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RETRIBUTIVE JUSTICE AND INTERNATIONAL CRIMINAL COURT (ICC).

BY
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DECLARATION

I, **DONA MOKEIRA ANYONA**, hereby declare that this research project is my original work. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed:.....Date:.....

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SUPERVISOR'S APPROVAL

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

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

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ABSTRACT

Conflict, and with special reference to armed conflict, has shaped the course of world history, and has prompted the intervention of measures to create peace. Conflicts in the 21st century are going to look very different from those of the century before. This paper looks at the possibility that by its application of the principle of retributive justice, the ICC has positively affected intra- and inter-state conflicts, and thereby, achieved one of its auxiliary objectives; a higher objective, which is to prevent the war from taking place, and not to wait for it to happen, to met out justice to the belligerents who did not play according to the rules of the game. Out of this analysis, the paper identifies gaps and lacuna that need be filled through policy shifts, and treaty amendments, or jurisprudential interpretation of already existent laws to advance the cause of rule of law and protect the court, and the idea that it presents, the idea that some crimes are so grave, that despite the nationality of the perpetrator must be tried. The hypothesis under consideration proposes that the current model of dispensing criminal justice by ICC, which applies retributive justice, is having a positive, preventive effect in commission of international crimes. The study finds that the restitutive model of conflict resolution is more individual focused, alienating the community, and focusing on punishing the offender, with less focus on the victim. On the other hand, the restorative model is focused towards long term sustainability of peace, through addressing the community, and the victim, as well as the offender. It is hence more wholesome an approach to conflict resolution. ICC's conflict resolution model is retributive, as opposed to restorative, or reparative. The paper recommends that ICC takes the model of restitutive, reparative or restorative justice, as opposed to retributive justice.

LIST OF ABBREVIATIONS

AG	Attorney General
CBOs	Community Based Organisations
CSOs	Civil Society Organizations
EIA	Environmental Impact Assessment
EITI	Extractive Industries Transparency Initiative
HC	High Court
IFC	International Finance Corporation
ICC	International Court of Justice
ILC	International Law Commission
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
NGOs	Non Governmental Organizations
OPCD	Office for the Public Council for the Defense
UK	United Kingdom
UNGA	United Nations General Assembly
USA	United States of America
TJRC	Truth Justice and Reconciliation Commission

DEDICATION

I dedicate this work to my late father Jack Anyona, whose memory lives on, and to all victims of armed conflict, and the many professionals and volunteers who give their labour to resolve conflicts and restore harmonious living.

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CHAPTER ONE

INTRODUCTION TO THE STUDY

“The history of all hitherto existing society is the history of class struggles.”

— *Karl Marx & Friedrich Engels The Communist Manifesto 1848*¹

1.1 Introduction

The history of man is a history of conflict, both internal and external; both within, and without man himself. Indeed, various ethno philosophies and great traditions have sought to motivate, inspire and move man towards a mastery of self as a prerequisite to mastery of environment. To this end, the Chinese have developed the "yin *and* yang" conundrum, to help maintain balance and internal conflict².

However, the conflicts that trouble the modern human beings in the 21st century, and that did trouble him since industrial evolution, have exhibited themselves grandly in the mass suffering, hardships and deaths visited upon the peoples of various communities, and hence the need for conflict resolutions strategies and institutions. Such conflicts, in their triad typologies of "class conflict, race conflict and ethnic conflict",³ have traversed the traditional definition of war, and conflicts as between states, to include armed conflict between non-state actors, like rebel movements within a state, or conflicts between state and rebel movements within it, or state and rebel movements out of its territory. Despite the nature or typology of parties to conflicts, conflict resolution is always at the helm of conflicts. From Westphalia came the Westphalia doctrine, treaty

¹Marx and Engels, *The Communist Manifesto*, introduction by Martin Malia (New York: Penguin group, 1998), pg. 35 ISBN 0-451-52710-0

² See “Yin and yang”, available at http://en.wikipedia.org/wiki/Yin_and_yang accessed on April, 2013

³Horowitz, Irving Louis (1980).*Taking lives: Genocide & state power*. (New Brunswick, NJ: Transaction Books, 1980).

and institutions, diplomatic foreign relations, currently codified in the Geneva Convention on the law of treaties; from Solferino came the Henry Dunant's doctrine on protection of the wounded, the war principles of necessity and proportionality, and the institutions of Red Cross and International Humanitarian law, presently codified in the Four Geneva Conventions, and the Hague Conventions on war and peace; from the first world war came the League of Nations, an intergovernmental organization founded as a result of the Paris Peace Conference that ended the First World War whose principal mission was to maintain world peace⁴; from the second world war came The United Nations, founded in 1945 after World War II to replace the League of Nations, to stop wars between countries, and to provide a platform for dialogue in conflict resolution⁵; and from the brutal and shocking criminal acts of the past century, the International Criminal Court (commonly referred to as the ICC) has been founded as a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression⁶.

From the foregoing, conflict, and with special reference to armed conflict, has shaped the course of world history, and has prompted the intervention of measures to create its absence-peace. Gumplowicz, in *Grundriss der Soziologie (Outlines of Sociology, 1884)*, describes how civilization has been shaped by conflict between cultures and ethnic groups. Indeed, large complex human societies evolved from the war and conquest. Such measures include institutions, as well as theories and principles

⁴ Christian, Tomuschat, *The United Nations at Age Fifty: A Legal Perspective*. (Martinus Nijhoff Publishers, 1995).

⁵ Lindblom, Anna-Karin, *Non-governmental organisations in international law*, (Cambridge University Press, New York, 2005), p.58

⁶ Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford: Oxford University Press (2002)).

applied by those institutions, and the processes followed in the institutions to realise peace, and or resolve conflict, while rendering the correct desert to the actions.⁷ This paper is a study of one such institution, the International Criminal Court, and the principles it applies, namely, retributive justice, with a view to analysing the efficacy of its processes in addressing conflicts, both at inter- and intra-state levels.

1.1.1 History of conflict

Conflicts are part of man, and the situation not only subsists in the international, far distant levels, but also in regional and local levels, with specific reference to Kenyan's post election violence, and central Africa's conflict belt. History has taught us that there have always been conflicts. Indeed it is difficult to imagine a period of human history where there were no conflicts. Currently today there are approximately 80 major conflicts around the world⁸. More than 1.5 billion people currently live in countries directly affected by conflict, with millions more feeling the indirect consequences. While inter-state and intra-state violence have seen recent declines, violence is still on the rise, compromising peace, security and development.

While the twentieth century witnessed the arrival of mechanization and then of nuclear weapons, which first reinforced and then, by a strategic paradox, wiped out violence, the most striking phenomenon in the twenty-first century is the asymmetry between extremely high-tech warfare and new forms of organized violence, which

⁷ Max Weber.

⁸<http://webdoc.sub.gwdg.de/ebook/p/2002/carlisle/conflict.pdf> Armed Conflict in the 21st Century: The Information Revolution and Post-Modern Warfare. Steven Metz, April 2000.

indirectly eradicate the impact of the most sophisticated weaponry⁹. This phenomenon, referred to as ‘new wars’, involves the erosion of all the traditional parameters of war that distinguish between lawful and unlawful actors, states and private protagonists, soldiers and civilians, intra- and inter-state wars, and political and lucrative objectives.¹⁰

With a few exceptions, such as the Mexican cartels, whose aims are fundamentally criminal, the vast majority of the contemporary armed groups are primarily driven by political objectives, and the constantly shifting plates of geopolitical and geostrategic revolutions speed up the rise and fall of non-state and transnational armed groups, as has been experienced in Libya, Mali, and Syria; as well as in Congo Zaire. Further, regional and international interventions have compounded pre-existing tensions and have been driven by competing national interests linked to the "war on terror". Of course, the globacity of world events, with its complexities and nuances, makes it less simple for the peace researcher to appreciate, and navigate the conflict seas towards peace and progress, rightly termed development, the end goal of human life.¹¹ There are wars and there are rumours of wars. Indeed, in the words of Prussian General Clausewitz, “*war is a chameleon*”¹². It is continuously changing and adapting. It is thus natural for war to change in style¹³.

Conflicts in the 21st century are going to look very different from those of the century before. The two wars launched in response to 9/11 – one in Afghanistan and the

⁹ Robin Geiss, ‘Asymmetric conflict structures’, in *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, pp. 757–777; Toni Pfanner, ‘Asymmetrical warfare from the perspective of humanitarian law and humanitarian action’, in *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 149–174.

¹⁰ Id.

¹¹ Sen, Amartya. 1980. "Equality of What?" in *The Tanner Lectures on Human Values*, v. 1, pp., Utah U.P. and Cambridge U.P.

¹² See Raymond Aron, *Penser la guerre: Clausewitz*, Tome II, l’âgeplanétaire, Gallimard, Paris, 1976, p. 185 (Clausewitz: *Philosopher of War*, London: Routledge, 1983).

¹³ Martin Van Creveld, *The Transformation of War*, New York, Free Press, 1991;

other in Iraq – are likely to be the last examples of 20th century-style warfare: large-scale multi-year conflicts involving the ground invasion of one country by another. Among the major powers, 21st century warfare is more likely to be fought on the digital frontier, or by special forces conducting limited operations.¹⁴ Among the majority of the world's nearly 200 states, conflicts are much more likely to take place within states than between them.¹⁵ As former UN official Andrew Mack found after a major study of conflicts between 1945 and 2008, wars in the post-Cold War world have mostly been fought within rather than between states, and by small armies equipped with light weapons. Those wars generally kill fewer people compared to the superpower proxy wars fought in the Cold War period, but they are “often characterised by extreme brutality toward civilians.” Consider Rwanda, Somalia, East Timor, Bosnia, Kosovo, Darfur, the Democratic Republic of the Congo, Libya and, increasingly, Syria¹⁶.

Armed conflicts will likely increase in the 21st century, and there are numerous reasons for this. On one part, it will be a continuation of ongoing conflicts that have raged on for centuries, including the disagreement over Kashmir between India and Pakistan, and the clash between Israel and Palestine over Gaza strip. On the other hand, there will be new conflicts due to the a multiplicity of factors, including wars caused by proxy in the rearrangement of world power stage with the rise of new nuclear, as well as super powers, like China, India, and Iran; civil wars, as is likely now brewing in Mozambique, and Congo, by citizens not satisfied with service delivery; globalization and clash of culture, especially religions, will cause more wars and deaths; as will the rise of pockets

¹⁴ See Lederbach, J. (2003). *The Little Book of Conflict Transformation*. Intercourse: Good Books.

¹⁵ Holsti, K. (1996). *The State, War, and the State of War*. Cambridge, UK: Cambridge University Press.

¹⁶ *Human Security Report*. (2005). Retrieved October 10, 2011, from Human Security Report: <http://www.humansecurityreport.info/>

of military-industrial complexes the world over, to advance sale of weaponry and technologies. In addition, there are presently many wars being fought over the possession or control of vital resources: water, arable land, gold and silver, diamonds, copper, petroleum and so on¹⁷.

Conflict over resources figured prominently in the inter-imperial wars of the 16th, 17th, 18th and 19th centuries, and laid the groundwork for World War I, and are still here, in Angola, Congo, Somalia and Sudan—driven largely or in part by competition over the control of critical sources of vital resources. Further, while some of the 20th century principles remain valid for understanding today's security context, others do not. Most importantly, today the majority of conflicts pit coalitions of nonstate armed groups and other nonstate actors against democratic states and groups¹⁸. In essence, 21st century conflicts will require a new legal regime is only to draw back the curtain on a decades-long process. Drivers of conflict in the new century are also not limited to single factors. Combinations of drivers, religious ideology/economics or economics/national security, as examples, can combine to make complex foundations for both internal and international conflicts. There is no limit to the combinations of these drivers, or the intensity each could have in fostering conflict, as we shall examine later¹⁹.

