurred. Second, assuming that Kenya is in breach of its duty of co-operation, then it is necessary to interpret the ICC's rule of enforcement under the Rome Statute to predict whether the ICC is likely to compel compliance on the part of a recalcitrant state. Curiously, notwithstanding that a state complies with its duty of co-operation, it may do so without changing its behavioural practices. This chapter shall thus describe how Kenya rationalized its compliance with its Rome Statute obligation to co-operate while simultaneously refusing to endorse a criminal trial policy in response to alleged mass atrocities committed during its post-2007 conflicts. Hence the ICC faced an awkward dilemma of choosing between promoting the values of *legitimacy* and *effectiveness*.

As argued in the previous chapter, Kenya's post-independence constitution lacked any consistent theory of constitutional interpretation. However, as was also shown, the new Supreme Court's landmark judgment at the 2013 presidential election petition *Odinga case*[1725] signaled a preference for a restrained approach. The Mutunga Court's conservative precedent suggests that that same court's constitutional interpretation of the rules of international criminal law – including the Kenyan International Crimes Act 2008 – is likely to require judicial restraint. The Supreme Court's precedent is important for making an explanatory interpretation of international criminal law i.e. one that prioritizes the interpretation of international criminal law from the perspective of the subject community i.e. Kenyans. This chapter asserts that an explanatory interpretation would suggest that under Kenyan law, the Kenya government had a limited duty to co-operate with the ICC's post-confirmation investigations. Rather, Kenya had a right to refuse the prosecutor's request – whether to facilitate the attendance of non-voluntary witnesses before the ICC in *the Ruto*

[1725] Supreme Court of Kenya Judgment, *supra* note 220.

case – or supplement vague and ambiguous requests for documents, including the suspect's financial statements, in *the Kenyatta case*. Conversely – in relation to these two international criminal law rules regulating state co-operation and compliance – the ICC majority judges' *collaborative interpretation* of the Rome Statute, instead endorsed a purposive or expansivist approach which ordered "full co-operation," including facilitating attendance by non-voluntary witnesses as well as furnishing a range of various unspecified documents, respectively. Given the background in which a litany of earlier ICC Pre-Trial, Trial and Appeals Chamber's judgments evinced judicial activism in *the Kenya cases*, therefore a question arises as to the extent to which the ICC can engage in judicial *creativity* without losing its *legitimacy.*

6.1.2. The Risks of Judicial Restraint and the Limits of Judicial Creativity

Modern international criminal law originated from the Nuremberg and Far East trials.[1726] Naturally, subsequent establishment of two *ad hoc* tribunals by the UN, on the former Yugoslavia and Rwanda, bear the imprimatur of their precursors. However despite their resemblance, significant differences exist – not only as between the earlier and later varieties of adjudication – but also as between the latter expositions and the ICC model. This was because, first, the language contained in the earliest statutes was scanty and allowed significant leeway for judicial interpretation. Second, pioneer judges lacked any precedents to guide their reasoning. Hence, as they ventured into the then unchartered terrain of international criminal justice, their decision-making took advantage of the wider linguistic latitude to engage in activist reasoning. Similarly, the ICTY and ICTR Statutes asserted the primacy of their tribunals above the sovereignty of their situation states.[1727] However, the Rome Statute represents a departure from the activist licence. The Rome Conference produced a compromise document which reflects a consensus between extremists across the conservative and progressive divide. On one hand, the conservative Member States Parties with an interest in preserving state sovereignty insisted on the ICC's legitimacy. Hence they introduced detailed provisions explicitly circumscribing the Court's jurisdiction and limiting its powers. According to Zappalà, examples of the Rome Statute's provisions designed to reduce the activist propensity include: One, the substantive legality principle;[1728] i.e. the explicit requirement that "(t)he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted"[1729] and the express

[1726] Zappalà, "Judicial Activism," *supra* note 171 p 217.
[1727] *Ibid.*
[1728] Article 21(3), Rome Statute, s*upra* note 14; See also *ibid.* p 220
[1729] Article 22(2), Rome Statute, *ibid.*

definition of detailed provisions creating elaborate offences.[1730] Two, the Rome Statute strongly encourages the recruitment of judges professionally trained in criminal law who – unlike non-lawyers – are likely to be "psychologically" tempered by a judicial restraint approach.

Notwithstanding the Rome Statute's attempts to restrict the interpretation of activist judges, nonetheless, Salvatore Zappalà argues that "the DNA of ICL imposes a double duty of activism on international criminal judges in order to overcome the risks of restraint."[1731] International criminal law owes its existence to a dual parentage – the union between criminal law and public international law. Given its state criminal law heritage, international criminal law is analogously limited to ensuring the protection of the suspect's rights. However, given its inter-state law resemblance, international criminal law is fettered by the Westphalian principle of non-interference in the internal affairs of sovereign states.[1732] Zappalà concludes that, in reality, if international criminal law is to achieve its mandate, neither of these assumptions can hold. Rather, the ICC's effectiveness is evaluated according to the degree to which it fulfills the reasons for its objects and purpose prescribed under the Rome Statute's preamble. First, the Rome Statute was expressly established by the international community not to shield suspects from justice, but to ensure that perpetrators of the worst crimes known to mankind do not go unpunished. Second, it is because sovereign states often suppress justice against suspects or fail to punish perpetrators that the Rome Statute pierces the sovereign veil by attributing individual criminal responsibility in order to overcome the inertia against prosecution of people who control state power.

Regarding so-called gaps in the Rome Statute: "*From the point of view of material adequacy of the existing law such gaps as undoubtably occur to the judicial mind are merely provisional*."[1733] However, without an element of judicial creativity, it would not be possible to apply statutory rules to resolve disputes. Therefore, in order to achieve the object of curbing impunity, it is necessary to fill gaps in the Rome Statute. On the other hand, unless the concerned state has internalized a norm which obligates use of criminal trials in response to a mass atrocity situation, then it may not voluntarily co-operate with the ICC. Thus, enforcement measures may be required to compel non-member states such as Sudan to generally co-operate with the ICC's arrest of suspects who allegedly perpetrated mass atrocities at Darfur. Enforcement may also be

[1730] Articles 6, 7 and 8, *ibid*.: See also Zappalà, "Judicial Activism," *supra* note 171 p 221.
[1731] *Ibid.* p 219.
[1732] *Ibid.* p 219, citing article 1, Rome Statute, *supra* note 14.
[1733] Powderly, "Distinguishing Creativity from Activism," *supra* note 172, p 231 (emphasis in original), citing H. Lauterpacht, *The Function of the Law in the International Community* (Oxford: Clarendon Press, 1933) p 135.

necessary to compel member states to co-operate by facilitating ICC's continuing investigations, such as arose during the trial of *the Kenya cases*. It is noteworthy that the military or economic sanctions routes are prohibitively expensive enforcement measures. Instead, international law compliance-theorists agree that sustainable international tribunals rely on enforcement techniques which balance between judicial restraint – to retain legitimacy – and judicial activism, to ensure effectiveness. A more sustainable approach to enforcing international criminal law norms is based on *persuasion* and *capacity-building*, rather than *censure* – leave alone *sanction*.

This chapter adopts some theories of "why states comply with norms prescribed under human rights instruments" to examine the specific extent to which the Kenyan government complied with its obligations under the Rome Statute in *the Kenya cases*. It critically analyses the ICC's interpretation of the duty to co-operate, rendered in 2014 by both the *Ruto* and *Kenyatta* Trial Chambers. It describes not only the interpretive approach used by the judges – whether restrained or activist – but more specifically, it compares the respective interpretive audiences which the ICC's dichotomous judgments may persuade. Zappalà contends that – in relation to interpretation of ambiguous co-operation duties and enforcement of compliance – the challenge for the ICC is not to *collaboratively* interpret the Rome Statute in furtherance of its perceived teleological purpose. Rather, the judges should adopt an *evaluative* interpretation which convinces the community of the situation state about the reasonableness and acceptability of its creative decisions. Otherwise, a state which perceives the ICC's judgments as unduly activist may invoke its own sovereignty status by refusing to comply with illegitimate orders or unreasonable obligations. Alternatively, ICC judges who justify their creativity by advancing reasons which persuade the disobedient state are less likely to provoke an unco-operative response. Following Joseph Powderly, the impasse between extremist conflicting ICC and sovereign state interests, may be resolved by a *conceptual* interpretation, which aims to convince the international criminal law academic scholars' community.

6.2. Between Compliance and Enforcement

Prior to and during trial of the *Kenyan cases,* an alarming litany of activist judgments were rendered from all levels of the ICC hierarchy – comprising the Pre-Trial, Trial and Appeals Chambers. Three controversial split decisions – relating to complementarity, the definition of "state-like" organizations and regarding the prosecution's negligence – were described and critically analyzed from chapters two through four of this book. The net effect of the ICC's preliminary jurisprudence was to dismiss preliminary objections both by the

Kenya government as well as the defence teams. Consequently, the pre-trial phase successfully confirmed both cases for trial. Significantly, the pre-trial phase is based on a lower evidentiary standard of "substantial reason to believe" that crimes against humanity were committed by the suspects during Kenya's post-2007 conflicts. Conversely, the trial phase demands a higher standard of proof from the prosecution, one based on possession of evidence to establish an accused's guilt "beyond reasonable doubt." Paradoxically, the express circumstances in which the ICC's complementarity jurisdiction was conferred – and expediency under which the confirmation of charges were sustained – effectively resulted in an evidentiary basis which was sufficient for pre-trial purposes, but inadequate to meet trial standards. An evidential deficit resulted, which gulf required post-confirmation investigations to bridge.

The ICC's investigative task is inherently problematic on account of two reasons. For one thing, because it lacks police personnel of its own. Hence the prosecutor is constrained to rely upon co-operation from the Rome Statute Member States Parties – not only to effect arrests of fugitives, but also to enforce compliance with obligations such as investigations or other requirements – as and when the judges may order. Another thing is that, even assuming the ICC had a police unit, nonetheless, in order to gain access to any given situation territory, such foreign officials would still depend upon state co-operation. During the reign of Kenya's Government of National Unity between 2008 and 2013, the ICC prosecutor conducted incomplete investigations, amid complaints of non-co-operation. In March 2013, after two key suspects in *the Kenya cases*, Kenyatta and Ruto ascended to the positions of President and Deputy President, respectively, it would invariably become more problematic for the prosecution to rely on Kenya's co-operation. This is because any sovereign state possesses capacity to frustrate ICC investigations, moreso where there is lack of political will for using criminal trials in response to mass atrocities. Commanding a simple majority in both the National Assembly and the Senate, Kenyatta's Jubilee government was mandated, *inter alia*, to define the country's criminal justice policy – including whether or not to provide legal assistance to The Hague – through co-operation. What was the probability that The Hague suspects would endorse state co-operation so as to facilitate acquisition of missing evidence to increase the chances of their own possible incrimination or conviction? As indicated by the prosecution applications towards the end of 2013, ICC's new prosecutor Fatou Bensouda decried *the Kenya cases* as the worst case of interference, bribery and witness intimidation in the ICC's history. Yet Kenya's Attorney-General, Githu Muigai insisted that, in compliance with Kenya's Rome Statute obligations, his office had continued to furnish the prosecutor with full co-operation. Thus, it became necessary not only to interpret the provisions regulating co-operation, but also to examine Kenya's activities to

determine the extent of (non) compliance, and if necessary order compliance and enforce ICC's orders.

6.3. Politics vs. Law: The Kenyan 2013 Election and the ICC

Suzanne Mueller examines "conventional theories of ratification." She finds "that they do not account for Kenya's decision to join the ICC or its questionable compliance with the Rome Statute."[1734] Instead, she suggests that "changes in political context and malleability of the rule of law do." Her argument *inter alia,* "invokes Douglass North's understanding of how politics works."[1735] It suggests that "as informal enforcement mechanisms, including sanctions and reward, jeopardize compliance, formal legal institutions and instruments such as treaties can be undermined."[1736] "North clarifies how informal norms and enforcement mechanisms often trump adherence to formal rules."[1737] Mueller recognizes that the Kenyan Hague suspects' "defense strategy…entailed using delaying tactics to ensure the ICC trials would not start until the defendants had won the election and gained power at the highest level." She argues that: "The tactics ranged from mobilizing international organizations against the ICC, making numerous, legal challenges designed to delay the court, and intimidation to potential witnesses, allegedly by defense sympathizers and go betweens, to keep them from assisting the ICC." Thus "attacking the ICC as a tool of the West both before and during the presidential campaign served this end and victory in the election."[1738] She concludes that: "The sequence of events raises serious questions about the fate of international human rights treaties and international criminal justice not only in Kenya, where institutions and the rule of law are weak, but also about the future of democracy there."[1739]

Mueller also relies upon Oona Hathaway who "convincingly argues that countries in such situations incur low costs in ratifying treaties. This in turn invites non-compliance of varying degrees and attempts to ignore or undermine the rule of law and other formal rules."[1740] Hathaway's argument is "that where basic freedoms are not 'well protected,' enforcement suffers, and non-compliance 'can be relatively cost-free.' "[1741] She "explains why the low cost of

[1734] Mueller, "Kenya and the International Criminal Court," *supra* note 36 p 27.
[1735] *Ibid.* p 28, citing Douglass C. North, "Economic Change through Time" (Jun., 1994) *The American Economic Review*, 84, 3, 359-368.
[1736] *Ibid.* p 28.
[1737] *Ibid.* p 37.
[1738] *Ibid.* p 28.
[1739] *Ibid.*
[1740] *Ibid*., citing Oona A. Hathaway, "The Cost of Commitment" (2003) *Stanford Law Review,* 55, 1821-63.
[1741] Mueller, *ibid.* p 38.

commitment in systems where the rule of law is not entrenched encourages treaty ratification and jeopardizes compliance."[1742] To Mueller:

> This correctly implies what North terms 'path dependence': The resilience and repetition of the past in the face of informal norms and enforcement mechanisms that guide decision makers and undermine formal changes. This explains both Kenya's response to the ICC, its internal political dynamics, and the unusual salience of the 2013 election.[1743]

Mueller also makes a damning observation that "Kenya's chief justice received threats before a Supreme Court decision on whether the two indicted defendants would be allowed to run for president. He also has said his email accounts were being hacked."[1744] She thus suggests not only that the March 2013 presidential election result was rigged but worse, that the High Court's February 2013 verdict regarding the eligibility of the indictees under the "integrity-bar" was wrong.

I shall neither interrogate nor revisit the empirical outcome of either Supreme Court's verdict of Kenya's 2013 presidential election nor that of the High Court's endorsement of inditees as eligible candidates. Suffice to reiterate that the normative framework relies upon John Rawls's *Law of Peoples*, which demands toleration of cultural diversity as shown in the introductory chapter. Assuming that Mueller's analysis that Kenya is a weak state, is correct, nonetheless, it is clearly not an *outlaw* state. Therefore, its sovereign population is entitled – under Rawlsian political liberalism – to learn from democratic mistakes of its own. Moreover, civic education by international civil society or developed Western liberal democracies should not be imposed on well-ordered, hierarchic, decent peoples, other than through persuasion. Neither is Mueller's evidence that Kenya relies on *informal* norms, entirely complete. Kenya's Truth, Justice and Reconciliation Commission had no mandate to confer amnesties on persons suspected of atrocities during post-2007 conflicts.[1745] Rather, it is arguable that at best the IEBC's declaration and the Kenya Supreme Court's presidential election petition judgment constituted robust *formal* processes, albeit of *de facto* amnesty. At worst, judicial activists, may lament the Supreme Court's restrained approach to interpretation in *Odinga's petition* which was based on a literal reading of constitutional time-lines and consequentialist logics. Nonetheless, the Court's judgment relied on construction techniques which were *legitimate*. It follows then that as the authoritative statement of domestic law, the

[1742] *Ibid.* p 37.
[1743] *Ibid*. p 38.
[1744] *Ibid.*
[1745] Tom Ojienda, "Legal and Institutional Framework of the TJRC – Way Forward" (2010) *Law Society of Kenya Journal*, 6, 1, 61-96.

Supreme Court's interpretation must be deferred to. Given the sociological and legal fact of Kenyatta and Ruto's occupancy of Kenya's highest executive offices, Mueller decries the fact that some of the ICC:

> TC's (Trial Chamber's) recent decisions seemed to accommodate the political power of individuals accused of grave crimes. This suggests a divided court under siege by its defendants and under pressure. It highlights the ICC's limited enforcement powers when political power and non-compliance combine to threaten the law.[1746]

The purpose of this chapter is to construct a theoretical framework to evaluate the norms under the international human rights instruments which regulate the compliance by states with their obligations under the international instruments. This shall enable evaluation of the international community's capacity to enforce human rights norms and obligations, particularly the ICC's power to enforce a Member States Party's obligation to co-operate under the Rome Statute. The first objective is – assuming as at this book's completion on September 2014, Kenya had complied with its obligations in *the Kenya cases* – to describe how Kenya indeed complied or how it legally and politically rationalized its attempted compliance. The second objective, if Kenya had failed to co-operate – to describe its activities of non-compliance – and to set out and evaluate the legal and political options available to the ICC Trial Chamber's to remedy such non-compliance. Compliance of the Kenya government with its co-operation obligations cannot be understood in isolation from the activities in which the country engaged, relating to The Hague process.

Due to space constraints, this chapter's methodology shall only examine Kenya's legal responses to the prosecutor's requests for co-operation, rather than its political or extra-judicial campaign waged against the ICC.[1747] In 2014, the *Ruto Trial Chamber's* majority judgment by judges Chile Eboe-Osuji and Robert Fremr, ordering Kenya to co-operate with the ICC prosecutor to facilitate attendance of non-voluntary witnesses shall be compared with the dissenting opinion of Judge Olga Herrera Carbuccia. An interpretative distinction shall be maintained between technical and substantial compliance. Hence the chapter concludes that although an ICC Member States Party may technically comply with its obligations under the Rome Statute, in theory, such compliance does not necessarily result in such state changing its behaviour so as to achieve the purpose of the Rome Statute, in practice. In other words, it is possible for a

[1746] *Ibid.*
[1747] Thomas Obel Hansen, "Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns," (2011) *California Western International Law Journal*, 42, 1, 1-35; See also Mueller, "Kenya and the International Criminal Court," *supra* note 36.

member state to simultaneously comply with its obligations under the Rome Statute provisions while at the same time refuse to endorse criminal trial as a response to mass atrocities. In *the Kenyatta case*, for example, Kenya rationalized its technical compliance with its international obligations by demonstrating that the prosecutor's requests for documents and financial records were vague and performance was, arguably, impossible. Ironically, the state may be said to have compiled with the letter of the Rome Statute, without furnishing any real co-operation to the ICC pursuant to the spirit of the Statute.

Therefore in the circumstances of this penumbra case, the Assembly of State Parties can do little to enforce the ICC's orders against its "non-recalcitrant" member state. In the words of Mueller, "it raises questions about the efficacy of international criminal law and some of the ICC's own decisions and procedures. Kenya's 2007-8 victims feel a 'growing loss of faith in the ICC' and that 'justice is slowly fading away.' "[1748] Her core claim is that the inapplicability of lay theories dealing with ratification and compliance suggests that both might be better understood by invoking North's and Hathaway's theories. This chapter makes three assumptions. First, that until and unless proven otherwise, Kenya's core relationship with the ICC is one of *compliance* rather than *non-compliance*. This is based on the customary international law principle that states act in good faith. Consequently, while Kenya has maneuvered in a variety of forums in attempts to reclaim its sovereignty from the ICC, and while the suspects have vigorously defended their interests and rights both politically and legally, these strategies are legitimate. Second, that the rights of suspects – as well as those of witnesses and bystanders – should be taken as seriously as those of victims. Third, that the Kenyan strategy before the ICC can be defended as based on formal rule of law, rather than on informal norms as Mueller suggests. To *evaluatively* interpret the ICC Trial Chamber's compliance decisions in *the Kenya cases*, the normative framework relied upon is based on Andrew Guzman's compliance theory sketched below.

6.4. Compliance Theory

6.4.1. From International Relations to International Law

I undertook a brief taxonomy and review of international relations literature in the introductory chapter, including the three key theories: (1) realism (and its correlative state sovereignty, and even its neorealism derivative); (2) liberal theory (ranging from the human rights/cosmopolitan model to neoliberal theories) and (3) intuitionalist (here we may cite emerging cosmopolitan

[1748] Mueller, *ibid.* p 38.

pluralism or communitarian, and Domestic Tort Law Model theories). Institutionalists "believe that international co-operation is possible, and that…institutions can reduce verification costs in international affairs, reduce the cost of punishing cheaters and increase the repeated nature of interactions, all of which make compliance more likely."[1749]

In this regard, take the New Partnership for Africa's Development (NEPAD) and the African Union (AU). These bodies provide all Africans the chance to take part and determine Africa's collective interest. To achieve its objectives a NEPAD Secretariat has been established and an Implementing Committee constituted. Six sectoral programme areas were initially proposed namely infrastructure, human resource development, agriculture, environment, culture, and science and technology. Additionally, Tim Murithi suggests "that the Peacebuilding Commission and AU/NEPAD need to develop a symbiotic partnership predicated on complementarity."[1750] Three strategies he proposes for symbiosis in post-conflict reconstruction to promote a complementarity of function, include:

> first, articulating more explicitly a commitment to partnership with other post-conflict reconstruction actors in the policies and mandates of their organisations; second, since policy does not always translate to practice, institutional structures need to be established to ensure that this interface actually takes place; finally, once these official structures exist, it is important to ensure that they actually work together on the ground.[1751]

Because: "The African Union has recognised that, in order to achieve its goals of sustainable peace and development there is a need to adopt a comprehensive strategy for postconflict reconstruction" therefore the "NEPAD Sub-committee on Peace and Security" has been requested to "support efforts at developing early warning systems…support postconflict reconstruction and development…including the rehabilitation of national infrastructure, the population as well as refugees and internally displaced persons."[1752] Further:

> according to the Policy Framework, a post-conflict reconstruction system has at least five dimensions: security; political transition, governance and participation; socio-economic development; human rights, justice and reconciliation; and, coordination, management and resource mobilization.[1753]

[1749] Guzman, "A Compliance-Based Theory" *supra* note 105.
[1750] Tim Murithi, "Towards a Symbiotic Partnership: The UN Peacebuilding Commission and the Evolving African Union/NEPAD Post-Conflict Reconstruction Framework" in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf: Essays on Africa and the United Nations* (Johannesburg: Jacana, 2006) 243-260 p 1.
[1751] *Ibid.* p 3.
[1752] *Ibid*. p 7.
[1753] *Ibid.* p 8.

However the AU Policy Framework also identifies "the lack of sufficient local ownership and participation in post-conflict reconstruction." Murithi acknowledges that the post-conflict reconstruction strategy adopted must correspond to the specificities of each situation." He concludes that: "Even though the AU Policy Framework exists, it is unclear whether the organisation will be able to mobilise the resources and build the capacity to undertake peacebuilding effectively."[1754] Murithi recommends that "to overcome some of the limitations currently affecting post-conflict reconstruction efforts in Africa a symbiotic relationship between the UN and the AU must avoid the duplication or replication of functions." Yet because rogue countries may be reluctant to respond to diplomatic measures, and further given the ICC's mandate to vindicate victim's rights through punishing perpetrators, therefore the Chief Prosecutor of the ICC is empowered to act independently, not symbiotically. The OTP's decision to prosecute can only be supervised by the ICC. It is necessary to understand, first, why despite Kenya joining other Member States Parties in ratifying the Rome Statute, it nonetheless refused to prosecute persons suspected of bearing the greatest responsibility for crimes against humanity allegedly perpetrated during the post-2007 conflicts. Second, why it rationalizes its "compliance" with the Rome Statute provisions. Third, why significant support was received through solidarity from certain regional quarters.

6.4.2. Guzman's Compliance Theory

This chapter adopts Guzman's early theory of compliance with international law of using a model of self-interested states – combined with an institutionalist theory. He argues that compliance occurs due to a state's concern about both reputational and direct sanctions triggered by violations of the law. Guzman's theory "explains…also why and when they violate international law."[1755] First, it "demonstrates that the traditional requirements of widespread state practice and a sense of legal obligations do not contribute to a useful understanding of CIL" (customary international law). Second that "the classical definition of international law is underinclusive and should be broadened to include not only treaties and CIL, but also agreements like ministerial accords, memoranda of understanding and so on." Third that "international laws will most likely affect outcomes in situations with many repeated interactions, each with relatively small stakes."[1756] Guzman concludes that "such…sanctions for violations of international law are generally not optimal."[1757] A more recent, elaborate rendition of the same is available. [1758]

[1754] *Ibid.* p 10.
[1755] Guzman, "A Compliance-Based Theory," *supra* note 105 p 1827.
[1756] *Ibid.* p 1828.

6.4.2.1. Explaining Compliance and Non-Compliance

Guzman draws from the instituionalist tradition of international relations to develop a model of compliance. Using a repeated game model of rational behaviour, he "demonstrates that international law can affect the behavior of states." Therefore:

> At a minimum a sound theory of compliance must explain both (1) instances of compliance with international law and (2) instances of violation…traditional legal theories of compliance have been unable to provide a constructive theoretical framework for compliance...because they cannot explain instances of violation. Neorealism, on the other hand, argues that international law has no effect on national behavior; explaining breach but not compliance.[1759]

Guzman "first develops a one-sided model to demonstrate how the irrelevance of international law is produced. Second, the assumption of a single period is relaxed showing how in a model with repeated interactions, one can develop a theory in which international law matters."[1760]

6.4.2.2. Violation and Compliance

"An important benefit of a rational actor model of international law….is its assumptions that decision-makers behave in such a way as to maximize the pay-offs that result from their actions….to provide predictions about when countries will choose to violate international legal obligations."[1761] "Thus" in Guzman's view:

> where the benefits outweigh its costs a country is expected to violate its agreements with other states. International law succeeds when it alters a state's payoffs in such a way as to achieve compliance with an agreement, when in the absence of such a law, states would behave differently i.e. when promises made by states generate some compliance pull – then international law succeeds.[1762]

[1757] *Ibid.* p 1829.
[1758] Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008).
[1759] Guzman, "A Compliance-Based Theory," *supra* note 105 p 1840.
[1760] *Ibid.* p 1841.
[1761] *Ibid.* p 1860.
[1762] *Ibid.*

He then turns to the issues of "why states violate international commitments. What factors influence the magnitude of reputational sanctions? What is the role of direct sanctions and when are sanctions likely to be most effective in encouraging compliance?"

6.4.2.3. Reputational Sanctions

Replying to the above questions: "To generate predictions about state behavior, one must have a theory about the magnitude of reputational loss resulting from violations of law. It seems clear that the reputational impact of a violation of international law varies depending on the nature of the violation." In Guzman's view: "A list of factors that influence the reputational impact of a violation, therefore should include:" First, "the severity of the violation." Second, "the reasons for the violation." Third, "the extent to which other states know of the violation." Fourth, "the clarity of the commitment and the violation."[1763]

6.4.2.3.1. The Severity of the Violation
"A minor technical violation will have a small impact compared to a major violation of an international obligation." Further: "Related…is the magnitude of harm suffered by other states. A violation that causes substantial and widespread harm does greater damage to a state's reputation than does a 'victimless' violation or one that imposes only slight harms."[1764]

6.4.2.3.2. Reasons for the Violation
It is understood that under certain conditions a state will choose to ignore its obligations. For example, violation of a human-rights treaty is viewed in a different light when it takes place under conditions of national crisis than if the violation occurs during a period of normalcy. A state that breaches such a treaty in a time of crisis may be able to retain a reputation for compliance with treaties during normal times.[1765]

6.4.2.3.3. Knowledge of the Violation
Because "the extent to which the violation is known by relevant players, affects the reputational consequences of the violation," therefore: "This is part of the reason why states expend resources to deny alleged violations of human rights law." [1766]

[1763] *Ibid.* p 1861.
[1764] *Ibid.* p 1862.
[1765] *Ibid.*
[1766] *Ibid.* p 1863.

6.4.2.3.4. Clarity of the Obligation and its Violation
Guzman concludes that: "The reputational consequences are more severe when the obligation is clear and the violation is unambiguous. As uncertainty of the obligation increases, the reputational cost from a violation decreases."

6.4.2.3.5. Other Obligations and Regime Changes
Guzman recognizes that:

> the actions of states may create implicit obligations. Furthermore, if a non-compliant government falls and is replaced by another that openly favors closer ties with the outside world, compliance with international legal obligations, and openness, the reputational impact of the past policies may be partly or even entirely erased.[1767]

Importantly, less consideration is given to direct sanctions, when they work best and their acceptance. In Hathaway's analysis of Guzman, she says that according to his theory: "On the whole, the benefits of human rights treaty compliance appear minimal while the costs often are not."[1768]

6.5. Normative International Law Theories

6.5.1. The Problem of Compliance

According to Guzman, armed with empirical evidence: "Most scholars and practitioners of international law believe that it affects the behavior of states." Nevertheless he opines that the theories advanced by legal scholars are flawed "because they are difficult to reconcile with modern international relations theory, rely…..on axiomatic claims about national behavior, and lack a coherent theory of compliance with international law."[1769] At present, the best theories relevant to international law and compliance come not from legal scholarship, but from international relations scholarship. While the international relations literature has already been reviewed in the introductory chapter of this book some mechanisms shall be discussed below. Guzman emphasizes that: "Absent an incentive towards compliance, resources devoted to the creation and maintenance of international legal structures are wasted, and the study of international law is futile."[1770] However, Hathaway states that:

> Scholars adopting this approach argue that state decisions cannot be explained simply by calculations of geopolitical or economic interests or

[1767] *Ibid.* pp 1864-5.
[1768] Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) *Yale Law Journal,* 111, 1935-2042 p 1951.
[1769] Guzman, "A Compliance-Based Theory," *supra* note 105 p 1826.
[1770] *Ibid.* p 1830.

> even the relative power of domestic political groups. A complete description of state action in the international realm requires an understanding of the influence and importance of ideas.[1771]

Thus how and why ideas matter remains a source of intense disagreement.

6.5.2. The Managerial Model

Abram Chayes and Antonina Handler Chayes[1772] argue that:

> the 'enforcement model' of compliance in which compliance is achieved through coercive mechanisms such as sanctions, should be replaced with a 'managerial model' which relies primarily on a co-operative problem-solving approach. The general propensity of states to comply with international law is the product of three factors.[1773]

One, "compliance avoids the need to recalculate the costs and benefits of a decision, saving transaction costs for complying states and generating an efficiency-based rationale for compliance." Two, "treaties are consent-based instruments that serve the interests of the participating states."[1774] Three, "a general theory of compliance furthers state compliance in any particular instance."[1775] In sum: "it provides a satisfying account for agreements designed to resolve co-ordination problems […] once the parties have agreed on a certain set of behaviors neither party has an incentive to deviate from the agreement. There is no need to focus on enforcement because there is no incentive to cheat." This theory incorporates "managerial issues including transparency, dispute settlement, and capacity-building which all assist in co-ordinating efforts." [1776]

According to Hathaway: "Compliance is due to a Norm of Compliance and Fostered by Persuasive Discourse."[1777] This "view adopts a 'co-operative problem-solving approach' to international law compliance as against the enforcement model of compliance."[1778] She is justified because: "International law is not analogous with domestic legal systems. Coercive economic or

[1771] Hathaway, "Do Human Rights Treaties," *supra* note 1768 p 1995.
[1772] Abram Chayes and Antonina Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (London: Harvard University Press, 1995) p 3, cited in Guzman, "A Compliance-Based Theory," *supra* note 105 p 1830.
[1773] *Ibid.*
[1774] *Ibid.*
[1775] *Ibid.*
[1776] *Ibid.*
[1777] Oona A. Hathaway, "Do Human Rights Treaties," *supra* note 1768 p 1955.
[1778] *Ibid.*

military sanctions for treaty compliance cannot be the primary mechanism of obtaining compliance with treaties. Such sanctions are too politically and economically costly and often ineffective in changing behavior."[1779] In Hathaway's interpretation "because they are too costly, they are rarely administered and tend to be intermittent and ad hoc, and hence unlikely to serve as legitimate, effective deterrents."[1780] Rather, Chayes and Chayes begin with "the expectation that states have a propensity to comply with their international obligations…because treaties generate norms, which necessarily carry a widely accepted obligation to obedience….the obligation to obey norms exists even in the absence of a threat of reprisal."[1781] Instead of self-interest, the driving force is *pacta sunt servanda* (promises must be kept), hence managing compliance strategy.

In 2002, Guzman cautioned that "observing that a norm generates compliance does not offer an explanation for compliance since we have no theory of why norms operate as a source of compliance." Political scientists have recently offered the various theories discussed in the sub-section which follows. Guzman furthermore is weary of managerialism because:

> Where a state violates a law because the law is contrary to its interests, however, the managerial model breaks down….the states conduct negotiations 'in the shadow' of potential sanctions. In the absence of such sanctions the offending party has no incentive to accept a negotiated solution that involves any punishment or constraint on future behavior. If one makes dispute resolution mandatory….and provides some form of sanction for failure to comply with the ruling, it is possible to increase compliance outside of co-ordination games.[1782]

6.5.2.1. Mechanisms of Norm Internalization

6.5.2.1.1. Of Two Logics: Consequences or Appropriateness?

For Candace Blake-Amarante, to determine "the debate as to whether it is necessary to prosecute perpetrators of international crimes or settle political accounts before dealing with matters of justice" it is necessary "to consider two distinct approaches that guide political behavior."[1783] If we are to employ the dichotomy established by James March and Johan Olsen between the "logic of consequences" (LoC) and "logic of appropriateness" (LoA), neoliberal

[1779] *Ibid.* p 1956.
[1780] *Ibid.* p 1957, citing Chayes and Chayes, *The New Sovereignty, supra* note 1772.
[1781] *Ibid.*
[1782] Guzman, "A Compliance-Based Theory," *supra* note 105 p 1832.
[1783] Blake-Amarante, "Peace vs. Justice," *supra* note 92 p 78.

institutionalism falls within the former along with neorealism.[1784] March and Olsen define the logic of consequences as presenting "political order as arising from negotiation among preferences or interests in circumstances in which there may be gains to co-ordinated action."[1785] Blake-Amanante interprets it as follows: "The logic of consequences assumes that there exist different courses of actions with no particular rule dictating what action to take. A person is only guided by the rational calculations determining which action will lead to the political actor's preferred outcome."[1786] For Christopher Lamont:

> A LoC-based approach to international criminal tribunals would envision tribunals acting as an agent of states….Hence…Posner and Yoo posit international tribunals can help states resolve disputes by providing information on the facts and rules of conduct. But they must act consistently with the interests of the states that create them.[1787]

Conversely: "The logic of appropriateness, instead, assumes that there are rules and roles that guide a political actor's behavior and the type of act chosen is what is appropriate given the particular rules and roles."[1788]

Eric Posner and John Yoo argue that "because of the risk that an independent prosecutor or judges may infuse moral values, ideologies or the interests of a clique of states into the work of the court," therefore, "tribunals that are not closely controlled by states such as the ICC actually pose a threat to international cooperation."[1789] If we are to accept the assumption that a global international criminal justice infrastructure would actually increase costs upon states (including upon third party states) by prolonging conflict, then state support for international criminal justice defies rationalist explanation. For example, "how can we tell LRA soldiers (in Northern Uganda) to come out of the bush and receive amnesty when at the same time the threat of arrest by the ICC hangs over their heads?"[1790] To contextualize: How can we tell Kenya to

[1784] Lamont, *International Criminal Justice, supra* note 103 p 17, citing J.G. March and J.P. Olsen, "The Institutional Dynamics of International Political Orders" (1998) *International Organization*, 52(4), 943-69; J. Caporaso, M. Green Cowles and T. Risse (eds.) *Transforming Europe: Europeanization and Domestic Change* (Ithaca: Cornell University Press, 2001) p 3.
[1785] Lamont, *ibid., quoting* March and Olsen, *ibid.* p 949.
[1786] Blake-Amarante, "Peace vs. Justice," *supra* note 134 p 78.
[1787] Eric A. Posner and John C. Yoo, "Judicial Independence in International Tribunals" (2005) *California Law Review,* 93, 1-74, particularly p 72, cited in Lamont, *International Criminal Justice, supra* note 103 p 17.
[1788] Blake-Amarante, *Choosing an International Legal Regime, supra* note 115 p 78.
[1789] Lamont, *International Criminal Justice, supra* note 103 p 17, quoting *supra* note 639 pp 7, 73
[1790] *Ibid.*, quoting W. Pelser, "Will ICC Prosecutions Threaten Ugandan Peace Process?" (2005) *Africa Reports: Institute for War and Peace Reporting*, 46 available at: http://www.iwpr <accessed 19th June 2015>

co-operate when the threat of ICC's prosecution hangs over the heads of its commander-in-chief and deputy?