The International Criminal Court (commonly referred to as the ICC or ICCT) is a permanent tribunal to prosecute individuals alleged to have committed international crimes. In so doing, the ICC promotes conflict resolution, and also, by application of

¹⁷ See generally Cheldelin, S., Druckman, D., & Fast, L. *Conflict Second Edition*, (New York: Continuum, 2008).

¹⁸ Accessed *Statement of Seville*. (n.d.). Retrieved October 10, 2011, from UNESCO: <http://www.unesco.org/cpp/uk/declarations/seville.pdf>

¹⁹ Ramsbotham, O., Woodhouse, T., & Maill, H. (2011). *Contemporary Conflict Resolution*. Cambridge, UK: Polity.

retributive measures, acts as a deterrent to would be perpetrators of international criminal acts. The establishment of an international tribunal to judge political leaders accused of war crimes was first made during the Paris Peace Conference in 1919 by the Commission of Responsibilities. The issue was addressed again at a conference held in Geneva under the auspices of the League of Nations on 1–16 November 1937, which resulted in the conclusion of the first convention stipulating the establishment of a permanent international court to try acts of international terrorism. The convention was signed by 13 governments, but was never ratified, and the convention never entered into effect.

Whereas the debate rages on the efficacy, or otherwise, of retribution, as opposed to restoration, Africa has preceded the novel importation of cultural relativism in international criminal law scene, with the application of the African concepts of Ubuntu—Tried to South Africa with the Truth and Reconciliation Commission (telling the truth and seeking forgiveness) and in Sierra Leone; the Gacaca (combination of International Tribunals with modified traditional justice systems in Rwanda); and the *Mat Oput*, a cleansing of suspects and victims of the war in Northern Uganda.

Ubuntu is an ancient African meta-philosophy essentially means '*I am myself*

through you'. Restoring human and civil dignity to victims which they have lost, in a spirit of Ubuntu or humaneness. Conceptually, the TRC deal with the victims and

offenders by focusing on the settlement and on the root causes²⁰. Offer amnesty to perpetrators on the condition that they make full, public disclosure - political crimes.

TRC a morally appropriate “third way” between trials and blanket amnesty.

Gacaca, meaning ‘on the grass’ a ‘traditional’ participative justice in Rwanda, draws upon a customary system of community hearings used to resolve disputes. An ideal model where retributive and restorative justice models meet, drawing on the benefit of each while using a system familiar to the Rwandan people. Involves an uneasy mix of confessions and accusations, plea-bargains and trials, forgiveness and punishment,

community service and incarceration.

²⁰Maepa 2005: 66-67

Matooput-*drinking the bitter herb or root*, is traditionally used to resolve inter-clan

disputes, E.g. killing of one clan member by a person of another clan. Separating the affected clans, mediation, establish the 'truth' and payment of compensation according to

by- laws". Traditional justice views criminal justice is a process of confessions,

forgiveness, cleansing, reconciliation, responsibility, restoration, rehabilitation, stability, and continuity. Agenda Item No. 3 of the JUBA Peace Agreements: accountability and reconciliation. 'traditional' justice mechanism, truth commissions, the Special War Crimes Court. Reflects the government's willingness to negotiate between the restorative and retributive justice systems. President Museveni said,

"In that case, we can approach the ICC and say, yes, those people who we have brought to your attention have now come (back)... we ask you to withdraw our complaint...If they opted for the 'traditional' settlement" ²¹

The Council on Foreign Relations in the U.S. recently released a report entitled "Justice Beyond the Hague" detailing the many other ways that international courts,

²¹ See Uganda offers "blood settlement" to LRA rebels Available at <http://www.polity.org.za/article/uganda-offers-quotblood-settlementquot-to-lra-rebels-2008-03-12> accessed on April, 2013

policymakers and advocates can “help build justice at national levels” by supporting the prosecution of international crimes in national courts. One of the most interesting mechanisms is the growth of hybrid tribunals – national courts that combine national and international judges and lawyers. Different versions of these tribunals exist in Sierra Leone, Cambodia, Bosnia, Kosovo and East Timor, and students of the European Court of Justice have long recognised that the real strength of the EU legal system is the way that it connects national and European-level judges in an interactive legal conversation.

From the foregoing, it seems a hybrid theory of conflict resolution is mushrooming, watered by the prevalent conflicts in Africa on one hand, and the ethno philosophy, ontology and cultural epistemology of the Africans on the other.

This paper will look at the possibility that by its application of the principle of retributive justice, the ICC has positively affected intra- and inter-state conflicts, and thereby, achieved one of its auxiliary objectives; a higher objective, which is to prevent the war from taking place, and not to wait for it to happen, the met out justice to the belligerents who did not play according to the rules of the game.

1.2 Statement of the Problem

This research analyses retributive justice through the International Criminal Court. It identifies gaps and lacuna that need be filled through policy shifts, and treaty amendments, or jurisprudential interpretation of already existent laws to advance the cause of rule of law and protect the court. The world is facing one current conflict, the war in Syria, while it has just come out of yet another, the war in Libya, that led to the deposition, and murder at the hands of international community, the former leader of

Libya, Col. Ghaddafi. At the same time, the world was recently treated to a most peaceful election in Kenya, perhaps, in the backdrop of threats of sanctions, and conviction and ultimate punishment of the indicted alleged mastermind of the 2007-8 election crisis and violence in Kenya, Mr. Ruto, and Mr. Kenyatta, now deputy president, and president, respectively. It has been argued that the threat of further charges made it possible for peace to hold.

Further, the indictment of Al Bashir was in the run up to the cessation of hostilities between northerners, and southerners, and it could be argued that the pressure from international community, through the ICC, led to the seeking of diplomatic means to achieve political ends.

In addition, the war in Congo, now referred to as Africa's World War I, is seen to be receding, with the indictment of former leaders, and the present pressure on the leaders of great lakes nations to act on the war lords.

All the above examples are to expound on the fact that the type of justice dispensed by ICC is limited, both in scope of operation (to African nations, and weak nations), and in penetration through realization of the effect of justice itself, being, peace and development. There are arguments that it has led to reduction in conflicts between, and within states.

Hence, from the foregoing, whereas the wars are showing a downward, albeit slow, trend of receding, there is not yet a clear relationship between the ICC, and the desire for leaders to stop such wars. Further, one might conclude that the fact that the ICC neither prevented the brutal execution of Ghaddafi, nor the actions currently in Syria, may lead to the institution having no role of play in reduction of inter- and intra-state conflict,

but rather, actively promoting conflicts for achievement of certain political ends of the international community, being western world.

1.3 Objectives

The main objective of this paper is to examine the extent, if at all any, to which the international criminal court has affected inter and intra state conflicts.

Other specific objectives are:

1. To determine the suitability of retributive justice model as applied by the ICC;
2. To analyse the role of ICC in preventing intra, and interstate conflicts;
3. To identify the emerging challenges and opportunities for ICC in promoting intra and interstate conflicts.

1.4 Research Hypotheses

The hypothesis under consideration proposes that the current model of dispensing criminal justice by ICC, which applies retributive justice, is having a positive, preventive effect in commission of international crimes.

More specific hypotheses that shall be tested are:

- i. For international crimes to be dealt with effectively, the ICC stands as a reliable mechanism for delivering justice;
- ii. The current model of delivering justice through retributive justice mechanism has a positive effect in non commission of international crimes;
- iii. Retributive justice is the best mechanism to deter crimes against humanity;
- iv. Retributive justice has a positive effect in bringing about peace.

1.5 Justification of the study

The relevance of ICC in promoting deterrence, as well as compliance with international criminal regulations as an idea, cannot be gainsaid. However, the practicality of fulfillment of this objective given the working environment and sponsors, or promoters of the ICC, are in question. Whereas the importance of resolution of conflicts is not doubted, the efficacy of the ICC has not been tested, beyond the trial of weak leaders from weak nations, namely, Africa. The need to analyse, and prove, whether the ICC, as currently applying the model of retribution, serves the goal of reducing intra and interstate conflicts.

The study is critical because the ICC, like any other international institution, is now facing integrity and legitimacy questions, especially with reference to their model of principles, as well as work practice over time, and may, in due time, compete with soon to be created options, as the world bank and IMF might so do with the soon to be created BRICS Bank. There is need to analyse the effectiveness of ICC to realise conflict resolution and prevention, with its current model of retributive justice.

Further, this paper will relate this study to the larger, ongoing analysis in the literature about the role of ICC in promoting world peace through observance, punishment, and deterrence of intra- and interstate conflicts. Finally, the results of this study will provide useful research information and resource to students, academicians, policy makers and other stakeholders who wish to understand in depth the area of study. Consequently, it offers a basis for further criticisms and development of the knowledge on the need for expetive theory, and practice, in resolution of disputes by the ICC, and broadly, resolution of international crimes.

1.6 REVIEW OF LITERATURE

Karl Marx proposed the radical criminology or critical criminology as a branch of conflict theory, drawing its ideas that modern capitalist societies were controlled by a wealthy few (bourgeoisie) who controlled the means of production (factories, raw materials, equipment, technology, etc.) while everyone else (the proletariat) was reduced to the lot of being wage laborers²². Conflicts, consequently, as a creation of the social system, and a cure must come from the social system, or more appropriately for Marx, its absence²³. This theory of course validates the restorative approach to dispute resolution, which rather than removing the criminal from the society, engages the whole society to solve the problem. This is in line with conflict theory of criminology, based upon the view that the fundamental causes of crime are the social and economic forces operating within society²⁴.

With related opinions are Hal Pepinsky and Richard Quinney who have advanced the theory of “peacemaking criminology”, looking at international issues such as war and genocide, and international struggles for human rights and universal social justice are related foci of concern in dispensing criminal justice.²⁵

Weber approach to conflict is contrasted with that of Marx. While Marx focused on the way individual behavior is conditioned by social structure, Weber emphasized the importance of "social action," i.e., the ability of individuals to affect their social

²² Marx, Karl. 1971. Preface to A Contribution to the Critique of Political Economy, Tr. S. W. Ryanzanskaya, edited by M. Dobb. London: Lawrence & Whishart. Skocpol, Theda. 1980. States and Social Revolutions: A Comparative Analysis of France, Russia, and China. New York: Cambridge University Press. Wallerstein, Immanuel M. 1974.

²³ Bridget O’Laughlin (1975) *Marxist Approaches in Anthropology* Annual Review of Anthropology Vol. 4: pp. 341–70 (October 1975)
William Roseberry (1997) *Marx and Anthropology* Annual Review of Anthropology, Vol. 26: pp. 25–46 October 1997

²⁴ Anderson, M.L. and Taylor, H.F. (2009). *Sociology: The Essentials*. Belmont, CA: Thomson Wadsworth.

²⁵ See CliffsNotes.com. Three Major Perspectives in Sociology. 22 Jun 2011.

relationships.²⁶ This social action, through indirectly applied by ICC in its representative faculty as an instrument of sovereign will, is not entirely captured in spirit as would be in it was a the level of Gacaca courts in Rwanda.

Durkheim's view of society as a functioning organism is further an approval of the restorative, and very participate justice system, as opposed to the retributive system.²⁷

C. Wright Mills, a post modernist conflict theorist, on the other hand, argues that the unholy marriage between business, government, and military, leads to creation of super elite, whose sole role is promulgation of conflicts for economic gain, and hence, is an anti-thesis to the very essence of government. In Mills's view, social structures are created through conflict between people with differing interests and resources. Individuals and resources, in turn, are influenced by these structures and by the unequal distribution of power and resources in the society. The policies of the power elite would result in increased escalation of conflict, production of weapons of mass destruction, and possibly the annihilation of the human race²⁸.

Alan Sears' argues ²⁹that societies are defined by inequality that produces conflict, rather than which produces order and consensus. This conflict based on inequality can only be overcome through a fundamental transformation of the existing relations in the society, and is productive of new social relations. Consequently, any move towards promotion of retribution, without addressing the inequality, the cause of the conflict, is like washing the pig. It soon gets into the mud.

²⁶Livesay, C. Social Inequality: Theories: Weber. Sociology Central.A-Level Sociology Teaching Notes. Retrieved on: 2010-06-20.

²⁷Durkheim, E. (1938). *The Rules of Sociological Method*. Chicago: The University of Chicago Press. p. 67.

²⁸Knapp, P. (1994). *One World – Many Worlds: Contemporary Sociological Theory* (2nd Ed.). Harpercollins College Div, pp. 228–246. Online summary ISBN 978-0-06-501218-7

²⁹Sears, Alan. (2008) *A Good Book, In Theory: A Guide to Theoretical Thinking*. North York: Higher Education University of Toronto Press, pg. 34-36.

Indeed, there are arguments that the indictment of Kenya's Uhuru Kenyatta, and the William Ruto, led to lack of violence in Kenya during the polls as a deterrent threat. This is possible, since, theoretically, one role of retribution in criminology is deterrence. The Prussian General Clausewitz, writing in his classical masterpiece, *On War*, noted that "War is a chameleon".³⁰ This reflects the ever continuously changing nature of conflicts. Indeed, today, there are wars and there are rumours of wars in central Africa, South Sudan, and Syria in the Middle East.

Martin Van Gerald argues that it is thus natural for war to change in style³¹. Robin Geiss, in analyzing the twentieth century conflict mosaic, notes that it witnessed the arrival of mechanization and then of nuclear weapons, which first reinforced and then, by a strategic paradox, wiped out violence, the most striking phenomenon in the twenty-first century is the asymmetry between extremely high-tech warfare and new forms of organized violence, which indirectly eradicate the impact of the most sophisticated weaponry³². This is a phenomenon, he referred to as 'new wars', involves the erosion of all the traditional parameters of war that distinguish between lawful and unlawful actors, states and private protagonists, soldiers and civilians, intra- and inter-state wars, and political and lucrative objectives³³.

Amartya Sen argues on the destructive nature of conflicts, stating that the globacity of world events, with its complexities and nuances, makes it less simple for the peace

³⁰ Raymond Aron, *Penser la guerre: Clausewitz, Tome II, l'âgeplanétaire*, Gallimard, Paris, 1976, p. 185 (Clausewitz: *Philosopher of War*, London: Routledge, 1983)

³¹ Martin Van Creveld, *The Transformation of War*, New York, Free Press, 1991;

³² Robin Geiss, 'Asymmetric conflict structures', in *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, pp. 757–777; Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', in *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 149–174.

³³ *Ibid.*

researcher to appreciate, and navigate the conflict seas towards peace and progress, rightly termed development, the end goal of human life.³⁴

Further, Holsti states that among the majority of the world's nearly 200 states, conflicts are much more likely to take place within states than between them³⁵. A former UN official Andrew Mack agrees with Holsti when he found after a major study of conflicts between 1945 and 2008, wars in the post-Cold War world have mostly been fought within rather than between states, and by small armies equipped with light weapons. Those wars generally kill fewer people compared to the superpower proxy wars fought in the Cold War period, but they are "often characterised by extreme brutality toward civilians." Consider Rwanda, Somalia, East Timor, Bosnia, Kosovo, Darfur, the Democratic Republic of the Congo, Libya and, increasingly, Syria³⁶.

In addition, Cheldein writes of the many wars being fought over the possession or control of vital resources: water, arable land, gold and silver, diamonds, copper, petroleum, and so on.³⁷

Traditionally, conflicts have been solved as per the legal structure of the people, and as per Locken philosophy of a people finding for themselves a state of society to address their problems. Foremost are the duo strategies, namely, the retributive approach and the restorative approach. Elmar refers to restorative justice (also sometimes called reparative justice)³⁸ as an approach to justice that focuses on the needs of the victims and

³⁴Sen, Amartya, "Equality of What?" in *The Tanner Lectures on Human Values*, v. 1, pp. 197-220. Utah U.P. and Cambridge U.P, 1980.

³⁵Holsti, K, *The State, War, and the State of War*. Cambridge, UK: Cambridge University Press, 1996.

³⁶*Human Security Report*. (2005). Retrieved May 10, 2013, from Human Security Report: <http://www.humansecurityreport.info/>

³⁷ See generally Cheldelin, S., Druckman, D., & Fast, L. (2008). *Conflict Second Edition*. New York: Continuum.

³⁸Weitekamp, Elmar (1993). "Reparative justice: Towards a victim oriented system". *European Journal On Criminal Policy and Research* 1 (1): 70-93. doi:10.1007/BF02249525

the offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender. According to Parade, Victims take an active role in the process, while offenders are encouraged to take responsibility for their actions, "*to repair the harm they've done—by apologizing, returning stolen money, or community service*".³⁹

According to Braithwaite, restorative justice is:

“ ...a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process.”⁴⁰

In social justice cases, restorative justice is used for problem solving⁴¹, unlike retributive justice, used for identification, and punishment.

According to Zehr and Mika⁴², there are three key ideas that support restorative justice. First is the understanding that the victim and the surrounding community have both been affected by the action of the offender and, in addition, restoration is necessary. Second, the offender's obligation is to make amends with both the victim and the involved community. Third, and the most important process of restorative justice, is the concept of 'healing,' or the collaborative unburdening of pain for the victim, offender, and community. All parties engage in creating agreements in order to avoid recidivism and to

³⁹"A New Kind of Criminal Justice", *Parade*, October 25, 2009, p. 6

⁴⁰Braithwaite, John (2004). "Restorative Justice and De-Professionalization". *The Good Society* **13** (1): 28–31.

⁴¹Braithwaite, J., *Restorative Justice and Responsive Regulation*, 2002.

⁴²Zehr, H. *The Little Book of Restorative Justice*, Intercourse, PA: Good Books, 2002

restore safety for how the wrongdoing can be righted which allows the victim to have direct say in the judgment process. This gives offenders the opportunity to understand the harm they have caused, while demonstrating to the community that the offender might also have suffered prior harm. Healing by reintegration of offenders into the community, strives to restore harmony, health, and well-being by comprising personal accountability, decision-making and the putting right of harm.⁴³ This inclusion as opposed to exclusion, demonstrates the capability of transformation of the administration of criminal justice, mental health, psychology and public policy norms. Examples of healing include: victim offender mediation, conferencing, healing circles, victim and ex-offender assistance, restitution, and community service, each method healing in different ways.

Lawrence⁴⁴ argues that since crime has its origins in the social conditions and recognizes that the offenders themselves have actually suffered harm. According to Morris, some of the most common criticisms that used against the practicality or realism of restorative justice are:

Restorative justice erodes legal rights; restorative justice results in net-widening; restorative justice trivializes crime (particularly men's violence against women); restorative justice fails to 'restore' victims and offenders; restorative justice fails to effect real change and to prevent recidivism; restorative justice results in discriminatory outcomes; restorative justice extends police powers; restorative justice leaves power imbalances untouched; restorative justice leads to

⁴³Latimer, J. "The Effectiveness of Restorative Justice Practices: A Meta-Analysis". *The Prison Journal* 85 (2), 2005, pp127-144.

⁴⁴Lawrence W Sherman and Heather Strang. "Restorative Justice: The Evidence". University of Pennsylvania, 2007.

vigilantism; restorative justice lacks legitimacy; and restorative justice fails to provide ‘justice’.”⁴⁵

Another critique of restorative justice suggests that professionals are often left out of the restorative justice conversation. Albert W. Dzur and Susan M. Olson argue that this sector of justice cannot be successful without professionals. They claim that professionals can aid in avoiding problems that come up with informal justice and propose the theory of democratic professionalism, where professionals are not just agents of the state – as traditional understandings would suggest – but as mediums, promoting community involvement while still protecting individuals’ rights.⁴⁶

Additionally, some critics like Gregory Shank and Paul Takagi see restorative justice as an incomplete model in that it fails to fix the fundamental, structural inequalities that make certain people more likely to be offenders than others.⁴⁷ They question the structure of society and the fairness of institutional systems at their very core, pushing for more understanding of root causes.

Robert defines retributive justice, on the other hand, as a theory of justice that considers punishment, if proportionate, to be the best response to crime.⁴⁸ In the 19th century, philosopher Immanuel Kant argued in *Metaphysics of Morals*, §49 E., stated that,

⁴⁵Morris, Allison (2002). "Critiquing the Critics: A Brief Response to Critics of Restorative Justice". *The British Journal of Criminology: An International Review of Crime and Society* 42: 596–615.

⁴⁶Dzur, Albert W.; Susan M. Olson (2004). "Revisiting Informal Justice: Restorative Justice And Democratic Professionalism". *Law & Society Review* 38 (1): 139–176.

⁴⁷Shank, Gregory; Paul Takagi (2004). "Critique of Restorative Justice". *Social Justice* 31 (3): 147–163.

⁴⁸Nozick, Robert (1981). *Philosophical Explanations*. Cambridge, MA: Harvard University Press. pp. 366–368.

*“the only legitimate form of punishment the court can prescribe must be based on retribution and no other principle.”*⁴⁹

According to Martin, punishment as a matter of justice, and it must be carried out by the state for the sake of the law, not for the sake of the criminal or the victim.⁵⁰

Rachels argues further that *“if the guilty are not punished, justice is not done.”*⁵¹

Further, if justice is not done, then the idea of law itself is undermined. This argument, though holding weight in punishing the perpetrator, fails to achieve a much wider objective of promoting harmony, by responding to the victim, since, after all, it is the individuals who is first victimized, and suffers.

Utilitarians, like Bentham, Austin, and Cicero, have argued that punishment can be forward-looking, justified by a purported ability to achieve future social benefits, such as crime reduction. For retributionists, punishment is backward-looking, justified by the crime that has been committed and carried out to atone for the damage already done.⁵² This is the deterrence theory of punishment. The central idea of retributive justice is that people should get what they deserve in respect to their behaviour. It emphasizes individual responsibility and accountability for crimes committed and adheres to the moral notion of justice which emphasizes justice very close to revenge. It is associated with Modern (formal) justice institutions like the International Criminal Court, International Court of Justice and the Formal State justice systems.

⁴⁹ See Rachels, James (2007). *The Elements of Moral Philosophy*

⁵⁰ Martin, Jacqueline (2005). *The English Legal System* (4th ed.), p. 174. London: Hodder Arnold. ISBN 0-340-89991-3.

⁵¹ Rachels, James (2007). *The Elements of Moral Philosophy*

⁵² See Cicero's *De Legibus*, 106 BC; see also Ronen Perry, The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory, 73 *Tenn. L. Rev.* 177 (2006); Ronen Perry, The Third Form of Justice, 23 *Canadian Journal of Law and Jurisprudence* (2010)

Maepa writes that in Africa, conflicts have been solved through restorative approaches which seek to re-integrate the individual back into the society.⁵³ On the other side, Ojijo writes that the inherited, transplanted legal regime of colonialism brought to the fore punitive, retributive justice mechanism operationalised through courts and prison systems, which was hitherto unheard of⁵⁴.

In spite of the legal transplantation of the retributive mechanism, both Ojijo and Maepa note that there has been a new revival of seeking to understand, and apply African traditional dispute resolution mechanisms to criminal acts, especially, international crimes.⁵⁵

Consequently, Agenda Item No. 3 of the JUBA Peace Agreements: accountability and reconciliation through ‘traditional’ justice mechanism, truth commissions, the Special War Crimes Court, and this reflects the government’s willingness to negotiate between the restorative and retributive justice systems. President Museveni said,

*“In that case, we can approach the ICC and say, yes, those people who we have brought to your attention have now come (back)... we ask you to withdraw our complaint...If they opted for the ‘traditional’ settlement”*⁵⁶

The Council on Foreign Relations in the U.S. recently released a report entitled “*Justice Beyond the Hague*” detailing the many other ways that international courts, policymakers

⁵³ Id

⁵⁴Ojijo. 2012. Afrikan Jurisprudence. Luo Theories, Systems and Procedures of Law and Justice. Kampala. Allpublicspeakers.com

⁵⁵Maepa 2005: 66-67

⁵⁶ See Uganda offers "blood settlement" to LRA rebels Available at <http://www.polity.org.za/article/uganda-offers-quotblood-settlementquot-to-lra-rebels-2008-03-12> accessed on April, 2013

and advocates can “help build justice at national levels” by supporting the prosecution of international crimes in national courts.