6.5.2.1.1.2. Norms, Rules and Legitimacy

This chapter shall attempt to apply the normative framework of March and Olsen's two logics to determine whether or not there exists a norm obligating Member States Parties to the Rome Statute to co-operate with the ICC prosecutor in either of two respects. First, so as to facilitate attendance by non-voluntary witnesses before the Trial Chamber as required in the *Ruto case*. Second, so as to facilitate the request for records and documents related to the *Kenyatta case*. "The compliance method identified by constructionists focuses on intersubjective processes of persuasion and shaming. Moreover, compliance with international law is a function of internationalization rather than the outcome of a rational weighing of material compliance costs."[1791] Lamont concludes that "LoC and LoA explanations for compliance are better represented by a continuum which would place purely LoC compliance or non-compliance acts at one extreme while purely LoA compliance or non-compliance acts would fall at the opposite extreme."[1792]

6.5.2.2. Sikkink's Norm Cascade Theory

6.5.2.2.1. Norm Life Cycles

"Constructivists Martha Finnermore and Kathryn Sikkink argue that norms emerge as a consequence of *norm entrepreneurs* gather adherents as a consequence of *norm leadership* and, if they become generalized, move beyond a tipping point to become a *norm cascade*, which leads to the internalization of the norm as a part of the normal expected behaviour."[1793]

6.5.2.2.2. The "Boomerang Pattern" and "Spiral Model"

"The life cycle of a norm is said to consist of three stages, norm emergence, norm cascade and norm internalization."[1794] The first stage, norm emergence, is characterized by norm entrepreneurs attempting to convince a critical mass of states to adopt a given norm.[1795] In the case of Kenya, signing of the ICC Rome Statute on 11th August 1999.[1796] Its signature contributed to the 60 countries

[1791] *Ibid.*
[1792] *Ibid.* p 18.
[1793] Schiff, *Building the International, supra* note 107 p 40, citing Finnermore and Sikkink "International Norm Dynamics," *supra* note 111.
[1794] Lamont, *International Criminal Justice, supra* note 103 p 19, citing Finnemore and Sikkink, *ibid.*; See also Sikkink, *Justice Cascade*, *supra* note 26.
[1795] *Ibid.*
[1796] Coalition for the International Criminal Court, http://www.iccnow.org/?mod=country&iduct=89 <accessed 21st July 2014>

threshold received before 1st April 2002 paving way for its entry into its force on 1st July 2002. The second norm cascade stage, describes the leaders' attempt to convince other states, norm followers to accept the new norm. In the context of Kenya, ratification was appended on 15th March 2005 becoming the 98th State Party.[1797] "The final stage, internalization, is marked by a new norm being 'taken-for-granted' and no longer being subject to debate."[1798] Thus Lamont cautions us to "assume that weakly internalized norms stages I and II norms would require substantial external persuasion to bring about compliance and non-compliance should be relatively common."[1799] Following the framework developed in chapter one of the book, the Kenyan state's signing of the Rome Statute in 2002 may be attributable to concessions to both "internal" pressure from formal civil society organizations as well as "external" pressure from the donor community.

Automatic constitutional domestication of international obligations may be construed as a "norm cascade." However, the Kenyan International Crimes Act 2008[1800] domesticated the Rome Statute, while *inter alia*, reserving limited internalization of the provision imposing an obligation on the government to co-operate regarding facilitation of non-voluntary witnesses. This chapter asserts that Kenya's reluctance to embrace the Rome Statute obligations wholesale, leads to an inference that the norm of co-operation – whether with the ICC prosecutor's requests for certain specific records or to facilitate attendance by non-voluntary witnesses – is not a stage II norm in Kenya. Timo Antero "Kivimäki observes that states that rationalize non-compliance with human rights regimes often do so with appeals to the norms of state sovereignty."[1801] Consequently, "two compliance models have emerged from Finnemore and Sikkink's exploration of norm life cycles:" the spiral and boomerang patterns.

Both models "identify domestic and transnational civil society networks acting to alter state behaviour and necessitate an exploration of domestic and transnational civil society…so as to assess the explanatory power of the above (boomerang and spiral) models."[1802] Lamont explains how: "The first model the 'boomerang pattern' was developed by Keck and Sikkink and isolates domestic

[1797] *Ibid.* As of 1st May 2013, 122 countries were States Parties to the Rome Statute. http://www.icc-cpi.int/en_menus/asp/publications/factsheet/Documents/ASP-Factsheet-2013-v4-ENG-web.pdf <accessed 21st July 2014>
[1798] Lamont, *International Criminal Justice, supra* note 103 p 20, citing Finnemore and Sikkink, "International Norm Dynamics," *supra* note 111 p 895.
[1799] *Ibid.*
[1800] ICA *supra* note 609.
[1801] Lamont, *International Criminal Justice, supra* note 103 p 20, citing Timo Antero Kivimäki, "National Diplomacy for Human Rights: a Study of US Exercise of Power in Indonesia, 1974-1979" (1994) *Human Rights Quarterly*, 16(2), 415 p 417.
[1802] *Ibid.*

civil society mechanisms which serve to mobilize external shaming processes through engagement with transnational advocacy networks."[1803] Further: "The second model the 'spiral model' builds on the 'boomerang' pattern by tracing state responses to domestic and transnational civil society mobilization."[1804] Payam "Akhavan, among others, has argued that much of the power of international criminal tribunals derives from *cathartic feedback*. Indictments certified by international tribunals are said to have a stigmatizing effect on the indicted and upon the states that fail to transfer them."[1805] Thus, the stigmatizing effect of norm-breaking alone is assumed to facilitate norm compliance. [1806]

6.5.3. Consent and Treaties

According to Guzman, "probably the most commonly held rationale for the relevance of international law to national conduct, especially in the context of treaties, is based on the notion of consent."[1807] The consent-based theory begins with the claim that states are not subject to any obligation to which they did not consent. The second step is "that states should obey treaties." Consequently "a stated consent generates a legal obligation which leads to compliance." However, detractors assert that "consent, by itself does not provide states with an incentive to obey the law….the maxim that 'treaties are to be obeyed'…as a normative matter…says nothing about how states will actually behave."[1808]

6.5.4. Legitimacy Theory

According to Thomas Franck[1809] "states obey rules perceived to have come into being in accordance with the right processes." Four factors "determine whether a state complies with international obligations; determinacy, symbolic validation,

[1803] *Ibid.*, citing Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in. International Politics* (Ithaca and London: Cornell University Press, 1998) pp 12-38.
[1804] *Ibid.,* citing Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge/New York: Cambridge University Press, 1999) 1-38.
[1805] Lamont, *International Criminal Justice, supra* note 107 p 21; See also Compliance Feedback Diagram *ibid.*
[1806] *Ibid.* p 21, citing Payam Akhavan, "New Frontiers of Judicial Enforcement: The International Criminal Tribunals for the Former Yugoslavia and Rwanda" in Gudmundur Alfredsson, Jonas Grimheden, Bertrand Ramcharan and Alfred Zayas (eds.) *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller* (The Hague: Martinus Nijhoff Publishers, 2001) 441-456.
[1807] Guzman, "A Compliance-Based Theory," *supra* note 105 p 1833; See also Lamont, *ibid.* pp xii and 21.
[1808] Guzman, *ibid.* p 1834.
[1809] *Ibid.* p 1958, citing Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

coherence and adherence. Where these four factors are present, legitimacy theory predicts a strong pressure towards compliance."[1810] However, Guzman dismisses legitimacy theory because it "takes the inquiry further than consent-based theory without explaining why states do or should care about legitimacy."[1811] In addition Franck notes that the fairness model is advanced by Philip Trimble.[1812] For Hathaway, "like the managerial model, it points not to calculation of self-interest as a source of state decisions to act consistently with international legal obligations, but instead to the perceived fairness of legal obligations."[1813] To Franck: "First there must be determinacy, so that the rules requirements are transparent and its fairness thereby 'made manifest' "[1814] – Chayes and Chayes agree that "ambiguity is a major source of non-compliance" – correspondingly. Second, "the rule must have attributes that signal that it is an important part of the system of social order," i.e. Franck's symbolic validation.[1815] Third, the rule must exhibit coherence – i.e. treat "like cases alike."[1816] Fourth "the rule must be closely connected to the secondary rules of process used to interpret and apply rules of international obligations."[1817]

6.5.5. The Transnational Legal Process

Harold Hoh's theory[1818] focuses on:

> how public and private actors interact in various fora, on both domestic and international levels, to make, interpret, enforce and internalize rules of transnational law. Koh argues that as transnational entities – including both states and nonstate entities interact, patterns of behavior and norms emerge and are internalized, leading to their interpretation within the domestic legal institutions of states and, in turn, compliance.[1819]

"The secret is" in Hathaway's interpretation "voluntary obedience not coerced compliance."[1820] Thus "Koh provides an explanatory framework for

[1810] *Ibid..*, citing Franck, *ibid.* p 30.
[1811] *Ibid.*
[1812] Philip Trimble, "Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy" (1997) *Mich. L. Rev*. 95, 1944, cited in Hathaway, "Do Human Rights Treaties," *supra* note 1768 p 1958.
[1813] Hathaway, *ibid.*
[1814] *Ibid.,* p 1959.
[1815] *Ibid.,* citing Franck, *Fairness in International Law, supra* pp 34-8.
[1816] *Ibid.,* citing Franck, *ibid.* p 38
[1817] *Ibid.,* citing Franck, *ibid.* pp 41-6.
[1818] Harold Hongju Koh, "Why do States Obey International Law?" (1997) *Yale Law School, Faculty Scholarship Series. Paper*, 2101; http://digitalcommons.law.yale.edu/fss_papers/2101 <accessed 23rd September 2014>
[1819] Guzman, "A Compliance-Based Theory," *supra* note 105 p 1835.
[1820] Hathaway, "Do Human Rights Treaties," *supra* note 1768 p 1960.

understanding how and why the process of norm internalization he considers the key to compliance or obedience, occurs:" To wit:

> when one or more transnational actors provoke an interaction they require enunciation of the norm applicable to the interaction. The interaction generates a legal rule that can be used to guide future transnational interactions. Over time a series of such interaction causes the norms to become internalized and eventually…(reconstitutes) the interests and identities of the participants.[1821]

Hathaway concludes that:

> The process of norm internalization on which the theory rests occurs in transnational actors – usually foreign policy personnel of governments involved, organizations which entrepreneurs, and nongovernmental organizations which form an 'epistemic community' to address a legal issue.[1822]

As transnational actors interact, Hathaway continues "they generate patterns of activity that lead to norms of conduct, which are in turn internalized into domestic structures through executive, legislative, and judicial action. Domestic institutions thereby enmesh international legal norms, generating self-enforcing patterns of compliance."[1823] Take the case of Kenya. Articles 2(5) and (6) of the Constitution provide for automatic domestication of customary international law and treaties. Under 2(5): "The general rules of international law shall form part of the law of Kenya,"[1824] while under 2(6): "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[1825] However in Hathaway's criticism, while the state obeys even contrary to self-interest, the fairness model of international law does not tell us what characteristics of the norm lead to compliance. Similarly, in Guzman's criticism:

> When international legal norms are at odds with the self-interest of the state, it is difficult for transnational legal process theory to explain why international norms would triumph. Moreover, if domestic concerns triumph, then internalization of international legal norms has no apparent impact on outcomes.[1826]

Additionally, it seems equally plausible that "rather than internalizing norms of international law, transnational actors might internalize the norm that powerful nations triumph over weak nations, or that economic influence resolves

[1821] *Ibid.,* citing Koh, "Why do States Obey," *supra* note 1818.
[1822] *Ibid.* p 1962.
[1823] *Ibid.*
[1824] Article 2(5), Constitution, *supra* note 13.
[1825] Article 2(6), *ibid.*
[1826] Guzman, "A Compliance-Based Theory," *supra* note 105 p 1836.

international disputes,"[1827] i.e. the internalized norms are unrelated to international law.

6.5.6. Testing Compliance

Hathaway poses the following questions: "Are treaties *effective* in improving a country's human rights practices? Do countries comply with or adhere to the requirements of the human rights treaties they have joined?" The challenges of measuring compliance requires a distinction between effectiveness and compliance. *Compliance* deals with procedural obligations. For example, the requirement to report about the substantive obligations outlined in the treaty. *Effectiveness* considers the spirit of the treaty. How does a state actually treat its inhabitants?[1828] Co-operation with the procedural requirements may be achieved through procedural requirements and legislative implementation requirements. For example, Kenya has enacted a new constitution domesticating its treaties. It has also enacted a substantive International Crimes Act 2008 implementing the Rome Statute. Hathaway concludes that because "compliance is an elastic concept,"[1829] therefore, a comparison is required allowing for different legal gradations.

Laws often incorporate a zone within which a behaviour is considered to "conform," even if it is not consistent with the letter of the legal obligation. It has been stated in chapter two that the notion of risk is different in different cultures. Therefore what constitutes a crime of endangerment from the perspective of different people may not pose a risk from the perspective of others. For Hathaway: "Compliance depends on a continuum based on the degree to which the behaviour deviates from the legal requirement." Whether or not enforcement is effective depends on changing practices. "What evidence is there that because a given country has ratified an international human rights instrument, therefore it shall change its activities or practices towards its citizens, than would have been expected in absence of ratification?" In *the Kenya cases* these questions are significant since in early 2014 external observers – such as Mueller – construed the Kenya government as being in non-compliance with its Rome Statute obligations to co-operate with the ICC prosecutor's investigations. Conversely, the Kenya government asserted having fulfilled its co-operative obligation and replied that the ICC prosecutor had failed, first, by conducting negligent pre-confirmation investigations. Second, by making vague requests for information. What specific domestic activities were claimed to have been in breach of the Rome Statute? Was the violation of a clear

[1827] *Ibid.*
[1828] Hathaway, "Do Human Rights Treaties," *supra* note 1768 p 1964.
[1829] *Ibid.* p 1965.

and important norm and to a grave degree? Was Kenya in defiance of an ambiguous request for assistance which merely attempts to shift blame for shoddy pre-confirmation investigations in order to save the ICC prosecutor's face? Did the alleged non-compliance warrant reputational or other sanctions for enforcement?

6.6. The Duty to Co-operate and the Right to Refuse

6.6.1 To Comply or to Defy?

Assuming that a state is in breach of its international obligations under the relevant human rights instrument, general compliance theory describes various options available to international criminal tribunals. A perusal of the compliance literature reveals, first, a consensus regarding feasibility and viability of *persuasion-based* and *capacity-building* responses – rather than *censure* – leave alone *sanctions*. Second, if a punitive response were to be employed to redress any given non-compliance situation, then censure aimed at reputational stigmatization is more efficacious than either economic or military sanctions. Finally, even assuming that reputational censure were to be deployed, then its effect is directly proportional to two factors. First, to the nature and extent of the provision breached. This means that breach of a relatively minor provision does not attract as much censure as breach of a major one. Non-compliance with a relatively minor provision or order of the ICC which has no effect on any third party state is unlikely to attract significant censure. Second, censure is contingent upon the number of members which have ratified a particular instrument. That is why Kenya counter-campaigned against the ICC decision to prosecute by appealing to the African Union for solidarity to withdraw from the Rome Statute. Because the remaining Member States Parties would be fewer, therefore such *en mass* withdrawal would substantially reduce the impact of any subsequent censure of Kenya for alleged non-compliance with its Rome Statute obligations. For similar reasons, Kenya's parliament, as shown in chapter one, on two occasions, threatened to withdraw from the Rome Statute.

In light of the foregoing, this chapter is justified in evaluating the gravity of the duty to co-operate with the ICC and also estimating the degree to which – as at September 2014 – Kenya may have been non-complaint with this duty, if any, in *the Kenya cases*. The evidence from ICC decisions reveals that the prosecutor applied in both *Kenya cases* for orders compelling the Kenya government to co-operate with the prosecutor. In *the Ruto case* the prosecutor's request was for Kenya to facilitate attendance by non-voluntary witnesses. In *the Kenyatta case*, the prosecutor's request was for the suspect's financial records (from mid-2007 until the end of 2010) and other documents. While Kenya insisted that it was in

full compliance with requested co-operation, the ICC Trial Chambers in both cases made orders compelling compliance. Even after such compliance orders, further wrangling continued with the ICC being forced (as at September 2014) to declare at least three non-voluntary prosecution witnesses as hostile witnesses in *Ruto's case* and having to review prosecutor's complaints of Kenya's continued non-compliance in *Kenyatta's*.

This chapter is thus justified in seeking answers to the various emerging issues. First, what is the legal basis of the duty to co-operate? This question cannot be answered from the perspective of international criminal law alone. It is equally important to consider the perspective of Member States Parties, in this case, that of the Kenya government under Kenyan law. Second, what are the contents of the duty to co-operate? This norm shall be outlined in contrast with the countervailing norm rooted in the right of refusal. Indeed, the primary "refusal right" pre-dates the secondary "co-operative duty."

Finally, this section considers some political circumstances which are peculiar to Kenya's criminal justice policy in response to the alleged crimes against humanity committed during the post-2007 election violence. As stated in the introduction to this chapter, the problem emerging after Kenya's 2013 presidential elections was that the Kenyatta-Ruto administration were unlikely to extend any welcome to the ICC prosecutor to complete her investigations. Indeed it would be irrational for any suspect to risk full trial and possible conviction if they can benefit from premature discontinuance of their case, even if on technical grounds. Moreso in light of the ICC's activist penchant and uncertainty arising from the Trial Chamber's potential to re-characterize the charges as happened in the *Katanga Trial*.[1830] Because of the Kenyan Attorney-General's purported reluctance to co-operate, in both *Kenya cases*, the ICC prosecutor was therefore forced to apply to the respective Trial Chambers for orders compelling compliance with Rome Statute obligations.

6.6.2. The Legal Basis of the Duty to Co-operate

6.6.2.1. Historical Origins of the duty under International Criminal Law

No duty need have been requested from the vanquished German or Japanese governments to co-operate with the Allied forces which invaded their territories following World War II. Rather, Nuremberg and the Far East Tribunals were compelled, as a demonstration of external might to enforce justice for victims. Conversely, apart from the *Nuremberg precedent*, prior to establishment of the

[1830] *The Katanga Trial, supra* chapter four, sections 4.5 and 4.6.

UN *ad hoc* tribunals on former Yugoslavia and Rwanda, all sovereign states had a right to refuse to give legal assistance to any other state. This global rule governing inter-state relationships is corollary to the Westphalian principle of non-interference in the internal affairs of sovereign states,[1831] i.e. the only basis for cooperation was derived from mutual legal assistance agreements such as extradition treaties. Such consent-based agreements were limited to specific fields of co-operation, and were also often loaded – complete with provisos or claw-back clauses – which retained the residual right of refusal. However, the principle grounds for refusal were not based on the requested state's unilateral or arbitrary interests. Rather in event of a dispute, the requesting party was entitled to seek an independent third party's opinion to arbitrate over the dispute by applying the terms of the inter-state agreement. Because these inter-state agreements create reciprocal rights and impose mutual obligations, therefore as chapter two showed, they result in "horizontal" relationships between consenting states. Conversely, in *the Blaškić case*, the ICTY distinguished its relationship with Croatia as being a "vertical" one. The facts were that Croatia refused to surrender requested documents on grounds that they contained confidential military secrets and therefore disclosure would jeopardize "national security." However, because the ICTY could make binding judicial and injunctory orders and further given the ICTY's primacy over domestic jurisdictions, therefore, the tribunal established vertical hierarchy over the sovereign state.[1832]

Additionally, both the ICTY and ICTR Statutes were silent regarding previous obligations persisting from inter-state mutual legal assistance agreements. Hence these pre-existing optional co-operation powers which conferred "horizontal" jurisdiction presumably continued to exist under the ICTY Statute in virtue of the Statute's silence, alongside or in parallel to the "vertical" jurisdiction vide newly-minted primacy over national situations over which the tribunal was conferred territorial jurisdiction. Göran Sluiter argues that this structure of co-operation contained in the *ad hoc* Statutes provided a precedent for the co-operation structure in the Rome Statute. However, the ICC's reverse complementarity jurisdiction reduces the verticality somewhat so that the state's duty to co-operate under the Rome Statute is mid-way between the traditional inter-state horizontal model and the primacy under the vertical model in the UN *ad hoc* tribunal statutes. Additionally, the ICC is under no obligation to accord any state any legal assistance. Rather, the Rome Statute provides under article 119(1) that in event of a dispute regarding any request, such dispute shall be

[1831] Göran Sluiter, "Cooperation of States with International Criminal Tribunals" in Cassese (ed.) *International Criminal Justice*, *supra* note 171, 187-200 pp 187-8
[1832] *Ibid.* pp 188-190.

resolved by the requesting party. This means that the ICC is a judge in its own case. [1833]

6.6.2.2. The Duty to Co-operate under Kenyan Law

Kenya's post-independence constitution adopted a dualist model in relation to international law. It was held in the landmark case of *Okunda v Republic* that "the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict."[1834] Hence international treaties required specific domestication through an enabling statute enacted by the legislature. Neither did the 2008 National Accord – which settled the post-2007 conflicts – explicitly authorize the Waki Commission to submit its report to the international community or the ICC. The procedural mechanism by which the presidentially-appointed Commission's chairman Judge Philip Waki delivered a secret envelope to the Chairman of the African Union Panel of Eminent Personalities Kofi Annan, for onward transmission to the ICC prosecutor remained a mystery – as at September 2014 – at any rate. Notwithstanding Kenya becoming a signatory and its ratification of the Rome Statute, the Kenyan International Crimes Act[1835] remains the principal domesticating legislation of the Rome Statute. As shown later, this legislation is significant since it controversially purports to oust the application of certain provisions of the Rome Statute, including *inter alia*, Kenya's duty to facilitate attendance of non-voluntary witnesses. This is so notwithstanding that a new constitution was promulgated in 2010 under which articles 2(5) and (6) domesticate international treaties which Kenya has ratified. This is because sovereignty may impose legislative requirements. Nonetheless, article 143 of the constitution does not immunize a Kenyan president against the obligation to attend international criminal trials.

6.6.3. The Contents of the Duty to Co-operate

The state's duty to co-operate is enshrined in article 12(3) of the Rome Statute as read with article 87(5). Under article 13 the UN Security Council can trigger ICC complementarity pursuant to article 5. As shown in chapter two of the book, so as to accommodate considerations of regional peace and stability, article 16 further permits the UN Security Council's deferral of ICC trials for a period of up to one year. Sluiter explains that, pursuant to articles 88, 90, 94 and 95 – upon jurisdiction accruing to the ICC over a given country situation – all Rome

[1833] *Ibid.* p 191.
[1834] [1970] EA 453 pp 555-6.
[1835] ICA *supra* note 610; See also Sluiter, "Cooperation of States," *supra* note 1831 p 193.

Statute Members States Parties are required to furnish "full" co-operation. Because the Statute represents a consensus – between those Member States Parties which preferred an activist court and those which preferred a conservative one – and further because the ICC retains a vertical relationship to Member States Parties, therefore unless a provision explicitly provides for a right of refusal, the state is required to co-operate.

The state may refuse for a variety of express reasons. For example, under the *ne bis in idem* doctrine,[1836] earlier explained in chapter two. Second, where a request contravenes a fundamental principle of law, such as a principle of legality.[1837] Third, states may even insist upon compliance with domestic procedures, thus delaying or slowing down urgent ICC requests for co-operation. This will be illustrated in section 6.8 below, while describing the ICC prosecutor's 2013 application for co-operation in *the Ruto case*. In the same vein, various scholars concur that states are not obliged to co-operate by facilitating attendance of non-voluntary witnesses at the Court.[1838] Fourth, among the reasons for state refusal are the grounds that a request either conflicts with another obligation or is vague and ambiguous. Kenya invoked the latter was in *the Kenyatta case*. Altogether, the main ground commonly cited by states in exercise of their right to refuse is that co-operation compromises "national security." To trump this spectre of state sovereignty, the Rome Statute vests authority in the ICC as the arbiter over any dispute between any States Party and itself. Thus upon ratifying the Rome Statute, states thereby cede some sovereignty to the ICC, not only decide disputes concerning what constitutes co-operation, or what degree of co-operation is required, but also which state activities constitute violations of the duty to co-operate. While the ICC has authority to determine what constitutes non-compliance with the duty to co-operate, it lacks enforcement powers. Therefore, for practical purposes, it is constrained to be reasonable and make acceptable judgments – lest member states resort to their residual sovereignty and refuse to co-operate. The UN Security Council's enforcement powers are only available in situations where investigations were initiated by its own resolutions. Otherwise, the ICC may only cite a non-complaint state to the Assembly of State Parties. The ASP may censure a state's non-compliance with its obligations. The enforcement procedures and options shall be discussed more elaborately in the penultimate section of this chapter.

[1836] Article 20(3), Rome Statute, *supra* note 14; See also *ibid.* p 190.
[1837] Article 21(3), *ibid.* Rome Statute; See also *ibid.* pp 194-5.
[1838] Sluiter, *ibid.* p 197; See also Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd ed.) (Cambridge: Cambridge University Press, 2010).

6.7. Whither Separation of Powers

To a significant extent, the Rome Statute imposes a progressive duty to co-operate upon its member states. To this end, it shall be shown below that in *the Ruto case,* in 2014 the ICC Trial Chamber majority judges Chile Eboe-Osuji and Robert Fremr rendered an activist decision compelling the Kenya government to co-operate with the prosecutor by facilitating attendance of non-voluntary witnesses. Their argument was based on two reasons. One, that the ICC's purpose is to seek the "truth." Two, that no Kenyan law prohibits the compulsion of a non-voluntary witness. It is the submission of this chapter that both reasons were wrong. First, Judge Christine Wyngaert's dissenting *Katanga Judgment* seen in chapter four, disagreed that the trial chamber's task is to "seek the truth." To a lesser extent, second, the Rome Statute also explicitly empowers states with the right to refuse. In this respect, in *the Ruto case* the a dissenting opinion by Trial Judge Olga Herrera Carbuccia upheld Kenya's right to withhold its co-operation*, inter alia* in circumstances where the ICC's Victim and Witnesses Unit is unable to guarantee the non-voluntary witness's safety. This seems to be a better interpretation.

Both Trial Chamber majority decisions compelling compliance and its dissenting opinion dismissing the prosecutor's request in *the Ruto case* adopt a *collaborative interpretation* in furtherance of the drafter's intentions. However, compliance theorists argue that persuading recalcitrant member states in regard to activist interpretations of ambiguous provisions requires an *explanatory interpretation*. This is because – as shown in the theoretical framework and literature reviewed above – an aggrieved state can easily retaliate by invoking its sovereignty in response to an unacceptable or unreasonable ICC activist decision. Alternatively, if the ICC intends to cite such non-complaint state to the ASP, then it would require authoritative support from the community of scholars of international criminal law. In that regard a *conceptual interpretation* would be preferable so as to justify the activist judgment of the majority in *Ruto Trial Chamber*.

Despite the authority under article 119 to determine co-operation requirements, this chapter concludes, first, that the ICC Trial Chamber's majority judgment in the co-operation decision of *the Ruto case* was neither a reasonable nor an acceptable expression of judicial activism. It was no judicial creativity. Second, the limits of the ICC's compulsion of states is illustrated by *the Kenyatta case,* despite the ICC Trial Chamber judges unanimously ordering co-operation with the prosecutor's request for the suspect's financial records and other documents. Kenya insisted that these requests were not only vague and ambiguous, but also amounted to outsourcing of the ICC prosecutor's investigative functions to the

Kenya government. Both the above compliance decisions have been appealed and were pending before the Appeals Chamber at the time of writing this book. Therefore the critique which appears below constitutes the book's originality and the importance of ICC's enforcement procedures and strategies.

6.8. Compelling Attendance at ICC of Non-Voluntary Witnesses

6.8.1. Implied Power of the ICC

The question of operationalizing complementarity came into focus in the *Ruto and Sang case*.[1839] Trial Chamber Judges Eboe-Osuji, Carbuccia (dissenting) and Fremr considered:

> the following questions:
> 1) Whether an ICC Trial Chamber is competent to subpoena witnesses…;
> 2) Whether a Trial Chamber is competent to obligate a State Party to compel a witness to appear before the Chamber…;
> 3) Whether a request of Kenya to compel the appearance of a witness is prohibited by Kenyan law or by the Rome Statute operating as part of the laws of Kenya; and,
> 4) Whether the Prosecution has justified issuing the subpoena as requested, as a matter of the probative value of the anticipated testimonies.[1840]

The *Ruto Trial Chamber* was divided. Judge Carbuccia's dissenting opinion shall be discussed in the subsequent section. The ICC Trial Chamber's majority opinion by Judges Osuji and Fremr defined " 'ordering,' 'compelling' the appearance of the witness, 'subpoena' or 'summons' " using the phraseology "commonly understood as commanding the appearance of a witness who refuses to appear voluntarily."[1841] The Kenya government and the defence teams contended "that an ICC Trial Chamber has no power to subpoena witnesses to appear before it…dependent on the so-called 'principle of voluntary appearance.' "[1842] Rather: "A witness…will be wholly free to refuse to come to court." However, the *Ruto Trial Chamber* majority judges summarily found that: "That theory does not deserve serious consideration" since: "It is quite simply not supported by a correct understanding of international law, customary practice in the administration of international criminal justice, and, indeed, the relevant provisions of the Rome Statute itself."[1843]

[1839] *Ruto Trial Chamber,* Order Compelling Kenya Government Cooperation, majority judges Chile Eboe-Osuji and Robert Fremr, *supra* note 207.
[1840] *Ibid.* pp 22-23 para 59.
[1841] *Ibid.* para 60.
[1842] *Ibid.* para 61.
[1843] *Ibid.* p 24 para 62.

After setting out the Rome Statute's preamble, the majority judges asserted that it is more than "hortatory prose that induces feelings of goodness all around."[1844] Rather, the preamble "is a compendious expression, in all solemnness, of the serious and urgent concerns that frame the mandate" of "the ICC, as part of the States Parties' collective hope and desire to protect humanity from the sorts of atrocities made manifest in the crimes over which the Court has been given jurisdiction." Moreover, "article 21(l)(c) of the Rome Statute – offer(ed) a basis to place an ICC Trial Chamber in an analogous position as a domestic criminal court." In the majority's view, "customary international criminal procedural law has now firmly recognised and settled the idea of compellability of a witness for purposes of a criminal trial before an international criminal court."[1845] The majority invoked *inter alia,* the *Reparation case*[1846] "where the ICJ held that 'under international law' an international body or organization 'must be deemed to have those powers' which, 'though not expressly provided' in the constitutive instrument, 'are conferred upon it by necessary implication as being essential to the performance of its duties.' "[1847] Further:

> The resulting principle of – or legal formula for – implied power thus becomes this. If the power (capacity or competence) under consideration is such that the functions (that the States Parties entrusted to an international body or institution) 'could not be effectively discharged' without the power (capacity or competence) in question, the international body or institution 'must be deemed to have [that power].' For, the power is 'necessitated by the discharge of its functions.'[1848]

Similarly, the majority judges Osuji and Fremr paraphrased what the ICJ had in mind in the *Nuclear Tests cases* thus:

> with exercising its implied powers as a court of law in
> (a) a positive manner that is essential to the realisation of its express jurisdiction; as well as
> (b) a negative manner to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character.'[1849]

[1844] *Ibid.* p 25 para 64.
[1845] *Ibid.* p 26 para 65.
[1846] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] International Court of Justice Reports 174 p 182 (other citations omitted).
[1847] *Prosecutor v Ruto, supra* note 146 pp 26-7 para 67.
[1848] *Ibid.* p 29 para 74.
[1849] *Nuclear Tests case (New Zealand v France) (Judgment)* (1974) ICJ Reports 457 (International Court of Justice), para 23 (emphasis added). See also *Nuclear Tests case (Australia v France)* (Judgment) [1974] International Court of Justice Reports 253 para 23, cited at *ibid.* p 29 para 74.

Focusing on the later indication they explained that:

> "Instances in which the Court may so decline to exercise its jurisdiction will include those instances in which the Court is invited to make decisions that have little or no real judicial value, in comparison to the political ramifications of the matter in the prevailing circumstances of the particular case; thus avoiding needless and unwitting submission of the judicial process into the arena of political conflict."[1850]

For this reason:

> the Chamber declined, in this case, to require the accused in this case (as the executive Deputy President of Kenya) to be continuously present at trial in The Hague, when it was possible to conduct his trial under a carefully couched decision conditionally excusing him from continuous presence at trial.[1851]

Indeed, even before the ICJ, various classical publicists pioneered by "Hugo Grotius, for instance, wrote as long ago as 1625 that 'besides words and letters,' treaties 'admit of tacit consent' that 'has the power of conveying a right.' And, such powers 'indeed naturally rising out of the action itself.' "[1852] Moreover, the *Ruto Trial Chamber* majority quoted the Rome Statute itself where article 4(1) provides as follows: "The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."[1853] Hence the majority judges concluded that "the power to compel the attendance of witnesses is an incidental power that is critical for the performance of the essential functions of the Court."[1854] Comparative provisions exist – not only in common rule 54 established pursuant to both articles 19(2) of the ICTY Statute and 18(2) of the ICTR Statute[1855] – but also these templates are identical to formulations "in the procedural laws of the Special Court for Sierra Leone, the Special Tribunal for Lebanon and Extraordinary Chambers in the Courts of Cambodia." Therefore the *Ruto Trial Chamber* asserted that:

> The picture is wholly consistent with the intendment of article 21(l)(c) of the Rome Statute, including in allowing general principles of national law to augment the provisions of the Rome Statute and related instruments. Subpoena powers are an undoubted element of general principles of national law in the administration of criminal justice.[1856]

[1850] *Ibid.* p 32 para 80.
[1851] *Ibid.*
[1852] *Ibid.* p 33 para 82.
[1853] *Ibid.* p 34 para 83 (emphasis in judgment).
[1854] *Ibid.* p 35 para 86.
[1855] *Ibid.* pp 35-36 paras 89-90.
[1856] *Ibid.* p 36 para 91.