From the foregoing, it seems a hybrid theory of conflict resolution is mushrooming, watered by the prevalent conflicts in Africa on one hand, and the ethno philosophy, ontology and cultural epistemology of the Africans on the other.

This paper will look at the possibility that by its application of the principle of retributive justice, the ICC has positively affected intra- and inter-state conflicts, and thereby, achieved one of its auxiliary objectives; a higher objective, which is to prevent the war from taking place, and not to wait for it to happen, the met out justice to the belligerents who did not play according to the rules of the game.

1.7 Theoretical Framework

The theoretical scope of the study will involve the analysis of the doctrine of retributive justice as opposed to other theories, chiefly, restorative justice, and general a comparative analysis of theories of criminal justice, and their efficacy. In so doing the study will delve into the novel hybridist theory of justice systems, which seeks to marry the two competing ideologies.

Theoretically, the study will also seek to expose the practice of ICC, and postulate as to the reasons for its negative connotation in Africa, with specific reference to the dual antagonist theories of universalism as opposed to cultural relativism in formulation and implementation of norms. In essence, the study will contrast and compare the two antagonist theories of criminal justice, the restorative theory of justice, vis-à-vis the retributive model, based on a normative benchmark of Austin’s utilitarianism.

Further, it will interrogate the theory of conflicts, existence of conflicts, causes, and cures, both at inter, and intra-state levels. In addition, the paper will look at the post-modern Marxist conflict theories of economic classes, as well as the modern social conflict theories of Mills, on the power elites, and its cogs in the wheels of ICC to perpetuate sustainable international peace and conflict resolution. Finally, the study will consider a possible framework for the broader interpretation of the ICC roles, to realise not only universal jurisdiction, but also universal acceptance.

1.8 The Research Methodology

1.8.1 Data Collection, Analysis and Interpretation

The research utilised both secondary and primary data obtained through questioning experts in this field and desk -top research. Other than Journals, other periodicals utilized were magazines with articles from legal scholars, practicing advocates and newspaper articles featuring newsworthy content recorded on the subject as they unfold.

Research Design

The research study was designed based on both qualitative methods, so as to collect opinion related evidence, and not countable data. The methodology was employed based on the data type being collected, which was qualitative data, collected through key informant interviews.

Population

This study population addressed respondents with key information, namely, victims of post election violence in Kenya, and the officers working in departments dealing with ICC restoration of justice, and experts informed on the issues related.

Sampling Technique

The study used a multi-stage sampling process which involved different sampling techniques for different respondent groups and different individual units within the respondent group.

Data Analysis.

The data was analysed through a comparative study of the research materials so as to seek to answer the research questions and ultimately, the research objective; and thematic analysis based on the research questions.

This proposed area of study is admittedly wide and incapable of exhaustively being researched under one concise thesis. The study therefore narrowed down and focused on the twin theories of retributive and restorative justice, and whether the ICC can fulfill its mandate of stalling, and preventing conflicts, based on its current one sided approach of retribution.

The study will consider the challenges or limitation faced by ICC in promoting peace and conflict free states and intra-states. The study will also question why even in the current global institutional framework, and with the increased activist state of world citizens, the court has focused on an African perspective. Finally, the study will make necessary recommendations on how and to what extent the ICC can effectively exercise its powers of promoting peace and stalling conflicts through dispute resolution.

1.9 Chapter Breakdown

The study is undertaken in four chapters. Each chapter will aim at answering one or more of the research questions.

Chapter One introduces the research topic first setting the broad context of the research study, the statement of the problem, justification, theoretical framework, literature review, hypotheses and the methodology of the study.

Chapter Two gives background information on the doctrine of retributive justice model as applied in daily situations and as contrasted with other models of criminal justice.

Chapter Three is dedicated an incisive analysis of the history and roles of the ICC, with special reference to conflict resolution and prevention, both at interstate, and intra-state level. The chapter focuses on the Kenyan 2008 post election violence, and analyses the ICC response, in terms of its application of the retributive justice system.

Chapter Four is the findings of the case study on the relationship between ICC's conflict resolution model, and Kenya's 2008 post election violence perpetrator and victims. This chapter analyses the effectiveness of the continuing process of ICC cases, with reference to suitability of retributive, as opposed to reparative or restorative dispute resolution system.

Chapter Four is the summary of findings, conclusion and recommendations of the study.

CHAPTER TWO

CONTEXTUALIZING RETRIBUTIVE JUSTICE

2.1 Conflict Resolution

Conflict resolution is conceptualized as the methods and processes involved in facilitating the peaceful ending of conflict.⁵⁷ Often, people attempt to resolve group conflicts by actively communicating information about their conflicting motives or ideologies to the rest of the group (e.g., intentions; reasons for holding certain beliefs), and by engaging in collective negotiation.⁵⁸ Ultimately, a wide range of methods and procedures for addressing conflict exist, including but not limited to, negotiation, mediation, diplomacy, and creative peace building.

The term conflict resolution may also be used interchangeably with dispute resolution, where arbitration and litigation processes are critically involved. Furthermore, the concept of conflict resolution can be thought to encompass the use of nonviolent resistance measures by conflicted parties in an attempt to promote effective resolution.⁵⁹ In the current centuries, the greatest manifestation of conflicts has been wars, which occur between warring parties who contest an incompatibility, being either territorial or governmental.⁶⁰ Wars sometimes conclude with a peace agreement, defined as a "formal agreement between warring parties, which addresses the disputed incompatibility, either

⁵⁷ Peter T. Coleman (2011). *The Five Percent: Finding Solutions to Seemingly Impossible Conflicts*

⁵⁸ Forsyth, D. R. (2009). *Group dynamics* (5th ed.). Pacific Grove, CA: Brooks/Cole.

⁵⁹ Adam Roberts and Timothy Garton Ash (eds.), *Civil Resistance and Power Politics: The Experience of Non-violent Action from Gandhi to the Present*, Oxford University Press, 2009.

⁶⁰ Kellett, Peter M, *Conflict Dialogue*. London: Sage Publications, 2007.

by settling all or part of it, or by clearly outlining a process for how the warring parties plan to regulate the incompatibility."⁶¹

A Ceasefire is another form of agreement between warring parties but unlike a peace agreement it only "*regulates the conflict behaviour of warring parties... [and] does not address the incompatibility.*"⁶²Of course, various individuals exhibit different styles of conflict resolution.⁶³ Some people adopt a "wait and see" attitude, effectively avoiding the conflict⁶⁴; some people yield to the conflict, showing a high concern for others while having a low concern for one's own self; others fight and enjoy seeking domination over others, and typically see conflict as a "win or lose"⁶⁵ predicament hence employing competitive, power tactics (e.g., argue; insult; accuse; violence); while others collaborate with others in an effort to find an amicable solution that satisfies all parties involved in the conflict seeking a "win-win" solution⁶⁶; and finally, others adopt the conciliation conflict style by valuing fairness and, in doing so, anticipate mutual give-and-take.⁶⁷ Despite the above classification of conflicts, the two competing, and opposing views on conflict resolution are retributive justice, and restorative justice.

⁶¹Uppsala Conflict Data Program Definitions, Ceasefire agreements, <http://www.pcr.uu.se/research/ucdp/definitions/>, accessed April, 2013

⁶²Uppsala Conflict Data Program Definitions, Ceasefire agreements, <http://www.pcr.uu.se/research/ucdp/definitions/>, accessed May, 2013

⁶³Goldfien, J. H., &Robbennolt, J. K. (2007). What if the lawyers have their way? An empirical assessment of conflict strategies and attitudes toward mediation styles. *Ohio State Journal on Dispute Resolution*, 22, 277-320.

⁶⁴Bayazit, M. &Mannix, E. A. (2003). Should I stay or should I go? Predicting team members intent to remain in the team. *Small Group Research*, 34(3), 290-321.

⁶⁵Sternberg, R. J., & Dobson, D. M. (1987).Resolving interpersonal conflicts: An analysis of stylistic consistency. *Journal of Personality and Social Psychology*, 52, 794-812.

⁶⁶Jarboe, S. C., &Witteman, H. R. (1996). Intragroup conflict management in task-oriented groups: The influence of problem sources and problem analysis. *Small Group Research*, 27, 316-338.

⁶⁷Van de Vliert, E., &Euwema, M. C. (1994).Agreeableness and activeness as components of conflict behaviors. *Journal of Personality and Social Psychology*, 66, 674-687.

2.2 Comparison Between Retributive and Restorative Justice

Restorative justice (also sometimes called reparative justice⁶⁸) is an approach to justice that focuses on the needs of the victims and the offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender. On the other hand, retributive justice is about punishment and revenge⁶⁹. Restorative justice is also referred to as transformative justice. Transformative justice is a general philosophical strategy for responding to conflicts. It takes the principles and practices of restorative justice beyond the criminal justice system. It applies to areas such as environmental law, corporate law, labor-management relations, consumer bankruptcy and debt, and family law.

Transformative justice uses a systems approach, seeking to see problems, as not only the beginning of the crime but also the causes of crime, and tries to treat an offense as a transformative relational and educational opportunity for victims, offenders and all other members of the affected community. In theory, a transformative justice model can apply even between peoples with no prior contact. Restorative justice (also sometimes called reparative justice⁷⁰) is an approach to justice that focuses on the needs of the victims and the offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender. Victims take an active role in the process, while offenders are encouraged to take responsibility for their actions, *'to repair the harm they've done—by apologizing, returning stolen money, or community service'*.⁷¹

⁶⁸Weitekamp, Elmar (1993). "Reparative justice: Towards a victim oriented system". *European Journal On Criminal Policy and Research*1 (1): 70–93.

⁶⁹ Ibid.

⁷⁰ Lawrence W Sherman and Heather Strang, *Restorative Justice: The Evidence*, University of Pennsylvania, 2007

⁷¹ "A New Kind of Criminal Justice", *Parade*, 25 October 2009, p. 6

Restorative justice involves both victim and offender and focuses on their personal needs. In addition, it provides help for the offender in order to avoid future offences. It is based on a theory of justice that considers crime and wrongdoing to be an offence against an individual or community, rather than the state.⁷² Restorative justice that fosters dialogue between victim and offender shows the highest rates of victim satisfaction and offender accountability.⁷³

According to Braithwaite⁷⁴, restorative justice is:

'...a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process.'

2.3 Conceptualization of Criminal Wrongs

Retributive justice conceives crime is an act against the state, a violation of a law, an abstract idea which requires an abstract act. Subsequently, crime is an individual act with individual responsibility. On the other side, restorative justice looks at crime as an act against another person and the community, and hence, addresses the offender as part of the community. Subsequently, crime has both individual and social dimensions of responsibility. Some critics like Gregory Shank and Paul Takagi see restorative justice as

⁷² Braithwaite, John (2004). "Restorative Justice and De-Professionalization". *The Good Society* 13 (1): 28 - 31.

⁷³ Latimer, J. (2005). "The Effectiveness of Restorative Justice Practices: A Meta-Analysis". *The Prison Journal* 85 (2): 127-144.

⁷⁴ 2004.

an incomplete model in that it fails to fix the fundamental, structural inequalities that make certain people more likely to be offenders than others.⁷⁵ They question the structure of society and the fairness of institutional systems at their very core, pushing for more understanding of root causes.

2.4 Crime Control under Retributive Justice

Retributive justice relies on the criminal justice system for crime control. On the other hand, the crime control lies primarily in the community under restorative justice systems. In essence, retributive justice system places community on sideline, represented abstractly by state whereas the restorative justice system places the community as facilitator in restorative process. In social justice cases, restorative justice is used for problem solving⁷⁶, unlike retributive justice, used for identification, and punishment.