In the *Ruto Trial Chamber* majority's interpretation it was suggested that States Parties are unable to partially accede to a treaty, and particularly that Kenya made no reservations upon ratification. Hence the entire Rome Statute became domesticated wholesale under a monist theory. Simultaneously, for the majority judges, a contrary inference would be absurd since:

> In the circumstances of that settled and accepted practice in international (and national) criminal procedural law, it would require very clear language indeed for the States Parties to the Rome Statute to be taken to have intended that the ICC – as the permanent international criminal court established for the primary purpose of eliminating impunity for grave violations of international criminal norms – should be the only known criminal court in the world (at the international and the national levels) that has no power to subpoena witnesses to appear for testimony.[1857]

Moreover "the specific power to compel the attendance of witnesses" is not implied but "indicated in explicit language." In addition to the Spanish and Arabic versions of the texts of article 64(6)(b) of the Rome Statute, the judges considered the French translation where: "The focus is on the verbs 'ordonner' in the French and 'require' in the English text. The French verb 'ordonner' translates into 'to order' in English."[1858] On one hand, the Kenya government argued that "the ordinary meaning of the word 'require' in the English language implicates a voluntary action."[1859]

However, the majority found that:

> *Oxford Thesaurus* principally indicate(s) the meaning of the word as 'order' and 'command' and that word was also indicated as co-terminous with 'coerce' and 'force.' Indeed, the primary entry appears as follows: '**require** *v* **1** order, command, ask (for), call (for), press (for), instruct, coerce, force; insist, demand; make: *I am required to appear in court on Monday. The teacher required that I bring my mother to school.*'[1860] (emphasis in judgment)

On the other hand, and with respect, the legal representative for the victims reasoned, disingenuously, in my humble interpretation, that:

> there would be 'no logical reasoning in law' for any dispensation that would permit compulsory measures of attendance against 'a witness in respect of very, very light offences' in the domestic contexts, while not permitting similar measures to be taken 'in respect of offences which [...] shock the conscience of [hu]man[ity].'[1861]

Curiously, the majority judges agreed that:

> the absurdity of the proposition that it was the intention of the Rome Statute States Parties to deny subpoena power to the ICC goes beyond the possibility that such an understanding has a very clear potential for the perpetuation of impunity – that is to say, freedom from accountability – for a person accused of international crimes even as grave as genocide. It also holds the equally disturbing potential that a person accused of a crime so grave may be denied critical defence if possibly exonerating evidence in his defence lies in the mouth of a witness who would not or could not appear voluntarily.[1862]

Because "article 86 imposes upon States Parties a general obligation to 'cooperate fully' with the Court in its 'prosecution' of crimes within the jurisdiction of the Court"[1863] therefore "Kenya is obligated to employ compulsory measures against the witness in order to perform the demands of the request."[1864] Hence beyond express powers, the majority judgment repeated their pronouncement of implied powers adopted from the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.[1865] Similarly, they re-paraphrased the *Reparations case* whose "effect is that these duties and rights and powers derive not only from the express words of an international organisation's constitutive instrument, but also from the process of implication in the light of the functions and purposes of the organisation in question."[1866] In the words of Gerald Fitzmaurice: "Its duties have as their counterpart obligations owing to it by member states, the performance of which the organization has a right to expect and, if necessary, to require."[1867]

6.8.2. The Principle of Good Faith in Treaties

It is noted that the majority judges Eboe-Osuji and Fremr in the *Ruto Trial Chamber* concurred with the constitutive interpretation of international statutes similar to that, *inter alia*, preferred by the majority in the Appeals Chamber who

[1857] *Ibid.* p 37 para 92.
[1858] *Ibid.* p 38 para 96.
[1859] *Ibid.* p 38-9 para 98.
[1860] *Ibid.* p 39 para 98, citing Laurence Urdang, *The Oxford Thesaurus* (Oxford: Clarendon Press, 1991) (explanation in footnote omitted).
[1861] *Ibid.* p 9 para 21.
[1862] *Ibid.* p 39 para 99.
[1863] *Ibid.* p 40 para 103.
[1864] *Ibid.* para 102.
[1865] *Ibid.* p 41 para 104, citing *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) supra* note 1849.
[1866] *Ibid.* p 42 para 107 citing *Reparations case, supra* note 1846.
[1867] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice: International Organisations and Tribunals" (1952) *British Yearbook of International Law*, 29, 1 pp 3-4, cited in *ibid.* footnote 156.

dismissed Kenya's application complementarity against, as well as Ekaterina Trendafilova and Cuno Tarfusser of the Pre-Trial Chamber, as analyzed by Leila Sadat.[1868] It is argued that their interpretation displays preference for judicial activism. Conversely, as shall be shown below, the approach of the dissenting opinion by Judge Olga Herrera Carbuccia, adopts a textual interpretation favored by scholars like Ohlin and earlier judgments by the Appeals Chamber's Anita Ušacka,[1869] the Pre-Trial Chamber's Hans-Peter Kaul,[1870] and Trial Chamber's Christine Van den Wyngaert.[1871] Judge Carbuccia exercised judicial restraint.

In this regard, to advance its contention that mandatory, coercive and involuntary "subpoena to a witness falls under what is indicated as 'service of documents, including judicial documents,' being a manner of assistance that States Parties are obligated," on one hand: "The Prosecution relie(d) on the combined effect of article 93(l)(d) and article 93(1)(1)."[1872] Majority judges Osuji and Fremr agreed that it "(wa)s then up to the State on whom a request has been made to specify how national law prohibits – in good faith – the type of the request that was made.[1873] They quoted Bin Cheng who argues that: " 'The law of treaties is closely bound with the principle of good faith, if indeed not based on it; for this principle governs treaties from the time of their formation to the time of their extinction.' " Consequently, "in the absence of the rule of good faith, '[i]nternational law...would be a mere mockery"[1874] because the rule of good faith operates to exclude the idea that in negotiating and concluding treaties, the parties had intended to create a regime that is merely 'illusory or nominal.' "[1875] In light of the ICC's mandate and the resulting global expectations the *Ruto Trial Chamber* majority judges rejected the Kenya government's argument refusing to facilitate attendance of non-voluntary witnesses as requested by the ICC prosecutor, since such:

> theory of such a degree of fundamental impotence would yield an outcome that is 'unreasonable, absurd or contradictory,' and 'impossible consequences' as regards the fulfilment of the mandate and the expectations. Indeed, both the 'weightier quality of the parties' and 'the greater magnitude of the subject-matter' seriously give the lie to the proposition.[1876]

In conclusion: "The result is that 'treaties ought not to be interpreted exclusively according to their letter, but according to their spirit"[1877] so that in Cheng's words: " 'No party appearing before the Court' should be free 'to make capital out of inexact expression' in the Rome Statute."[1878]

The majority emphasized the proposition in *Blaškić* that:

> the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal.[1879]

On the other hand, as expounded below: "The Defence and the Attorney-General of Kenya (sought) to defeat the Prosecution's objective by pointing to the provisions of article 93(l)(e)…'[f]acilitating the voluntary appearance of persons as witnesses ... before the Court.' "[1880] The dissenting judgment of Appeals Chamber Judge Ušacka agreed with the Kenya government's challenge against jurisdiction as did dissenting Judge Carbuccia, against compelling non-voluntary witnesses.

Complementarity is of significance in my view, as seen in chapter two. "According to the doctrine of complementarity, the primary jurisdiction to try anyone accused of a crime over which the ICC has jurisdiction lies with the State that has the strongest sovereign connection with the case, in the applicable terms of the Rome Statute."[1881] In the Ruto Trial Chamber majority's view, "the doctrine of complementarity should, in good faith, put the ICC in no weaker stead to conduct such trials in cases before it. In other words, the ICC will have an equal ability – as does a domestic criminal court genuinely trying an international crimes case – to subpoena witnesses to appear…"[1882] In the

[1868] Sadat, "Crimes Against Humanity," *supra* note 193; See also *supra* chapters three and four.
[1869] *The Ruto Appeal Chamber* Kenya's Admissibility Challenge Judge Ušacka's dissenting opinion, *supra* note 1121.
[1870] *Kenya Cases Confirmation-of-Charges* Judge Kaul's dissenting opinions *supra* notes 196 and 197.
[1871] *Katanga Trial Judgment Minority Opinion*, See also *Kenyatta Case* (Decision on Application under 65(4) *supra* note 206; See also *supra* chapter four.
[1872] *Ruto Trial Chamber,* Order Compelling Kenya Government Cooperation, majority judges Chile Eboe-Osuji and Robert Fremr *supra* note 207 p 45 para 113.
[1873] *Ibid.* p 46 para 115.
[1874] *Ibid.* p 49 para 122, quoting Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1993) p 106.
[1875] *Ibid.* p 47 para 117, citing Cheng, *ibid.* p 113 (footnotes omitted).
[1876] *Ibid.* p 50 para 124, citing Cheng, *ibid.* p 112.
[1877] *Ibid.* p 51 para 126, citing Cheng, *ibid.* p 115.
[1878] *Ibid.* p 52 para 128, citing Cheng, *ibid.* p 163.
[1879] *Ibid.* p 53 para 130, citing *Prosecutor v Blaškić* (*Judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18th July 1997*) 29th October 1997, (ICTY Appeals Chamber), IT-95-14-A para 31 (emphasis and parenthesis in the judgment).
[1880] *Ibid.* p 46 para 114.
[1881] *Ibid.* p 56 para 136.
[1882] *Ibid.* p 57 para 138.

majority judgment's view, "the doctrine of complementarity subrogates the ICC into the position of a national criminal court that is exercising jurisdiction genuinely and in good faith in the search for the truth." This is because: "Anything less would detract from the ability of the ICC to ensure that those accused of the crimes are indeed tried, for purposes of accountability, when the State with sovereign jurisdiction over the crimes has not done so genuinely."[1883] This issue shall be revisited in the next section which rationalizes the ICC Trial Chamber's majority using the dissenting opinion regarding compulsion of involuntary witnesses.

The majority opinion in *the Ruto Trial Chamber* appeared to resent the social constructivist nature of the international legal system when it calls for:

> the need for circumspection relying on any 'international custom' in the context of mutual legal assistance requests 'between countries' by virtue of which witnesses from the situation country are readily to be viewed as completely free to decline appearance before the ICC, while the Court shrugs or looks on helplessly with no facility of compulsory measures.[1884]

Hence the Trial Chamber majority Osuji and Fremr went to great lengths to avoid considering the *travaux préparatoires.*[1885] They concluded that "in circumstances where treaties give birth to an international organisation, such as is the case with the ICC, resort to *travaux préparatoires* is not always appropriate."[1886] The two judges nonetheless attempted to refute the *travaux préparatoires* argument "that the word 'voluntary' was a later addition in the drafting history" because "the drafters deliberately meant that the limit of assistance that the States Parties are required to render as regards appearance of witnesses is only voluntary assistance – nothing more."[1887] Instead, the majority found that: "The construction urged by the Defence and the Attorney-General was not reasonable. For, it required reading the article 93(l)(e) in isolation, without regard to article 93(1)(l)."[1888]

The ICC majority judges Osuji and Fremr invoked the general saving power of "article 93(1)(l) which requires States Parties to render to the ICC '[a]ny other

[1883] *Ibid.*
[1884] *Ibid.*
[1885] *Ibid.* pp 56-60 paras 141-5; French trans. meaning "preparatory works" citing *Prosecutor v Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial)* 18th October 2013, [Trial Chamber V(B)] (the *Kenyatta Excusal Decision*), ICC-01/09-02/11-830, p 56 para 141 footnote 185. Majority Decision of Judge Fremr and Judge Eboe-Osuji, paras 76-77. (Judge Kuniko Ozaki's dissenting opinion is not discussed herein).
[1886] *Ruto Trial Chamber,* Order Compelling Kenya Government Cooperation, majority judges Chile Eboe-Osuji and Robert Fremr *supra* note 207 p 60 para 145 (footnotes omitted).
[1887] *Ibid.* para 146.
[1888] *Ibid.* p 61 para 148.

type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.' "[1889] The Trial Chamber used this broad speculative provision to supplement the narrow specific "articulated construction of article 93(l)(e) (which requires States Parties to facilitate 'voluntary appearance' of witnesses)."[1890] It shall be submitted that this was contrary to the relevant cannons of statutory interpretation.

The *Ruto Trial Chamber* majority judges concluded that: "The ICC, being a court that exercises jurisdiction that is complementary to the jurisdiction of national courts, is not given powers of primacy that are inconsistent with the domestic legal order, on matters of compellability of witnesses located within the particular domestic forum."[1891] However, risks increase because "(c)ompelled appearance, on the other hand, involves, by definition, essential legal antagonism between the unwilling witness and any person (including the police) or entity (including a State) that seeks to compel the witness into something that s(h)e does not wish to do."[1892] Hence where "involuntary appearance carries high or considerable risk" of "essential legal antagonism between the volunteering witness and the State that is obligated to facilitate the witness's voluntary appearance"[1893] then: "It means only that it is to be done in accordance with article 93(1)(1) – i.e. if *bona fide* domestic law does not forbid it."[1894] However, "any domestic law purporting to prohibit the requested assistance stands to be appraised for *bona fides*, in light of the indication in article 93(3) that the prohibition needs to be 'on the basis of an existing fundamental legal principle of general application.' "[1895] For example, "the domestic law of 'Canada permits that Canada may provide the following assistance:...compelling witness testimony, including compelling witnesses to give evidence in foreign proceedings by means of audio or video-link.' "[1896]

6.8.3. Laws Governing Witness Compellability

While the *Ruto Trial Chamber* majority was correct in their interpretation of Canadian law, it would be unsafe to attempt to import such analogy directly into Kenya without adopting it to the Kenyan situation. The fieldwork research for this book examined the cost-benefit test of the ancillary powers doctrine

[1889] *Ibid.*
[1890] *Ibid.*
[1891] *Ibid.* para 148.
[1892] *Ibid.* p 62 para 151.
[1893] *Ibid.* para 150.
[1894] *Ibid.* para 151.
[1895] *Ibid.*
[1896] *Ibid.* p 63 para 153.

explained in the previous chapter, which makes a comparative study on the two jurisdictions. An analysis of the findings suggests that the test for Commonwealth countries regarding use of technical provisions to oust substantive rights depends on a cost-benefit analysis. The right to privacy is not absolute. Nonetheless, the onus depends on the prosecution to show that – from its act of criminal prosecution of suspects in Kenya's post-2007 conflicts – survivors are likely to accrue more benefits than the costs inflicted from intrusion into the individual rights to privacy of the involuntary witness. Demonstrating this probability requires empirical evidence. While the international community may undoubtedly benefit, by deterring other warlords from acts of impunity, the key question is not the gains by the international community per se. Rather the question includes whether wider Kenyan society will benefit from risking the harm to its individual citizen, if bystanders are compelled to attend and testify when doing so may have adverse effects on their extended families.

Hence I disagree with the test applied by the *Ruto Trial Chamber* majority judges. They asked a negative question to the Attorney General and the Defence "to indicate whether there was any Kenyan law that *prohibits* Kenya as a State Party from complying with an ICC request for the facilitation of the compelled appearance of a witness before the Trial Chamber."[1897] The majority shifted the burden of proof to the Kenyan AG to prove that the public interest will suffer harm, to wit:

> the Counsel for Victims in this case… is a member of the Bar of Kenya. In his own submissions, he was categorical that there is no Kenyan law that prohibits Kenya from rendering to the ICC the manner of assistance urged in the Prosecution's application. Any such prohibition, according to him, is controlled by the laws of Kenya that ordinarily govern questions of compellability of witnesses in criminal trials in the domestic courts of Kenya.[1898]

As shall be submitted in the penultimate section but one of this chapter, the Trial Chambers' interpretation of Kenyan law on this point is not correct. It is submitted that under common law principles of administrative law, no statutory body can claim to exercise power unless such power is specifically donated by parliament or delegated by a superior. Therefore, the Kenyan Attorney General cannot facilitate what parliament has not empowered him to do. My original claim is that I take up the challenge laid down by the majority judges that "no one has brought to the attention of the Chamber any *bona fide* law of Kenya that specially precludes an obligation on the government to assist the ICC in the facilitation of compelled appearance of a witness under an ICC subpoena for

[1897] *Ibid.* p 65 para 158.
[1898] *Ibid.* para 159.

purposes of appearance before a Trial Chamber."[1899] Particularly, I propose a solution to the question regarding the conflict between the section 20(1)(a) of Kenya's International Crimes Act which, on one hand, provides:

> This Part shall apply to a request by the ICC for assistance that is made under–
>
> (a) Part 9 of the Rome Statute, in relation to–
>
> (i) the provisional arrest, the arrest, and the surrender to the ICC of a person in relation to whom the ICC has issued an arrest warrant or given a judgment of conviction;
>
> (ii) the identification and whereabouts of persons or the location of items;
>
> (iii) the taking of evidence, including testimony under oath, and the production of evidence, expert opinions, and reports necessary to the ICC;
>
> (iv) the questioning of any person being investigated or prosecuted;
>
> (v) the service of documents, including judicial documents;
>
> (vi) facilitating the voluntary appearance of persons as witnesses or experts before the ICC;
>
> (vii) the temporary transfer of prisoners;
>
> (viii) the examination of places or sites, including the exhumation and examination of grave sites;
>
> (ix) the execution of searches and seizures;
>
> (x) the provision of records and documents, including official records and documents;
>
> (xi) the protection of victims and witnesses and the preservation of evidence;
>
> (xii) the identification, tracing and freezing, or seizure of proceeds, property and assets, and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; or
>
> (xiii) any other type of assistance that is not prohibited by the law of Kenya, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC;"[1900]

And section 20(2) which provides:

> "Nothing in this section–
>
> (a) limits the type of assistance that the ICC may request under the Rome Statute or the ICC Rules (whether in relation to the provision of information or otherwise); or,
>
> (b) prevents the provision of assistance to the ICC otherwise than under this Act, including assistance of an informal nature.[1901]

The short proposition is that no positive legislation is required to prevent or prohibit ICC interference with a Kenyan citizen's liberties. Rather, positive

[1899] *Ibid.* para 160.
[1900] Section 20(1)(a) ICA, *supra* note 610.
[1901] Section 20(2) *ibid*.

legislation is required to authorize intrusion. Where there is a gap in the legislation, a common law court would be constrained to consider not only the fact that an investigation of crime is a legitimate prosecution duty. But also to analyze the costs and benefits of ancillary police powers. The ICC did not do this. Instead, the ICC majority judgment presumed that because mass atrocities are evil, unless the Kenyan Attorney-General or the defence can show that Kenyan society shall suffer more harm than good, therefore prosecution is always necessary. Curiously, the majority decision then adopted the victim counsel's assertion that there is no law prohibiting such compulsion of non-voluntary witnesses – hook, line and sinker.

The majority judgment further cited section 4(1) of the Kenyan ICA, to wit:

> The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya in relation to the following matters – (a) the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests;...(c) the bringing and determination of proceedings before the ICC;...[1902]

Majority judges Osuji and Fremr then looked to the Kenyan case of *Barasa v Cabinet Secretary of the Ministry of Interior*[1903] where "Principal Justice Mwongo's findings afford further and independent support to the findings"[1904] regarding domestication of the Rome Statute. Namely, that: "The provisions of the Rome Statute specified in subsection (2) of section 4 include 'Part 6 (which relates to the conduct of trials)' and 'Part 9 (which relates to international co-operation and judicial assistance).' "[1905] On 2nd August 2013 an ICC warrant of arrest was issued against journalist Walter Osapiri Barasa under seal. He was suspected of an offence against the administration of justice, in accordance with article 70 of the Rome Statute, including corruptly influencing or attempting to corruptly influence ICC witnesses. In March 2014, Kenyan High Court Judge Richard Mwongo ruled that Barasa could be extradited.[1906] However, the

[1902] *Ruto Trial Chamber,* Order Compelling Kenya Government Cooperation, majority judges Chile Eboe-Osuji and Robert Fremr, *supra* note 207 p 71 para 175.
[1903] *Barasa v Cabinet Secretary of the Ministry of Interior and National Coordination & others*, Petition no. 288 of 2013, judgment delivered on 31st January 2014 (High Court of Kenya), para 59; See also para 83, cited in *ibid.* para 178.
[1904] *Ibid.* p 72 para 179.
[1905] *Ibid.* p 71 para 177.
[1906] Paul Ogemba, "Order for Walter Barasa's Extradition To ICC: Judge Satisfied with ICC's Reasons to have Journalist Extradited to Hague," *Daily Nation,* 14th May 2014 http://mobile.nation.co.ke/news/Walter-Barasa-Extradition-ICC-Case-Witness-Tampering/-/1950946/2314954/-/format/xhtml/-/13d5n54z/-/index.html <accessed 22nd July 2014>

Kenyan Court of Appeal subsequently stopped the suspect's arrest and deportation to The Hague, pending hearing and determination of his appeal.[1907]

The *Ruto Trial Chamber's* majority held that Justice Mwongo's "judgment left no doubt at all that 'the Rome Statute forms part of the laws of Kenya to the extent stated' in section 4 of the ICA, and that the 'stipulated parts of the Rome Statute ... have the force of law in Kenya." In the circumstances, as he further observed: "The ICC is therefore a Court duly recognized and incorporated by the Constitution as a court with which, in terms of the preamble and objects of the ICA, Kenya must cooperate in the performance of its functions."[1908] Because "(e)ach of these witnesses may provide important testimony on the crimes charged and the individual criminal responsibility of the accused" therefore the Ruto Trial Chamber majority judges concluded that:

> (i) it has the power to compel the testimony of witnesses;
> (ii) pursuant to article 93(1)(d) and (1) of the Statute, it can, by way of requests for cooperation, obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed;
> (iii) there are no provisions in Kenyan domestic law that prohibit this kind of a cooperation request; and,
> (iv) the Prosecution has justified the issuance of the summonses to compel the appearance of the Eight Witnesses.[1909]

6.9. Taking Witnesses Seriously: Judge Carbuccia's Dissenting Opinion

6.9.1 Fair Trial Guarantees of Due Process Rights

Judge Olga Herrera Carbuccia's dissenting opinion[1910] disagreed with the findings of *Ruto Trial Chamber's* majority that "the Government of Kenya has the legal obligation, pursuant to article 94(1)(d) and (1) of the Statute, to enforce…a summons"[1911] which are issued "vis-à-vis witnesses who are not willing to testify in court voluntarily."[1912] Instead, her view was that the International Criminal "Court has no mechanism to make an individual liable for

[1907] "Appeal Court Halts Walter Barasa's Extradition to the ICC," *Daily Nation,* 29th May 2014 http://mobile.nation.co.ke/news/Appeal-court-halts-Walter-Barasa-extradition-to-the-ICC/-/1950946/2330366/-/format/xhtml/-/thjc9lz/-/index.html <accessed 22ndJuly 2014>
[1908] *Ibid.*
[1909] *Ibid.* p 76 para 193.
[1910] Ruto Trial Chamber Dissenting Opinion of Judge Olga Herrera Carbuccia on the Application for Witness Summonses and Request for Cooperation *supra* note 211.
[1911] *Ibid.* p 5 para 9.
[1912] *Ibid.* para 8.

refusing to testify in contravention of a Court order under Article 64(6)(b) of the Statute."[1913] This was, first, because under article 70: "The Statute's provision on offences against the administration of justice does not contemplate this kind of contempt power."[1914] It "should be interpreted in light of Article 93(1)(e) of the Statute," under which compulsory assistance from States Parties to ICC requests is limited to: "Facilitating the *voluntary* appearance of persons as witnesses or experts before the Court."[1915] Further: "Such holistic reading is to be confirmed by the text of Article 64(6)(b) itself, as witness attendance is to be required 'by obtaining, if necessary, the assistance of States *as provided in this Statute*.' "[1916]

Second, in addition to her holistic and textual approaches, ICC Trial Chamber Judge Carbuccia's dissent invoked inspiration from an historical reading of the Statute since: "The first recorded insertion of the word 'voluntary' into the provision appears on 6 July 1998' (saying that) "*This included the notion that witnesses or experts may not be compelled to travel to appear before the Court."*[1917] Third, Judge Carbuccia's dissent notes "the existence of Article 93(7) of the Statute, which provides that a detained person must give their consent prior to being transferred to testify before the Court. It does not make sense why a non-detained person could be compelled to testify under Article 93(1)(l) but a detained person could not…"[1918] Fourth, because, in her interpretation: "The principle of voluntary appearance has also been confirmed by other ICC Chambers in previous occasions."[1919] Fifth, "the Prosecutor in its interviews with its witnesses has routinely included this principle when it informs them of their rights and duties as witnesses."[1920]

Sixth, Judge Carbuccia recognized that: "It is dangerous to extend the scope of a residual provision such as Article 93(1)(l) to include something that was foreseen and in fact was excluded from the primary provision."[1921] The Judge therefore exercised judicial restraint which in my view correctly disagreed that "'this residual provision which includes 'any other assistance' that can be provided by State Parties' could include facilitating the appearance and

[1913] *Ibid.* pp 5-6 para 11 (footnote omitted).
[1914] *Ibid.* p 6 para 11.
[1915] *Ibid.* para 12 (footnote omitted).
[1916] *Ibid.* (emphasis added).
[1917] *Ibid.* p 7 para 13 (footnote omitted), (emphasis added).
[1918] *Ibid.* para 14.
[1919] *Ibid.* p 8 para 15 footnote 20, citing "*Lubanga case* Transcript of 20th May 2011 ICC601/04-01/06-T-335-ENG ET, page 5 line 19; Kenya Situation Second Decision on Application of Nine Persons to be Questioned by the Office of the Prosecutor, 31st January 2011, ICC-01/09-39, paragraph 20."
[1920] *Ibid.*
[1921] *Ibid.* pp 8-9 para 16 (footnote omitted).

testimony of non-voluntary witnesses, as this possibility was expressly eliminated from paragraph 1(e)."[1922]

Judge Carbuccia asserted a positivist perspective since under: "Articles 1-4 of the Statute, the power of the Court is limited to the provisions of the Statute….clarified by the provisions of Article 21 of the Statute which establishes the hierarchy of the applicable law."[1923] Because: "The Court shall exercise its functions and powers 'as provided for in the Statute" ' and this provision 'is directed against an expansion of the Court's powers beyond the Statute;' "[1924] And further because "using the doctrine of implied powers beyond what was provided for in the Statute (wa)s in (her) view contrary to the Statute, particularly the principle of legality (*nullum crimen sine lege*)"[1925] Therefore: "The concept of 'implied powers' (could) not apply in this case."[1926] Rather, "the definition of a crime sh(ould) be strictly construed and sh(ould) not be extended by analogy, the definition sh(ould) be interpreted in favour of the person being investigated, prosecuted or convicted."[1927]

Seventh and possibly most important, "the ICC cannot compel witnesses to testify because of fear of criminal prosecution when the ICC, and particularly the Victims and Witnesses Unit (VWU), cannot guarantee the safety and well-being of the witness."[1928] That is why the VWU "has previously stated that they 'will only be able to arrange witness' availability for testimony as long as the individual *consents* to appear as a witness."[1929] Judge Carbuccia effectively determined that the costs in violating the principle that "proceedings must be done respecting the principle of legality, the guarantees of due process and the rights to a fair trial"[1930] outweighed the benefits of granting the Trial Chamber the power to subpoena "persons refusing to give their testimony before the ICC provided for in paragraph 64(6)(b)."[1931]

[1922] *Ibid.* p 8 para 16.
[1923] *Ibid.* p 10 para 20.
[1924] *Ibid.* para 21.
[1925] *Ibid.* para 22.
[1926] *Ibid.* para 21.
[1927] *Ibid.* p 11 para 23.
[1928] *Ibid.* para 25.
[1929] *Ibid.* pp 11-12 para 25 (emphasis added).
[1930] *Ibid.* p 12 para 26.
[1931] *Ibid.*

6.9.2 Physical Elimination of Witnesses

This section of the book notes that it seems patently against prosecutorial ethics and public policy to elicit information from respondents under the pretext that such information shall only be utilized on consent of such respondent and then to subsequently renege by compelling that witness to instead produce that information involuntarily. Since it is extracted using deception, such an approach is tantamount to illegally obtained evidence and may ultimately frustrate the Court's short and long term objectives of eliciting truth. Thus it raises various fundamental issues. First, because involuntary witnesses may turn hostile and disown their earlier statements. Indeed, the orders compelling co-operation were ultimately issued. However, the Kenyan government complied not by compelling travel, but through facilitating domestic arrangements from safe havens. It is noted that the first three OTP witnesses who took to the witness stand at secret locations in Nairobi testifying through video linkages behind veiled identities, recanted their earlier statements forcing the *Ruto Trial Chamber* to declare them hostile. Moreover, evidence given outside court, i.e. hearsay, necessarily carries inferior weight to testimony inside the courtroom. Whether the witness told the truth in the first instance or in their subsequent statements is for the Trial Chamber to decide. Second, future potential witnesses may be reluctant to risk volunteering their statements, if they discover that previous witnesses or their families became imperiled – whether directly or indirectly – as a result of speaking to ICC Prosecutors. For example, in mid-June 2014, the Kenyan media reported that one potential witness in *Kenyatta's case*: "Former Mungiki sect leader Maina Njenga (was) shot along Nyahururu-Nairobi highway." These dramatic reports alleged that "Njenga('s) convoy of two vehicles was sprayed with bullets." Furthermore that "Nyandarua County Commander Hamisi Mabea has confirmed that five people who were with Njenga in his vehicle are dead."[1932] Njenga admitted to having recorded a statement with ICC investigators about the 2007-08 post-election violence in Botswana. He volunteered to record his statement on condition that it was done outside the country. "Let people know that they want to kill me because of the case against Uhuru at the ICC. Sometime back, officials from the ICC sought me. The court officials asked me to say what I knew about the violence but I told them I knew nothing because I was in prison."[1933] It is not alleged that Njenga

[1932] Alex Kiprotich, "Ex-Mungiki Leader Maina Njenga Shot and Wounded Along Nyahururu-Nairobi Highway" *The Standard Digital* http://www.standardmedia.co.ke/article/2000122277/maina-njenga-shot-and-wounded-along-nyahururu-nairobi-highway/ <accessed 15th July 2014>

[1933] Dominic Wabala, "Maina Njenga gave ICC Statement in Botswana" 31st May 2014, *The Nairobi Star* http://www.the-star.co.ke/news/article-169295/maina-njenga-gave-icc-statement botswana#sthash.ec6UXENH.dpuf <accessed 15th July 2014>

was necessarily an ICC witness in *the Kenyatta case*, although he may have been a potential witness.

In conclusion, because: "The Court would have to take appropriate measures to protect the witnesses' safety and well being pursuant to Article 68(1) of the Statute before any such order is enforced" and further because the VWU was either unwilling or apparently unable to protect non-voluntary attendance by witnesses, therefore, I am sympathetic with Judge Carbuccia's dissenting conclusion in *Ruto's case* that "the Government of Kenya was under no obligation to assist in compelling and ensuring the appearance of the (non-voluntary) witnesses."[1934] On summons served by Kenya's police, the witnesses availed themselves. Authority for the proposition of law that "principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify"[1935] is found in *Doorson v Netherlands*. Hence witnesses should not only be protected against cruel and inhuman treatment but also from unwarranted interference into their private lives.

6.10. The Limits of the Agency Analogy in Public Law

6.10.1. The Kenyan Legislature Limits the State's ICC Co-operation

Chapter two of the book problematized the ICC Appeals Chamber majority's interpretation of complementarity in its 2011 judgment which ruled that the ICC had jurisdiction over *the Kenya cases*. Moreover, the instant chapter also disagrees with the ICC Trial Chamber's interpretation of Kenyan law as regards the jurisdiction of Kenyan courts to compel the Attorney General to facilitate the production of unsafe involuntary witnesses to testify before the ICC in *the Ruto case*. In this section, it shall be submitted that according to Kenyan administrative law, the Attorney General is a creature of statute, and the constitution. In this respect, unlike natural persons who enjoy liberties unless restricted by law, instead statutory bodies lack power unless specifically conferred by an enabling Act. It is true that the Kenyan International Crimes Act expressly authorizes the Attorney General with power to facilitate the attendance of *voluntary* witnesses before the ICC. However, it shall be concluded that if the AG exceeds his statutorily-donated power – by jeopardizing security of attendance by *non-voluntary* witnesses under the guise of facilitation – then such

[1934] *Ibid.* para 27.

[1935] (1996) 22 EHRR 330, cited in Jenny McEwan, "Ritual, Fairness and Truth: the Adversarial and. Inquisitorial Models of Criminal Trial" in: Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds.), *The Trial on Trial: Truth and Due Process (Volume One)* (Oxford and Portland Oregon: Hart Publishing, 2004) p 55.

administrative action is in excess of jurisdiction and attracts judicial review to prohibit him from acting *ultra vires* the International Crimes Act. This notwithstanding, some non-voluntary witnesses testified from secret locations, behind veiled identities and were declared hostile upon departing from their original statements.

In the English case of *R v Tower Hawkes of London Borough exparte Chetnick Developments Ltd.*, it was explained by Lord Bridge of Harwich that:

> For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification…But for public bodies the rule is the opposite. It is that any action to be taken must be justified by a positive law. A public body has no legal rights which it enjoys for its own sake; at every turn all of its dealings constitute fulfillment of duties which it owes to others; indeed it exists for no other purpose.[1936]

Consequently, it is submitted that under Kenyan law, properly interpreted, no Kenyan court can compel the AG to facilitate attendance of an involuntary witness before the ICC. Indeed, if the AG acts *ultra vires* the ICA then he is likely to be held personally liable to compensate the involuntary witness for loss of liberty upon abduction, kidnapping or other violation of his fundamental rights to liberty and privacy. Nor is it possible for the ICC to invoke an analogy from the private law principle of agency to suggest that Kenya is estopped from denying that the AG is authorized to act on its behalf. Such argument would suggest that the ICC or such involuntary witnesses believe that the AG has ostensible of apparent authority to perform such actions of facilitating the witness's non-voluntary attendance.[1937] He does not. Rather, the words of the Kenyan International Crimes Act are clear that the intention of the legislature is to limit the state's co-operation with ICC to facilitate voluntary attendance.

An aberration of the use of common law estoppel occurred in *Lever (Finance) Ltd v Westminster LBC*.[1938] In that case, a planning officer working for the local planning authority represented to an architect orally that minor changes in a house shown on plans for which planning permission had been granted was an "immaterial variation" not requiring fresh planning permission. After the building work was commenced the residents complained and the planning authority threatened to serve an enforcement notice requiring the modified

[1936] [1988] 1 ALL ER 961, 965-66; AC 858, 862; 2 WLR 654.
[1937] P.P. Craig, *Administrative Law* (6th ed.) (Oxford: Oxford University Press, 2004) (7th ed.) [Sweet & Maxwell, 2012] pp 504-505; See also P. Craig, "Representations by Public Bodies" (1977) 93 *L.Q.R.* 397 pp 404-408.
[1938] [1971]1 QB 222.

development to be discontinued. The company applied successfully to the court for a declaration that the pubic body was estopped from contesting the representation made by its planning officer who acted within the apparent scope of his authority, and for an injunction to prevent service of the enforcement notice.[1939] Because the planning officer lacked delegated authority, Denning LJ's decision is widely criticized.