Restorative justice principles are characterized by four key values: first, the encounter of both parties. This step involves the offender, the victim, the community and any other party who was involved in the initial crime. Second, the amending process takes place. In this step, the offender(s) will take the steps necessary to help repair the harm caused. Third, reintegration begins. In this phase, restoration of both the victim and the offender takes place. In addition, this step also involves the community and others who were involved in the initial crime. Finally, the inclusion stage provides the open opportunity for both parties to participate in finding a resolution. The process of restorative justice is lengthy and must be committed to by both parties for effective results.

⁷⁵Shank, Gregory; Paul Takagi (2004)."Critique of Restorative Justice". *Social Justice*31 (3): 147–163.

⁷⁶Braithwaite, J., *Restorative Justice and Responsive Regulation*, 2002.

2.5 Conceptualization of Accountability for Crime

Retributive justice system conceives offender accountability defined as taking punishment. It hence considers punishment is effective against crime and in changing behaviour. The central idea of retributive justice is that people should get what they deserve in respect to their behaviour. It emphasizes individual responsibility and accountability for crimes committed and adheres to the moral notion of justice which emphasizes justice out of justice very close to revenge. It is associated with modern (formal) justice institutions like the International Criminal Court, International Court of justice and the Formal State justice systems.

On the other hand, accountability under restorative justice system is defined as assuming responsibility and taking action to repair harm. It considers threats of punishment deter crime, hence, punishment alone is not effective in changing behavior and is disruptive to community harmony and good relationships.

According to Zehr and Mika ⁷⁷, there are three key ideas that support restorative justice. First is the understanding that the victim and the surrounding community have both been affected by the action of the offender and, in addition, restoration is necessary. Second, the offender's obligation is to make amends with both the victim and the involved community. Third, and the most important process of restorative justice, is the concept of 'healing,' or the collaborative unburdening of pain for the victim, offender, and community.

All parties engage in creating agreements in order to avoid recidivism and to restore safety for how the wrongdoing can be righted which allows the victim to have direct say in the judgment process. This gives offenders the opportunity to understand the

⁷⁷Zehr, H. *The Little Book of Restorative Justice*, Intercourse, PA: Good Books, 2002

harm they have caused, while demonstrating to the community that the offender might also have suffered prior harm. Healing by reintegration of offenders into the community, strives to restore harmony, health, and well-being by comprising personal accountability, decision-making and the putting right of harm.⁷⁸ This inclusion as opposed to exclusion, demonstrates the capability of transformation of the administration of criminal justice, mental health, psychology and public policy norms. Examples of healing include: victim offender mediation, conferencing, healing circles, victim and ex-offender assistance, restitution, and community service, each method healing in different ways.

2.6 Restorative Justice and the Place of Victims

Under retributive justice system, the victims are peripheral to the process, and the offender is defined by deficits, with a dependence on proxy professionals. On the other hand, under restorative justice system, the victims are central to the process of resolving a crime, and the offender is defined by capacity to make reparation, with direct involvement by participants. Victims take an active role in the process in restorative systems, while offenders are encouraged to take responsibility for their actions,

"to repair the harm they've done—by apologizing, returning stolen money, or community service".⁷⁹

In restorative justice systems, the professionals are often left out of the restorative justice conversation. Albert W. Dzur and Susan M. Olson argue that this sector of justice cannot be successful without professionals. They claim that professionals can aid in avoiding problems that come up with informal justice and propose the theory of

⁷⁸Latimer, J. (2005). "The Effectiveness of Restorative Justice Practices: A Meta-Analysis". *The Prison Journal* 85 (2): 127–144.

⁷⁹"A New Kind of Criminal Justice", *Parade*, October 25, 2009, p. 6

democratic professionalism, where professionals are not just agents of the state – as traditional understandings would suggest – but as mediums, promoting community involvement while still protecting individuals’ rights.⁸⁰ Restorative justice is primarily concerned with healing victim’s wounds; restoring offenders to law-abiding lives, and repairing harm done to interpersonal relationships and the community.

The central premise is that victims, offenders and the affected communities are all key stakeholders in the restorative process. The goal is not revenge but restoration of healthy relationships between individual and within communities. Lawrence⁸¹ argues that since crime has its origins in the social conditions and recognizes that the offenders themselves have actually suffered harm. An opponent, like Levrant, thinks that the acceptance of restorative justice is based more on “humanistic sentiments” rather than restorative justice’s effectiveness.

According to Morris, some of the most common criticisms that used against the practicality or realism of restorative justice are:

“...restorative justice erodes legal rights; restorative justice results in net-widening; restorative justice trivializes crime (particularly men’s violence against women); restorative justice fails to ‘restore’ victims and offenders; restorative

⁸⁰Dzur, Albert W.; Susan M. Olson (2004). "Revisiting Informal Justice: Restorative Justice And Democratic Professionalism". *Law & Society Review*38 (1): 139–176.

⁸¹ See Lawrence W Sherman and Heather Strang (2007). "Restorative Justice: The Evidence". University of Pennsylvania.

justice fails to effect real change and to prevent recidivism; restorative justice results in discriminatory outcomes; restorative justice extends police powers; restorative justice leaves power imbalances untouched; restorative justice leads to vigilantism; restorative justice lacks legitimacy; and restorative justice fails to provide 'justice'."⁸²

2.7 The Focus of Retributive Justice System

The focus of retributive justice system is on establishing blame or guilt, on the past (did he/she do it?). It is hence adversarial, focusing on offender's past behavior. On the other hand, the focus of restorative justice system is on the problem solving, on liabilities/obligations, on the future (what should be done?). It is hence leaning towards dialogue and negotiation, focusing on the harmful consequences of offender's behavior; emphasis is on the future. Utilitarians, like Bentham, Austin, and Cicero, have argued that punishment can be forward-looking, justified by a purported ability to achieve future social benefits, such as crime reduction. For retributionists, punishment is backward-looking, justified by the crime that has been committed and carried out to atone for the damage already done.⁸³ This is the deterrence theory of punishment.

According to Braithwaite, restorative justice is:

"...a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm.

⁸²Morris, Allison (2002). "Critiquing the Critics: A Brief Response to Critics of Restorative Justice".*The British Journal of Criminology: An International Review of Crime and Society*42: 596–615.

⁸³See Cicero's *De Legibus*, 106 BC; see also Ronen Perry, The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory, 73 *Tenn. L. Rev.* 177 (2006); Ronen Perry, The Third Form of Justice, 23 *Canadian Journal of Law and Jurisprudence* (2010)

*With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process.*⁸⁴

2.8 How Justice is Handled in Retributive Justice

The distributive justice system focuses on imposition of pain to punish and deter/prevent crime, while the restorative justice system focuses on restitution as a means of restoring both parties; the goal is reconciliation and or restoration. Retributive justice is a theory of justice that considers punishment, if proportionate, to be the best response to crime.⁸⁵ In the 19th century, philosopher Immanuel Kant argued in *Metaphysics of Morals*, §49 E., that the only legitimate form of punishment the court can prescribe must be based on retribution and no other principle.⁸⁶ Kant regards punishment as a matter of justice, and it must be carried out by the state for the sake of the law, not for the sake of the criminal or the victim.⁸⁷ He argues that if the guilty are not punished, justice is not done.⁸⁸ Further, if justice is not done, then the idea of law itself is undermined. This argument, though holding weight in punishing the perpetrator, fails to achieve a much wider objective of promoting harmony, by responding to the victim, since, after all, it is the individual who is first victimized, and suffers.

⁸⁴Braithwaite, John (2004). "Restorative Justice and De-Professionalization". *The Good Society* 13 (1): 28–31.

⁸⁵Nozick, Robert (1981). *Philosophical Explanations*. Cambridge, MA: Harvard University Press. pp. 366–368.

⁸⁶ See Rachels, James (2007). *The Elements of Moral Philosophy*

⁸⁷Martin, Jacqueline (2005). *The English Legal System* (4th ed.), p. 174. London: Hodder Arnold. ISBN 0-340-89991-3.

⁸⁸Rachels, James (2007). *The Elements of Moral Philosophy*

2.9 Chapter Summary

Chapter two is dedicated to a commentary on the doctrine of retributive justice model as applied in daily situations, and as contrasted with the contrasted model of restorative model of justice system. The chapter begins with an introduction to conflict resolution mechanisms generally, and proceeds to contrast and compare the two general and contradicting approaches to conflict resolutions, being restorative and retributive approaches. The chapter then concludes with a summary of the discussion.

This chapter has introduced conflict resolution models, with a specific model on restitution, as contrasted with restorative models of conflict resolution. From the foregoing, the restitutive model of conflict resolution is more individual focused, alienating the community, and focusing on punishing the offender, with less focus on the victim. On the other hand, the restorative model is focused towards long term sustainability of peace, through addressing the community, and the victim, as well as the offender. It is hence more wholesome an approach to conflict resolution.

CHAPTER THREE

THE ICC MODEL OF CONFLICT RESOLUTION

3.1 Background on The ICC

The International Criminal Court (commonly referred to as the ICC or ICCt) is a permanent tribunal to prosecute individuals alleged to have committed international crimes. In so doing, the ICC promote conflict resolution, and also, by application of retributive measures, acts as a deterrent to would be perpetrators of international criminal acts.

As of February 2013, 122 states are states parties to the Statute of the Court, including all of South America, all of Australia, nearly all of Europe and roughly half the countries in Africa. The law of treaties obliges these states to refrain from “*acts which would defeat the object and purpose*” of the treaty until they declare they do not intend to become a party to the treaty.⁸⁹ Three states—Israel, Sudan and the United States—have informed the UN Secretary General that they do not intend to become states parties and, as such, have no legal obligations arising from their former representatives' signature of the Statute⁹⁰

The establishment of an international tribunal to judge political leaders accused of war crimes was first made during the Paris Peace Conference in 1919 by the Commission of Responsibilities. The issue was addressed again at a conference held in Geneva under the auspices of the League of Nations on 1–16 November 1937, which resulted in the

⁸⁹The 1969 Vienna Convention on the Law of Treaties, Article 18. Accessed 23 November 2006.

⁹⁰John R Bolton, 6 May 2002. *International Criminal Court: Letter to UN Secretary General Kofi Annan*. US Department of State. Accessed June 2013.

conclusion of the first convention stipulating the establishment of a permanent international court to try acts of international terrorism. The convention was signed by 13 governments, but was never ratified, and the convention never entered into effect.

The United Nations stated that the General Assembly first recognised the need for a permanent international court to deal with atrocities of the kind committed during World War II in 1948, following the Nuremberg and Tokyo Tribunals.⁹¹ At the request of the General Assembly, the International Law Commission drafted two statutes by the early 1950s but these were shelved as the Cold War made the establishment of an international criminal court politically unrealistic.⁹² In 1994, the ILC presented its final draft statute for an ICC to the UNGA and recommended that a conference of plenipotentiaries be convened to negotiate a treaty and enact the Statute. On 17 July 1998, the Rome Statute of the International Criminal Court was adopted and became a binding treaty on 11 April 2002, when the number of countries that had ratified it reached sixty.⁹³

3.2 ICC and Conflict Resolution (Retributive Justice)

The Court can generally exercise jurisdiction only in three cases, viz. if the accused is a national of a state party, if the alleged crime took place on the territory of a state party or if a situation is referred to the Court by the United Nations Security Council.⁹⁴ It is designed to complement existing national judicial systems: it can exercise

⁹¹United Nations Department of Public Information, December 2002.*The International Criminal Court*. Retrieved 5 May 2013.

⁹²Dempsey, Gary T. (16 July 1998). "Reasonable Doubt: The Case Against the Proposed International Criminal Court". *Cato Institute*. Retrieved 31 December 2006.

⁹³Amnesty International (11 April 2002). "The International Criminal Court – A Historic Development in the Fight for Justice". Retrieved June 2013.

⁹⁴Articles 12 & 13 of the Rome Statute. Accessed May 2013.

its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes.⁹⁵ Primary responsibility to investigate and punish crimes is therefore left to individual states.