Subsequently, it was suggested that when a developer "acts" on the representation he should be acting to his detriment. This suggestion was made by the English High Court in *Norfolk County Council v Secretary of State for the Environment*[1940] where the Council resolved to refuse planning permission for a factory extension. This followed the earlier decision in *Barnard v National Dock Labour Board*[1941] where the Statute establishing the National Dock Labour Board authorized it to delegate specified disciplinary functions, including powers of suspension, to local dock boards. Consequently, the local Board Secretary suspended Barnard. It was argued that the unlawful delegation to the port manager could be cured by ratification of the Labour Board. Lord Denning correctly rejected this and held that "since a prior command in the form of delegation would have been unlawful, so also would have been the ratification."[1942] It is submitted, *mutatis mutandis*, that in *the Ruto case*, the AG lacked delegated authority under Kenya's International Crimes Act, hence any ratification of ICC's order to facilitate attendance of non-voluntary witnesses at The Hague would be null and void. Paul Craig distinguishes two problems where "a delegate who takes certain action, for example to institute legal proceedings, without prior approval" and:

> The authority whose approval is required then purports to ratify the action undertaken. One is whether the ratification could occur at the stage the proceedings had reached. The other is whether the officer instituting the proceedings was capable of doing so at all, whether that task could have been delegated to that person.[1943]

The common law presumes that unless a statute is expressed to bind the Crown, it does not. In the English authority of *Pyx Granite Co. Ltd v Ministry of Housing and Local Government*[1944] the House of Lords decided that, the Crown

[1939] Neil Hawke and Neil Parpworth, *Introduction to Administrative Law* (London/Sydney: Cavendish Publishing 1996 [Reprinted 1998]) pp 142-3
http://www.academia.edu/6105995/Administrative_Law <accessed 15th September 2014>
[1940] [1973] 3 All ER 673; [1973] 1 WLR 1400; 72 LGR 44.
[1941] [1953] 2 QB 18; [1953] 2 WLR 995; 97 S.J. 331; [1953] 1 All ER 1113; [1953] 1 *Lloyd's Rep.*
[1942] Craig, *Administrative, supra* note 1937 p 504.
[1943] *Ibid.* p 505.
[1944] [1960] AC 260.

and its departments were not bound by the rent restriction Acts, so that they could lease dwellings in order to produce income and then evict the tenants at the end of the leases where a private landlord could not. Similarly, as an alternative to seeking a determination that no planning permission was required, a landowner could apply to the court for a declaration which would be binding upon the planning authority in enforcement proceedings.[1945]

Public policy presumes that the public knows the contents of statutes. If a public official purports to act without authority, then such act is null and void *ab initio* and the aggrieved citizen may sue the official in his private capacity. It is argued that international criminal law is a combination of public international law and criminal law. Under the Kenya government's dualist theory of international law, international norms require domestication in order to have domestic effect. This theory differs from the ICC majority's monist theory which holds that international norms are automatically domesticated without any further enabling legislation. The latter argument advanced by the Office of the Prosecutor and endorsed by the ICC majority decision, discussed in section 6.8 above as held by the Trial Chamber majority in *the Ruto case*, suggests that the complementarity provision in the Kenyan ICA or the Rome Statute supersedes, or supplants the domestic law creating the Office of the Attorney General.

Whether or not the AG may himself invoke international law doctrines of functional immunity[1946] in defence of his liability to third parties is beyond the scope of this book. The argument is limited to distinguishing powers and actions of entities established by public law from the acts of natural persons regulated by private law. The ICC majority presume that under Kenyan public law – which is based on English common law – any act which a public body is not prohibited from doing, is presumed to be permitted. This is a mistake. On the contrary, this chapter argues that any power which is not expressly donated to a public body, is presumed to be denied. William Wade explains that while "it may be entitled to insist on this or that procedure be followed whether by a private person affected by its decision or superior body…the rule is necessary to protect people from arbitrary interference by those set in power over them." Hence "the principle which governs the relationship of public bodies and private persons with the law." In other words:

> A private person has absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts in good faith and upon lawful and relevant grounds in the public interest…The whole conception of unfettered discretion is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good.[1947]

The onus is thus on public bodies to identify the enabling provision which authorizes the interference with private liberties. Hence the cost-benefit analysis undertaken in *the Ruto case* is between the interests of post-2007 victims to pursue criminal trials in vindication of retributive justice, on one hand, as against the likelihood of criminal trials to provoke future ethnic conflicts to the greater detriment of the survivor society, on the other hand. By contrast, considerations in regard to the prosecutor's request for documents in the *Kenyatta case*, discussed below, are distinctly different. In the latter instance, it shall be submitted that no citizen need prove his or her right to liberty or privacy. Rather, the enjoyment of liberty is a primary, private good which precedes the production of secondary, public goods, or even semi-public goods such as criminal law.[1948] Nonetheless, as explained in chapter five, the ICC prosecutor is burdened to pass the cost-benefit test for ancillary police powers. The Kenya government's assertion of compliance is a matter of degree. It argues that relevant records sought by the prosecutor of mobile telephone transfers were – not required to be maintained by service providers under Kenyan law during the period in question – and further that the costs of searching for various unspecified companies and unparticularized motor-vehicles or land-related information, are prohibitive. Apart from the Attorney General, Kenyatta was summoned to appear physically at a Trial Chamber status conference scheduled for 8th October 2014 to clarify his personal status as a suspect vis-à-vis those of head of state and government. Enforcement issues shall be the subject of section 6.12 below. I conclude that deprivation of an international criminal law trial need not deprive post-2007 victims from receiving an appropriate domestic remedy. It is postulated that their remedy may lie in compensation by the state for various breaches of human rights law. Victim claims may be based on the state's duty to take preventive measures. In *Osman v UK,*[1949] Ahmet Osman was wounded in a shooting incident which led to the death of his father. The English courts all agreed that the police owed no duty of care the victims. Yet the European Court of Human Rights ruled that such blanket immunity would be a

[1945] *Regina v East Sussex County Council (Appellants) ex parte Reprotech (Pebsham) Ltd. (Respondents) and One Other Actions* para 37; See also *Lever (Finance)*, *supra* note 1940.
[1946] Albeek, *Immunity of States*, *supra* note 113.
[1947] William Wade, *Administrative Law* 6th ed. (Oxford: Oxford University Press, 1988) 399-400; See also Charles A. Khamala, "Judicial Review of Administrative Decisions Regarding Political Parties in Kenya" presented at the Strathmore University 8th Ethics Conference, Nairobi, Kenya from 27th-28th October 2011 available at:
https://www.google.com/?gws_rd=ssl#q=charles+khamala+strathmore
<accessed on 27th September 2014>
[1948] A.P. Grayling, *Liberty in the Age of Terror: A Defence of Civil Liberties and Enlightenment Values* (USA: Bloomsbury, 2011).
[1949] [1998] EHRR 101; See also Starmer, Strange and Whitaker, *Criminal Justice, Police Powers, supra* note 219 p 262.

breach of article 6 of the European Convention on Human Rights. Another remedy may lie for the state's failure to provide a system of effective investigation.[1950] In this regard, in an unprecedented Kenyan case, Citizens Against Violence, Kalenjin Youth Alliance, South Rift Human Rights and Advocacy Centre, the Independent Medico-Legal Unit and 15 individual victims of alleged police brutality inflicted during Kenya's post-2007 election violence sued the AG, DPP, former Commissioner of Police Major General (Rtd.) Hussein Ali and former Administration Police Commandant Kinuthia Mbugua at the Nairobi High Court, claiming neglect to investigate and prosecute senior government officials with murder, crimes against humanity and mass displacement.[1951]

6.10.2. Mutual Legal Assistance and Witnesses' Right to Be Heard

I respectfully disagree with the *Ruto Trial Chamber* majority's suggestion that compelling witness attendance on the part of involuntary witnesses is a function which Kenya's Attorney General is authorized by Parliament to perform under Kenyan law. Rather:

> It is always within the power of Parliament to exclude any matter from the competence of the ordinary courts. The courts are naturally, slow to imply such exclusion. They prefer to regard special procedures laid down by statute as additional parallel procedures rather than as excluding recourse to the courts.[1952]

The silence by Parliament in Kenya's ICA – pertaining to facilitating attendance by *non-voluntary* witnesses at The Hague – coupled with the express command that the Attorney General should facilitate attendance by *voluntary* witnesses, operates as an ouster clause by the legislature expressly ousting judicial authority over the latter, but retaining judicial review in relation to the former citizens. At best, the AG would be required to obtain a judicial order of extradition of against such *non-voluntary* witnesses after an *inter partes* hearing. Because of the "presumption under English statutory interpretation not to create penalties unless expressly imposed,"[1953] therefore, the onus would lie on the AG to establish grounds for limiting the *non-voluntary* witness's liberties. Such grounds may have to evince not only that the state has an *interest* in prosecuting post-2007 conflicts, but also that such interest is both *legitimate* as well as

[1950] *Ibid*. p 263.
[1951] Lucianne Limo, "Post Election Violence Victims Sue Officers," *East African Standard*, 14th February 2013.
http://www.standardmedia.co.ke/?articleID=2000077244&story <accessed on 17th February 2013> See also Khamala, "Legal Aid," *supra* note 762 p 122 footnote 26.
[1952] A.K.R. Kiralfy, *The English Legal System* (London: Sweet & Maxwell, 1990) p 115.
[1953] *Ibid.*

substantial.[1954] These criteria operate in addition to the fact that the ICC Pre-Trial Chamber may have substantial reason to believe that crimes within the court's jurisdiction have been committed. They also invoke the article 53 considerations regarding the balancing issues of victims' dissatisfaction against the interests of justice.

For purposes of argument, it is assumed that the Kenya government is reluctant to prosecute The Hague suspects and therefore is conferring *de facto* amnesties upon them, notwithstanding technical compliance with the Rome Statute. This minimalist response to the post-2007 conflicts may be justified by various arguments. Such arguments are predicated on the fact that criminal trials are neither the only nor necessarily the most effective response to mass atrocities. The ICC prosecutor believes otherwise and hence embarked on a strategy which the Kenyan AG believed jeopardizes security and peace in Kenya. To the extent that criminal trials are inconsistent with the Kenyan government's post-2007 criminal justice policy, then the AG – as the chief legal advisor to the government – is mandated to defend the public interest. For example, suppose an involuntary witness testifies at the Hague proceedings in furtherance of retributive justice. Further suppose that by so doing the wider public interest in Kenya suffers whether by jeopardizing the safety and security of the witness's extended family or by igniting ethnic conflicts. Then the government must take responsibility for the consequences of such future decreased respect for human rights. The Kenyan public would also need to bear with the heightened ethnic tensions raised by trial of the president and deputy president which interfere with other democratic freedoms.

Conversely, assuming all other factors constant – in a politically-stable, ethnically-homogeneous society, where the population has high literacy and advanced economic development – then a zero-tolerance prosecution policy regarding mass atrocities is likely to be effective in increasing democracy and reducing human rights violations. However in a post-conflict society with fragile political institutions, a low-literacy, ethnically-heterogeneous population with low income, then a more balanced approach may be more legitimate. The determination of an optimum post-conflict response should consider the historical and social conditions of the society in question on a case-by-case basis. Some post-conflict situations may foster transitional justice by balancing a "noble lie" based on a truth commission with prosecution of selected perpetrators. Other situations may benefit from "limited" amnesties. Assume that "first-best" cases (where successful revolutionaries impose victor's justice) comprise pure retributive justice responses. Nonetheless, a good judge applies

[1954] Husak, *Overcriminalization, supra* note 639.

the "second best" political morality which reflects the concerns of one's own society, including the choice of leaders and parliament to decriminalize the suspects. The ICC prosecutor, on the other hand, is motivated by different concerns. Because the international prosecutor considers global criteria for investigating and prosecuting suspects and therefore for compelling witness attendance – from the criteria considered by a domestic prosecutor – a conflict of interest arises. The interests of the international community in prosecuting for victim justice diverge from the interests of the Kenyan government of according amnesty for peace and security. How then can co-operation emerge between diametrically opposed interests? If the ICC prosecutor persists in insisting upon such co-operation, the ICC may be likely to be inclined to ultimately refer the Kenya government to the ASP for non-cooperation. In the perception of many Kenyans, sanctioning Kenya is likely to precipitate a legitimacy crisis in the ICC. Kenya has considerable support from African countries in empowering the African Court with jurisdiction over international crimes. That forum may be more sensitive to domestic conditions facing survivor societies in responding to mass atrocities. It is not necessarily irrational to respond to certain mass atrocities otherwise than through retributive criminal trial. The Kenyan International Crimes Act appears fettered by the rule against retrospectivity. It is opportune to recall the book's problem statement encapsulated in the Mbeki-Mamdani thesis is that criminal trials should not be used *to resolve* mass conflicts.

6.11. Compelling Production of Financial and Other Records

6.11.1. Procedural History

In November 2013, in *Kenyatta's case* invoking the Rome Statute,[1955] the ICC prosecutor, both confidentially and *ex parte,* accused the Kenya government of non-compliance.[1956] On its part, the latter opposed the suggestion that it was in non-compliance with its obligations.[1957] Kenyatta's defence filed a response to the Prosecution's *ne bis in idem* submissions, reviving its earlier application "seeking a termination of the proceedings and the issuance of an acquittal pursuant to Article 64(6)(f) of the Statute."[1958] The *Kenyatta Trial Chamber* comprising judges Kuniko Ozaki, Robert Fremr and Geoffrey Henderson

[1955] *Prosecutor v Uhuru Muigai Kenyatta, Kenyatta Trial Chamber,* Judges Kuniko Ozaki (Presiding Judge), Robert Fremr and Geoffrey A. Henderson, Decision of 31st March 2014 Chamber V(B) "Decision on Prosecution's Applications for a Finding of Non-Compliance Pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date." www.icc-cpi.int/iccdocs/doc/doc1755190.pdf <accessed 27th September 2014>
[1956] *Ibid.* 4 para 4
[1957] *Ibid.* p 5 para 5.
[1958] *Ibid.* p 7 para 14 (footnote omitted).

interpreted the prosecutor's obligations[1959] which "clearly envisage…requests for cooperation emanating independently from the Prosecution in furtherance of its investigative mandate."[1960] Furthermore, "the Statute[1961] confirm(ed) the independent authority of the Prosecution to make requests for cooperation." It is noted that "the drafting history of the Statute further affirms this interpretation."[1962] The Chamber unanimously concluded that: "both Articles 93(1) and 99(1) of the Statute explicitly provide that compliance with such requests is to be facilitated under procedures of national law....rather than impede the execution of cooperation requests emanating from the Court."[1963] In order "to form the basis of a collaborative process" therefore the ICC prosecutor's requested assistance which fell "within Article 93(l)(i) of the Statute, being requests for copies of documents and records, including records of accounts, transactions and investigations, as well as various registrations and filings."[1964] Because "the Prosecution has clear authority to make independent requests for cooperation under Article 93(1) of the Statute," and since a narrow interpretation "would require judicial approval...for a significant volume of ordinary investigative steps (and) would be inconsistent with the statutory division of mandates between the different organs of the Court," therefore "a restrictive interpretation of 'the Court' in Article 93(1) of the Statute, as advanced by the Kenyan Government and the Defence, cannot be logically sustained."[1965]

6.11.2. Prosecutor's Request for Finding of Non-Compliance

The *Kenyatta Trial Chamber* noted the monist obligation:[1966]

> to ensure there are procedures for cooperation available under national law. These procedures should facilitate timely compliance with requests for assistance. The Chamber (found) it unnecessary to consider whether or not the International Crimes Act and other Kenyan domestic legislation provides a sufficient basis for executing cooperation requests under Part 9 of the Statute. Any purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court, or to undermine any

[1959] Article 54(3)(c), Rome Statute, *supra* note 14.
[1960] *Kenyatta Trial Chamber,* Decision on Prosecution's Non-Compliance Applications *supra* note 1955 p 12 para 26.
[1961] Article 34, Rome Statute, *supra* note 14.
[1962] *Kenyatta Trial Chamber,* Decision on Prosecution's Non-Compliance Applications, *supra* note 1955 p 13 para 27.
[1963] *Ibid.* p 14 para 31.
[1964] *Ibid.* p 12 para 25.
[1965] *Ibid.* p 11 para 24.
[1966] *Ibid.,* article 88, Rome Statute, *supra* note 14.

application for non-compliance under Article 87(7) of the Statute that may result.[1967]

Moreover, "the Kenyan Government did not initially query the legality of the Records Request....until 9 January 2014...(that) the Kenyan Government unequivocally stated its objection to the Records Request."[1968]

6.11.3. The Prosecutor's Request for Postponement of Trial

Given that "the Rules provides (sic) that '[t]he Trial Chamber, on its own motion....may postpone the date of the trial" therefore the *Kenyatta Trial Chamber* observed "that an adjournment is a discretionary remedy arising from the Chamber's responsibility to control the conduct of proceedings in a fair and expeditious manner."[1969] Considering that it would "be contrary to the interests of justice for the Prosecution to proceed to trial in circumstances where it believes it will not be in a position to present evidence sufficient to reach this beyond reasonable doubt evidentiary threshold" and further "based on a weighing of the interests of justice in this case, including the rights of the accused and the interests of victims"[1970] therefore an adjournment was preferable "in contrast to the more 'drastic' remedy of a stay of proceedings."[1971] Notwithstanding that "the possibility of obtaining sufficient evidence as a result of the Records Request (wa)s highly (s)peculative, and the realistic prospect of otherwise securing conclusive evidence that could support the charges (wa)s 'minimal,' "[1972] and further notwithstanding "the delay in effectively pursuing the request has not been adequately explained"[1973] the *Kenyatta Trial* judges unanimously granted indulgence. They tilted the balance in favour of the prosecution. This was because "the non-compliance on the part of the Kenyan Government (could) be attributed to the accused." However, the judges were quick to add that: "No evidence was provided to support that serious allegation and the Chamber (wa)s not called upon to decide the issue of any such alleged interference"[1974] by President Kenyatta. Nevertheless, the broad latitude given to the prosecution belied the suggestion that "the Chamber ha(d) serious concerns regarding the timeliness and thoroughness of Prosecution investigations in this

[1967] *Kenyatta Trial Chamber,* Decision on Prosecution's Non-Compliance Applications, *supra* note 1955 p 21 para 47 (footnote omitted).
[1968] *Ibid.* p 22 para 47.
[1969] *Ibid.* para 47.
[1970] *Ibid.* p 34 para 76.
[1971] *Ibid.* 37 para 81.
[1972] *Ibid.* p 37 para 82.
[1973] *Ibid.* p 37 para 83.
[1974] *Ibid.* p 38 para 86.

case (it)...consider(ed) it appropriate to caution the Prosecution in that regard."[1975]

In stark departure from Judge Wyngaert's disregard for the notion that a trial chamber's function is to seek the truth, in the *Katanga Notice to Re-Characterize Decision* discussed in chapter four, instead *the Kenyatta Trial Chamber* insisted that:

> the specific circumstances of the present case....in particular, its *truth-seeking function*...the direct reason for the Prosecution's evidence falling below the standard required for trial...appear(ed) to have been the decision to withdraw Witness 12 following his admission of having misled the Prosecution regarding his presence at a particular meeting. However, the present difficulties with the body of evidence upon which the Prosecution relie(d) is clearly the result of multiple interacting factors which have influenced and impacted the manner in which investigations were conducted.[1976]

Because:

> the (International Criminal) Court cannot carry out its mandate without the cooperation of State Parties...it is appropriate to take all reasonable judicial measures to ensure cooperation by States Parties in furtherance of the truth-seeking function of the Court before making a finding of noncompliance and referring the matter to the ASP for its ultimate consideration.[1977]

The *Kenyatta Trial Chamber* took judicial notice of the new special status of the "soon-to-be-accused" persons given that: "Heads of state or relevant government organs therefore have to give effect to the obligations and ultimately have responsibility to ensure State compliance with their treaty obligations. As such, at the very least, the Chamber note(d) the possibility of a potential conflict of interests in this case."[1978] Curiously, the Chamber attributed the prosecution's pre-confirmation "shoddy," "tardy" or "negligent" investigations to the suspect's alleged interference. Yet Kenyatta was not the president in 2010 when initially suspected, and was forced to resign from his position as Finance Minister in January 2012 upon confirmation of charges, although he retained Deputy Prime Ministership. In the absence of evidence of any interference in virtue of Kenyatta's earlier capacity of Deputy Prime Minister, it is unclear how the judges unanimously condoned the prosecutor's three-year delay in conducting investigations only to re-open investigations after he ascended to the presidency and suggest that he was responsible for instigating earlier interference. Under

[1975] *Ibid.* p 39 para 88.
[1976] *Ibid.* p 39 para 90 (emphasis added).
[1977] *Ibid.* p 40 para 92.
[1978] *Ibid.* pp 40-1 para 92.

President Kenyatta's watch, all three ICC trial judges found that due to "unprecedented security concerns relating to victims and witnesses...at least three Prosecution witnesses appear to have withdrawn as a direct result of security concerns."[1979] Consequently, "in his capacity as President, which has the potential to contribute to an atmosphere adverse to the Prosecution's investigation on the ground, as well as to foster hostility towards victims and witnesses who are cooperating with the Court;"[1980] such speculation violates a suspect's presumption of innocence. Yet the Chamber concluded that "these factors amount to unique circumstances, beyond the Prosecution's control, which contributed to a loss of evidence in this case and, consequently, might justify granting a strictly limited opportunity to pursue outstanding investigations at this stage."[1981] Out of abundant caution, the ICC inferred that "should the charges in (*the Kenyatta case*) be withdrawn, the greater the risk of deterioration of evidence and potential prejudice to victims, witnesses and the accused."[1982] Instead they not only yielded to the prosecutor's request for "an adjournment of limited duration, and for a clearly defined purpose which the Chamber consider(ed) necessary...in order to facilitate the execution of this long outstanding request for assistance,"[1983] it also rejected "the Defence Termination Request"[1984] and ordered that the Kenya government's co-operation "process should be carried out in good faith."[1985]

6.12. Consequences for Disobedience of ICC Orders and Non-Compliance with Rome Statute Obligations

6.12.1. Rationalizing Compliance with the Rome Statute under Kenya's 2008 National Accord

6.12.1.1. Failure to Facilitate ICC Investigations

A common observation throughout the normative evaluation of the decisions taken by the ICC's Pre-Trial and Trial Chambers in *the Kenya cases* analyzed in this chapter, is that legal obligation alone cannot explain compliance with ICC orders. Managerial models to compliance therefore lack applicability to *the Kenya cases* before the ICC. First, because the six suspects voluntarily submitted themselves to the ICC's jurisdiction upon receiving summons to appear – which they initially discovered when their names were broadcast

[1979] *Ibid.* pp 41-2 para 93.
[1980] *Ibid.* p 42 para 94.
[1981] *Ibid.* p 42 para 95.
[1982] *Ibid.* p 43 para 96.
[1983] *Ibid.* p 43 para 98.
[1984] *Ibid.*
[1985] *Ibid.* p 45 para 101.

through the media by the Chief ICC Prosecutor. Nonetheless they responded positively to the Court's authorization warrants. Unlike President Omar Bashir of Sudan,[1986] the Kenyan suspects have always attended before the ICC when required. Second, while witnesses appear to have volunteered statements to the investigators, they also appear to have subsequently withdrawn their statements. Several have even claimed that they were coerced by the prosecutor into signing false testimonies.

Third, on the Kenya government's part, it has an ambivalent record. On 1st February 2011, the High Court of Kenya issued injunctions temporarily halting issuance of domestic "taking or recording any evidence from any Kenyan or issuing any summons to any Kenyan for purposes of taking any evidence pursuant to any International Criminal Court process."[1987] Consequentially, domestic court injunctions not only prevented potential witness testimonies of state security officials from being used by the prosecution in support of its case before the Pre-Trial Chamber at the confirmation-of-charges hearing, but also remained in force during 2014. Fourth, on one hand, the Kenya government insisted that the state has voluntarily co-operated with the ICC. To this end, the government had facilitated access of the ICC to Kenyan territory and even accorded its officers diplomatic status. It is possible to claim that the government's challenge – of ICC's jurisdiction over the situation in Kenya – was undertaken within the purview of its legal rights to enter appearance under protest. Such a preliminary point of law enables a party to recognize any forum for the limited purposes of arguing a legal objection that such forum lacks power to preside over the substantive claim. As seen in chapter two concerning complementarity, the Pre-Trial Chamber, as well as Appeals Chamber majority judges however answered the jurisdiction issue in the affirmative. Significantly, only Judge Ušacka disagreed that the Court's complementary procedure accrues. In 2011, she held that Kenyan investigations were "active."[1988]

It is clear that an accused has a right against self-incrimination.[1989] On one hand, in their private capacity no suspect can be compelled by any authority to divulge any information concerning their alleged guilt which may result in their

[1986] *Bashir case, supra* note 140.
[1987] Against Lady Justice Kalpana Rawal (as she then was). The Kenyan Attorney General did not appeal. See *the Kenyatta case* ICC-01/09-02/11-713, 9th April 2013, Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative. Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, para.42.
http://www.icc-cpi.int/iccdocs/doc/doc1577522.pdf <accessed 27th September 2014>
[1988] Lamont, *International Criminal Justice, supra* note 103; See also diagram of the ICC and States modeled p 170.
[1989] Article 67(1)(g), Rome Statute *supra* note 14; See also Rule 74, RPE, *supra* note 1180.

conviction. This rule is part of natural justice, which article 21(3) of the Rome Statute obligates the ICC to apply as "consistent with internationally recognized human rights." On the other hand, the state which is under the control of The Hague suspects is under a diametrically opposite obligation to facilitate ICC investigations – which entails the gathering of relevant incriminating information against the suspects. Is compelling compliance by the state – with its obligations to co-operate with prosecutor – possible in such circumstances where suspects control the state?

6.12.1.2. Rationalizing Non-Complaint Behaviour

Assume that a state adopts and persists in continuing non-compliant conduct. Can its behaviour be transformed from non-compliant into compliant, particularly regarding the prosecutor's requests for the suspect's records in the *Kenyatta case* and/or facilitating attendance by non-voluntary witnesses in the *Ruto case*? What machinery or mechanisms of enforcement does the ICC Trial Chamber possess if it encounters a worst case scenario of persistent state recalcitrance? The analysis of this chapter attempts to rationalize the options which the judges had of proceeding with *the Kenya cases* should they have found that no further prosecution investigations were possible. First, the Chamber may have been forced to require the prosecutor to withdraw its cases for the embarrassing reason of lack of evidence. The state initially co-operated from the moment it invited Ghanaian President John Kufuor, the then AU Chairman on 9th January 2008, and former UN Secretary General Kofi Annan in the last week of January 2008, to mediate power-sharing negotiations until execution of the National Accord. Kenya seemed to have internalized the norm of punishing persons suspected of gross violations of human rights during the post-2008 conflicts. That is why the Waki Commission was established and its work was facilitated.[1990] However as stated above, Commission chairman Waki's envelope was secretly transmitted to Annan so that none of the potential suspects was aware or could emerge to challenge it. Challenges were made by Kenyatta and Ruto in the High Courts, to remove their names from the Kenya National Commission on Human Rights report as they had not been accorded an opportunity to be heard. Ultimately transmission of the Waki envelope to the ICC's first prosecutor Ocampo triggered the announcement of suspects, on 15th December 2010. It is only after that announcement was revealed to the suspects that they eventually received summons and entered appearance at the Pre-Trial Chamber, thus voluntarily submitting themselves to its jurisdiction. Cooperation is a Rome Statute obligation imposed on all Member States Parties. Therefore in

[1990] Panel of African Personalities, *Back from the Brink*, *supra* 1626.

event of non-compliance the state is confronted with the task of rationalizing non-complaint behaviour. [1991]

Second, the Trial Chamber may refer the cases to the ASP citing Kenya for breach of its obligation to co-operate with the ICC. In *the Kenya cases* – so as to override the requirements of the Kenyan International Crimes Act[1992] – the ICC invoked the Vienna Convention on the Law of Treaties. It is submitted that in the event that a state opts for non-compliance, there are multiple rationalizations available through which such states can characterize non-compliance acts. Transposing Christopher Lamont's explanation – from the ICTY context as applied to witnesses rather than suspects – an appeal to a counter-veiling norm has the effect of locking-in non-compliance. While mounting legal challenges to individual orders or citing an inability to locate an accused or witnesses, allows for the non-compliant state to rationalize a compliance act as fulfillment of an accepted legal obligation at a later date.[1993] The blocking of issuance of warrants by the domestic court in 2011 – for government personnel and policemen which remained in force as at 2014 – rationalizes Kenya's action as intending to comply after the resolution of that High Court case or discharge of the injunction order. However, the ICC has never entered appearance to challenge the Kenyan High Court's order. Another example is the inability of the government to disclose records relating to Kenyatta's wealth. The state rationalized its efforts by stipulating that the prosecution's request was too vague and amounted to delegating its task of investigations to the Kenya government. Technically, this is considered as compliance with the Rome Statute obligation of co-operation. The ICC Trial Chamber is limited in the way it could confront non-compliant behaviour by a Member States Party. Its second option would be to adhere to legal processes set out in the Rome Statute's referral of the non-compliant state to the ASP. It has been argued in the preceding section that referral to the ASP seems futile, given that the November 2013 ASP meetings were seized of the witnesses issues and decided that the calling of absentee witnesses would have prospective and not retroactive effect. Nonetheless, Lamont observes that citing a non-compliant state serves as a public forum at which such state can be publicly named and shamed.[1994] He would assess this as a powerful normative tool with which the ICC could galvanize third party state enforcement action outside the ASP.

[1991] *Ibid*. p 169. An analogy of ICC citation and reporting to the ASP may be modeled based on diagram in *ibid*. p 171.
[1992] ICA 2008, *supra* note 610.
[1993] Lamont, *International Criminal Justice, supra* note 103 p 170.
[1994] *Ibid.*

Third, assuming that the ASP makes a finding that Kenya has indeed withheld co-operation from the prosecutor in breach of its obligations under the Rome Statute, then the annual meeting may declare that it deplores the conduct of the member state. The ASP may even demand that Kenya should improve its compliance record under the Rome Statute by enhancing co-operation with the prosecutor. However the only action contemplated under the Rome Statute "is restricted to the theoretical realm."[1995] Nonetheless, since third party states may regard such recalcitrant state as stigmatized and therefore apply diplomatic or economic sanctions against it, such declaration may, however, attract indirect consequences. Under this "coercive model" in anticipation of any adverse diplomatic or even economic sanctions, Kenya would be advised to consider counter-veiling evasive measures such as turning eastwards towards increasing diplomatic and trade relations with China. Indeed, immediately prior to the March 2013 presidential elections, the international community, particularly The US African Representative Carson warned Kenyans that "choices have consequences."[1996] Some examples of Western backlash against the Jubilee government include both the US and UK issuing travel advisories against visiting Kenyan coastal town of Mombasa. UK has imposed a ban on *miraa* (narcotic) which was a significant blow to the economy of the Eastern province communities of Meru. Guzman's theory of compliance[1997] buttresses the assortment of international relations theories discussed in the introductory chapter. Non-co-operation with international obligations is consequential as predicted by both neorealist and neoliberal institutionalist theories. Kenya has continued seeking friendlier relations with Far East countries, i.e. China etc.

Under article 93 of the Rome Statute, Kenya is confronted with dealing with the legality of ASP obligations to co-operate with the ICC Trial Chamber through an appeal to countervailing norms or accepting the jurisdiction of the ICC. In this regard, Kenya has appealed the *Ruto Trial Chamber's* decision compelling Nairobi to co-operate with the prosecutor to facilitate attendance by non-voluntary witnesses.[1998] On his part – by the time of writing this chapter – President Kenyatta had voluntarily disclosed some of his bank statements to the prosecution[1999] and co-operation, although deemed less than satisfactory, was

[1995] *Ibid.*
[1996] Brown and Raddatz, "Dire Consequences or Empty Threats?" *supra* note 37.
[1997] Guzman, "A Compliance-Based Theory," *supra* note 105.
[1998] 12th May 2014, The Government of the Republic of Kenya's Request for Leave Pursuant to Rule 103(1) of the ICC Rules of procedure and Evidence to join as Amicus curiae and make Observations in the Applications by the Ruto and Sang Defence Teams for Leave to Appeal the Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation http://www.icc-cpi.int/iccdocs/doc/doc1776000.pdf <accessed 22nd July 2014>
[1999] Walter Menya, "State Complies with ICC Directive on Uhuru's Cash, Property Records," *Daily Nation*, 5th July 2014.

ongoing. Nonetheless, the state reserved the right to challenge the Trial Chamber's decision compelling co-operation. However, the point is that more flagrant violations – such as simply ignoring arrest warrants against a non-voluntary witness or a request order to furnish information regarding Kenyatta which intrudes into private materials held by third party banks or even official registries – absent a legal rationale in the Rome Statute, are incompatible with an acceptance of ICC jurisdiction.[2000]

If third party states impose direct sanctions, Lamont would suggest that this indicates that ICC does not exercise normative pull over Kenya. Such disobedience is exhibited by Sudan – a non-member state. Hence arrest warrants are alive – as at the date of concluding this book – for the arrest of President Omar al-Bashir whenever he enters the jurisdiction of a Rome Statute member party. By enforcing the Rome Statute such "external" pressure aims at restoring respect for human rights. In an extreme situation, of continuing gross human rights violations, liberal democracies are under a "responsibility to protect" which may entail military intervention of an outlaw state to prevent violations of international humanitarian law and restore democracy. In 1999 NATO invaded Kosovo. USA as the world's remaining superpower forced Serbia to co-operate with the ICTY at The Hague by enforcing warrants against accused persons.[2001] Whether or not a "power-centric" approach will be adopted by powerful countries in *the Kenya cases* remains to be seen. Indeed the international community's interests are always changing and never static. It must be emphasized that Kenya is not an outlaw state. Moreover, as John Rawls argues, liberal democracies must tolerate and co-exist with decent, non-liberal, well-ordered, hierarchical peoples. Kenya has sought support from the African Union and East African Community. The AU has demanded that the ICC refer *the Kenya cases* for disposal by Kenyan courts.

It follows that, at best – the role of the ICC or ASP or even affected third party states – regarding enforcing Kenya's compliance with orders – whether to surrender information or facilitate attendance by non-voluntary witnesses, lies in persuasion. Extradition of suspects is predicated upon domestic court orders. The ICC's outreach activities must inspire Kenyan citizens about the fundamental value of "universal" human rights and also their patriotic duty to testify in support of the criminal law. On its part, Kenya's political strategy has

[2000] The ICC and other Third Party States may be modeled based on diagram in Lamont, *International Criminal Justice, supra* note 103 p 172.
[2001] Slobodan Milošević was a Serbian and Yugoslav politician who was the President of Serbia from 1989 to 1997 and President of the Federal Republic of Yugoslavia from 1997 to 2000.
http://en.wikipedia.org/wiki/Slobodan_Milo%C5%A1evi%C4%87<accessed 27th September 2014>

oscillated from soliciting support from the UNSC for deferral to seeking to amend the Rome Statute to accord immunity to sitting presidents and even support of the African Union to show solidarity by withdrawing from the Rome Statute *en mass*. The AU's 30th June 2014 Malabo Protocol mooted conferring jurisdiction on the African Court of Justice and Human Rights over international crimes. This chapter is therefore justified in exploring, first, the extent to which a state can act to create and even entrench counter-veiling norms which can constrain such state's ability to co-operate with ICC. Second, whether or not the decision by the Kenyan Supreme Court upholding the election of the two key Hague suspects as Kenya's president and deputy president effectively created conditions under which Kenya's co-operation with the ICC in *the Kenya cases* was no longer feasible in the short term.[2002]

6.12.2. Towards Internal Participation in International Justice in Kenya

This chapter recognizes that it not possible for the state to prevent harm from happening altogether. Nonetheless, the constitutional guarantee of equality means that upon violation of human rights, the state is obligated to ensure due process. Considerations of maintaining collective peace in a fragile state may be valid. Because some post-2007 victims may possess material evidence, therefore, in alternative to the *aut delegare aut judicare* (extradite or prosecute) maxim, it is possible for the state to instead compensate such victims *in lieu* of domestic criminal prosecution. An international criminal justice norm which recognizes the Domestic Tort Law model or endorses compensation for victims *in lieu* of prosecution may be encapsulated by recognizing a new norm requiring states to either *compensate or co-operate*. Hence the international prosecutor's interpretation of such genuine political processes – whether truth commissions or other reparations which accord conditional amnesties – may encourage extra-judicial settlement attempts such as power-sharing, constitutional, electoral and judicial reform. This is preferable to creating conditions which stifle collective memory and truth or instead fostering witness interference or bribery. Pure retribution or maximalist approaches may be inconsiderate of African customary criminal law responses which are compensatory, moreso in response to political disputes.[2003]

6.13. In Lieu of a Conclusion

Antonio Cassese points out that: "So long as states retain some essential aspects of sovereignty and fail to set up an effective mechanism to enforce arrest

[2002] Diffuse subjects of Article 93 Obligations may be modified based on diagram by Lamont, *ibid.* p 177.
[2003] *AZAPO, supra* note 307.

warrants and to execute judgments, international criminal tribunals may have little more than normative impact."[2004] For Cherif Bassiouni, a direct enforcement system for international criminal law is "a regime applicable to international judicial institutions which have the power of enforcing their orders and judgments without going through states or any other legal authority."[2005] He cites the Nuremberg and Tokyo tribunals as the only historical examples of such a regime made possible, courtesy of victor's justice.