To date, the Court has opened investigations into eight situations in Africa: the Democratic Republic of the Congo; Uganda; the Central African Republic; Darfur, Sudan; the Republic of Kenya; the Libyan Arab Jamahiriya; the Republic of Côte d'Ivoire and Mali. Of these eight, four were referred to the Court by the concerned states parties themselves (Uganda, Democratic Republic of the Congo, Central African Republic and Mali), two were referred by the United Nations Security Council (Darfur and Libya) and two were begun *proprio motu* by the Prosecutor (Kenya and Côte d'Ivoire).

It has publicly indicted 30 people, proceedings against 23 of whom are ongoing. The ICC has issued arrest warrants for 21 individuals and summonses to nine others. Five individuals are in custody; one of them has been found guilty and sentenced (with an appeal lodged), three are being tried and one's confirmation of charges hearing has yet to begin. One individual has been acquitted and released (with an appeal lodged). Nine individuals remain at large as fugitives (although one is reported to have died). Additionally, three individuals have been arrested by national authorities, but have not yet been transferred to the Court. Proceedings against seven individuals have finished following the death of two, the dismissal of charges against another four and the withdrawal of charges against one.

As of April 2013, the Court's first trial, the Lubanga trial in the situation of the DR Congo, is in the appeals phase after the accused was found guilty and sentenced to 14 years in prison and a reparations regime was established. The Katanga-Chui trial

⁹⁵"[Article 17 | Rome Statute](#)"; see also "[Article 20 | Rome Statute](#)"

regarding the DR Congo was concluded in May 2012; Mr. Ngudjolo Chui was acquitted and released. The Prosecutor has appealed the acquittal. The decision regarding Mr. Katanga is pending. The Bemba trial regarding the Central African Republic is ongoing with the defence presenting its evidence. A fourth trial chamber, for the Banda-Jerbo trial in the situation of Darfur, Sudan, has been established with the trial scheduled to begin in May 2014. There are a fifth and a sixth trial both scheduled to begin in May and July 2013 respectively in the Kenya situation, namely the Ruto-Sang and the Kenyatta trials for which a single Trial Chamber is responsible. The decision on the confirmation of charges in the Laurent Gbagbo case in the Côte d'Ivoire situation is pending after hearings took place in February 2013. The confirmation of charges hearing in the Ntaganda case in the DR Congo situation is scheduled to begin in September 2013.

One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims.⁹⁶ For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court.⁹⁷ The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC, not only to bring criminals to justice but also to help the victims themselves obtain justice.

Article 43(6) establishes a Victims and Witnesses Unit to provide "protective measures and security arrangements, counseling and other appropriate assistance for

⁹⁶Ilaria Bottigliero (April 2003). ["The International Criminal Court – Hope for the Victims"](#).³² *SGI Quarterly*, pp. 13–15. Accessed 24 July 2007.

⁹⁷International Criminal Court. Victims and witnesses. Accessed June 2013.

witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."⁹⁸ Article 68 sets out procedures for the "Protection of the victims and witnesses and their participation in the proceedings."⁹⁹ The Court has also established an Office of Public Counsel for Victims, to provide support and assistance to victims and their legal representatives.¹⁰⁰ Article 79 of the Rome Statute establishes a Trust Fund to make financial reparations to victims and their families.¹⁰¹

For the first time in the history of humanity, an international court has the power to order an individual to pay reparation to another individual; it is also the first time that an international criminal court has had such power. Pursuant to Article 75, the Court may lay down the principles for reparation for victims, which may include restitution, indemnification and rehabilitation. On this point, the Rome Statute of the International Criminal Court has benefited from all the work carried out with regard to victims, in particular within the United Nations.

The Court must also enter an order against a convicted person stating the appropriate reparation for the victims or their beneficiaries. This reparation may also take the form of restitution, indemnification or rehabilitation. The Court may order this reparation to be paid through the Trust Fund for Victims, which was set up by the Assembly of States Parties in September 2002.

One of the principles of international law is that a treaty does not create either obligations or rights for third states without their consent, and this is also enshrined in the

⁹⁸Article 43(6) of the [Rome Statute](#). Accessed May 2013

⁹⁹Article 68 of the [Rome Statute](#)

¹⁰⁰International Criminal Court, 17 October 2006. [Report on the activities of the Court](#) PDF (151 KB). Accessed 18 June

¹⁰¹International Criminal Court. [Trust Fund for Victims](#). Accessed June 2013.

1969 Vienna Convention on the Law of Treaties.¹⁰² The co-operation of the non-party states with the ICC is envisioned by the Rome Statute of the International Criminal Court to be of voluntary nature.¹⁰³ However, even states that have not acceded to the Rome Statute might still be subjects to an obligation to co-operate with ICC in certain cases.¹⁰⁴ When a case is referred to the ICC by the UN Security Council all UN member states are obliged to co-operate, since its decisions are binding for all of them.¹⁰⁵

Member states are obligated to respect and ensure respect for international humanitarian law, which stems from the Geneva Conventions and Additional Protocol I,¹⁰⁶ which reflects the absolute nature of IHL.¹⁰⁷ Although the wording of the Conventions might not be precise as to what steps have to be taken, it has been argued that it at least requires non-party states to make an effort not to block actions of ICC in response to serious violations of those Conventions.¹⁰⁸

In relation to co-operation in investigation and evidence gathering, it is implied from the Rome Statute¹⁰⁹ that the consent of a non-party state is a prerequisite for ICC Prosecutor to conduct an investigation within its territory, and it seems that it is even more necessary for him to observe any reasonable conditions raised by that state, since such restrictions exist for states party to the Statute.¹¹⁰ Taking into account the experience

¹⁰²"[Article 34](#)" (PDF). [Vienna Convention on the Law of Treaties](#). United Nations. 1969. Retrieved July 2013.

¹⁰³Article 87 (5)(a) of the [Rome Statute](#).

¹⁰⁴Zhu, Wenqi (2006). "[On Co-Operation by States Not Party to the International Criminal Court](#)" (PDF). [International Review of the Red Cross \(International Committee of the Red Cross\)](#) (861): 87–110.

¹⁰⁵Article 25 of the [UN Charter](#). Retrieved July 2013

¹⁰⁶Article 89 of [Additional Protocol I](#) from 1977. Accessed on July 2013.

¹⁰⁷*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 114, para. 220.

¹⁰⁸Zhu, Wenqi (2006). "[On Co-Operation by States Not Party to the International Criminal Court](#)" (PDF). [International Review of the Red Cross \(International Committee of the Red Cross\)](#) (861): 87–110.

¹⁰⁹Article 99 of the [Rome Statute](#).

¹¹⁰Zhu, Wenqi (2006). "[On Co-Operation by States Not Party to the International Criminal Court](#)" (PDF). [International Review of the Red Cross \(International Committee of the Red Cross\)](#) (861): 87–110.

of the ICTY (which worked with the principle of the primacy, instead of complementarity) in relation to co-operation, some scholars have expressed their pessimism as to the possibility of ICC to obtain co-operation of non-party states.¹¹¹ As for the actions that ICC can take towards non-party states that do not co-operate, the Rome Statute stipulates that the Court may inform the Assembly of States Parties or Security Council, when the matter was referred by it, when non-party state refuses to co-operate after it has entered into an ad hoc arrangement or an agreement with the Court.¹¹²

It is unclear to what extent the ICC is compatible with reconciliation processes that grant amnesty to human rights abusers as part of agreements to end conflict.¹¹³ Article 16 of the Rome Statute allows the Security Council to prevent the Court from investigating or prosecuting a case,¹¹⁴ and Article 53 allows the Prosecutor the discretion not to initiate an investigation if he or she believes that “an investigation would not serve the interests of justice”.¹¹⁵ Former ICC president Philippe Kirsch has said that “some limited amnesties may be compatible” with a country's obligations genuinely to investigate or prosecute under the Statute.¹¹⁶

It is sometimes argued that amnesties are necessary to allow the peaceful transfer of power from abusive regimes. By denying states the right to offer amnesty to human rights abusers, the International Criminal Court may make it more difficult to negotiate an end to conflict and a transition to democracy. For example, the outstanding arrest

¹¹¹Zhu, Wenqi (2006). ["On Co-Operation by States Not Party to the International Criminal Court"](#) (PDF). *International Review of the Red Cross* (International Committee of the Red Cross) (861): 87–110.

¹¹²Article 87(5) of the [Rome Statute](#).

¹¹³Anthony Dworkin (December 2003). ["Introduction"](#) in *The International Criminal Court: An End to Impunity?* Crimes of War Project. Accessed June 2013.

¹¹⁴Article 16 of the [Rome Statute](#).

¹¹⁵Article 53 of the [Rome Statute](#).

¹¹⁶Anthony Dworkin (December 2003). ["Introduction"](#) in *The International Criminal Court: An End to Impunity?* Crimes of War Project. Accessed June 2013.

warrants for four leaders of the Lord's Resistance Army are regarded by some as an obstacle to ending the insurgency in Uganda.¹¹⁷ Czech politician Marek Benda argues that "the ICC as a deterrent will in our view only mean the worst dictators will try to retain power at all costs".¹¹⁸ However, the United Nations¹¹⁹ and the International Committee of the Red Cross¹²⁰ maintain that granting amnesty to those accused of war crimes and other serious crimes is a violation of international law.

The ICC has been criticized for various reasons. Critics of the Court argue that there are "insufficient checks and balances on the authority of the ICC prosecutor and judges" and "insufficient protection against politicized prosecutions or other abuses".¹²¹ Concerning the independent Office of Public Counsel for the Defence (OPCD), Thomas Lubanga's defence team say they were given a smaller budget than the Prosecutor and that evidence and witness statements were slow to arrive.¹²²

In some common law systems, such as the United States, the right to confront one's accusers is traditionally seen as negatively affected by the lack of an ability to compel witnesses and the admission of hearsay evidence,¹²³ which along with other indirect evidence is not generally prohibited.¹²⁴ Hence, the rights of the accused are not ably guaranteed. Further, the ICC has been criticized for being contrary to the rights

¹¹⁷Tim Cocks (30 May 2007). "[Uganda Urges Traditional Justice for Rebel Crimes](#)". *Reuters*. Accessed 31 May 2007.

¹¹⁸Alasdair Palmer (14 January 2007). "[When Victims Want Peace, Not Justice](#)". *The Sunday Telegraph*. Accessed June 2013.

¹¹⁹See, for example, [Kofi Annan](#) (4 October 2000). *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, para. 22. Accessed June 2013.

¹²⁰Jean-Marie Henckaerts & Louise Doswald-Beck, 2005. *Customary International Humanitarian Law*, Volume I: Rules, pp. 613–614. Cambridge: Cambridge University Press. ISBN 978-0-521-80899-6.

¹²¹US Department of State, 30 July 2003. [Frequently Asked Questions About the U.S. Government's Policy Regarding the International Criminal Court \(ICC\)](#). Retrieved June 2013

¹²²Stephanie Hanson (17 November 2006). Court. Council. Retrieved June 2013

¹²³Maffei, Stefano (2006). [The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses](#). pp. 222–225. ISBN 978-90-76871-64-6.

¹²⁴"[China's Attitude Towards the ICC](#)", Lu Jianping and Wang Zhixiang, *Journal of International Criminal Justice*, 6 July 2005.

guaranteed by the US Constitution due to the absence of jury trials, as well as allegations that retrial is permitted for errors of fact, hearsay is accepted as evidence, and that there is no right to a speedy trial and a public trial, or reasonable bail.¹²⁵

In addition, limitations exist for the ICC. The Human Rights Watch (HRW) reported that the ICC's prosecutor team takes no account of the roles played by the government in the conflict of Uganda, Rwanda or Congo. This led to a flawed investigation, because the ICC did not reach the conclusion of its verdict after considering the governments' position and actions in the conflict.