Unlike *ad hoc* "international criminal tribunals (which) depend on states for their creation," instead: "With regard to the existing permanent International Criminal Court (ICC), the Statute of Rome represents a deepening institutionalization of a *limited* international criminal tribunal system that depends on state co-operation."[2006] To paraphrase Lamont, it is because the ICC is a permanent institution without temporal or territorial limitation over states over which it exercises jurisdiction, that it was vested with significantly less authority than the *ad hoc* UN tribunals for the former Yugoslavia and Rwanda.[2007]

However, Stephen Krasner points out that:

> …neorealism, neoliberal institutionalism and sociological perspectives] cannot analyze questions involving political entities that are not fully autonomous…such entities even if they are called states, are considered not just by the power of other states but also by externally imposed domestic conditions.[2008]

The relevance of Krasner's observation is pertinent to *the Kenya cases* where the majority judges have nonchalantly found the commission of crimes against humanity by constituting both the "Network" and Mungiki as "state-like organizations." However, chapter three showed that the Network's criminal actions cannot be distinguished from its existence, while chapter four demonstrated that the Kenya government contains Mungiki's sporadic criminal behaviour. Neither of the two informal groups are found to possess systematic features with an independent legal personality or corporate structure. It is suggested by Jalloh that the Rome Statute should recognize this gap. Rather than permit judges to engage in judicial activism or creativity to invent indirect co-

[2004] Cassese, "Self-Determination of Peoples," *supra* note 52 p 17, cited in Lamont, *International Criminal Justice, supra* note 103 p 24.
[2005] M. Cherif Bassiouni, *Introduction to International Criminal Law* (New York: Transnational Publishers, Ardsley, 2003) p 18 cited in Lamont, *ibid.*
[2006] Lamont, *ibid.* p 25 (emphasis added).
[2007] *ibid.*
[2008] S.D. Krasner, "Compromising Westphalia" (1995–1996) *International Security*, 20(3): 115–151 p 147, cited in *ibid.* p 25.

perpetratorship to punish violence by tribal groups, the ASP should criminalize informal groups. Another scholar Jens David Ohlin has devised a horizontal organizational criminality model. But no amendment of substantive international crimes has been discussed at the Assembly of States Parties.

From 20-28th November 2013, civil society from across the world joined states and other stakeholders in The Hague for the 12th annual meeting of the ASP to the Rome Statute of the International Criminal Court (ICC).[2009] States agreed to allow those mandated to fulfill "extraordinary public duties at the highest national level" to request excusal from presence at trial and to be represented by their legal counsel. However, it would be for ICC trial judges to decide on any request taking into account a number of factors, including the interests of justice and the nature of the hearing in question. The rule would only apply for persons under summons to appear. The possibility of allowing the accused to appear via video-link in the courtroom was also part of this rule change.[2010] Under Rule 134ter:

> 1. accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.
> 2. The Trial Chamber shall only grant the request if it is satisfied that: exceptional circumstances exist to justify such an absence;……
> 3. Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.[2011]

Other rule changes adopted by the ASP at that meeting concerned allowing the use of recorded testimony in proceedings, and giving trial judges the power to decide on holding hearings outside The Hague. Not only was the issue of redefining individual criminal responsibility not on the agenda, but also statements by absentee witnesses were specifically considered as inadmissible for *the Kenya cases*, and only admissible in future. This suggests that the ASP was clearly aware of the prosecutor's obstacles in *the Kenya cases* and she has been denied the remedy she sought of being able to adduce and therefore rely on the statements of absentee witnesses.

[2009] Coalition for the ICC, *supra* note 1796.
[2010] "The Assembly of States Parties concludes its twelfth session" 29th November 2013 http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf <accessed 19th July 2014>
[2011] Rule 134ter, Rome Statute, *supra* note 14.

The question lingers of how Member States Parties, like Kenya, should co-operate with an order which – from its domestic perspective is apparently *ultra vires* the ICC's power. Considering that the complementarity doctrine confers less power on the ICC regarding enforcement – not only than a domestic court, but also than the *ad hoc* tribunals – under which circumstances can full co-operation be expected and when can it be withheld? Article 93 encompasses a broad range of obligations which include providing access to witnesses and documentation. Thus any study of compliance must recognize that although article 93 obligations for co-operation appear clearly intended to exclude facilitation of non-voluntary witnesses, the ICC majority judgment compelling the Kenya government to facilitate their attendance in *Ruto case* seems to suggest that the government is somehow party to the disappearance, intimidation or other bribery of the witnesses. Conversely, the minority judgment correctly recognizes that the safety arrangements should be made by the ICC's relevant Victims and Witnesses Unit. Failure to allocate sufficient resources for this purpose should be an issue for which they revert to the ASP. The irony is that Judge Kaul's dissenting judgment at the Pre-Trial Chamber stage of *the Kenya cases* warned about this exact problem of lack of resources. The *Ruto Trial Chamber's* majority's decision seems to require the ASP on its part, to then either – increase the ICC's budgetary allocation to the Victim's and Witnesses Unit as well as endorse a proposed amendment to the definition of what constitutes a crime against humanity[2012] – or establish guidelines to regulate a rogue prosecutor from pursuing frivolous cases against informal groups. Given the African context where all action may be interpreted from its wider social context, it seems possible to associate a leader with the violence of every low-level member of the tribe.

[2012] "The Rome Statute of the International Criminal Court" in Kevin Jon Heller and Markus D. Dubber (eds.) *The Handbook of Comparative Criminal Law* (Stanford, California: Stanford, University Press, 2011) 593-634.

CONCLUSION

RECONCILIATION OR RETRIBUTION?

7.1. Mass Atrocities as a Crazy Case

I have sought to explanatorily interpret the ICC's response to alleged crimes against humanity committed during Kenya's post-2007 conflicts. The background to the alleged crimes is that Kenya was undergoing transition from authoritarian to democratic rule when the ethnic conflicts erupted. Besides Kenya being classified as a low-income economy, it has an ethnically heterogeneous population. Mass atrocities were depicted as a complex social phenomenon. Theoretically, a *lone genocidaire* is possible. Practically, however, widespread atrocities are committed by groups. African societies retain strong social bonds. Consequently, it is more difficult to attribute any activity to individual members of an ethnic group. While positive ethnicity may harness social capital for development, negative ethnicity is exclusionary and may even be directed for criminal enterprise.

7.1.1. Victims

Three dimensions of mass conflicts each comprise four competing interested actors in democratic transition. The first category of victims comprises the dimension of people who suffer core physical harms. At least four categories of victims were identified. 1,333 killed, 900 raped, tens of thousands assaulted and violently robbed, hundreds of thousands who fled their homes or lost valuable property. These visible casualties attract immediate and emotive attention, particularly persons in desperate need of humanitarian assistance – whether material provisions or counselling for post-traumatic stress disorders. Within this first category of direct victims there emerge communities of care. This sub-group accommodates those directly impacted by physical attacks. Their lives are altered by unexpected responsibilities which constitutes a ripple effect. The second sub-group includes witnesses to mass atrocity whose evidence, if preserved, may be useful – in the reconciliation or prosecution process – whichever is deemed appropriate.

The second category of victims, in the Kenyan transitional situation comprises millions of individuals who suffered in previous episodes of mass atrocities and who perceive their grievances as being as valid as the current victims.

Colonialism endorsed a "might is right" model of international law.[2013] Therefore during the decade preceding Kenya's independence, Mau Mau freedom fighters suffered gross human rights abuses.[2014] It was not until Britain's recent acknowledgement and apology that any victim reparation action has been taken for Kenya's pre-independence atrocities.[2015] Furthermore, before 1998, no permanent International Criminal Court existed. Therefore victims of historical injustices as well as crimes during the 1990's tribal clashes remain uncompensated for personal injuries or losses incurred. Nonetheless, if current victims claim retributive justice or are compensated – assuming a duty to reparate victims emerges – then past victims may feel equally entitled to stake valid claims. They await governmental debate and action on the Kenyan Truth, Justice and Reconciliation Commission Report currently pending before parliament, rectificatory justice for the Mau Mau and others is being pursued before London courts.

A third variety of potential victims, ironically, may arise from among individuals wrongly charged or suspected of wrongdoing. This category is recognised and protected by the common law principal of opportunity. Under adversarial systems, it better for nineteen guilty persons to be wrongly acquitted than for one guilty suspect to be wrongly convicted of a crime he or she did not commit.[2016] Conversely, under the legality principle, civil law prosecutors possess no discretion to decline to prosecute in the public interest. Rather, as chapters three and four of the book have explained despite international criminal procedure having a strong civil law component, nonetheless an legality principle imposes a mandatory requirement on civil law prosecutors to prosecute each and every case with sufficient evidence. To this end, the Pre-Trial Chamber mimics inquisitorial systems, where investigating magistrates assist in preparing a *dossier*. Moreover, the ICC Trial Chamber judges are thereafter even empowered to re-characterize the charges anytime before judgement. The

[2013] Steve Smith, Ken Booth and Marysia Zalewski (eds.) *International Theory: Positivism and Beyond* (Cambridge University Press, 1996).
[2014] Huw Bennett, *Fighting Mau Mau: British Amy and Counter Insurgency in the Kenya Emergency* (Cambridge: Cambridge University Press 2013); See also David Anderson, *Histories of the Hanged: Britain's Dirty War and the End of Empire* (London/Wiedenfield and Nicolson, 2005); Caroline Elkins, *Britain's Gulag The Brutal End of Empire in Kenya* (London: Jonathan Cape, 2005).
[2015] Clar Ni Chonghaile, "Kenyan Mau Mau Veterans Celebrate Victory in UK Torture Damages Case: Veterans clap, cheer and dance as news comes through from London of high court ruling that they can claim compensation."
(Nairobi: *The Guardian*, 5th October 2012).
http://www.guardian.co.uk/world/2012/oct/05/kenyan-mau-mau-veterans <accessed on 6 October 2012>; Britain apologized in mid-2013 and settled the claim out of court.
[2016] John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed.) (Boston: Little, Brown and Company, 1940).

impact of this array of procedural artillery tends to generate acute uncertainty on suspects.

Finally, the Mbeki-Mamdani thesis draws attention to a fourth category of potential victims. They claim that the use of criminal trials to resolve mass conflicts, may backfire. In pursuing retributive justice, instead of consolidating peace, the fragile survivor society may disintegrate. Invariably, amid such renewed chaos a class of new victims may emerge. This situation is highly likely where suspects possess constituencies. The consequentialist interpretation of *the Kenya cases* advanced throughout the book emphasized that ICC judges should not underestimate the real likelihood of renewed ethnic conflicts in Kenya's Rift Valley. Thus, a limited exception by way of conditional amnesties for top leaders may be appropriate.

7.1.2. Perpetrators

The second dimension of widespread social conflicts comprises the offender class. Chapter one of the book introduced expressive deterrence, proposed by Cronin-Furman and Taub as an effective goal which explains the purpose of international criminal law in containing impunity at the national level. Chapter one further drew upon D'Amato's Domestic Tort Law model which explains how domestic leaders may be rewarded by non-prosecution as a trade-off for settling civil wars. It was noted that, courtesy of both internal and external influences, Kenya's post-2007 negotiations culminated into a power-sharing agreement under the 2008 National Accord. Internal actors were reconciled by ethnic balancing among the political class. External actors were led by the AU, but strongly influenced by Western donors. Ultimately, exclusion of civil society and individual activists undermined the implementation of criminal trial responses to the post-2007 conflicts. Instead, a Government of National Unity endorsed power-sharing as an ethnic-balancing formula. Because criminal prosecution was not enshrined into law, the National Accord effectively conferred *de facto* amnesty on any mass atrocity suspects. Meanwhile upon parliament's failure to establish Special Criminal Tribunals recommended by the Waki Report, a list of suspects was delivered to the ICC Chief Prosecutor.

Mass atrocity perpetrators, according to Cronin-Furman and Taub, are not restricted to self-driven individuals who murder, maim or burn. A second kind of perpetrator lacks equipment, money or know-how. Roxin shows that without assistance, such principal offenders or "actors-up-front" would not possess capacity to commit an international crime. The accessory comprises a third kind of offender. Because the "actor-behind-the-scenes" controls the fungible *Frontmann*, therefore the *Hintermann* is construed as bearing the greatest

responsibility for the international crime. Finally, a fourth kind of offender who was not immediately relevant to the charges in *the Kenya cases*, is a commander who commits "crimes by omission." International criminal law imputes command responsibility on superiors upon their failure to prevent or punish subordinates. The problematic aspect with *the Kenya cases* emerges from the fact that they do not comprise *manifest criminality*. Unlike Nazis at Auschwitz or Apartheid South Africa, which conspicuously displayed radical evil, none of the Kenyan suspects belongs to a genocide club. Moreover, on a literal and historical interpretation of the Rome Statute, neither "the Network" in *Ruto's case* nor Mungiki in *Kenyatta's* possessed the requisite features to qualify as "state-like" organisations. Consequently, the suspects' defences argued that the ICC Prosecutor identified them for prosecution – based on second-hand hearsay retrieved from NGOs – but without conducting adequate forensic investigations. Chapter three observed, *inter alia*, that the definitions of "state-like" organizations may not necessarily proscribe violence by informal groups. Yet the ICC Pre-Trial Chamber majority judges engaged in judicial activism to construe that term to apply to both "the Network" and Mungiki in *the Kenya cases*. Conversely, the minority opinion of Judge Hans-Peter Kaul rejected the majority judges' expansivism. Nonetheless, the confirmation of charges was successful against four Kenyan suspects, William Ruto, Joshua Sang, and Francis Muthaura and Uhuru Kenyatta for individual criminal responsibility based on indirect co-perpetration (Sang allegedly contributed).

7.1.3. Institutions

The third dimension of mass atrocities comprises the officials whose responsibility it is to protect citizens. The book traced the origin of sovereignty to the 1648 European Westphalian Treaty. It is by promising security and inspiring religious awe that the Hobbesian Leviathan or state acquires legitimacy. However, such concentrations of power not only repress criminals and repel foreign invaders. Unfortunately, tyrants may turn their power to punish their own citizens. Whether coincidentally or by design, the 1948 UN Universal Declaration of Human Rights lacked any enforcement mechanism. It took until 1998 for the international community, in recognition of its "responsibility to protect," to establish the Rome Statute which provides the means by which the international community punishes the worst crimes known to mankind. Chapter two explained that the ICC Member States Parties to the Rome Statute ceded state monopoly over the international community's power to punish through reverse complementarity. Because the ICC possesses power to issue binding orders and further because states have agreed to defer to the ICC's interpretations of the Statute, therefore in event of a dispute between a state and the ICC, the ICC's interpretation is supreme. Its judges even supervise the

prosecutor's decision to prosecute. However, chapter six explained that because the ICC lacks a police unit, without state-co-operation the OTP cannot not encroach into national territories. Therefore, any breach of its orders must be referred to one of two other institutions, the UNSC or ASP for enforcement.

In addition to any Member States Party which may report mass atrocities, ICC jurisdiction may be triggered by two other institutions. If, as in *the Kenya situation,* the conflicts were referred to the ICC by the prosecutor, *proprio motu*, then the judges may cite any non-compliance to the ASP. Such a possibility looms over the prosecutor's accusation that the Kenya government has refused to co-operate in *the Kenya cases*. Finally, the UN Security Council is mandated under the UN Charter to oversee international peace and security. The UNSC not only authorizes military invasion, to intervene in a conflict. It may also resolve to either establish a post-conflict *ad hoc* tribunal or refer conflicts to the ICC. The book does not focus on the political intrigues involving the African Union's interaction with the ICC. Nonetheless – on the arguments advanced by the Mbeki-Mamdani thesis,[2017] explained in the introductory chapter – to the extent that amnesty for suspected perpetrators was essential as a trade-off to end Kenya's post-2007 conflicts and facilitate transitional justice, it would clearly be counter-productive to resort to criminal trials before the political dispute had been resolved.

7.2. Evaluation: an Explanatory, not Expansive Interpretation

On one hand, a clear "red light" theory[2018] or due process model informs some of the ICC's judges who adopted historical and textual interpretations of the Rome Statute to craft restrained judicial decisions in the *Kenya cases*. In *Kenya's challenge against admissibility*, the post-2007 investigations in Kenya were interpreted as active. In the dissenting opinion of Appeals Chamber Judge Ušacka, therefore the Kenya government showed genuine will and ability to investigate and prosecute the cases domestically. Displaying a similar due process approach at the Pre-Trial stage, Judge Kaul rejected the prosecutor's evidence and theories. In his dissenting judgments, warrants should neither have been authorized, nor should either of *the Kenya cases* have been confirmed for trial. The positivist or contextualist series of judgments include Trial Chamber Judge Wyngaert's which further decried the prosecutor's inadequate investigations, pertinently in *the Kenyatta case*. However, unique circumstances dissuaded the *Kenyatta Trial Chamber* from terminating further investigations. Nonetheless, Judge Wyngaert's concurring *Katanga* judgment expressed scathing criticism of the prosecution's failure to comply with its obligations and

[2017] Mbeki and Mamdani, "Courts Can't End," *supra* note 20.
[2018] Harlow and Rawling, *Law and Administration*, *supra* note 1574.

government to compel attendance by involuntary witnesses at *the Ruto Trial Chamber*. Her interpretation of the relevant provisions of the Rome Statute clearly imposed a limited obligation on State Parties to facilitate attendance by voluntary witnesses. Therefore before compelling involuntary attendance, the ICC must first guarantee safety, which clearly neither the Prosecutor nor the VWU had done. In conclusion, pre-trial jurisprudence proponents of this positivist approach suggest that a due process interpretation should have been given to the Rome Statute in its application to the facts in *the Kenya cases*. If the Appeals Chamber exercises judicial restraint, then *the Kenya cases* should be terminated as against both President Kenyatta and Deputy President Ruto. In *the Ruto case* the hostility of involuntary witnesses is likely to result in natural termination of the cases against Ruto and Sang even before the suspects are put on defence. However, the situation of Sang involves contribution which is based on recorded broadcasts the analysis of which are peripheral to my core argument. On the other hand, clear crime control or "green light" judicial activism appears in the decisions of a majority of ICC judges who use a teleological, purposive and "basic human values" test to interpret the Rome Statute. These constitutionalists regard the ICC as an international organization which demands an expansive interpretation of the letter of its provisions so as to give expression to the spirit of the mandate as stated in its preamble. The purpose of international criminal justice to them is to not only to punish, but also to prevent the perpetration of the worst crimes known to mankind. For these reasons, in the Kenya situation, the majority of Pre-Trial Chamber judges expeditiously dismissed the Kenya government's admissibility challenge on grounds that Kenya had delayed commencement of any investigations and prosecutions. Similarly, the confirmation of both cases by Pre-Trial majority judges found that the evidence had attained the "substantial reason to believe" threshold by contriving a hitherto unknown offence called "indirect co-perpetrator" under the Rome Statute. Such ambitious judicial activism is predicated on advancing the ICC's mandate is to punish and deter crimes against humanity.

7.3. The Impact of Kenya's 2013 Presidential Elections on the ICC Cases

Chapter four focused on the procedural unfairness emanating from the ICC Trial Chamber's potential to re-characterize charges before judgment. On one hand, such power can achieve the ICC's mandate since flexibility enables the Trial Chamber to overcome *technical* defences which may otherwise result in acquittal of a guilty accused. On the other hand, even assuming that potentially incriminating evidence is available to the prosecution, the accused should be availed a fair opportunity to defend himself against it. Without notice of clearly

defined charges, it is not practical to effectively defend a suspect against all possible speculative accusations. Yet in *the Kenyatta case* the prosecutor not only admitted knowingly relying on false evidence before the Pre-Trial Chamber, but also lacked sufficient candour to disclose the fact of withdrawal of that witness's false affidavit, to the Pre-Trial Chamber and suspects. Nonetheless, the Trial Chamber retained an activist stance – not only permitting the continuation of the case, but even indulging the prosecutor to open post-confirmation investigations.

In 2014, the ICC Trial Chamber unanimously directed the Kenya government to co-operate by facilitating investigations into evidence regarding President Kenyatta's wealth, including as appears from cash flows in his bank accounts made contemporaneously with the post-2007 conflicts. Kenyatta voluntarily provided his own bank statements. However, the prosecution complained that the information was insufficient. Before *the Ruto Trial Chamber,* several witnesses recanted their statements. Once again, in response to a request by the prosecutor to require co-operation by the Kenya government regarding attendance of involuntary witnesses before that Trial Chamber, the majority judges adopted a crime control interpretation of the Rome Statute. The constitutive approach reasons as follows: Given that pursuit of the truth is the ICC's mandate and further because the ICC possesses identical jurisdiction as a Kenyan court, therefore, failure by Kenyan courts to prosecute necessarily transfers the contempt of court powers of Kenyan courts to the ICC. Chapter six expressed skepticism about the majority's "green light" argument in one particular *Ruto Trial Chamber* decision. That Trial Chamber correctly chose a comparative example of the Canadian situation as a Commonwealth jurisdiction where the fundamental right to privacy is not absolute and is subject to derogation. Yet the Chamber failed to show the mechanism by which such provision of derogation is applied. To their credit, the "constitutive" judges did not simply assume that mere existence of the derogation provision meant that the prosecution are always entitled to derogate from a citizen's liberty. Nonetheless, the premise of those majority Trial Chamber judges in requiring the Kenya government to compel involuntary witnesses to attend is that they seem to shift the burden on to citizens to prove their right to liberty, the wider public interest or are oblivious to security concerns. This is a mistake. It is my contribution that all citizens – not only suspects but more so – international witnesses are innocent bystanders and entitled to exercise their liberty as regards the information they possess. A law, decision or order which requires a witness to put the interests of others before his own imposes a value judgment that such other life or interest of such other person or victim is more important than that of the witness. Yet as Rawls's *Law of Peoples* demonstrates, the international legal system is not utilitarian. Even assuming such cost-benefit analysis, then for

compulsion of involuntary witnesses, *the Ruto case* prosecutor should show how the social benefit of the act of witness attendance before the Trial Chamber exceeds the social cost.

Chapter five showed how the Kenya Supreme Court interpreted the 2010 constitution to uphold Kenyatta and Ruto's overwhelming victory at Kenya's 2013 presidential elections over – the *perceived* instigator of The Hague process – the ODM's Odinga. It was conjectured in chapter five that the victory by the "coalition of the accused" would render Kenya's dwindling co-operation with the ICC less reliable. The international community threatened Kenyan voters that "choices have consequences," meaning that should Kenyans support Jubilee, and further should Kenya fail to co-operate with the Hague process, then such a decriminalization policy or *de facto* amnesty may impact adversely not only on the suspects, but even on the state. Chapter five further demonstrated that the precedent by the Kenyan Supreme Court in its decision of the 2013 presidential election petition cases is binding Kenyan law. An analysis of the fieldwork of this book found that the overall approach by the unanimous Kenyan Supreme Court judges in arriving at their decision of excluding unconstitutionally-obtained evidence was based on a textual rather than expansive reasoning of the relevant constitutional provisions. I argue that the six top-most judges in the country – undertook the relevant cost-benefit analysis, albeit inarticulately, which excluding unconstitutionally-obtained evidence entailed. In their wisdom, the men and woman who were entrusted with the responsibility to authoritatively make the value judgment of whether the ethnically-heterogeneous, fragile and low-income post-conflict Kenyan society would benefit from a run-off, declined that route. The Kenyan Supreme Court could have chosen to compel the IEBC, its information officials and others involved to testify before the court to reveal the required "factual truth." However, the social cost of such act of investigating for circumstantial evidence at the 2013 presidential election petition, was rejected under the guise of "fidelity to the law."

If the Kenyan Supreme Court had chosen to permit the main petitioner's further affidavit, then there was a real likelihood of either a run off or even transfer of power to the main rival, Odinga. The co-operation by the Kenya government with The Hague regarding either *Muthaura's case* or also the others may also have been determined differently. As it stands, the Kenyan Supreme Court judges adopted a due process theory. Chapter six analyzed the legal provisions under Kenya's International Crimes Act in which compulsion of involuntary witnesses is sought by the ICC. In sum, the due process reasoning of Judge Carbuccia's decision restricts the Trial Chamber from invading the suspect's rights under the principle of legality. Her decision respects the positivist

technicalities under which the Rome Statute is domesticated into Kenya. Under dualism, the international community comprises sovereign states which are only bound by international treaties to the extent provided under a restrictive reading of the text contained in a treaty. Furthermore, chapter six observed that under common law's administrative law, Kenya's Attorney General is a creature of statute and it is not possible for the ICC OTP to delegate its investigations by requiring him to facilitate the transfer any involuntary witnesses. Legally, pursuant to the ICC order that the AG should co-operate with the ICC prosecutor, the AG may, at worst, advise the DPP to seek a court order to impinge on the involuntary witnesses' liberties. Instead, the AG facilitated domestic video link. After service by Kenya's police, some witnesses testified.

7.4. Conclusion and Recommendations

7.4.1. Conclusion: Whither the Waki Report?

The gaps in the applicable Rome Statute provisions which are claimed to regulate the factual circumstances in *the Kenya cases* were examined in chapter three. After critically evaluating various judicial activist judgments by the ICC chambers, including in chapter four, a comparison with the *Katanga Trial* judgment which belatedly recharacterized its charges, chapter six then returned to the vexing issue of the extent to which the Kenyan government remains obligated to co-operate with the ICC. Ultimately, from an "internal" perspective I argued that using a consequentialist interpretation of the situation, the Kenya government, is not justified in changing its criminal justice policy towards the post-2007 conflicts so as to endorse a criminal trial response. Given the delicate circumstances of this crazy case, it is possible to simultaneously comply with the Rome Statute as well as reject criminal trials. A consequentialist interpretation of Kenya's International Crimes Act[2019] invokes two reasons. First, the majoritarian support from the democratic domestic bystander community. Second, because the risk of further ethnic conflicts which may erupt upon responding by using criminal trials exceeded the losses already inflicted upon victims of the post-2007 conflicts. Hence the greater good may lie in according "limited" amnesties to suspects.

Judicial creativity entails estimating and factoring in the potential consequences of a judgment. Such legal reasoning competes against the persuasive power of teleological or purposive judgments which stand accused of advancing neo-liberalism. From a practical perspective, beyond seeking effectiveness through referring rogue states to the ASP for external reputational shaming, the ICC

[2019] Kenyan ICA, *supra* note 609.

would do well to enlarge its outreach capacity to generate internal support for its universal mandate among citizens of the world. Such civic education would be contingent upon demonstrating the international prosecutor's neutrality, objectivity and even-handedness. Thus an amendment of the Rome Statute should ensure on one hand, that the OTP receives enhanced capacity for forensic review of evidence. On the other hand, there is also need to incorporate an explanatory interpretation of the diverse legal traditions and values which embrace domestic use of legitimate reconciliatory processes in response to mass atrocities. The Kenyan survivor society perceived judicial activism by ICC's majority judges as unreasonable.

The Rome Statute, in general, and article 25 provisions in particular, criminalizing individual criminal responsibility on the basis of the control theory of perpetration adopted from German criminal law are incoherent and require harmonization with international criminal justice. The anomaly is not exclusively with article 25 in isolation from substantive defences and prosecution policy. Additionally, attention must be paid to the "factors excluding criminal responsibility" under article 31 which equally constrain criminality of conduct by which such person "means to cause that consequence"[2020] or "is aware that it will occur in the ordinary course of events." This task is directed to the Rome Statute Member State Parties. Most of all, article 7(2)'s requirement of a "state-like" or organizational policy on the part of an informal group appears to attract divergent considerations by different judges and need clarification.

7.4.2. Recommendations

Several significant policy implications arise from the book. Some are specific, others middle range and still others are more general and broad. The specific issues are modified from Roche[2021] who proposes five criteria which guide the ICC Prosecutor's decision to prosecute in truth commission situations. In Kenya, constitutional, electoral and judicial reforms appear to be effective responses to the post-2007 conflicts.

7.4.2.1. The Kenya cases

(a) Have Kenyans accorded the constitutional, electoral and judicial reform widespread support? It is submitted that the answer is likely to be in the affirmative as indicated by the enactment of the new constitution and peacefully conducted 2013 presidential elections. However, in addition to structural

[2020] *Ibid.* 31(2) (a)
[2021] Roche, "Truth Commission Amnesties," *supra* note 165.

reforms, much more depends on whether the TJRC report shall be adopted by parliament and its recommendations implemented to prioritize restorative justice as an alternative to special criminal tribunals being enshrined in the constitution to insulate the International Crime Act, or insulate ICC's complementarity from judicial review.

(b) The question of whether or not Kenya's TJRC used transparent and principled criteria to select deserving senior political and military leaders for amnesty does not arise on an activist interpretation of the Rome Statute. Instead, a narrow "same person, same conduct" test conferred complementarity on the ICC to assume jurisdiction where no domestic judicial processes were considered active. Instead, I recommend that the Office of the Prosecutor and ICC judges should consider domestic informal or non-judicial processes under article 53 of the Rome Statute. If that provision permits use of restorative justice approaches, then Kenya's domestic prosecutions of a few low level offenders, combined with the constitutional and other reforms may *appear* to validly satisfy the public interest for non-prosecutorial responses to the mass atrocities arising from the post-2007 conflicts in the context of a political dispute in a low income, ethnically heterogeneous transitional society.

(c) Was participation of all stakeholders at the 2010 national constitutional referendum as well as the 2013 presidential election inclusive? It is true that the new constitution devolves power to the regions, expands human rights to embrace socioeconomic and cultural rights, albeit progressively, as well re-created public confidence in the rule of law following closely-contested 2013 presidential elections. This was evinced by a credible Supreme Court judgment in 2013 which appeared to dilute the ICC's confirmation of charges against the four Kenyans suspected of bearing the greatest responsibility for crimes against humanity committed during the post-2007 conflicts.

(d) Shall the government actually make the reparations to the victims of the post-2007 conflicts who have evidence against their low level perpetrators in lieu of prosecutions of the wrongdoers? Will the compensation be prompt and adequate? For example, those victims who lost bread-winners may require continuing life "pensions" to sustain their bereaved families. In 2014, the ICC Prosecutor alleged that the sustained prosecution of President Kenyatta and Deputy President Ruto engendered witness bribery, intimidation and elimination. Reintegration theorists would add that prosecution also entrenches a culture of denial, thus hampering closure.

(e) Will Kenya's constitutional reform process incorporate the dialogue emerging from the TJRC process? Will its recommendations be legitimized by

referendum to show its broad acceptability? Questions regarding the efficacy of constitutional reforms require empirical research to prove.

7.4.2.2. Some Middle Range Issues

These issues touch on the potential of "moderate" informal settlements which involve the restoring balance among ethnic communities which were characteristic of traditional African criminal law processes as opposed to the fixation with a "justice cascade" through maximalist retributive justice by way of criminal prosecution.

(a) Nowadays not only is customary law not a popular course at university level, but also the leading Kenyan undergraduate textbook[2022] is restricted to family matters, i.e. marriage, divorce and burials. Further research needs to produce course materials in indigenous criminal law, which should be a component of the law syllabus. Alternatively, access to justice may be anchored in traditional dispute resolution and taught in restorative justice or penology courses.

(b) The institution of citizenship needs to confer prominence in a participatory criminal justice system. This entails not merely retaining assessors before high court murder trials, or expanding their role to magistrate's courts. Public participation is more important, considering that developing country judicial processes lack juries which are characteristic of Western countries. New laws permit victim impact statements after conclusion of trials to assist magistrates reach appropriate sentences. Outreach by the ICC is required to popularize such universal values.

(c) Section 3(2) of the Kenyan Judicature Act which ousts recognition of African customary criminal law as a source of law should in the long-term, be repealed. Significantly, the Supreme Court's dismissal of *Odinga's petition* against Kenyatta's election invoking due process under the procedural rule imposing rigid timelines to exclude belated evidence is justifiable on a cost-benefit analysis. Consideration may be given to enlarging the time within which to adjudicate over closely-contested presidential elections to subject circumstantial evidence to due process.

(d) Pursuant to the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters,[2023] restorative justice programmes may be

[2022] Eugene Cotran, *Casebook on Kenya Customary Law* (Nairobi: Professional Books and University of Nairobi, 1987).
[2023] http://www.pficjr.org/programs/un/ecosocresolution Adopted by the UN Economic and Social Council in 2002 < accessed 29thJanuary 2012>

made a mandatory alternative at every stage of the international criminal justice process, i.e. before charge, during trial, pre-sentencing and post-conviction. This shall shift public international attitudes away from retributive justice towards encouraging relationship-focused justice and community policing rather than reactive policing. Criminal prosecution is not ideal for *resolving* political conflicts.

(e) The ICC Office of the Prosecutor's absolute fiat, under the Rome Statute[2024] to decide whether to prosecute should expressly consider the "interests of justice" criterion under an opportunity principle. Specialist mediators can mobilize both the local community as well as civil society to participate in reconciling victims and offenders. ICC should play a positive role before resorting to negative complementarity. Hence complainants and accused persons may, in the "interests of justice," be encouraged to settle their disputes by consent, reconcile communities and record their agreements before the ICC for enforcement ultimately by contempt of court. The ICC Victims and Witnesses Unit should be empowered to provide more witness protection and counseling support to victims.

7.4.2.3. The Grand Scale

(a) The Kenyan ethnic conflicts emanate from its colonial "divide and rule" legacy and promote imperial interests thus continuing international corruption under globalization. It is necessary for freedom fighters to be paid reparations. The colonial governments should play a role in apologizing and reparating freedom fighters in addition to that of domestic post-colonial governments on account of historical injustices.

(b) The anomalies pointed out by Christie regarding non-universality of the ICC and corroborated by other communitarians caution, Kenyans to be wary of claims of Western institutions and standards including not only the ICC but also UN Basic Principles. Some standards to use to evaluate the TJRC's institutional structure and functions are provided under the UN Basic Principles for Use of Restorative Justice in Criminal Matters. Yet Kenya's constitutional reforms and *de facto* amnesty may not constitute conventional restorative justice. Daniel Van Ness[2025] shows that UN criminal, victim and offender documents standards have historically changed according to prevailing criminological theories and are by no means static. Despite arguments that documents represent "universalist"

[2024] Article 42, Rome Statute, *supra* note 14.
[2025] Daniel W. Van Ness "Proposed Basic Principles on the Use of Restorative Justice: Recognising the Aims and Limits of Restorative Justice" in Andrew Von Hirsch, Julian Roberts, Anthony E. Bottoms, Kent Roach and Mara Schiff (eds.) *Restorative Justice & Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford and Portland, Oregon: Hart Publishing, 2003) 157-176.

standards, are ideologically dominating or disempowering, it is noted that as a member of the UN, Kenya is bound to report to the UN ECOSOC regarding its annual progress in adopting these internationally recognized principles.