Further, the ICC has been accused of bias and even as being a tool of Western imperialism, only punishing leaders from small, weak nations while ignoring crimes committed by richer and more powerful nations. The conviction of Charles Taylor, the former president of Liberia, is said to have sent an unequivocal message to current leaders: that great office confers no immunity. In fact it sent two messages: if you run a small, weak nation, you may be subject to the full force of international law; if you run a powerful nation, you have nothing to fear.¹²⁶ In particular, the ICC has been criticized for targeting only people from Africa; to date, all of the ICC's cases are from African countries.

¹²⁵Carlan, Philip E.; Nored, Lisa S.; Downey, Ragan A. (2011).*An Introduction to Criminal Law*. p. 24. ISBN 978-1-4496-4721-6.

¹²⁶<http://www.guardian.co.uk/commentisfree/2012/apr/30/imperialism-didnt-end-international-law>

3.3 Chapter summary

Chapter three is dedicated an incisive analysis of the history and roles of the ICC, with special reference to conflict resolution and prevention, both at interstate, and intra-state level. This chapter has looked at ICC, its history, and conflict resolution model, and also its application of retributive, as opposed to restorative justice. The next chapter now seeks to analyze the case study of Kenya, where the ICC has been involved in the post election violence conflict resolution.

CHAPTER FOUR

THE ICC AND KENYA 2007/8 POST-ELECTION VIOLENCE.

4.1 Background To The 2008 Post Election Violence In Kenya.

The 2007–08 Kenyan crisis was a political, economic, and humanitarian crisis that erupted in Kenya after former President Mwai Kibaki was declared the winner of the presidential election held on December 27, 2007. Supporters of Kibaki's opponent, Raila Odinga of the Orange Democratic Movement, alleged electoral manipulation, which was widely confirmed by international observers.¹²⁷

In addition to staging several nonviolent protests, opposition supporters went on a violent rampage in several parts of the country, most noticeably in Odinga's homeland of Nyanza Province and the slums of Nairobi, part of his Langata constituency. Police shot a number of demonstrators, including a few in front of TV news cameras, causing more violence directed toward the police.¹²⁸ Targeted ethnic violence (as opposed to violent protests) escalated and at first was directed mainly against Kikuyu people – the community of which Kibaki is a member – living outside their traditional settlement areas, especially in the Rift Valley Province.¹²⁹

Tensions in the Rift Valley have caused violence in several previous Kenyan elections, most notably in the 1992 Kenyan Elections. Some of the Kikuyu also engaged in retaliatory violence against groups supportive of Odinga, primarily Luos and Kalenjin,

¹²⁷"[Kenya rivals agree to share power](#)". BBC News. February 28, 2008. [Archived](#) from the original on February 29, 2008. Retrieved July 2013.

¹²⁸(AFP) – Jan 26, 2008 (January 26, 2008). "[AFP: Politician's portrait marks border in Kenyan slum](#)". Google. Retrieved May 1, 2010.

¹²⁹Samir Elhawary (2008) [Crisis in Kenya: land, displacement and the search for 'durable solutions'](#) [Overseas Development Institute](#)

especially in the areas surrounding Nakuru and Naivasha. The slums of Nairobi saw some of the worst violence, some of this ethnically-motivated attacks, some simple outrage at extreme poverty, and some the actions of criminal gangs. The violence continued sporadically for several months, particularly in the Rift Valley. By the end of 2008, an estimated one third of the 2,200 member Indian community in Kisumu, which controlled most of the city's trade, had begun repatriating back home in the wake of the ethnic clashes. The largest single loss of life was when a church providing shelter from the violence to 200 people was set on fire by rioters, killing 35 people. The people who were sheltering were members of President Kibaki's tribe, the Kikuyu.¹³⁰

Former UN Secretary General Kofi Annan arrived in the country about a month after the election, and successfully brought the two sides to the negotiating table. On February 28, 2008, Kibaki and Odinga signed a power-sharing agreement called the National Accord and Reconciliation Act, which established the office of prime minister and created a coalition government.¹³¹ The power-sharing Cabinet, headed by Odinga as Prime Minister, was eventually named on April 13, after lengthy negotiations over its composition;¹³² it was sworn in on April 17.¹³³

Human Rights Watch accused "ODM politicians and local leaders" of organizing, instigating and facilitating violence against Kikuyus.¹³⁴ The BBC reported on March 5, that government officials had met with members of the Mungiki militia, which is banned,

¹³⁰ "[Kenya diplomatic push for peace](#)". *BBC News*. January 2, 2008. Retrieved July 2013.

¹³¹ "[Key points: Kenya power-sharing deal](#)". *BBC News*. February 28, 2008. [Archived](#) from the original on March 3, 2008. Retrieved July 2013.

¹³² "[Kenya unveils 40-seat cabinet](#)", *Al Jazeera*, Accessed June 2013.

¹³³ "[Odinga sworn in as Kenya PM](#)", *Al Jazeera*, Accessed July 2013.

¹³⁴ "[Kenyan ethnic attacks 'planned'](#)". *BBC News*. January 24, 2008. [Archived](#) from the original on March 7, 2008. Retrieved June 2013.

at State House to arrange for the militia to protect Kiyukus. The government denied this.¹³⁵

The violence in Kenya has had serious economic ramifications throughout East Africa, particularly for the landlocked countries of the Great Lakes region (Uganda, Rwanda, Burundi, and eastern parts of the Democratic Republic of Congo).¹³⁶ These countries depend upon Kenyan infrastructure links (particularly the port at Mombasa) for important imports as well as export routes. Significant shortages of gasoline were reported in Uganda as well as Zanzibar following the elections. The East African Community, despite having election observers in Kenya, has not yet issued a statement.

The series of protests and demonstrations followed, and fighting—mainly along tribal lines—led to many deaths, injuries and displacements.¹³⁷ A government spokesman claimed that Odinga's supporters were "engaging in ethnic cleansing".¹³⁸ Odinga countered that Kibaki's camp was "guilty, directly, of genocide"¹³⁹ as he called for international mediation.¹⁴⁰

4.2 ICC Response to the Kenyan post-election violence: Effectiveness of Retributive Justice over Restorative Justice.

As part of the mediation between Kibaki and Odinga in 2008 the two parties agreed a series of accords. One of these was to establish the Commission of Inquiry into the Post-Election Violence, chaired by Kenyan judge Philip Waki to investigate the

¹³⁵"State 'sanctioned' Kenyan clashes". *BBC News*. March 5, 2008. [Archived](#) from the original on April 18, 2008. Retrieved June 2013.

¹³⁶"The page cannot be found". 2008. Archived from [the original](#) on May 17, 2011. Retrieved July 2013

¹³⁷"Odinga rejects Kenya poll result". *BBC News*. 31 December 2007. Retrieved June 2013

¹³⁸"Kenya diplomatic push for peace". *BBC News*. January 2, 2008. Retrieved July 2013.

¹³⁹ *Id.*

¹⁴⁰"Raila takes the lead in search for a way out". *The Standard*. Hong Kong. 2008. Archived from [the original](#) on February 7, 2008. Retrieved June 2013.

violence and particularly the actions of the police.¹⁴¹Waki's report recommended that the Kenyan government set up a special tribunal to prosecute those responsible for the worst crimes and although both Kibaki and Odinga voiced support for a local tribunal, the idea was rejected by the National Assembly.¹⁴²Waki passed his report, including a list of the names of those he considered most responsible for the violence back to Kofi Annan with instructions that it be passed to the International Criminal Court if progress with the local tribunal was not made.

On 16 July 2009 the Waki commission delivered a copy of his report along with six boxes of documents and supporting materials to the International Criminal Court along with a sealed envelope containing a list of people who could be implicated in the violence. The prosecutor, Luis Moreno Ocampo opened the envelope, inspected its contents and re-sealed it.¹⁴³ Initially the ICC gave the Kenyan government a deadline of July 2010 to establish a local tribunal before it would refer the case to the ICC Prosecutor Luis Moreno Ocampo.¹⁴⁴ The "Waki List" has so far not been made public, and there is speculation that it may contain more names than the six who were initially indicted by the ICC; consequently there have been some calls in Kenya for either the ICC or Waki to release the list.¹⁴⁵

After failed attempts to conduct a criminal investigation of the key perpetrators in Kenya, the matter was referred to the International Criminal Court in The Hague.¹⁴⁶ In 2010, the Prosecutor of the ICC Luis Moreno Ocampo announced that he was seeking

¹⁴¹[*Annan hands ICC list of perpetrators of post-election violence in Kenya*](#). The Guardian. Retrieved June 2013

¹⁴² Id.

¹⁴³"[Waki Commission list of names in the hands of ICC Prosecutor](#)"

¹⁴⁴[*Annan hands ICC list of perpetrators of post-election violence in Kenya*](#). The Guardian. Retrieved July 2013

¹⁴⁵Barasa, Lucas (10 July 2009). "[Parties ask ICC to disclose violence suspects](#)". *Daily Nation*.

¹⁴⁶ "[Waki Commission list of names in the hands of ICC Prosecutor](#)"

summons for six people: Deputy Prime Minister Uhuru Kenyatta, Industrialisation Minister Henry Kosgey, Education Minister William Ruto, Cabinet Secretary Francis Muthaura, radio executive Joshua Arap Sang and former police commissioner Mohammed Hussein Ali—all accused of crimes against humanity.¹⁴⁷ The six suspects, known colloquially as the "Ocampo six"¹⁴⁸ were indicted by the ICC's Pre-Trial Chamber II on 8 March 2011 and summoned to appear before the Court.¹⁴⁹

The government of Kenya and the National Assembly both attempted to stop the ICC process. The government appealed to both the United Nations Security Council and the Court itself regarding the admissibility of the case.¹⁵⁰ The National Assembly voted in favour of removing Kenya as a state party to the Rome Statute, the international treaty which established the ICC.¹⁵¹ Despite this opposition, the suspects cooperated with the proceedings and attended preliminary hearings in The Hague in April 2011 and confirmation of charges hearings in September of that year.¹⁵² On 23 January 2012, the Pre-Trial Chamber II confirmed the charges against Kenyatta, Muthaura, Ruto, and Sang and declined to confirm the charges against Ali and Kosgey.¹⁵³

¹⁴⁷["Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali"](#) .International Criminal Court. 15 December 2010. p. 6.Retrieved June 2013

¹⁴⁸ "ICC judges summon 'Ocampo six'". [Al Jazeera English](#). 8 March 2011. Retrieved July 2013.

¹⁴⁹["Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali"](#).International Criminal Court. 8 March 2011. p. 23.Retrieved June 2013.

¹⁵⁰["Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang"](#). International Criminal Court. 8 March 2011. p. 22–23. Retrieved July 2013

¹⁵¹"Parliament pulls Kenya from ICC treaty", [Daily Nation](#), 22 December 2010.

¹⁵²["Timeline-Kenya and the ICC"](#). Reuters

¹⁵³["Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute"](#). ICC. p. 138

4.3 ICC and Retribution versus Reparation in 2008 Post-Election Violence.

The procedures of the ICC allow for the participation of victims who may submit views and observations to the Court and also apply for reparations.¹⁵⁴ In the case of Ruto et al. 394 victims applied to participate in the proceedings and the pre-trial chamber admitted 327 of those victims as participants.¹⁵⁵ In the case of Muthaura et al. 249 victims applied and 233 were admitted as participants.¹⁵⁶

Criminal prosecutions are a widely used response to the issue of accountability for past human rights violations and a large number of scholars maintain that trials should have a prominent place, if not regarding such trials as an initial and leading mechanism during post-conflict reconstruction¹⁵⁷. This school of thought sees prosecutions as ‘demarcating the normative shift from illegitimate to legitimate rule’, in other words, as drawing a thick line between the past and the present¹⁵⁸. Naturally, making a clear break with the past requires punishing the crimes committed by previous regimes and introducing new rules of the game which provide for deterrence of future violations and rebuild trust in state institutions¹⁵⁹.

Nevertheless, the aftermath of a conflict often presents tensions between aspiration and capability¹⁶⁰. This is to say that very often, transitional situations raise people’s hopes and expectations but they cannot be easily met in the wake of the difficult

¹⁵⁴“[Participation of victims in proceedings](#)”. International Criminal Court. Retrieved June 2013.; see also “[Reparations for Victims](#)”. International Criminal Court. Retrieved June 2013.