(c) It is necessary to assert relevant African standards and values contained in the African Human and Peoples' Rights Charter.[2026] For this reason, African policymakers would do well to develop criteria for collective crimes with a joint intentions element. The African continent should not be content to complain about ICC's inadequate external efforts to fight impunity, but should instead introduce accountability or protect victims from mass crimes. This consideration is directed to the AU and other concerned peace-keeping, peace-making and conflict resolution institutions.

(d) A new constitutional settlement should ideally emerge from the discourse at the TJRC. Yet Stephan Parmentier's[2027] evaluation of the South African TRC Report concludes that:

> the TRC was not intended for parties working together in the 'resolution' of matters arising out of political crimes of the past; but was designed to understand these matters; as a result, the processes were not concluded by way of agreements binding upon the parties to deal with the consequences of gross and massive violations of human rights (with the exception of amnesty proceedings) evidently the TRC did not comply with the conditions of confidentiality, as its aims lay in publicity. There were no cases referred back to the criminal justice system in event of non-agreement; failures to implement agreement did not arise.[2028]

Jennifer Llewellyn further asks whether truth commissions can serve as institutions of restorative justice. She notes that justice-based defences of truth commissions take either of two forms: First, "they offer some measure of justice of prosecution in transitional contexts when the full justice of prosecution and punishment is not possible"[2029] i.e. "justice to the extent possible." Second,

[2026] ACHPR, *supra* note 74, as read with Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights the Malabo Protocol (2014) amending Article 46A of the African Court of Justice and Human Rights http://www.iccnow.org/documents/African_Court_Protocol_-_July_2014.pdf < accessed 30 September 2014>

[2027] Stephan Parmentier, "The South African Truth, Justice and Reconciliation Commission: Towards Restorative Justice in the Field of Human Rights" in Ezzat A. Fattah and Stephan Parmentier*, Victim Policies and Criminal Justice on the Road to Restorative Justice: Essays in Honour of Tony Peters* (Belgium: Leuven University Press, 2001) 401-423.

[2028] *Ibid.*

[2029] Jennifer Llewellyn, "Truth Commissions and Restorative Justice" in Gerry Johnstone and Daniel W. Van Ness (eds.) *Handbook of Restorative Justice* (Cullompton, Devon: Willan Publishing, 2007) 397-425.

"they provide a different kind of justice than that of prosecutions and punishments. Underlying both is "a case for modifying the requirements of justice under extreme and unusual circumstances. These circumstances make clear the need to focus on restoration of relationships in response to wrongdoing."[2030]

(e) Hate crimes provisions[2031] under the Kenyan National Cohesion and Integration Act should be evaluated and the NCI Commission strengthened to prosecute negative ethnicity. These crimes include ethnic patronage which appear to elude the Ethics and Anti-Corruption Commission's core mandate. In order to create consensus on the criminalization of various collectivities and avoid the impression that the ICC is hunting the leaders of indigenous ethnic groups or African peoples who have a right to exist and control territory and "make it happen," a UN Convention on Crimes Against Humanity[2032] is required. This consideration is directed to the UN General Assembly who may consider new crimes such as kleptocracy[2033] or even crimes against democracy. The ASP to the Rome Statute may consider amending the ICC's jurisdiction accordingly to criminalize organizational liability by modifying Roxin's control theory of crime to apply to informal organizations.

[2030] *Ibid.*

[2031] Hate speech is defined in sections 13 and 62 of the NCICA, *supra* note 1324.

[2032] Sadat, "Crimes Against Humanity," supra note 193 pp 338, 373, citing Leila Nadya Sadat (ed.) *Forging a Convention for Crimes Against Humanity* (St. Louis: Washington University, 2012).

[2033] Chile Eboe-Osuji, "Preface" in Schabas, McDermott and Hayes (eds.) *supra* note 152 xli-xliv.

EPILOGUE

In October 2014, the Ruto Appeals Chamber held that "article 93(1)(b) of the Statute provides the legal basis for Kenya's obligation to compel witnesses to appear before the Trial Chamber sitting in situ or by way of video-link."[2034] Unfortunately in March 2015, on one hand:

> The Kenya government…identified the body of a man found in a national park as would-be International Criminal Court witness (ICC) Meshack Yebei. Mr Yebei, who went missing in December, was expected to testify in the case against Deputy President William Ruto. DNA tests have confirmed Mr Yebei's identity and officials will now conduct a post-mortem to establish how he died. Mr Ruto denies any involvement in the violence that erupted after Kenya's 2007 elections. Lawyers for Mr Ruto said that Mr Yebei was to have been a witness for the defence.

On the other hand:

> The ICC said Mr Yebei was implicated in efforts to corrupt prosecution witnesses in the case against Mr Ruto – charged with crimes against humanity – and another defendant, Joshua Sang. Mr Yebei was reportedly abducted in late December at his home in Eldoret where he had gone to visit his family.[2035]

In December 2014, the *Kenyatta Trial Chamber* gave the Office of the Prosecutor one week to decide whether to proceed with the trial or withdraw. On 5th December 2014, the ICC Prosecutor Bensouda withdrew the case against President Uhuru Kenyatta. "The prosecutor's office said the Kenyan government had refused to hand over evidence vital to the case. Mr Kenyatta said he was 'excited' and 'relieved' at the dropping of charges. 'My conscience is absolutely clear,' he said, adding that his case had been 'rushed there without proper investigation.' "[2036] Significantly, in August 2015, the Kenyatta Appeals Chamber reversed the Trial Chamber's decision regarding Kenya's non-referral. Instead, *the Kenyatta case* was remanded to the Trial Chamber for

[2034] Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" Situation in the Republic of Kenya, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* no. ICC-01/09.01/11 OA 7 OA 8 Date: 9 October 2014 https://www.icc-cpi.int/CourtRecords/CR2014_08266.PDF <accessed 17th March 2015>

[2035] "Kenyan Body Confirmed as ICC Witness Meshack Yebei" BBC News 9th March 2015 http://www.bbc.com/news/world-africa-31799171 <accessed 17th March 2015>

[2036] "ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence" BBC News 5th December 2014, http://www.bbc.com/news/world-africa-30347019 <accessed 17th March 2015>

reconsideration as to whether the Prosecutor exhausted municipal judicial remedies to facilitate thorough investigations. Non-referral was also reversed for "conflating the case against Kenya with (the 'interests of justice' in the circumstances of) the *Kenyatta case*."[2037] Finally, a decision regarding whether or not the suspects in *the Ruto and Sang case* have a case to answer was delivered in April 2016. The ICC terminated the last of its *Kenya cases*, against Kenya's Deputy President Ruto and former radio journalist Sang, due to "a troubling incidence of witness interference and intolerable political meddling."[2038]

[2037] ICC Appeals Chamber reverses decision on Kenya's cooperation and remands issue to Trial Chamber for new determination ICC-CPI-20150819-PR1139 *The Prosecutor v Uhuru Muigai Kenyatta* https://www.icc-cpi.int/Pages/item.aspx?name=pr1139 <accessed 28th May 2016>

[2038] Public redacted version of Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red 5 April 2016 Trial Chamber V(a), *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-2027-Red <accessed 28th May 2016>

APPENDICES

APPENDIX I

POLITICAL AND ADMINISTRATIVE MAP OF KENYA (2008)[2039]

[2039] Images Kenya Provinces, and Naivasha, Nakuru and Eldoret towns, Google <accessed 13th October 2013>

APPENDIX II

A.II.1 KENYA'S 2013 PRESIDENTIAL ELECTION OUTCOME[2040]

KENYA 2013 ELECTION RESULTS (4th March 2013)

National Tallying Centre – BOMAS OF KENYA

The results of the Presidential election were as follows:

Candidate	Valid Votes	%
James Legilisho Kiyiapi	40,998	0.34%
Martha Wangari Karua	52,848	0.36%
Mohamed Abduba Dida	1,988,475	0.43%
Musalia Mudavadi	483,981	3.96%
Paul Kibugi Muite	12,580	0.10%
Peter Kenneth	72,786	0.60%
Raila Odinga	5,340,546	43.70%
Uhuru Kenyatta	6,173,433	50.51%

FULL RESULTS PER COUNTY

Ainabkoi Constituency: Raila 4,631, Uhuru 28,838
Ainamoi Constituency: Raila 7,111 Uhuru 43, 734 Mudavadi 689
Aldai Constituency: Uhuru-34,893, Raila-4,766
Alego Usonga Constituency: Raila 66, 380 Uhuru 192 Mudavadi 192
Awendo Constituency: Raila 35,404 Uhuru 87 Mudavadi 62
Bahati Constituency: Raila 2,827, Uhuru 52,142

[2040] http://www.crecokenya.org/wp-content/uploads/KENYA-2013-ELECTION-RESULTS.pdf <accessed 13th October 2013>

APPENDIX IIA

A.II.2A THE 2007 PRESIDENTIAL ELECTION OUTCOME[2041]

A.II.2.1 Candidates

Electoral Commission of Kenya: Official National Results

Other Names	First Name	Votes	Party Abrev	Party
Mwai	Kibaki	4,578,034	PNU	Party of National Unity
Raila Amolo	Odinga	4,352,860	ODM	Orange Democratic Movement
Stephen Kalonzo	Musyoka	879,899	ODM-K	Orange Democratic Movement - Kenya
Joseph Ngacha	Karani	21,168	KPTP	Kenya Patriotic Trust Party
Pius Muiru	Mwangi	9,665	KPP	Kenya People's Party
Nazlin Omar Fazaldin	Rajput	8,624	WCP	Workers Congress Party of Kenya
Kenneth Stanley Njindo	Matiba	8,049	SSA	Saba Saba Asili
David Waweru	Ngethe	5,976	CCU	Chama Cha Uma Party
Nixon Jeremiah	Kukubo	5,926	RPK	Republican Party of Kenya

[2041] Electoral Commission of Kenya

(Contd.) Kenya's 2007 Parliamentary Election Results[2042]

Electoral Commission of Kenya: Official Parliamentary Results

Party	Name	Symbol	Seats
ODM	Orange Democratic Movement	Orange	99
PNU	Party of National Unity	Two Torches with Flames	43
ODM-K	Orange Democratic Movement - Kenya	Oranges	16
KANU	Kenya African National Union	Cockerel	14
SAFINA	Safina Party	Safina	5
NARC KENYA	Narc Kenya	Flower	4
NARC	National Rainbow Coalition	Traditional African Torch (Mwenge)	3
FORD-P	Forum for the Restoration of Democracy for the People	Pen	3
NFK	New Ford Kenya	Cup	2
PICK	Party of Independent Candidates of Kenya	Child	2
CCU	Chama Cha Uzalendo	Whistle	2
SKSPK	Sisi Kwa Sisi Party of Kenya	Train	2
DP	Democratic Party of Kenya	Lantern	2
PDP	Peoples Democratic Party	Traditional African Banjo	1
MGPK	Mazingira Greens Party of Kenya	Tree	1
PPK	Peoples Party of Kenya	Trumpet	1
NLP	National Labour Party	Bull (Ndume)	1
KADDU	Kenya African Democratic Development Union	Fruit Basket (Mavuno)	1
KENDA	Kenya National Democratic Alliance	Bell	1
KADU-ASILI	Kenya African Democratic Union Asili	Coconut Tree	1
FORD-K	Forum for the Restoration of Democracy - Kenya	Lion	1
UDM	United Democratic Movement	Milk Can	1
FORD-A	Forum for the Restoration of Democracy - Asili	Two Fingers Raised	1

[2042] *Ibid.*

APPENDIX II B

March 2008 Amendments to Section 15 of the Constitution of Kenya introducing power-sharing[2043]

Part 2
Ministers and the Cabinet
15A. Prime Minister and Deputy Prime Ministers.

(1) There shall be a Prime Minister of the Government of Kenya.
(2) There shall be two Deputy Prime Ministers of the Government of Kenya.
(3) Parliament may, by an Act of Parliament and notwithstanding any other provision of this

Constitution, provide for—

(a) the appointment and termination of office of the Prime Minister, Deputy Prime Ministers and Ministers;
(b) the functions and powers of the Prime Minister and Deputy Prime Ministers;
(c) the establishment of a coalition Government;
(d) any other matter incidental to or connected with the foregoing.

(4) Subject to the provisions of any Act made under subsection (3), the Prime Minister and the Deputy Prime Ministers shall be Ministers of the Government of Kenya.
(5) The Act made pursuant to subsection (3) immediately following the commencement of this section shall, while in force, be read as part of this Constitution.
(6) Nothing contained in or done under the authority of an Act of Parliament made pursuant tosubsection (3) immediately following the commencement of this section shall be held to be inconsistent with or in contravention of any provision of this Constitution.

[2043] Constitution of Kenya (Amendment) Act (2008).

APPENDIX II C

LAWS OF KENYA

NATIONAL ACCORD AND RECONCILIATION ACT[2044]

No. 4 of 2008

Revised Edition 2012 [2008] Published by the National Council for Law Reporting with the Authority of the Attorney-General www.kenyalaw.org

ARRANGEMENT OF SECTIONS

Section

[*Date of assent: 20th March, 2008*.]

[*Date of commencement: 20th March, 2008*.]

An Act of Parliament to give effect to the Agreement on the Principles of Partnership of the Coalition Government, to foster national accord and reconciliation, to provide for the formation of a coalition Government and the establishment of the offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, their functions and various matters connected with and incidental to the foregoing

1. Short title

This Act may be cited as the National Accord and Reconciliation Act, 2008.

2. Commencement

This Act shall come into force upon its publication in the Kenya Gazette, which shall not be later than fourteen days from the date of assent.

[2044]Published by the National Council for Law Reporting with the authority of the Attorney General www.kenyalaw.org

3. Appointment of Prime Minister and Deputy Prime Ministers

(1) There shall be a Prime Minister of the Government of Kenya and two Deputy Prime Ministers, who shall be appointed by the President in accordance with this section.

(2) The person to be appointed as Prime Minister shall be an elected member of the National Assembly who is the parliamentary leader of—

(a) the political party that has the largest number of members in the National Assembly; or

(b) a coalition of political parties in the event that the leader of the political party that has the largest number of members in the National Assembly does not command the majority in the National Assembly.

(3) Each member of the coalition shall nominate one person from the elected members of the National Assembly to be appointed a Deputy Prime Minister.

4. Functions of the Prime Minister, etc.

(1) The Prime Minister—

(a) shall have authority to coordinate and supervise the execution of the functions and affairs of the Government, including those of Ministries;

(b) may assign any of the coordination responsibilities of his office to the Deputy Prime Ministers, as well as one of them to deputise for him;

(c) shall perform such other duties as may be assigned to him by the President or under any written law.

(2) In the formation of the Coalition Government, the persons to be appointed as Ministers and Assistant Ministers from the political parties that are partners in the coalition other than the President's party shall be nominated by the parliamentary leader of the party in the coalition and thereafter there shall be full consultation with the President on the appointment of all Ministers.

(3) The composition of the Coalition Government shall at all times reflect the relative parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance.

(4) The office of the Prime Minister and the Deputy Prime Minister shall become vacant

only if—

(a) the holder of the office dies, resigns or ceases to be a member of the National Assembly otherwise than by reason of the dissolution of Parliament;

(b) the National Assembly passes a resolution which is supported by a majority of all the members of the National Assembly, excluding the ex officio members, and of which not less than seven days notice has been given, declaring that the

National Assembly has no confidence in the Prime Minister or Deputy Prime Minister, as the case may be; or

(c) the coalition is dissolved.

(5) The removal of any Minister nominated by a parliamentary party of the coalition shall be made only after prior consultation and concurrence in writing with the leader of that party.

5. The Cabinet

The Cabinet shall consist of the President, the Vice President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers.

6. Dissolution of coalition

The coalition shall stand dissolved if—

(a) the Tenth Parliament is dissolved;

(b) the coalition parties agree in writing; or

(c) one coalition partner withdraws from the coalition by a resolution of the highest decision-making organ of that party in writing.

7. Salary and allowances

The Prime Minister and Deputy Prime Ministers shall be entitled to such salaries, allowances, benefits, privileges and emoluments as may be approved by Parliament from time to time.

8. Act to cease to apply

This Act shall cease to apply upon dissolution of the tenth Parliament, if the coalition is dissolved, or a new
Constitution is enacted, whichever is earlier.

9. Interpretation

In this Act, the Agreement on the Principles of Partnership of the Coalition Government means the Agreement set out in the Schedule.

SCHEDULE
[Section 9.]

ACTING TOGETHER FOR KENYA
AGREEMENT ON THE PRINCIPLES OF PARTNERSHIP OF THE COALITION GOVERNMENT

Preamble:

The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country. The Kenyan people are now looking to their leaders to ensure that their country will not be lost.

Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process.

With this agreement, we are stepping forward together, as political leaders, to overcome the current crisis and to set the country on a new. As partners in a Coalition Government, we commit ourselves to work together in good faith as true partners, through constant consultation and willingness to compromise.

This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to a better, more secure, more prosperous Kenya for all.

To resolve the political crisis, and in the spirit of coalition and partnership, we have agreed to enact the National Accord and Reconciliation Act, 2008, whose been agreed upon in their entirety by the parties hereto and a draft copy thereof is appended hereto.

Its key points are—

• There will be a Prime Minister of the Government of Kenya, with authority to co-ordinate and supervise the execution of the functions and affairs of the Government of Kenya.

• The Prime Minister will be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party does not command a majority.

• Each member of the coalition shall nominate one person from the National Assembly to be appointed a Deputy Prime Minister.
• The Cabinet will consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers. The removal of any Minister of the coalition will be subject to consultation and concurrence in writing by the leaders.
• The Prime Minister and Deputy Prime Ministers can only be removed if the National Assembly passes a motion of no confidence with a majority vote.
• The composition of the Coalition Government will at all times take into account the principle of portfolio balance and will reflect their relative parliamentary strength.
• The coalition will be dissolved if the Tenth Parliament is dissolved; or if the parties agree in writing; or if one coalition partner withdraws from the coalition.
• The National Accord and Reconciliation Act shall be entrenched in the Constitution.

Having agreed on the critical issues above, we will now take this process to. It will be convened at the earliest moment to enact these agreements. This will be in the form of an Act of Parliament and the necessary amendment to the Constitution. We believe by these steps we can together in the spirit of partnership bring peace and prosperity back to the people of Kenya who so richly deserve it.

Agreed this date 28 February, 2008.

H.E. President Mwai Kibaki
Government/Party of National Unity

Hon. Raila Odinga
Orange Democratic Movement

Witnessed By:
H.E. President Jakaya Kikwete

President of the United Republic of
Tanzania and Chairman of the African Union

H.E. Kofi A. Annan
Chairman of the Panel of
Eminent African Personalities

APPENDIX III

INTERNATIONAL CRIMINAL COURT PRE-TRIAL CHAMBER II CONFIRMATION OF CHARGES AGAINST FOUR KENYAN SUSPECTS ON 23RD JANUARY 2012

1. SITUATION NO. 1.

1.1. Confirmation of Charges against William Samoei Ruto

– For these reasons, the Chamber finds sufficient evidence to establish substantial grounds to believe that:

a. On 31 December 2007 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, pursuant to articles 7(l)(a), (d) and (h) of the Statute;

b. Between 1 January 2008 and 4 January 2008 Mr. Ruto jointly with other members of the organisation committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in the greater Eldoret area, pursuant to articles 7(l)(a), (d) and (h) of the Statute;

c. Between 30 December 2007 and 16 January 2008 Mr. Ruto jointly with other members of the organization committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Kapsabet town, pursuant to article 7(l)(a), (d) and (h) of the Statute;

d. Between 30 December 2007 and 2 January 2008 Mr. Ruto jointly with other members of the organization committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Nandi Hills town, pursuant to articles 7(l)(a), (d) and (h) of the Statute. [2045]

[2045] *The Ruto case supra* note 146 pp 128-9 p 350.

1.2. Confirmation of Charges against Joseph Arap Sang

—In conclusion, the Chamber is satisfied that there are substantial grounds to believe that:

a. On 31 December 2007 Mr. Sang contributed, within the meaning of article 25(3)(d)(I) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, pursuant to articles 7(l)(a), (d) and (h) of the Statute;

b. Between 1 January 2008 and 4 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in the greater Eldoret area, pursuant to articles 7(l)(a), (d) and (h) of the Statute;

c. Between 30 December 2007 and 16 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Kapsabet town, pursuant to articles 7(l)(a), (d) and (h) of the Statute;

d. Between 30 December 2007 and 2 January 2008 Mr. Sang contributed, within the meaning of article 25(3)(d)(i) of the Statute, to the commission of the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Nandi Hills town, pursuant to articles 7(l)(a), (d) and (h) of the Statute.[2046]

1.3. Declination to Confirm Charges Against Henry Kiprono Kosgey

The Chamber held however that:
– Having evaluated the evidence as a whole, in view of the prejudice experienced by the Defence, the Chamber finds that the Prosecutor has not met the evidentiary standard required at this stage of the proceedings. It follows that the Chamber needs neither to engage with the Defence challenges related to Mr. Kosgey's involvement, nor to proceed with an examination of the elements concerning his alleged criminal responsibility as provided in the Amended DCC.[2047]

[2046] *Ibid.* p 137 para 367.
[2047] *Ibid.* p 109 para 297.

1.4 Final Orders

—FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY
a) REJECTS the first part of the Defence challenge to the jurisdiction of the Court, in accordance with paragraph 34 of the present decision;
b) DISMISSES in limine the second part of the Defence challenge to the jurisdiction of the Court, in accordance with paragraph 36 of the present decision;
c) DECIDES that the Chamber has jurisdiction with respect to the present case;
d) DETERMINES that the case is admissible;
e) CONFIRMS the charges presented against Mr. Ruto under Counts 1, 3 and 5 of the Amended Document Containing the Charges, to the extent specified in paragraph 349 of the present Decision;
f) CONFIRMS the charges presented against Mr. Sang under Counts 2, 4 and 6 of the Amended Document Containing the Charges, to the extent specified in paragraph 367 of the present Decision;
g) DECLINES to confirm the charges presented against Mr. Kosgey under Counts 1, 3 and 5 of the Amended Document Containing the Charges;
h) DECIDES to commit Mr. Ruto and Mr. Sang to a Trial Chamber for trial on the charges as confirmed.
i) DECIDES that the conditions imposed on Mr. Ruto and Mr. Sang in the Decision on Summons to Appear remain in effect;
j) DECIDES that the conditions imposed on Mr. Kosgey in the Decision on Summons to Appear cease to have effect.[2048]

2. SITUATION NO. 2

2.1. Confirmation of Charges against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta

— In sum, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta are individually criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute for:

a. murder constituting a crime against humanity within the meaning of article 7(l)(a) of the Statute, i.e. the killing of perceived ODM supporters in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (Count 1);

[2048] *Ibid.* p 138 para 367.

b. deportation or forcible transfer of population constituting a crime against humanity within the meaning of article 7(1)(d) of the Statute, i.e. the displacement of perceived ODM supporters in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (Count 3);

c. rape constituting a crime against humanity within the meaning of article 7(l)(g) of the Statute, i.e. the rape of perceived ODM supporters in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (Count 5);

d. other inhumane acts constituting a crime against humanity within the meaning of article 7(l)(k) of the Statute, i.e.: (i) severe physical injury of perceived ODM supporters; and (ii) infliction of serious mental suffering to perceived ODM supporters by way of subjecting them to witnessing the killings and the mutilations of their close relatives, in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (Count 7);

e. persecution constituting a crime against humanity within the meaning of article 7(l)(h) of the Statute, i.e. the following acts committed against perceived ODM supporters by reason of their perceived political affiliation: (i) killing; (ii) displacement; (iii) rape; (iv) severe physical injury; and (v) infliction of serious mental suffering by way of subjecting them to witnessing the killing and the mutilation of their close relatives, in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008 (count 9).[2049]

—Accordingly, pursuant to article 61(7)(a) of the Statute, the Chamber concludes that the charges against Mr. Muthaura and Mr. Kenyatta must be confirmed to the extent specified in the preceding paragraph and that Mr. Muthaura and Mr. Kenyatta must be committed to a Trial Chamber for trial on the charges as confirmed.[2050]

2.2. Declination to Confirm Charges against Brigadier Hussein Ali

The Chamber held however that:
—Conversely, the Chamber determines that there is not sufficient evidence to establish substantial grounds to believe that Mr. Ali committed any of the crimes

[2049] *The Kenyatta case*, *supra* note 147 pp 152-3 para 428.
[2050] *Ibid.* p 154 para 430.

charged. Therefore, the Chamber must decline to confirm the charges against Mr. Ali pursuant to article 61(7)(b) of the Statute.[2051]

2.3. Final Orders

—FOR THESE REASONS, THE CHAMBER, BY MAJORITY, HEREBY:

a) DECIDES that the case falls within the jurisdiction of the Court;
b) CONFIRMS the charges presented under Counts 1, 3, 7, 9 and the charge of rape presented under Count 5 of the Amended Document Containing the Charges against Mr. Muthaura and Mr. Kenyatta;
c) DECLINES to confirm the charge of other forms of sexual violence presented under Count 5 of the Amended Document Containing the Charges against Mr. Muthaura and Mr. Kenyatta;
d) DECLINES to confirm the charges presented under Counts 2, 4, 6, 8 and 10 of the Amended Document Containing the Charges against Mr. Ali;
e) DECIDES to commit Mr. Muthaura and Mr. Kenyatta to a Trial Chamber for trial on the charges as confirmed;
f) DECIDES that the conditions imposed on Mr. Muthaura and Mr. Kenyatta in the Decision on Summonses to Appear remain in effect;
g) DECIDES that the conditions imposed on Mr. Ali in the Decision on Summonses to Appear cease to have effect.[2052]

Judge Hans-Peter Kaul appends a dissenting opinion.

[2051] *Ibid.*
[2052] *Ibid.* p 154 para 430.

APPENDIX IV

THE KRIEGLER REPORT EXECUTIVE SUMMARY[2053]

On 30 December 2007, following announcement of the presidential election results, violence broke out in several places across Kenya amid claims that the Electoral Commission of Kenya (ECK) had rigged the presidential election. Sporadic eruptions continued for many weeks, bringing death and destruction to thousands of Kenyans. An African Union-sponsored Panel of Eminent African Personalities led by former United Nations Secretary General Kofi Annan brokered a settlement which heralded a government of national unity between the main political parties and a common commitment to urgent constitutional reform. The settlement included the appointment of two commissions, one to examine the violence and the other, the Independent Review Commission (IREC), to examine the December 2007 Kenyan elections from various perspectives. In conformity with its terms of reference (ToRs) IREC now presents its findings and recommendations, based on its analysis of the legal framework for the conduct of elections in Kenya, the structure, composition and management system of the ECK and its organisation and conduct of the 2007 electoral operations. The report specifically examines the integrity of the whole electoral process, from voter registration and nomination of candidates through voting, counting, transmission and tallying to dispute resolution and post-election procedures, deals with the role of political parties, observers, the media, civil society and the public at large, and comments on the independence, capacity and functional efficiency of the ECK.

Main findings

Kenya's constitutional and legal framework relating to elections contains a number of weaknesses and inconsistencies that weaken its effectiveness. This legislation needs urgent and radical revision, including consolidation. The electoral management process as a whole needs revision during the preparation and conduct of the 2007 elections the ECK lacked the necessary independence, capacity and functionality because of weaknesses in its organizational structure, composition, and management systems. The institutional legitimacy of the ECK and public confidence in the professional credibility of its commissioners and staff have been gravely and arguably irreversibly impaired. It lacks functional efficiency and is incapable of properly discharging its mandate. The conduct of the electoral process was hampered and the electoral environment was polluted by the conduct of many public participants, especially political parties and the media. There were serious defects in the voter register which impaired the integrity of the 2007 elections even before polling started:

• it excluded nearly one-third of eligible voters, with a bias against women and young people
• it included the names of some 1.2 million dead people

Serious anomalies in the delimitation of constituencies impaired the legitimacy of the electoral process even before polling started.

There was generalised abuse of polling, characterised by widespread bribery, vote buying, intimidation and ballot-stuffing. This was followed by grossly defective data collation, transmission and tallying, and ultimately the electoral process failed for lack of adequate planning, staff selection/ training, public relations and dispute resolution.

The integrity of the process and the credibility of the results were so gravely impaired by these manifold irregularities and defects that it is irrelevant whether or not there was actual rigging at the national tally centre. The results are irretrievably polluted.

Main recommendations

All political role-players in Kenya should recognise that materially defective elections accompanied by public violence will remain a feature of life in their country absent a concerted and sustained commitment to electoral integrity by all Kenyans.

Radically reform the ECK, or create a new electoral management body (EMB), with a new name, image and ethos, committed to administrative excellence in the service of electoral integrity, composed of a lean policy-making and supervisory board, selected in a transparent and inclusive process, interacting with a properly structured professional secretariat.

Devise, implement and maintain appropriate executive, legislative and political measures to enable the reconstituted or new EMB to initiate, popularise and sustain a national commitment to electoral integrity and respect for the inalienable franchise rights of Kenyan citizens.

Empower the EMB, by means of executive, legislative and political measures properly to perform the essential functions entrusted to it under sections 42 and 42A of the Constitution (delimitation and the conduct of elections and associated activities).

[2053] http://www.mapambano.com/Downloads/kriegler_report.htm <accessed 2nd September 2014>

Adopt a new voter registration system.
Agree (as part of the constitutional review process) on an electoral system, which puts to rest the continuous discussion about a new electoral system for Kenya.
Choose and implement the necessary constitutional and other legal amendments to give effect to whichever of IREC's recommendations are accepted.

Minority Opinion
Two members of the Commission held a dissenting view on some of the findings reported in Chapter 6. Their opinions are presented in italics at the end of each of the relevant paragraphs.

APPENDIX V

THE KENYA INTERNATIONAL CRIMES ACT[2054] (SELECT PROVISIONS)

AN ACT of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions

PART I—PRELIMINARY

Short title and commencement.

1. This Act may be cited as the International Crimes Act, 2008,

Act to bind the Government.
3. This Act shall be binding on the Government.

Rome Statute to have force of law.

4. (1) The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya in relation to the following matters—

(a) the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests;
(b) the conduct of an investigation by the Prosecutor or the ICC;
(c) the bringing and determination of proceedings before the ICC;
(d) the enforcement in Kenya of sentences of imprisonment or other measures imposed by the ICC, and any related matters;
(e) the making of requests by Kenya to the ICC for assistance and the method of dealing with those requests.

(2) The relevant provisions of the Rome Statute are—

(a) Part 2 (which relates to jurisdiction, admissibility, and applicable law);

Service of Documents and Appearance of Witnesses

Assistance in arranging service of documents.
(*Cf.* Rome Statute, articles 19 (8), 56, 58 (7), 59 (7), 64, 93 (1) (d).)

[2054] ICA, *supra* note 610.

86. (1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, paragraph 7 of article 58, article 64 or paragraph 1 (d) of article 93 of the Rome Statute in arranging for the service of a document in Kenya, the Attorney-General may shall give authority for the request to proceed if he is satisfied that—

(a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and

(b) the person or body to be served is or may be in Kenya.

(2) If the Attorney-General gives authority for the request to proceed, he shall forward the request for service to the appropriate Kenyan agency, and that agency shall, without delay—

(a) use its best endeavours to have the process served—

(i) in accordance with any procedure specified in the request; or

(ii) if that procedure would be unlawful or inappropriate in Kenya, or if no procedure is specified, in accordance with the law of Kenya; and

(b) transmit to the Attorney-General—

(i) a certificate as to service, if the document is served; or

(ii) a statement of the reasons that prevented service, if the document is not served.

(3) In this section, "document" includes—

(a) a summons requiring a person to appear as a witness; and

(b) a summons to an accused that has been issued under paragraph 7 of article 58 of the Rome Statute.

Request for voluntary appearance of witness.

(*Cf.* Rome Statute, articles 19 (8), 56, 64, 93 (1) (e).)

87. (1) Where the ICC requests assistance under paragraph 8 of article 19, article 56, paragraph 7 of article 58, article 64 or paragraph 1 (e) of article 93 of the Rome Statute i n facilitating the voluntary appearance of a witness before the ICC, the Attorney-General may give

authority for the request to proceed if he is satisfied that—

(a) the request relates to an investigation being conducted by the Prosecutor or any proceedings before the ICC; and

(b) the witness's attendance is sought so that the witness can give evidence or information relating to the investigation or proceedings; and

(c) the witness is or may be in Kenya.

(2) In this section and sections 88 and 89, "witness" includes a person who may give expert evidence, but does not include a person who has been accused of an international crime in the proceedings to which the request relates.

Consent required and assurances may be sought.

(*Cf.* Rome Statute, article 93 (2).)

88. (1) If the Attorney-General gives authority for the request to facilitate the voluntary appearance of a witness to proceed, he shall forward the request to the appropriate Kenyan agency.

(2) The Kenyan agency to which a request is forwarded under subsection (1) shall make such inquiries as may be necessary to ascertain if the prospective witness consents to giving evidence or assisting the ICC.

(3) The Attorney-General may, at any time, ask the ICC to give one or more of the following assurances—

(a) that the witness will not be prosecuted, detained, or subjected to any restriction of personal freedom by the ICC in respect of all or any specified acts or omissions that occurred before the person's departure from Kenya;

(b) that the witness will be returned to Kenya as soon as practicable in accordance with arrangements agreed to by the Attorney-General;

(c) an assurance relating to such other matters as the Attorney-General thinks appropriate.

Attorney-General may facilitate appearance.

89. (1) The Attorney-General shall assist in the making of arrangements to facilitate a witness's

attendance before the ICC if he is satisfied that—

(a) the prospective witness has consented to giving the evidence or assistance requested; and

(b) the ICC has given adequate assurances where appropriate.

(2) The Attorney-General shall—

(a) approve and arrange the travel of the witness to the ICC;

(b) obtain such approvals, authorities, and permissions as are required for that purpose,

including, in the case of a person who although not liable to be detained in a prison is subject to a sentence—

(i) the variation, discharge, or suspension of the conditions of the person's release from prison; or

(ii) the variation or suspension of the person's sentence, or of the conditions of the person's sentence; and

(c) take such other action for the purposes of subsection (1) as he thinks appropriate.

Temporary Transfer of Prisoners

Attorney-General may arrange for transfer.

92. (1) The Attorney-General may authorise the temporary transfer of a Kenyan prisoner to the ICC if he is satisfied that—

(a) the prisoner has consented to giving the evidence or assistance requested; and

(b) the ICC has given adequate assurances where appropriate.

(2) If the Attorney-General authorises the temporary transfer of the prisoner to the ICC, he may–

(a) direct that the prisoner be released from the prison in which that person is detained, for the purpose of the transfer to the ICC; and

(b) make arrangements for the prisoner to travel to the ICC in the custody of—

(i) a member of the police force;

(ii) a prison officer; or

(iii) a person authorised for the purpose by the ICC.

TRADUCTION FRANÇAISE

Crimes contre l'humanité durant les conflits post-électoraux de 2007-2008 au Kenya: une interprétation jurisprudentielle.

Résumé

Les fortes inégalités sociales qui se sont développées depuis l'indépendance ont conduit à des mobilisations visant à modifier la gouvernance autoritaire du Kenya. Lors des conflits ethniques qui ont suivi la ré-élection en 2007 du Président Kibaki, des crimes de masse ont été commis. En 2008, un Accord National de partage du pouvoir a été conclu entre le PNU de Kibaki et l'ODM du Premier Ministre Odinga. Néanmoins, dans le cadre de sa compétence complémentaire, la Cour Pénale Internationale a autorisé six arrêts d'enquête et confirmé les charges contre quatre personnes accusées d'être les co-auteurs indirects de crimes contre l'humanité. Mais en 2013, la « coalition des accusés » rassemblant Uhuru Kenyatta et William Ruto a remporté la présidence de la république. Dès lors, de nombreux témoins à charge ont disparu, sont morts ou ont retiré leurs témoignages. Les juges ont exigé du gouvernement Jubilee de faciliter la comparution des témoins réticents dans le procès Ruto et pour le procès Kenyatta, ils ont demandé la production de documents financiers sur le patrimoine de l'accusé. L'activisme judiciaire est justifié si la CPI cherche à protéger effectivement les victimes. Cependant, sans coopération de l'Etat, la CPI ne peut ni enquêter ni obtenir la mise en œuvre de ses sommations. Cette thèse évalue les différentes interprétations contradictoires du Statut de Rome que ces procès ont amené.

Clé mots Capacité - souveraineté constitutionnelle - complémentarité - conflits - contrôle - Droit pénal - post- conflit - Ethnicité - élections - Humanité - Droit international - Kenya - Justification - Nécessité - Peuples - Commission de l'acte - Procédure- Punition - pénale responsabilité individuelle – conformité - Suspects - Justice transitionnelle - Violence- Victimes.

1. Introduction

Messieurs les membres du jury, Monsieur le Prof. Jose Luis de la Cuesta, Prof. Stephan Parmentier et Prof. Christian Thibon, je vous remercie de me permettre de soutenir ma thèse. Je remercie pour leurs encouragements et leur inspiration le Prof. Robert Cario et le Dr. Hervé Maupeu, mon directeur et co-directeur de thèse durant les six ans qui ont été nécessaires pour cette recherche doctorale. L'Université de Pau et en particulier ses bibliothécaires m'ont fourni un environnement idéal. Je me permets également de remercier l'Ambassade de France au Kenya qui m'a octroyé une bourse doctorale ainsi que l'IFRA-Nairobi qui m'a également aidé financièrement.

2. Contexte

Je vous propose d'abord de présenter le contexte. Il y a deux types principaux de réponses aux conflits. Les Maximalistes qui préfèrent la justice rétributive qui inflige aux contrevenants des punitions. Les Minimalistes préfèrent pour leur part une justice restaurative qui accorde des amnisties aux personnes responsables des conflits. Entre ces deux extrêmes, il y a le système des « sanctions criminelles limitées ». Les commissions de vérité peuvent dispenser des amnisties conditionnelles pour les auteurs de crimes qui dévoilent leurs rôles dans les violences, qui peuvent être accompagnées de mesures de justice corrective en faveur des victimes qui reçoivent des réparations en échange de leurs témoignages. Alternativement, la justice distributive implique des réformes structurelles du système légal autoritaire. Il facilite la transition vers la démocratie.

3. Le problème pour la recherche

A partir de ces alternatives, je poserai ainsi le problème. Selon Thabo Mbeki et Mahmood Mamdani, la justice rétributive n'est pas une réponse appropriée pour résoudre les crimes de masse. Parce que les auteurs de ces crimes tout comme les victimes appartiennent à des groupes ou des communautés, il y a des causes politiques aux guerres civiles qu'il faut prendre en compte. Après les guerres conventionnelles, les auteurs doivent être jugés comme à Nuremberg. Par contre, les violences ethniques contemporaines appellent à la réconciliation, les survivants devant co-exister dans le même pays.

4. La recherche objectifs et questions

Cela me conduit aux questions de recherche suivantes. Cette thèse se propose de développer un cadre normatif permettant d'interpréter les réponses aux conflits post-électoraux de 2007-2008. Il s'agit de montrer quels acteurs ont joué différents rôles et intérêts qui ont conduit à leurs réponses aux conflits. Parmi les maximalistes, on trouve les activistes des droits de l'homme et certaines organisations de la société civile qui militent en faveur de procès criminels contre les auteurs des crimes de masse. En l'absence d'une révolution victorieuse, les maximalistes ne pouvaient pas imposer la justice des vainqueurs aux anciens oppresseurs. Parmi les modérés, on trouve certains membres de la communauté internationale qui ont plutôt œuvré en faveur de la solution favorisée par la classe politique qui préfère un partage du pouvoir et des réformes constitutionnelles. Dès lors, le procureur de la Cour Pénale Internationale a pris des suspects dans les deux camps, le PNU et ODM et a obtenu leur inculpation pour crimes contre l'humanité. La question était : est-ce que la société kenyane des survivants allait rejeter les inculpés par la CPI, Uhuru Kenyatta et William Ruto à l'occasion des élections présidentielles de 2013 ? Notre thèse défend l'idée que la victoire électorale de ces deux candidats est le

fait des pragmatiques qui y ont vu le moindre mal afin de préserver une fragile paix entre les kikuyu et les kalenjin.

5. Cadre théorique

En quelques mots, voici mon cadre théorique. Le droit international criminel est un mélange de droit international public et de droit pénal. Notre thèse l'analyse en ayant notamment recours à des sous-théories de droit procédural et substantif venant de la tradition juridique de la common law. John Rawls dans *La Loi des Peuples* développe une théorie de la relativité culturelle selon laquelle les sociétés libérales devraient organiser des peuples bien ordonnés et hiérarchisés selon des critères acceptables. Dès lors, les sociétés libérales ne devraient s'attaquer qu'à des états illégaux qui se livrent à des massacres de masse. Larry May appelle cela le « principe de la sécurité internationale ».

Le **Chap. 1** explique que selon Francis Deng, les sociétés traditionnelles étaient hiérarchisées. Cependant, les leaders africains voyaient leurs actes contrôlés. Le pouvoir colonial pour sa part a usé de la technique de « diviser pour régner » afin de créer une classe de squatters et des élites. Après l'indépendance, l'Etat a continué d'exploiter, d'exclure et d'aliéner la majorité de la population. Le système des élections où le gagnant raflait toute la mise, où l'accès aux ressources publiques était limité à certains a causé les conflits ethniques. La réponse à court terme des conflits post-électoraux que le Kenya a connu en 2007-2008 a consisté dans un cessez-le feu et dans un partage du pouvoir négocié par l'Union africaine. Les solutions à plus long terme consistaient dans la nouvelle constitution de 2010 qui notamment organisait la décentralisation. En 2011, la CPI a affirmé sa juridiction sur la situation kenyane.

Le **Chap. 2** montre que selon la théorie de la complémentarité de Kevin Jon Heller, la CPI n'a pas juridiction sur les situations où l'Etat poursuit pour des crimes sérieux les personnes impliquées au niveau local dans ces exactions. Cependant, en vertu de l'a.17 du Statut de Rome, la chambre d'appel de la CPI exige que l'Etat poursuive la même personne pour les mêmes conduites qui lui sont reprochées par le Procureur de la CPI. Dès lors, en 2011, les actions judiciaires conduites par le Kenya ont été considérées comme « inactives ». Néanmoins, une des juges d'appel, Anita Ušacka, invoquant apparemment l'a. 53 dans les « intérêts de la justice », a appliqué un « test de processus ». Usant de critères tenant compte de la culture locale et de la tradition juridique, elle a interprété les actions judiciaires kenyanes comme « active ».

6. Revue de littérature

Le **Chap. 3** montre comment l'a.7 du Statut de Rome institue l'imputation de crimes contre l'humanité. L' »international harm principle » suppose trois

éléments. En premier lieu, il faut un crime sérieux contre un droit humain central. Cela peut être des meurtres, des actes de torture, de viol ou le fait de déplacer des populations par la force. En second lieu, ce crime doit être un élément d'une stratégie d'attaque de populations civiles. En troisième lieu, l'attaque doit être généralisée ou systématique. Les violations des droits de l'homme dans les affaires kenyanes auraient été perpétrées par des organisations de type étatique, *state-like organizations*.

Les procès kenyans invoquent la responsabilité individuelle des suspects en vertu de l'a. 25(3)(a). La responsabilité criminelle individuelle peut être de trois types. Il y a la commission directe, la commission indirecte et commission conjointe. Curieusement, la Chambre de pré-procès de la CPI a inventé une nouvelle forme de commission appelée « co-commission indirecte » qui aurait été commise par les quatre suspects kenyans. Cependant, la juge Christine van den Wyngaert a rejeté cette forme de caractérisation.

Expliquons maintenant comment nous justifions notre thèse. Elle se justifie du fait de la controverse entre les opinions des différents juges de la Chambre de pré-procès de la CPI. La majorité des juges, à savoir les juges Trendafilova et Tarfusser ont autorisé les inculpations et ont confirmé les charges de crimes contre l'humanité. Ils ont adopté une interprétation extensive et téléologique du Statut de Rome. Ils ont considéré le « Network », à savoir la ou les structures auxquelles on attribue les massacres perpétrés par des groupes kalenjin, et Mungiki comme des *state-like organizations*, des organisation de type étatique. Leur activisme judiciaire interprétait le rôle de la CPI comme devant promouvoir les droits humains des victimes et la punition des coupables. Au contraire, le juge minoritaire, Hans-Peter Kaul a adopté une interprétation littérale, contextualisée et historicisée. Son opinion dissidente a interprété la théorie de Claus Roxin comme rejetant le précédent de Nuremberg de « coupable par association ». Il a considéré le « Réseau » et Mungiki comme des gangs ordinaires appelant à des poursuites criminelles par les autorités kenyanes. Certains universitaires ont estimé que la Chambre d'appel de la CPI devrait clarifier si le Statut de Rome criminalise ou pas les organisations informelles. D'autres universitaires pensent que c'est à l'Assemblée des Etats parties d'amender le Statut.

8. Hypothèse

La principale proposition de cette thèse telle que développée dans le **Chap. 4** est que la Chambre du procès de la CPI a les pouvoirs de re-caractériser les fait d'une affaire à tout moment avant le jugement. Cette procédure de « civil law » empêche un accusé d'échapper à l'inculpation simplement à cause de cette spécificité technique. La proposition mineure est dans les procès kenyans, le

procureur de la CPI a baclé les enquêtes de pré-confirmation, cela car il espérait que le la Chambre du procès utiliserait ses pouvoirs pour re-caractériser les faits en fonction de nouvelles preuves obtenues durant les enquêtes de post-confirmation. Nous pensons également qu'à la suite de la confirmation des charges contre Kenyatta et Ruto par la chambre de pré-procès, le procureur estimait que la population kenyane rejetterait ces leaders. Il a sous-estimé l'impact de la solidarité ethnique, influence de l'illettrisme et de la pauvreté dans les pays en voie de développement. A la surprise de beaucoup, Kenyatta et Ruto on remporté les élections présidentielles de 2013. Les charges contre Muthaura ont été levées et les procès kenyans sont progressivement devenus de plus en plus illégitimes.

9. Méthodologie

Le **Chap. 5** se livre à une interprétation de la décision de la Cour Suprême du Kenya d'avril 2013 concernant la contestation du résultat des élections présidentielles. Le 9 mars 2013, la Commission électorale a déclaré Kenyatta vainqueur avec 6.1 millions de voix contre Odinga ayant remporté 5.3 millions de voix. Etonnamment, Kenyatta a remporté plus de 50% des voix dès le premier tour. Odingaa déclaré que Kenyatta a gagné du fait d'actions criminelles manifestes. Mais sa plainte devant la Cour Suprême n'a usé de preuves circonstancielles. Plus tard, Odinga a tenté d'introduire des preuves d'action criminelle manifeste en prétendant que l'équipement électronique de la Commission électorale était prévu pour ne pas fonctionner correctement. Mais la Cour a refusé d'étendre la période de temps pour apporter ces preuves. Ainsi, Odinga n'a pu contester que des aspects techniques du registre électoral et sa plainte a été rejetée. Nous défendons l'idée que la raison réelle derrière le refus de la Cour de donner davantage de temps aux plaignants tient à la nécessité de sauvegarder une paix fragile et d'éviter une guerre ethnique.

10. Rationale

Alors que la Cour Suprême a prétendu invoquer la fidélité au droit, elle a fait une interprétation conséquentialiste de la constitution kenyane pour entériner l'élection de Kenyatta et Ruto. Les juges minoritaires de la CPI ont fait une interprétation du Statut de Rome témoignant d'un même esprit de limitation alors que les juges majoritaires ont fait preuve d'activisme judiciaire. A notre sens, les avis des juges minoritaires apparaissent comme plus légitimes.

11. Limitations

Le **Chap. 6** montre que la CPI n'a pas à sa disposition de forces de police qui lui soient propres. Afin d'enquêter et d'arrêter les suspects, elle dépend de la coopération des Etats-membres. Elle n'intervient pas sur les scènes de crime rapidement après la commission des délits et elle dépend de témoignages de

seconde main de la société civile. Afin de remplir son mandat de lutte contre l'impunité, la CPI doit donc adopter une stratégie d'activisme judiciaire. Cependant, quand les suspects détiennent le pouvoir d'Etat, si la CPI ne se restreint pas, elle court le risque de ne plus bénéficier de la coopération de l'Etat et de perdre en légitimité.

12. Originalité

En 2014, la majorité des juges de la Chambre en procès de la CPI ont ordonné au Kenya d'organiser la venue de témoins non-volontaires dans le procès Ruto. Ils ont dit poursuivre la « vérité » et ont affirmé qu'aucune loi kenyane ne va à l'encontre de cette recherche. Ils avaient tort. L'International Crimes Act du Kenya (2008) limite expressément la coopération dans les cas de témoins volontaires. Ainsi, la juge dissidente Olga Herrera Carbuccia a souligné que l'Unité Victimes, Témoins et Protection devrait garantir la sécurité des témoins non-volontaires comme condition à leur venue. Notre thèse va dans ce sens.

13. Importance

Dans le Procès Kenyatta, l'Etat kenyan a estimé qu'il ne pouvait pas satisfaire aux demandes de la CPI de lui fournir les renseignements demandés concernant le patrimoine de Kenyatta. Il a justifié son refus en affirmant que les demandes du procureur étaient vagues, ambiguës et équivalaient à demander au Kenya de faire l'enquête à la place de la CPI. Notre thèse examine quatre scénarios à la disposition de la CPI. 1/ Elle rejette les demandes du procureur du fait d'absence de preuves ; 2/ Du fait du refus de l'Etat de coopérer, elle dénonce l'Etat devant l'ASP ; 3/ Si l'on suit la théorie d'Andrew Guzman, l'ASP pourrait alors se livrer à une réprimande ; 4/ des sanctions économiques et diplomatiques pourraient être prises par d'autres Etats.

14. Conclusion

Notre thèse estime que si l'on se livre à une interprétation du Statut de Rome qui prenne en compte les conséquences, les procès criminels ne sont pas réponse la plus légitime aux conflits post-électoraux de 2007. Néanmoins, le modèle de « Domestic Tort Law » exige que du fait de l'échec de garantir la sécurité des victimes et du fait que les suspects n'ont pas été poursuivis judiciairement, les victimes doivent être compensées. Dans ce sens, certaines décisions de la Cour Européenne des droits de l'homme sont des précédents utiles.

BIBLIOGRAPHY

BOOKS

Anderson, David, *Histories of the Hanged: Britain's Dirty War and the End of Empire* (London: Wiedenfield and Nicolson, 2005).

Anaan, Kofi with Nader Mousavizadeh, *Interventions: A Life of War and Peace* (London and New Delhi: Allen Lane, 2012).

Arendt, Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963).

Ashworth, Andrew, *Principles of Criminal Law* (Oxford: Oxford University Press; 2009).

Bassiouni, M. Cherif, *Introduction to International Criminal Law* (New York: Transnational Publishers, Ardsley, 2003).

----------*Crimes against Humanity in International Criminal Law* (Dordrecht, The Netherlands: Martinus Nijhoff, 1992).

Beattie, J.M., *Crime and the Courts in England 1660-1800* (New Jersey: Princeton University Press, 1986).

Bennett, Huw, *Fighting Mau Mau: British Amy and Counter Insurgency in the Kenya Emergency* (Cambridge: Cambridge University Press 2013).

Bloom Jr., Lackland H., *Methods of Interpretation: How the Supreme Court reads the Constitution* (Oxford/New York: Oxford University Press, 2009).

Boas, Gideon, James Bischoff and Natalie Reid, *International Criminal Law Practitioner Library Vol. I: Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2007).

Bratman, M.E., *Intention, Plans, and Practical Reason* (Cambridge, MA: Harvard University Press, 1987).

Brownlie, Ian, *Principles of Public International Law* (4th ed.) (Oxford: Clarendon Press, 1991).

Cario, Robert, *Justice Restaurative: Principles et Promisses* (2nd ed.) (Paris: L'Hartmann, 2010 [2005]).

Cassese, Antonio, *Self Determination of Peoples: A Legal Reappraisal* (Cambridge, New York: Cambridge University Press, 1995).

----------*International Criminal Law* (1st edn.) (Oxford: Oxford University Press, 2003).

----------Gudio Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2013).

Cavadino, Michael, and James Dignan, *Penal Systems: A Comparative Approach* (London: Sage, 2006).

Chalmers, James and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh: Thompson W. Green, 2006).

Chayes, Abram and Antonina Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (London: Harvard University Press, 1995).

Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1993).

Cockburn, J.S., *Crime in England 1550-1800* (London: Methuen & Co Ltd., 1977).

Cohen, David William and E.S. Atieno Odhiambo, *The Risks of Knowledge: Investigations into the Death of the Hon. Minister John Robert Ouko in Kenya, 1990* (Athens OH: Ohio University Press, 2004).

Conway, Gerard, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge Press, 2012).

Cotran, Eugene, *Casebook on Kenya Customary Law* (Nairobi: Professional Books and University of Nairobi, 1987).

Cryer, Robert, Håkan Friman Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd ed.) (Cambridge: Cambridge University Press, 2010).

Donnelly, Jack, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989).

Douglas, Mary, *Risk and Blame: Essays in Cultural Theory* (London: Routledge, 1992).

Drumbl, Mark A., *Atrocity Punishment, and International Law* (Cambridge University Press, 2007).

----------and Ken S. Gallant, *Appeals in Ad Hoc International Criminal Tribunals: Practice and the Community* (Dartmouth: Ashgate, 1999).

Duff, R.A. *Answering for Crime: Responsibility and Liability in the Criminal* Law (Oxford: Hart Publishing, 2007).

Durkheim, Emile, *The Division of Labor in Society* (Translated by George Simpson) (New York: The Free Press, 1947).

Dworkin, Ronald, *Justice for Hedgehogs* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2011).

----------*Justice in Robes* (Cambridge Mass.: Harvard University Press, 2006).

----------*A Matter of Principle* (Cambridge (Mass.) and London: Harvard University Press, 1985).

---------- *Taking Rights Seriously* (London: Gerald Duckworth & Co Ltd., 1977).

El Zeidy, Mohamed, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff, 2008).

Elias, Norbert, *The Society of Individuals*, Robert Van Krieken (ed.) (Dublin: UCD Press, 2010).

Elkins, Caroline, *Britain's Gulag: The Brutal End of Empire in Kenya* (London: Jonathan Cape, 2005).

Elster, Jon, *Closing the Books: Transitional Justice in a Historical Perspective* (UK: Cambridge University Press, 2004).

Fletcher, George P., *Rethinking Criminal Law* (Boston: Little, Brown & Co., 1978).

----------and Jen David Ohlin, *Defending Humanity: When Force Is Justified and Why* (New York: Oxford University Press, 2008).

Franck, Thomas M., *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

Geertz, Clifford, *The Interpretation of Cultures* (New York: Basic Books, 1973).

Genn, Hazel G., *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (New York: Oxford University Press, 1987).

Gillies, Peter, *Criminal Law* (4th edn.) (Sydney: LBC, 1950).

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

Glenn, H. Patrick, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn.) (Oxford: Oxford University Press, 2014).

Grayling, A.P. *Liberty in the Age of Terror a Defence of Civil Liberties and Enlightenment Values* (USA: Bloomsbury 2011).

Gross, Oren and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).

Harlow, Carol and Richard Rawling, *Law and Administration (Law in Context)* (3rded.) (Cambridge University Press, 2009).

Hart, H.L.A., *The Concept of Law* (Oxford: Oxford, 1961).

Hatchard, John and Tunde I. Ogowewo, *Tackling Constitutional Overthrow in the Commonwealth* (London: Commonwealth Secretariat, 2003).

Hawke, Neil, and Neil Parpworth, *Introduction to Administrative Law* (London/Sydney: Cavendish Publishing 1996 [Reprinted 1998]) pp 142-3

Hil, Richard, *International Criminology: A Critical Introduction* (London & New York: Routledge: Taylor & Francis Group, 2008).

Hobbes, Thomas, *The Leviathan* (C.B. MacPherson ed.) (Harmondsworth: Penguin Books, 1974 [1651]).

Husak, Douglas, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008).

Hydén, Göran, *Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry* (Berkeley: University of California Press, 1980).

Jacobson, Arthur and Michel Rosenfeld (eds.) *The Longest Night: Polemics and Perspectives on Election 2000* (Berkeley and Los Angeles: University of California Press, 2002).

Kant, Immanuel, *Perpetual Peace: A Philosophical Essay* (London; New York: Allen and Unwin; Macmillan, 1917) AK/ III 367.

----------*On The Radical Evil in Human Nature*, translated by Thomas Kingsmill Abbott, B.D. (4th revised ed.) (1792).
Keck, Margaret E. and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998).
Kenyatta, Jomo, *Suffering Without Bitterness: the Founding of the Kenya Nation* (Nairobi: East African Publishing House, 1968).
----------*Facing Mount Kenya: The Tribal Life of the Gikuyu* (London: Secker & Warburg, 1938).
Keohane, Robert, *Neorealism and Its Critics* (New York: Columbia University Press, 1986).
----------*After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).
Kihoro, Wanyiri, *Never Say Die: The Chronicle of a Political Prisoner* (Nairobi: East African Educational Publishers, 1998).
Kiralfy, A.K.R., *The English Legal System* (London: Sweet & Maxwell: 1990).
Kymlicka, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).
Lamont, Christopher K., *International Criminal Justice and the Politics of Compliance* (London: Ashgate, 2010).
Lewis, Mark, *The Birth of a New Court: The Internationalization of Crime and Punishment 1919-1950* (Oxford: Oxford University Press, 2014).
Lynch, Gabrielle, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (Chicago: University of Chicago Press, 2011).
Mallinder, Louise, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008).
Mani, Rama, *Beyond Retribution: Seeking Justice in the Shadows of Wars* (UK: Polity, 2002).
Marx, Karl, *The Theses on Feuerbach (*Moscow, USSR: Progress Publishers, [1845]1969).
May, Larry, *After War Ends: A Philosophical Perspective* (Cambridge: Cambridge University Press, 2012).
---------*Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005).
Mettraux, Guénaël, *The Law of Command Responsibility* (Oxford University Press, 2009).
Minow, M., *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).
Moi, Daniel Arap, *Kenya African Nationalism: Nyayo Philosophy and Principles* (London: Macmillan Publishers, 1986).

Mueller, Claus, *The Politics of Communication: A Study in the Political Sociology of Language, Socialization and Legitimation* (New York: Oxford University Press, 1974).
Mutua, Makau, *Kenya's Quest for Democracy: Taming Leviathan* (Boulder, Colo.: Lynne Rienner Publishers, 2008).
----------*Human Rights: A Political Cultural Critique* (Philadelphia: Penn University of Pennsylvania Press, 2002).
Mwagiru, Makumi, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya* (Nairobi: Institute of Diplomacy and international Studies, 2008).
Ndegwa, Duncan, *Walking in Kenyatta's Struggles: My Story* (Nairobi: Kenya Leadership Institute, 2006).
Nino, Carlos Santiago, *Radical Evil on Trial* (New Haven/London: Yale University Press, 1996).
Nobles, Richard and David Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford: Oxford University Press, 2000).
Nowrojee, Pheroze, *Kenya's The November 2005 Referendum and Kenyan Politics Today: Directions in Constitutional Reform* (Nairobi: African Research and Resource Forum; Heinrich Böll Foundation, 2006).
O'Byrne, Darren J., *Human Rights: An Introduction* (United Kingdom: Pearson Education Limited, 2003).
Office of the Panel of Eminent African Personalities, *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya* ([Nairobi]: The African Union, undated).
Ogot, Bethwell Allan, *History of the Southern Luo: Volume I, Migration and Settlement 1500-1900* (Nairobi: East African Publishing, House, 1967).
Okoth-Ogendo, H.W.O. *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Nairobi: Africa Centre for Technology Studies, 1991).
Olásolo, Héctor, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford and Portland, Oregon: Hart Publishing, 2009).
Olsen, Tricia D. and Leigh A. Payne and Andrew Reiter, *Transitional Justice in the Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: United States Institute of Peace Press, 2010).
Olusanya, Olaoluwa, *Double Jeopardy without Parameters: Re Characterization of International Criminal Law* (Antwerp Oxford: Intersentia, 2004).
Ormerod, D. *Smith and Hogan* (Oxford University Press [2006] 2011).
Osiel, Mark, *Making Sense of Mass Atrocity* (New York: Cambridge University Press, 2009).
---------*Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J. and London: Transaction Publishers, 1997).

Oucho, John O., *Undercurrents of Ethnic Conflict in Kenya* (Leiden, The Netherlands: Brill Academic Publishers, 2002).

Packer, Herbert, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

Pikis, G.M., *The Rome Statute of the International Criminal Court* (Leiden: Martinus Nijhoff, 2010).

Pogge, Thomas, *Realizing Rawls* (Ithaca: Cornell University Press, 1989).

---------W. *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002).

Press, Robert, *Peaceful Resistance: Advancing Human Rights and Democratic Freedoms* (Aldershot, U.K.: Ashgate Publishing Limited, 2006).

Pritt, Dennis Nowell, *Law, Class and Society (Book Three) Law and Politics and Law in the Colonies* (London: Lawrence and Wishart, 1971).

Rawls, John, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

---------*Political Liberalism* (New York: Columbia University Press, 1993).

---------*A Theory of Justice* (Oxford: Oxford University Press, 1971).

Raz, Joseph, *Practical Reason and Norms* (Oxford: Oxford University Press, [1975]1999).

---------*Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995).

Reichel, Philip L., *Comparative Criminal Justice Systems: A Topical Approach* (Upper Saddle River, NJ:

Pearson Prentice Hall/Pearson Education, 2013).

Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink (eds.) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge/New York: Cambridge University Press, 1999).

Rossiter, Clinton L., *Constitutional Dictatorship* (Princeton: Princeton University Press, 1948).

Roxin, Claus, *Täterschaft und Tatherrschaft* (8th ed.) (Hamburg: Verlag de Gruyter, 2006).

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

Schather, Oscar, *International Law in Theory and Practice* (Dordrecht/Boston/London: Martinus Nijhoff, 1991).

Schmitt, Carl, *Political Theology Four Chapters on the Theory of Sovereignty*, translated by George Schwab (Cambridge, Mass, MIT Press, 1988).

Sikkink, Kathryn, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton and Company, 2011).

Slapper, Gary and Steve Tombs, *Corporate Crime* (UK: Pearson Education, 1999).

Smith, Steve, Ken Booth and Marysia Zalewski (eds.) *International Theory: Positivism and Beyond* (Cambridge University Press, 1996).

Starmer, Keir, Michelle Strange and Quincy Whitaker, *Criminal Justice, Police Powers and Human Rights* (Blackstone's Human Rights Series) (London: Blackstone, 2001).

Teitel, Ruti G., *Transitional Justice* (Oxford University Press, New York, 2000).

Twining, William, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009).

Urdang, Laurence, *The Oxford Thesaurus* (Oxford: Clarendon Press, 1991).

Van Alebeek, Rosanne, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2010).

Van Sliedregt, Elies, *Individual Criminal Responsibility in International Law* (Oxford University Press: Oxford, 2012).

Wade, William, *Administrative Law* (6th ed.) (Oxford: Oxford University Press, 1988).

Waldron, Jeremy, *Law and Disagreement* (New York: Oxford University Press, 1999.

Walker, L., *The Battered Woman Syndrome* (New York: Springer, 1984).

Wessels, Johannes and Werner Beulke, *Strafrecht, allgemeiner Teil: Die Straftat und ihr Aufbau (Schwerpunkte)*.

Wigmore, John Henry, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed.) (Boston: Little, Brown and Company, 1940).

Williams, S.A. "Issues of Admissibility, Article 17," in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article* (1st ed.) (Baden-Baden: Nomos, 1999).

Van den Wyngaert, Christine and Guy Stessens, "The International Non Bis in Idem Principle: Resolving some of the Unanswered Questions" (October 1999) *International and Comparative Law Quarterly,* 48, 4, 709-804.

Zakaria, Fareed, *The Future of Freedom* (New York: W.W. Norton & Co., 2003).

Zappalà, Salvatore, "Judicial Activism and Judicial Restraint," in Antonio Cassese (ed.) *International Criminal Justice* (New York: Oxford University Press, 2009) 216-22.

----------*Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003).

BOOK CHAPTERS

Akhavan, Payam, "New Frontiers of Judicial Enforcement: The International Criminal Tribunals for the Former Yugoslavia and Rwanda" in Gudmundur Alfredsson, Jonas Grimheden, Bertrand Ramcharan and Alfred Zayas (eds.) *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller* (The Hague: Martinus Nijhoff Publishers, 2001) 441-456.

Amirthalingham, Kumaralingham, "Culture, Crime and Culpability: Perspectives on the Defence of Provocation" in A.D. Renteln and M.C. Foblets (eds.) *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Oxford: Hart Publishing, 2009) 35-60.

An-Na'im, Abdullahi Ahmed, "Introduction" in Abdullahi Ahmed An-Na'im (ed.) *Human Rights under African Constitutions: Realising the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2003).

Balint, Jennifer, "Dealing with International Crimes: Towards a Conceptual Model of Accountability and Justice" in Alette Smeulers and Roelof Haveman (eds.) *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008) 311-334.

Barzilai, Gad, "The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent" in Terrence C. Halliday, Lucien Karpik and Malcolm M. Feeley (eds.) *Fighting for Political Freedom* (Oxford: Hart Publishing, 1998) 247-280.

Blake-Amarante, Candance H., "Peace v Justice: The Strategic Use of International Criminal Tribunals" Draft available online acuns.org/.../Peace-Justice-International-Criminal-Tribunals-Candace-Blake <accessed 7th July 2014> print version in Henry F. Carey and Stacey M. Mitchell (eds.) *Trials and Tribulations of International Prosecution* (Lanham, MD: Lexington 2013) chapter 8.

Boot, Machfeld, Gordon Dixon and Christopher K. Hall, "Article 7: Crimes against Humanity" in Otto Triffterer (ed.) *Commentary of the Rome Statute of the International Criminal Court* (München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 1999) 117.

Bratman, M.E., "Shared Valuing and Frameworks for Practical Reasoning" in R.J. Wallace, R. Kumar and S. Freeman (eds.), *Reason and Value: Themes from the Moral Philosophy of Joseph RAZ* (Oxford: Oxford University Press, 2006).

Broomhall, Bruce, "The International Criminal Court: A Checklist for National Implementation," in M.C. Bassiouni (ed.) *ICC Ratification and National Implementing Legislation* (13, quarter) (*Érès, Nouvelles Études Pénales*, 1999) 113–15.

Brownlie, Ian, "An Essay in the History of the Principle of Self Determination" in C.H. Alexandrowicz (ed.) *Grotian Society Papers: Studies in the History of the Law of Nations* (The Hague: Martin Nijhoff, 1968).

Carothers, Thomas, "Why Developing Countries Prove so Resistant to the Rule-of-Law" in James J. Heckman, Robert I. Nelson and Lee Cabatingan (eds.) *Global Perspectives on the Rule of Law* (London; New York: Routledge, 2010).

Caporaso, J., M. Green Cowles and T. Risse (eds.) *Transforming Europe: Europeanization and Domestic Change* (Ithaca: Cornell University Press, 2001).

Chege, Michael, "Kenya: Back from the Brink?" In Larry Diamond and Marc F. Plattner (eds.) *Democratization in Africa: Progress and Retreat* (Boulder, CO: Lynne Rienner Publishers, 2008) 135- 152.

Coleman, Jules L. Douglas D. Heckathorn and Steven M. Maser, "A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law" in R.G. Frey and Christopher W. Morris (eds.) *Liability and Responsibility: Essays on Law and Morals* (Cambridge: Cambridge University Press, 1991) Ch 6.

Cronin-Furman, Kate and Amanda Taub, "Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice" in William Schabas, Yvonne McDermott and Niamh Hayes (eds.) *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Farnham, UK: Ashgate, 2013) 435-452.

De Mesquita, Bruce Bruno James D. Morrow Randolph Siverson and Alistar Smith, "The Selectorate Model: A Theory of Political Institutions" in Joseph Burger and Morris Zekldith Jr. (eds.) *New Directions in Sociological Theory* (USA: Rowman & Littlefield Publishers, 2002) 262-292.

De Smet, S., "A Structural Analysis of the Role of the Pre-Trial Chamber in the Fact Finding Process of the ICC" in Carsten Stahn and Göran Sluiter (eds.) *Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff, 2007).

Deng, Francis M. "Beyond Cultural Domination: Institutionalizing Equity in the African State" in Mark R. Bessinger and Crawford Young, (eds.) *Beyond the Crisis? Post-Colonial Africa and Post-Soviet Eurasia in Comparative Perspective* (USA: Woodrow Wilson Center Press, 2004) 359-384.

Eboe-Osuji, Chile "Preface" in William Schabas, Yvonne McDermott and Niamh Hayes (eds.) *Ashgate Research. Companion to International Criminal Law: Critical Perspectives* (Farnham, UK: Ashgate, 2013) xli-xliv.

Fletcher, George P. "Justice and Fairness in the Protection of Crime Victims" in Christopher Russell (ed.) *George Fletcher's Essays on Criminal Law* (New York: Oxford University Press, 2013) 254-263.

Gathenji, Mbuthi, "Post-Election Violence and Crimes Against Humanity in 2007" in Kimani Njogu (ed.) *Defining Moments: Reflections on Citizenship Violence and the 2007 General Elections in Kenya* (Nairobi: Twaweza Communications, 2011) chapter 13.

Gazal-Ayal, Oren and Limor Riza, "Plea-bargaining and Prosecution" in Nino Garoupa (ed.) Criminal Law and Economics (UK and USA: Edward Elgar Publishing, 2009) 145-70.

Ghai, Yash Pal "State, Ethnicity and Economy in Africa" in Hiroyuki Hino, John Lonsdale, Ranis and Frances Stewart (eds.) *Ethnic Diversity and Economic Instability in Africa: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2012) 129-168.

---------- "Constitutionalism and the Challenge of Ethnic Diversity" in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds.) *Global Perspectives on the Rule of Law* (London; New York: Routledge, 2010) 279-302.

Gioia, F. "Comments on chapter 3 of Jann Kleffner," in J. Kleffner and G. Kor (eds.) *Complementary Views on Complementarity* (The Hague: TMC Asser Press, 2006).

Grofman, Bernard, "Games of Breach of Contract in Patching Expectation Interest‖ (1981) *Research in Law and Economics*, 3, 67‑90.

Guariglia, Fabricio, "The Selection of Cases by the Office of the Prosecutor of the International Criminal Court" in Carsten Stahn and Göran Sluiter (eds.) *Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff, 2007) 209-218.

Halliday, Terence C., "The Fight for Basic Legal Freedoms: Mobilization by the Legal Complex" in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds.) *Global Perspectives on the Rule of Law* London; New York: Routledge, 2010) 210-240.

Hebel, Herman Von and Darryl Robinson, "Crimes within the Jurisdiction of the Court" in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 79-126.

Heinsch, R., "How to Achieve a Fair and Expeditious Trial Proceedings before the ICC: Is it time for more Judge Dominated Approach?" in Carsten Stahn and Göran Sluiter (eds.) *Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff, 2007).

Holmes, J.T. "Complementarity: National Courts versus the ICC," in Antonio Cassese, Paola Gaeta and John Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (New York, NY: Oxford University Press, 2002).

Heller, Kevin Jon, "A Sentence-Based Theory of Complementarity" (Winter 2012) *Harvard International Law Journal*, 53, 1, 315-336; reprinted in William Schabas, Yvonne McDermott and Niamh Hayes (eds*.) Ashgate Research. Companion to International Criminal Law: Critical Perspectives* (Farnham, UK: Ashgate, 2013) 205-222.

Husak, Douglas, "Does Criminal Responsibility Require an Act?" in R.A. Duff. (ed.) *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press, 1998) 60-100.

Jacobs, Dov, "A Shift in Power: Who's in Charge of the Charges at the International Criminal Court?" in William Schabas, Yvonne McDermott and Niamh Hayes (eds*.) Ashgate Research. Companion to International Criminal Law: Critical Perspectives* (Farnham, UK: Ashgate, 2013).

Jordash, Wayne "Joint Criminal Enterprise Liability: Result-Oriented Justice" in William Schabas, Yvonne McDermott and Niamh Hayes (eds*.) Ashgate Research. Companion to International Criminal Law: Critical Perspectives* (Farnham, UK: Ashgate, 2013) 133-161.

Khamala, Charles A., "Without Kenyatta or Moi: Voting for a Change" in James Shikwati (ed.) *Reclaiming Africa* (Inter Region Economic Network, Nairobi) 287-328.

Kolb, R. "General Principles of Procedural Law" in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds.) *The Statute of the International Court of Justice, A Commentary* (Oxford: Oxford University Press, 2006).

Llewellyn, Jennifer, "Truth Commissions and Restorative Justice" in Gerry Johnstone and Daniel W. Van Ness (eds.) *Handbook of Restorative Justice* (Cullompton, Devon: Willan Publishing, 2007) 397- 425.

Maupeu, Hervé, Katumanga Musambayi and Mitullah Winnie (eds.) *The Moi Succession: Elections 2002* (Nairobi: Transafrica Press, 2005) 33-68.

---------- "The Churches and the Polls" in Marcel Rutten, Alamin Mazrui and François Grignon (eds.) *Out for the Count: The 1997 General Elections and Prospects for Democracy in Kenya* (Kampala: Fountain Publishers, 2001) 50-71.

Mbataru, Patrick, "The Anatomy of a Crisis: Transitional Politics and the Rent Crisis in Nairobi" in Hervé Maupeu (ed.) *L'Afrique Orientale* (Paris and Nairobi: IFRA, 2003).

Mégret, Frédéric, "Too Much of a Good Thing? ICC Implementation and the Uses of Complementarity" in C. Stahn and M. El Zeidy (eds.) *International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2010).

Miti, Katabaro, Ella Abatan and Stephanie Minou, "Guest Editor's Introduction," Is Power-Sharing the Solution to South Africa's Conflicts? (September, 2011) *Southern African Peace and Security, University of Pretoria*, 2, 1, 1-8.

Morris, Kenneth E. "Western Defensiveness and the Defense of Rights: A Communitarian Alternative" in Lynda Bell, Andrew J. Nathan and Ilan Peleg

CRIMES AGAINST HUMANITY IN KENYA'S POST-2007 ELECTION VIOLENCE

(eds.) *Negotiating Culture and Human Rights* (NewYork: Columbia University Press, 2001) 68-95.

Morrison, Wayne, "Globalization, Human Rights and International Criminal Courts" in J. Munice and D Wilson (eds.) *Student Handbook of Criminal Justice and Criminology* (London: Cavendish Publishing) 153-165.

Muigai, Githu, "Jomo Kenyatta and the Rise of the Ethno-nationalist State in Kenya" in Bruce Berman, Dickson Eyoh and Will Kymlicka, *Ethnicity and Democracy in Africa* (Oxford/ Athens: J. Currey/ Ohio University Press, 2004).

Muli, Koki, "Reflections about the Events at Kenyatta International Conference Centre (KICC) on 27th-31st December 2007" in Kimani Njogu (ed.) *Defining Moments: Reflections on Citizenship Violence and the 2007 General Elections in Kenya* (Nairobi: Twaweza Communications, 2011) 3-39.

Mungai, Kibe, "The Law and Leadership: The Post-Colonial Experience in Kenya in Kimani Njogu (ed.) *Governance and Development: Towards Quality Leaders hip in Kenya* (Nairobi: Twaweza Communications, 2007) 50-103.

Murithi, Tim, "Towards a Symbiotic Partnership: The UN Peacebuilding Commission and the Evolving African Union/NEPAD Post-Conflict Reconstruction Framework" in Adekeye Adebajo and Helen Scanlon (eds.) *A Dialogue of the Deaf: Essays on Africa and the United Nations* (Johannesburg: Jacana, 2006) 243-260.

Mutua, Makau, "The Ideology of Human Rights: Towards Post Liberal Democracy?" in E.K. Quashigah and O.C. Okafor (eds.) *Legitimate Governance in Africa* (The Netherlands: Kluwer Law International, 1999).

Njogu, Kimani, "Putting out the Flames: The Kenya National Dialogue and Reconciliation Process" in Kimani Njogu (ed.) *Defining Moments: Reflections on Citizenship Violence and the 2007 General Elections in Kenya* (Nairobi: Twaweza Communications, 2011) 105-46.

Nouwen, Sarah M.H., "Fine-Tuning Complementarity" in Bartram S. Brown (ed.) *Research Handbook on International Criminal Law* (Cheltenham: Edward Elgar 2011) Chapter 9.

Nowrojee, Pheroze, "Why the Constitution needs to be changed" in Kivutha Kibwana, Chris Maina Peter and Oloka-Onyango (eds.) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996).

Ohlin, Jens David, "Organizational Criminality" in Elies Van Sliedregt (ed.) *Pluralism in International Criminal Law* (Oxford University Press, 2014) 107-127.

----------"Peace, Security, and Prosecutorial Discretion" in Carsten Stahn and Göran Sluiter (eds.) *Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff, 2007) 185-207.

Okoth-Ogendo, H.W.O., "Constitutionalism without Constitutions: The Challenge of Reconstruction of the State in Africa" in Carla M. Zoethout, Marlies E. Pietermaat-Kros and Piet W.C. Akkermans (eds.) *Constitutionalism in Africa: A Quest for Autochthonous Principles* (Rotterdam: Sandres Instituut, 1996) 49-1.

Owiti, Okech and William Mbaya, "Public Order and Preservation of Public Security Law" in Smokin C. Wanjala and Kivutha Kibwana (eds.) *Democratization and Law Reform in Kenya* (Nairobi: School of Law, University of Nairobi, 1997) 32-92.

Parmentier, Stephan, "The South African Truth Justice and Reconciliation Commission: Towards Restorative Justice in the Field of Human Rights" in Ezzat A. Fattah and Stephan Parmentier (eds.) *Victim Policies and Criminal Justice on the Road to Restorative Justice: Essays in Honour of Tony Peters* (Belgium: Leuven University Press, 2001) 401-423.

Powderly, Joseph, "Distinguishing Creativity from Activism: International Criminal Law and the Legitimacy of a Judicial Development of the Law" in William Schabas, Yvonne McDermott and Niamh Hayes (eds.) *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Farnham, UK: Ashgate, 2013) chapter 10.

Rhea, Harry M., "International Criminal Courts" in Cindy J. Smith, Sheldon X. Zhang and Rosemary Barberet (eds.) *Routledge Handbook of International Criminology* (Oxon:, Routledge, 2011).

Sadat, Leila Nadya (ed.) *Forging a Convention for Crimes Against Humanity* (St. Louis: Washington University, 2012).

Schabas, William, "The Sierra Leone Truth and Commission" in Naomi Roht-Azziaza and Javier Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge, Cambridge University Press, 2006) 21-42.

----------"Criminal Responsibility for Violations of Human Rights" in Janust Symonds (ed.) *Human Rights: International Protection Monitoring and Enforcement* (England/USA: Ashgate Publishing, 2003) 281-302.

Sihanya, Ben and Duncan Okello, "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreements" in Karuti Kanyinga and Duncan Okello (eds.) *Tensions and Reversals in Democratic Transitions: Kenya 2007 General Elections* (Nairobi: Society for International Development and Institute for Development Studies University of Nairobi, 2010) 633-709.

Sluiter, Göran, "Cooperation of States with International Criminal Tribunals" Antonio Cassese (ed.) *The Oxford Companion to International Criminal Justice* (New York: Oxford University Press, 2009) 187-200.

Stahn, Carsten, " 'Sentencing Horror' or Sentencing Heuristic' A Reply to Heller's Sentence-Based Theory of Complementarity" in William Schabas,

Yvonne McDermott and Niamh Hayes (eds.) *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Farnham, UK: Ashgate, 2013) 358-67.

Stribopolous, James, "Packer's Blind Spot: Low-Visibility Encounters and the Limits of Crime Control versus Due Process" in François Tanguay-Renaud and James Stribopoulos (eds.) *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart Publishing, 2012) 193-216.

Tamir, Yael, "Class and Nation" in Phillipe Van Parijs (ed.) *Cultural Diversity versus Economic Solidarity* (Brussels: De Boeck and Larcier, 2004) 139-157.

Taylor, Charles, "The Politics of Recognition," in Amy Gutmann (ed.) *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25-73.

Thaman, Stephen C., *Comparative Criminal Procedure: A Casebook Approach* (2nd edn.) (Durham, NC: Carolina Academic Press [2002] 2008).

Turone, Giuliano, "Powers and Duties of the Prosecutor," in Antonio Cassese, Paola Gaeta and John Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary, Volume I* (New York, NY: Oxford University Press, 2002).

Van den Wyngaert, Christine and Tom Ongena, "*Ne bis in idem* Principle, Including the Issue of Amnesty" in Antonio Cassese, Paola Gaeta and John Jones (eds.) T*he Rome Statute of the International Criminal Court: A Commentary, Volume I* (New York, NY: Oxford University Press, 2002) 705-29.

Van Ness, Daniel W., "Proposed Basic Principles on the Use of Restorative Justice: Recognising the Aims and Limits of Restorative Justice" in Andrew Von Hirsch, Julian Roberts, Anthony E. Bottoms, Kent Roach and Mara Schiff (eds.) *Restorative Justice & Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford and Portland, Oregon: Hart Publishing, 2003).

Walgrave, Lode, "Community Service as a Cornerstone of a Systemic Restorative Response to (Juvenile) Crime" in Gordon Bazemore and Lode Walgrave (eds.) *Repairing the Harm Done by Youth Crime* (Monsey, NJ: Criminal Justice Press, 1999).

Wells, Celia, "A Cry in the Dark: Corporate Manslaughter and Cultural Meaning" in Ian Loveland (ed.) *Frontiers of Criminology* (London, Sweet and Maxwell, 1995) 109-125.

Wilson, Heather A., *International Law and the Use of Force by National Liberation Movements* (Oxford University Press, 1988) 55-88.

Wolf, Thomas P. "Immunity or Accountability? Daniel Toroitich Arap Moi: Kenya's First Retired President" in Roger Southall and Henning Melber (eds.) *Legacies of Power: Leadership, Change and Former Presidents in African Politics* (Uppsala: Nordic Africa Institute, 2006) 197-232.

JOURNAL ARTICLES

Amar, Akhil Reed, "Intratextualism" (1999) *Harvard Law Review*, 112, 747-827.

Ashworth, Andrew, "A Change of Normative Position: Determining the Contours of Culpability in Criminal Law" (2008) *New Crim. L Rev.* 11,2, 232-256.

Abbott, Kenneth W., "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts" (1999) *American Journal of International Law*, 93, 361-379;

Ago, Roberto, "Positive Law and International Law" (1957) *American Journal of International Law*, 51, 691–733.

Axelrod, Robert and Robert Keohane, "Achieving Cooperation under Anarchy: Strategies and Institutions" (1985) *World Politics*, 38(1), 226-254.

Badar, Mohamed Elewa, " 'Just Convict Everyone!' – Joint Perpetration: From Tadić to Stakić and Back Again" (2006) *International Criminal Law Review*, 6, 2, 293-302.

Benzing, Markus, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" (2003) *Max Planck Yearbook of United Nations Law,* 7, 591-632.

Brown, Stephen and Rosalind Raddatz, "Dire Consequences or Empty Threats? Western Pressure for Peace, Justice and Democracy in Kenya" (February 2014) *Journal of Eastern African Studies*, 8, 1, 43-62.

Cassese, Antonio, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise" (2007) *Journal of International Criminal Justice*, 5, 109–133.

Cheeseman, N., G. Lynch and J. Willis (2014) "Democracy and its Discontents: Understanding Kenya's 2013 Elections," *Journal of Eastern African Studies*, 8 (1), 2-24, pp 3-4.

----------and B.M. Tendi, "Power-Sharing in Comparative Perspective: the Dynamics of 'Unity Government' in Kenya and Zimbabwe" (2010) *Journal of Modern African Studies*, 48(2) (02), 203-29.

Christie, Nils, "Conflicts as Property" (1977) *British Journal of Crimino*logy, 17, 1-15.

Craig, P. "Representations by Public Bodies" (1977) 93, *L.Q.R.* 397, 404-408.

D'Amato, Anthony, "Peace vs. Accountability in Bosnia" (1994) *Am. J. Int. L.*, 88, 500-506.

De la Cuesta, José Luis, "Concurrent National and International Criminal Jurisdiction and the Principle '*Ne Bis in Idem*' General Report" (2002) *International Review of Penal Law*, 73, 707-736.

DeRouen, Karl and Jacob Bercovitch, "Enduring Internal Rivalries: A New Framework for the Study of Civil War" (2008) *Journal of Peace Research*, 4, 1, 55-74.

Donnelly, Jack, "International Human Rights: A Regime Analysis" (Summer 1986) *International Organization*, 40, 3, 599-642.

Drumbl, Mark A., "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity" (Winter 2005) *Northwestern University Law Review*, 55, 539-610.

Dworkin, Ronald, "Law as Interpretation" (1982) *Texas Law Review,* 60, 527-550.

Easterbrook, Frank H. "Criminal Procedure as a Market System" (1983) *Journal of Legal Studies*, 12, 289-32.

Finnemore, Martha, and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) *International Organization*, 52, 887-917.

Fitzmaurice, Gerald, "The Law and Procedure of the International Court of Justice: International organisations and Tribunals" (1952) *British Yearbook of International Law*, 29, 1.

Fletcher, George P., "The Place of Victims in the Theory of Retribution" (1999) *Buffalo Criminal Law Review*, 3, 51.

Fox, Gregory H., "The Right to Political Participation in International Law" (1992) *Yale Journal of International Law*, 17, 539.

Gates, Scott and Strøm Kaare, "Power-sharing and Civil Conflict" (2008) *Oslo: PRIO/CSCW, Policy Brief*, 1.

Grofman, Bernard, "Games of Breach of Contract in Patching Expectation Interest (1981) *Research in Law and Economics*, 3, 67‑90.

Guzman, Andrew T., "A Compliance-Based Theory of International Law" (2002) *California Law Review*, 90, 1826–1887.

Hansen, Thomas Obel, "Transitional Justice: Toward a Differentiated Theory" (2011) *Oregon Review of International Law*, 13, 1-46.

----------"Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns," (2011) *California Western International Law Journal*, 42, 1, 1-35.

Hart, H.L.A., "Positivism and the Separation of Law and Morals" (February 1958) *Harvard Law Review*, 71, 4, 593-629.

Hathaway, Oona A., "The Cost of Commitment" (2003) *Stanford Law Review,* 55, 1821-63.

----------"Do Human Rights Treaties Make a Difference?" (2002) *Yale Law Journal*, 111, 1935-2042.

Hellstern, Sirkku, "Afro-Libertarianism and the Social Contract Framework in Post-Colonial Africa: The Case of Post 2007 Elections in Kenya" (June 2009) *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)*, Premier Issue New Series, 1, 1, 127-146.

Henham, R., "Theorizing Law and Legitimacy of International Criminal Justice" (2007) *International Journal of Law in Context*, 3, 257.

Jain, Neha, "Control Theory of Perpetration in International Criminal Law" (2011) *Chicago Journal of International Law*, 12, 1, 157-198.

Jalloh, Charles Chernor, "What Makes a Crime against Humanity a Crime Against Humanity" (2013) *American University International Law Review*, 28 (2) 381-441.

Kagwanja, Peter Mwangi, " 'Power to Uhuru': Youth Identity and Generational Politics in Kenya's 2002 Elections" (2005) *Journal of African Affairs*, 105, 418, 51-75.

----------"Facing Mount Kenya or Facing Mecca? The Mungiki, Ethnic Violence and the Politics of the Moi Succession in Kenya, 1987-2002" (2003) *Journal of African Affairs*, 102, 25-49.

Keohane, Robert, "International Institutions: Two Approaches" (December 1988) *International Studies Quarterly*, 32, 4,379-396.

Khan, Karim A.A. and Anand A.A. Shah, "Defensive Practices: Representing Clients before the International Criminal Court" (2013) *Law and Contemporary Problems*, 76, 3 & 4, 191-233. <accessed on 10th September 2014>

Kivimäki, Timo Antero, "National Diplomacy for Human Rights: a Study of US Exercise of Power in Indonesia, 1974-1979" (1994) *Human Rights Quarterly*, 16(2), 415 p 417.

Koh, Harold Hongju, "Why do States Obey International Law?" (1997) *Yale Law School, Faculty Scholarship Series. Paper*, 2101; http://digitalcommons.law.yale.edu/fss_papers/2101 <accessed 23rd September 2014>

Kress, Claus, "On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 Kenya Decision" (2010) *Leiden Journal of International Law*, 23, 870.

Lynch, Gabrielle, "Electing the 'Alliance of the Accused': The Success of the Jubilee Alliance in Kenya's Rift Valley," (2014) *Journal of Eastern African Studies*, 8 (1), 93-114.

MacDonnell, Vanessa, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012) *Supreme Court Law Review*, 58 (2d) 225.

March, J.G. and J.P. Olsen, "The Institutional Dynamics of International Political Orders" (1998) *International Organization*, 52(4), 943-69.

Mkandawire, Thandika, "Globalisation and Africa's Unfinished Agenda" (1997) *Macalester International*, 7, 71–107.

Mitchell, M.I., "Power Sharing and Peace in Côte d'Ivoire: Past Examples and Future Prospects" (2012 *Conflict, Security and Development*, 12(2), 171-191.

Moravcsik, Andrew, "Explaining International Human Rights Regimes: Liberal Theory and Western Europe" (1995) *European Journal of International Relations*, 1 (2), 157-189.

Mueller, Suzanne, "Kenya and the International Criminal Court (ICC) Politics, the Election and the Law" (2014) *Journal of East African Studies*, 8, 1, 25-42.

Muigai, Githu, "Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation" (2004) *East African Law Journal*, 1, 1-20.

North, Douglass C. "Economic Change through Time" (Jun., 1994) *The American Economic Review*, 84, 3, 359-368.

Odoriozolo-Gurruttxaga, Miren, "The Doctrine of Joint Criminal Enterprise at the ad hoc Tribunals and its Applicability in the Rome Statute of the ICC" (2013) *Revue électronique de l'AIDP / Electronic Review of the IAPL / Revista electrónica de la AIDP*, A-03:1. http://www.penal.org/?page=mainaidp&id_rubrique=41&id_article=376 <accessed 19th September 2014>

Ohlin, Jens David, "Joint Intentions to Commit International Crimes" (2011) *Chicago Journal of International Law*, 11, 2, 693-752.

Ojienda, Tom, "Legal and Institutional Framework of the TJRC – Way Forward" (2010) *Law Society of Kenya Journal*, 6, 1, 61-96.

Pelser, W., "Will ICC Prosecutions Threaten Ugandan Peace Process?" (2005) *Africa Reports: Institute for War and Peace Reporting*, 46 available at: http://www.iwpr <accessed 19th June2015>

Posner, Eric A. and Alan O. Sykes, An Economic Analysis of State and Individual Responsibility under International Law (2007) *American Law and Economics Review*, 9 (1), 72-134.

Robinson, Darryl, "Developments in International Criminal Law" (1999) *American Journal of International Law,* 93, 43-51.

Roche, Declan, "Truth Commission Amnesties and the International Criminal Court," (2005) *British Journal of Criminology*, 45, 565-581.

Rotsch, Thomas, *Zeitschrift für die gesamte Strafrechtswissenschaft* (2000) 518, 557.

---------"*Tatherrschaft kraft Organisationsherrschaft?*" (2000) Zeitschrift für die gesamte Strafrechtswissenschaft? 112.

Roxin, Claus, *Straftaten im Rahmen organisatorischer Machtapparate*, (1963) Goltdammer's Archiv für.Strafrecht 110.

Rudolph, Christopher, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals" (Summer 2001) *International Organization*, 55, 3, 659-91.

Sadat, Leila Nadya, "Crimes against Humanity in the Modern Age," (April 2013) *American Journal of International Law*, 107, 334-77.

---------"The Legacy of the ICTY: The International Criminal Court" (2002-2003) *New England Law Review*, 37(4), 1073-1080.

Sculhofer, Stephen J., "Plea Bargaining as Disaster" (1988) *Yale Law Journal*, 101, 1979-2009.

---------"Is Plea-Bargaining Inevitable?" (1984) *Harvard Law Review*, 17, 43—82.

Solum, Lawrence B., "The Unity of Interpretation" (2010) *Boston University Law Review* Rev., 90, 551-78.

Spinellis, Dionysios, "The *Ne Bis in Idem Principle* in the 'Global Instruments'" (2002) *International Review of Penal Law*, 73(3-4) 1149-1153.

Sriram, Chandra Lekha and Marie-Joëlle Zahar, "The Perils of Power-Sharing: Africa and Beyond" (2009) *Africa Spectrum*, 44, 3, 11-39.

Stahn, C., "Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55" (2005) *Criminal Law Forum* 16, 1-31.

Stanley, Elizabeth, "Truth Commissions and the Recognition of State Crime" (2005) *British Journal of Criminology,* 45, 4, 582-97.

Starr, Sonja, "Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations" (2007) *Northwestern University Law Review*, 101, 3, 1257-1314.

Sutherland, Edwin H., "White-Collar Criminality," (Feb. 1940) *American Sociological Review*, 5, 1-12.

Traniello, Marisa, "Power-Sharing: Lessons from South Africa and Rwanda" (2008) *International Policy Review*, 3(2), 28-43. www.saccps.org/pdf/2-1/Miti%20(Guest%20Introduction).pdf <accessed 17th September 2014>

Trimble, Philip, "Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy" (1997) *Mich. L. Rev*. 95, 1944.

Van den Wyngaert, Christine and Guy Stessens, "The International Non Bis in Idem Principle: Resolving some of the Unanswered Questions" (October 1999) *International and Comparative Law Quarterly,* 48, 4, 709-804.

NEWSPAPERS AND MAGAZINES

Bagaka, Obuya, "Striking Similarities between Uhuru Kenyatta's Trial at The Hague and Jomo Kenyatta's Kapenguria case" *East African Standard*, 29th September 2014.

Daily Nation, 22nd January 2008.

Daily Nation, 10th January, 2008.

"Electoral Commission Scrambles Frantically to Find Legal Route to Voter Recounting," *The East African*, 7th-13th January, 2008.

Elkins, Caroline, "What's Tearing Kenya Apart? History, for One Thing," The Washington Post, 6th January 2008. http://www.washingtonpost.com/wpdyn/content/article/2008/01/04/AR2008010404300.html?hpidopinionsbox1<accessed 27th September 2014>

"Frazer's Full Statement on Situation," *Sunday Nation*, 13th January 2008.

Hatcher, Jessica, "Controversy as Kenya Salutes Uhuru Kenyatta as new Leader: Ugandan Ruler Yoweri Museveni Astonishes Diplomats at Ceremony with Fierce Attack on Hague Court," *The Guardian,* 9th April, 2013. http://www.theguardian.com/world/2013/apr/09/controversy-kenya-uhuru-kenyatta-uganda <accessed 22nd September 2014>

Herting, Keith, "ICC judge withdraws from case against Kenya president" *The Jurist*, 28th April 2013 http://jurist.org/paperchase/2013/04/icc-judge-withdraws-from-case-against-kenya-president.php <accessed 21st October 2013>

Hodin, Blam, "Police Torture is charged in Kenya," *Washington Post*, 13th March 1987.

"Jurists Fault Supreme Court Ruling on Presidential Petition," *East African Standard*, 6th September 2013 http://www.standardmedia.co.ke/m/?articleID=2000092900&story_title=Jurists-fault-Supreme-Court-ruling-on-presidential-petition <accessed 4th October 2013>

Kagwanja, Peter, "Why Courts Should Steer Clear of African Civil Wars: The ICC Should be Guided by a Clear Grasp of the Changing Character of Warfare in Africa," *Daily* Nation, 22nd February, 2014.

Kaplan, Robert D., "Was Democracy Just a Moment?" *Atlantic Monthly*, December 1997, Cover Story.

Kinjire, Samuel, "Kibaki's Petition Thrown Out," (January 2000) *The Lawyer Magazine*, no. 17.

Kimei, Kipchumba, "The Work I did was Impressive, Says Ocampo" *East African Standard* 22nd September 2014.

Kipkorir, Donald B. "Why Kivuitu must be Held Accountable for Polls Chaos," *Daily Nation*, 5th January, 2008.

Kiprotich, Alex, "Ex-Mungiki Leader Maina Njenga Shot and Wounded Along Nyahururu-Nairobi Highway" *The Standard Digital* http://www.standardmedia.co.ke/article/2000122277/maina-njenga-shot-and-wounded-along-nyahururu-nairobi-highway/ <accessed 15th July 2014>

KTN Jioni, 17th January 2008.

Limo, Lucianne, "Post Election Violence Victims Sue Officers," *East African Standard*, 14th February 2013. http://www.standardmedia.co.ke/?articleID=2000077244&story

Macharia, Wanjiru, "Court Convicts Kenyan of Poll Chaos," *Daily Nation*, 12th June 2012.

Makori, Wacui, "Staying the Course of Peace," *The Nairobi Star*, 17th January, 2008.

Matata, Lydia, "Kenya: Africog Unveils People's Court," *The Nairobi Star*, 12th April 2013. http://allafrica.com/stories/201304121191.html <accessed 29th September 2014>

Mathiu, Mutuma, "Uhuru/Ruto Won Fair and Squarely and Raila Odinga Lost Badly……" *Daily Nation*, 12th April, 2013.

Mbeki, Thabo and Mahmood Mamdani, "Courts Can't End Civil Wars," *New York Times*, 5th February, 2014).

Menya, Walter, "Ruto Defence accuses Kibaki of Betrayal" Daily Nation, 31st October 2013. http://www.nation.co.ke/news/politics/Ruto-defence-accuses--Kibaki-of-betrayal-/-/1064/2055492/-/p0k7tz/-/index.html<accessed 31st October 2013>

Moreno-Ocampo, Luis, *The Nairobi Star*, April 2013.

McCrummen, Stephanie, "Kenyan Troops Strike at Militia involved in Land Clashes," *Washington Post*, 11th March, 2008. http://www.washingtonpost.com/wp-dyn/content/article/2008/03/10/AR2008031001015.html# <assessed 28th September 2014>

Mullin, Catherine, "Judge Christine Van den Wyngaert is excused and Dissents From Uhuru Kenyatta Case," *AMICC*, 8th May 2013. http://amicc.blogspot.fr/2013/05/judge-christine-van-den-wyngaert-is.html <accessed 21st October 2013>

Ni Chonghaile, Clar, "Kenyan Mau Mau Veterans Celebrate Victory in UK Torture Damages Case" (Nairobi: *The Guardian*, 5th October 2012). http://www.guardian.co.uk/world/2012/oct/05/kenyan-mau-mau-veterans <accessed on 6 October 2012>

"Now ECK Denies Rigging Poll in Favour of Kibaki," *Daily Nation*, 24th January, 2008.

Nowrojee, Pheroze, "Chapter 6 Doesn't Bar Uhuru and Ruto," *The Star Newspaper,* 7th November 2012 http://www-ke.the-star.co.ke/news/article-94589/chapter-six-doesnt-bar-ruto-and-uhuru<accessed 22nd September 2014>

Odula, Tom and Rodney Muhumuza, "Kenya Election Results: Uneasy Calm after Court Ruling on Vote" *Huff Post World*, 31st March 2013.

---------"Kivuitu Responsible for Post-Election Violence," *The Nairobi Star*, 21st September 2011.

Olick, Felix, "US Don says Neither Uhuru nor Raila Attained 50 pc Vote," *East African Standard*, 4th May 2013.

Ongiri, Isaac, "Kibaki did not Trust Military – Wikileaks" *The Nairobi Star*, 12th March 2011 http://www.the-star.co.ke/news/article-69762/kibaki-did-not-trust-military-wikileaks#sthash.c1TGp8U2.dpuf <accessed 27th September 2014>

Owino, Samwel, "Ocampo Denies his ICC Kenyan Cases have failed" extracted from "Why has the Court Failed to deliver on its Promise?" *BBC HARDtalk interview*, 19th September 2014. http://mediamaxnetwork.co.ke/peopledaily/?p=107026m <accessed September 24th 2014.

Opiyo, David, "Kibaki axed Kalenjins after 2002, ICC told," *Daily Nation*, 20th February 2014.

Rice, Xan and David Batty and agencies, "Opposition to Resume Protests after Kenya Talks Fail," *The Guardian*, 11th January, 2008.

Robins-Early, Nick, "Haunting Images as Kenya Mourns Victims of Garissa Terror Attack," *The Huffington Post*, 7th April 2015 http://www.huffingtonpost.com/2015/04/07/kenya-attack-mourning-photos_n_7020548.html <accessed 8th April 2015>

Rwenji, Caroline and Zadock Angira, "Kosgey on 12 Counts for abuse of Office," *Daily Nation*, 4th January 2011, http://www.nation.co.ke/news/politics/Kosgey-on-12-counts-for-abuse-of-office--/-/1064/1083554/-/a4qwvwz/-/index.html <accessed 25th June 2014 <accessed 25th June 2014>

Stolberg, Sheryl Gay and Jeffry Gettleman, "Rice in Nairobi, Offers Incentives to End Violence" *New York Times*, 19th February 2008.

Teyie, Andrew, "Judge: How we came to Conclusion Uhuru Poll Victory was Valid" *Daily Nation*, 23rd August 2013. http://mobile.nation.co.ke/News/Judge+Why+we+ruled+Uhuru+defeated+Raila+++/-/1950946/1965922/-/format/xhtml/-/dw77d9/-/index.html <accessed 4th October 2013>

Wangusi, Nathan, "Kenya: 2013 Election Will Be a Referendum on Integrity" *Pambazuka News*, 25th October 2012

http://allafrica.com/stories/201210260806.html<accessed on October 16th 2013

Wheatle, Alex, "Tottenham 2011 and Brixton 1981 – Different Ideals, Similar Lessons: There is no More Faith in Police than when I fought in the Brixton Riots. Now we must Demand Answers in Non-Violent ways" *the Guardian* 9th August 2011 http://www.theguardian.com/profile/alex-wheatle <accessed 22nd September 2014>

Wrong, Michela, "Indictee for President!" 11th March 2013, http://latitude.blogs.nytimes.com/2013/03/11/being-prosecuted-by-the-i-c-c-helped-uhuru-kenyattas-chances-in-kenyas-election/ <accessed 25th September 2014>

Zakaria, Fareed, "The Rise of Illiberal Democracy," *Foreign Affairs*, November/December, 1997.

UNPUBLISHED PH.D. THESES

Blake-Amarante, Candance H., *Choosing an International Legal regime: How Much Justice Would You Trade for Peace?* (Graduate School of Arts and Sciences, Columbia University, unpublished Ph.D. Thesis, 2013) p 120 Blake_columbia_0054D-11387.pdf <accessed 7thJuly 2014>

Muigai, Githu, *Constitutional Amendment Process in Kenya (1964-1997): A Study in the Politics of the Constitution* (Faculty of Law, University of Nairobi, unpublished Ph.D. thesis, 2001).

INTERNET SOURCES

Abyua, Edwin Odhiambo, "The Role of the Judiciary in Promotion of Free and Fair Elections" 1-16. www.juridicas.unam.mx/wccl/ponencias/1/1.pdf <accessed 27th September 2014> http://www.africafiles.org/article.asp?ID=19264 <accessed June 29th 2014>

African Leaders Accuse ICC of 'Race Hunt' AU urges Hague-Based Court to Stop Upcoming Trials of Kenyan President and his Deputy over Crimes against Humanity;" http://www.aljazeera.com/news/africa/2013/05/201352722331270466.html <accessed 22nd September 2014>

"African Union Accuses ICC of 'Hunting' Africans" http://www.bbc.com/news/world-africa-22681894; <accessed 22nd September 2014>

"How Kenya Handled Local Tribunal Process" http://mobile.nation.co.ke/News/How-Kenya-handled-local-tribunal-process/1950946/1997172/-

/format/xhtml/-/dwh96i/-/index.html <accessed 3rd June 2014>
http://en.wikipedia.org/wiki/Slobodan_Milo%C5%A1evi%C4%87 <accessed 27th September 2014>

"ICC drops Uhuru Kenyatta charges for Kenya ethnic violence" http://www.bbc.com/news/world-africa-30347019 <accessed 17th March 2015>

"Is the 'Tyranny of Numbers' Just a Hoax?" *The Nairobi Star*, 16th February 2013. <accessed 25th September 2014>

Kagwanja, Peter, "Statement" http://fr.scribd.com/doc/66933570/PROF-Kagwanja-Press-Statement-on-Icc-29-9-2011 <accessed 27th August 2013>

"Kenya's Reality Check as Annan Jets in" The East African Standard, 23rd January, 2008. allafrica.com/stories/20080121259.html <accessed 14th September 2014>

"Kenyan body confirmed as ICC witness Meshack Yebei" BBC News 9th March 2015 http://www.bbc.com/news/world-africa-31799171 <accessed 17th March 2015>

Khamala, Charles, A. "Judicial Review of Administrative Decisions Regarding Political Parties in Kenya" Presented at the Strathmore University 8th Ethics Conference, Nairobi, Kenya From 27th-28th October 2011 available at https://www.google.com/?gws_rd=ssl#q=charles+khamala+strathmore <accessed on 27th September> http://legal-dictionary.thefreedictionary.com/obiter+dicta <8th September 2014>.

Lonsdale, John, "Kenya: Ethnicity, Tribe, and State," *Open Democracy*, 17th January 2008, https://www.opendemocracy.net/article/democracy_power/kenya_ethnicity_tribe_state <accessed 26th September 2014

"Monster Mitar Vasiljevic Released From Prison," 13th March 2010. http://srebrenica-genocide.blogspot.fr/2010/03/monster-mitar-vasiljevic-released <accessed 3rd October 2013>

"Mutahi Ngunyi Predicts a Jubilee Alliance Win – The Tyranny of Numbers (Hypothetically)" http://kenyapolitical.blogspot.fr/2013/02/mutahi-ngunyi-predicts-jubilee-alliance.html <accessed 4th October 2013>

"ODM Sues Kibaki in the Hague," *The East African Standard*, 22nd January, 2008, African Press International http://africanpress.me/2008/01/22/ <accessed 19th July 2014>

Press, Robert, interviews of Pheroze Nowrojee, 3rd August, 2002 US Congress Library http://www.loc.gov/rr/amed/pdf/Kenyan%20Human%20Rights%20Interviews/Pheroze%20Nowrojee%20Interview.pdf <accessed 15th June 2014>

www.thepeoplescourt.co.ke <accessed on 20th July 2013>.

INDEX

A

B

C