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ Arthur, P. (2011) ‘Fear of the Future, Lived through the Past: Pursuing Transitional Justice in the Wake of Ethnic Conflict’, In: Arthur, P., ed. (2010) *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, Cambridge: Cambridge University Press

¹⁵⁸Teitel, R. G. (2002) *Transitional Justice*, Oxford: Oxford University Press

¹⁵⁹Asaala, E. (2010) ‘Exploring transitional justice as a vehicle for social and political transformation in Kenya’, *African Human Rights Journal*, 377 – 406

¹⁶⁰ Clark, P. Kaufman, Z. D. & Nicolaidis, K. (2008) ‘Tensions in Transitional Justice’, In: Clark, P. & Kaufman, Z. D. (2008) *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, London: Hurst & Company

choices transitional governments have to make. The challenges are innumerable ranging from unaddressed historical injustices and political unaccountability to financial, legal and security problems brought about by the conflict.

The trials of those bearing responsibility for crimes may have a number of varying, sometimes contradictory, outcomes. On the one hand, removing high profile perpetrators from a position of responsibility may eliminate obstacles to accountability and ‘foster a democratic political culture’¹⁶¹. Also, the imprisonment of perpetrators can deliver a measure of justice to victims and witnesses and put a stop to their fear of revenge. Arthur¹⁶² demonstrates that prosecutions of low-level transgressors in Bosnia enhanced a sense of security amongst communities and prompted persons displaced by the conflict to return home without concerns about their safety. On the other hand, there might be a limitation to what trials can achieve with the potential to cause more harm than good. This can particularly take place in multi-ethnic societies with the lack of national consciousness and prevalence of regional or community-based identities. There is a risk that the trial of a person holding the position of power within a particular region will be interpreted as a witch-hunt against the whole community¹⁶³. As a result, the manipulation of group identities can contribute to the polarisation of inter-group relations, breed instability and perhaps even lead to the renewal of violence¹⁶⁴.

¹⁶¹ Arenhövel, M. (2012) ‘Democratization and Transitional Justice’, *Democratization*, 15: 3, 37 – 41

¹⁶² Arthur, P. (2011) ‘Fear of the Future, Lived through the Past: Pursuing Transitional Justice in the Wake of Ethnic Conflict’, In: Arthur, P., ed. (2010) *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, Cambridge: Cambridge University Press

¹⁶³ Aptel, C. (2011) ‘International and Hybrid Criminal Tribunals: Reconciling or Stigmatizing?’, In: Arthur, P., ed. (2010) *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, Cambridge: Cambridge University Press

¹⁶⁴ Dukalskis, A. (2011) ‘Interactions in Transition: How Truth Commissions and Trials Complement and Constrain Each Other’, *International Studies Review*, 13:3, 432 – 451

The danger of trials is also their prime focus on perpetrators which might side-line those affected by violence. It is important to note that victims and survivors are not a monolithic category and that their needs and expectations undergo a change¹⁶⁵. In addition, not all survivors might have an inherent interest in punitive justice. In Kenya, there might be those, who suffered indirectly, as a result of state corruption and unequal redistribution of resources who would welcome systemic reforms enabling them to live in peace and escape the traps of poverty and inequality. Another category are could be those tortured in Nyayo House chambers during Moi's rule or relatives of the victims of Wagalla massacre, and families of assassinated Kenyan politicians, for whom immediate retribution and revelation of truth might be the only option¹⁶⁶. Still, there are resource less IDPs affected by election violence who require financial compensation and guarantees of non-repetition, so that they could start rebuilding their lives¹⁶⁷.

The post-conflict situations are very unpredictable and difficulties might arise in balancing peace with other pressing considerations such as accountability, deterrence and the needs of victims¹⁶⁸. It is clear that criminal courts can never prosecute all those responsible and that punitive judicial accountability can only be one response to the

¹⁶⁵ Simpson, G. (2008) 'One among Many: The ICC as a Tool of Justice during Transition', In: Waddell, N. and Clark, P., eds. (2008) *Courting Conflict? Justice, Peace and the ICC in Africa*, London: Royal African Society

¹⁶⁶ Musau, N. and Sheikh, S. A. (2011) 'Daring Struggle: The long fight for Justice for Wagalla Massacre Victims', Nairobi Star, 28 June, [online] available at: <<http://www.the-star.co.ke/lifestyle/128-lifestyle/29613-daring-struggle-the-long-fight-for-justice-for-wagalla-massacre-victims>> [Accessed July 2013]

¹⁶⁷ Kenya Human Rights Commission (KHRC) (2011) *Gains and Gaps: A Status Report on IDPs in Kenya, 2008-2010*, Nairobi: KHRC, [online] available at : <http://www.khrc.or.ke/component/docman/doc_details/17-gains-and-gaps-a-status-report-on-idps-in-kenya-2008-2010.html> [Accessed July 2013]

¹⁶⁸ Republic of Kenya (2003) *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, [online] available at: <http://marsgroupkenya.org/pdfs/2008/march_2008/Kenya_Report_of_the_Task_Force_on_the_Establishment_of_a_Truth_Justice_and_Reconciliation_Commission_August_26th_2003.pdf> [Accessed July 2013]

complex post-conflict situation ‘in a panoply of available judicial and non-judicial mechanisms’¹⁶⁹. Thus, the question should not be about whether or not to prosecute, but rather how to prosecute and coordinate trials with other transitional justice responses. This reflects the issue of timing and sequencing of transitional justice activities. Nevertheless, the reality on the ground can always alter what has been envisaged by theorists, or international and domestic actors. It will be shown that in Kenya, the initial planning of transitional justice measures was thwarted by the fluid and erratic domestic politics which resulted in a haphazard timing, sequencing and coordination of different activities.

4.4 Chapter Summary

The chapter focuses on the Kenyan 2008 post election violence, and analyses the ICC response, in terms of its application of the retributive justice system. This chapter analyses the effectiveness of the continuing process of ICC cases, with reference to suitability of retributive, as opposed to reparative or restorative dispute resolution system. This chapter has addressed, in detail, the background of the post election violence in Kenya in 2008, and the response by the government, and the international criminal court. The chapter has also addressed the doctrines of restorative justice, as compared with retributive justice, and the extent to which they have been applied in the international criminal court, with regards to the Kenyan post election violence.

While the victims were waiting for justice, the politicians could not decide which route would be least threatening to their political interest. As many commentators agree,

¹⁶⁹ Simpson, G. (2008) ‘One among Many: The ICC as a Tool of Justice during Transition’, In: Waddell, N. and Clark, P., eds. (2008) *Courting Conflict? Justice, Peace and the ICC in Africa*, London: Royal African Society

the debate is more about politics rather than justice¹⁷⁰. Concerns about the threat of the ICC to national sovereignty or the hurdles surrounding the STK were just a reflection of the general political impotence to firmly anchor the rule of law in the state institutions.

The ICC investigations have been more effective due to the inability of politicians to exert full control over the external criminal justice process¹⁷¹.

The shadow of the ICC has been an important element which has shaped the Kenyan transitional justice process¹⁷². The side effect of the ICC process was that it increased politicians' efforts to create resistance to it, thus restricting the focus on reforms and the situation of victims. In addition, and somewhat ironically, the ICC reinforced the calls for domestic justice which has resulted in a number of key judicial reforms, including the adoption of important bills and the appointment of a new, reform-oriented Chief¹⁷³.

The International Criminal Court (ICC) prosecutor has repeatedly emphasized that her work is for the benefit of the victims of the 2007-2008 post-election violence. This could be a way to stress that her decisions are not guided by political considerations, a statement worth making in a country like Kenya where actions ruled by corruption, bribery, and political interest are the norm rather than the exception. However, it is

¹⁷⁰Warigi, G. (2011) 'Who gains from Kenya's ICC cases?', BBC News, 7 April 2011, [online] available at: <<http://www.bbc.co.uk/news/world-africa-12831054>> [Accessed July 2013]

¹⁷¹Hansen, T. O. (2011) 'A Holistic Look: How the ICC Process Shapes Transitional Justice in Kenya', The International Criminal Court Kenya Monitor, 19 September, [online] available at: <<http://www.icckenya.org/2011/09/a-holistic-look-how-the-icc-process-shapes-transitional-justice-in-kenya/>> [Accessed July 2013]

¹⁷²Musila, G. M. (2008) 'A Preliminary assessment of the Kenyan Truth, Justice and Reconciliation Commission Bill, 2008', African Renaissance, 5: 1, 40 – 46

¹⁷³Brown, S. (2012, forthcoming) 'The National Accord, Impunity and the Fragile Peace in Kenya', In: Sriram, C. L., García-Godos, J., Martín-Ortega, O., Herman, J., eds. (2012) *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, London: Routledge

difficult to assert that victims' interests have been a major consideration in the investigations and have been at the heart of decisions made in the cases.

At the ICC, victims have a right to participate in proceedings. BUT for according to the court's jurisprudence, in order for victims to participate in a case, they must show that the harm they suffered bears a direct causal link to the crimes for which an accused is to be tried. This means, for example, that if the accused person in one case were to be tried for murder and murder only, victims of other crimes allegedly committed by the same person such as torture, rape, or displacement, would not be able to participate even if those crimes were committed during the same attack or otherwise within the same framework.

In addition to the relationship with the charges, victims must show that they suffered crimes as a result of one or more of the specific incidents that the ICC prosecutor has selected for prosecution. For example, if crimes were committed in village X and village Y but the prosecution decided to only prosecute the accused for crimes committed in village Y, then only those who suffered crimes in village Y would be able to participate and would be, in principle, entitled to receive reparations. Victims from village X would be excluded from the proceedings. This is problematic because the ICC prosecutor has adopted a policy of 'focused investigations and prosecutions.' This means that instead of presenting exhaustive cases covering all of the crimes allegedly committed by the accused persons, only a few incidents that serve as a 'sample' of the overall scope of criminality are selected. While cost-effectiveness makes this a reasonable policy, it has an adverse impact on victims. Although the prosecution is committed to presenting cases that are representative of the most important forms of victimization, such representative

nature has at times been absent in the selection of cases for prosecution and identification of sufficient evidence to back that up.

At different stages of the proceedings, the scope of the Kenya cases has been reduced. Initially, during the pre-trial stage of the case, prior to the issuance of the summons to appear, the prosecutor had wanted to include incidents that took place in Kisumu and Kibera during the post-election violence (Kenya Case II). The prosecution had also submitted that crimes related to that case had been committed from December 27, 2007 through February 29, 2008. However, Pre-Trial Chamber II found that the prosecution did not provide sufficient evidence to support that; in Case II, the incidents in Kisumu and Kibera were excluded and the temporal scope of the case was reduced to a few days in January.

The focus of the cases from the issuance of summons to appear until the confirmation of charges was the following: from December 30, 2007 and the end of January 2008 in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town, in the UasinGishu and Nandi Districts in Kenya Case I, and from on or about January 27 to 31, 2008 in Nakuru and Naivasha in Case II.

The geographical and temporal limits of the case were determined on the basis of the evidence provided by the prosecution and in accordance with the standard of evidence required at the stage of issuance of arrest warrants or summons to appear, i.e. ‘reasonable grounds to believe.’ However, that scope was further significantly reduced by the Decision on the Confirmation of Charges. Based on the evidence that the prosecution put

forward and the pre-trial chamber's assessment in application of a higher threshold, i.e. 'substantial grounds to believe,' the factual basis of the case was reduced even further.

According to the pre-trial chamber, the evidence provided by the prosecution was only sufficient to establish that there were substantial grounds to believe that crimes were committed in Turbo town on December 31, 2007, the greater Eldoret area from January 1 to 4, 2008, Kapsabet town from December 30, 2007 to January 16, 2008, and Nandi Hills Town from December 30, 2007 to January 2, 2008 in Case I, and in Nakuru from January 24 to 27, 2008 and Naivasha from January 27 to 28, 2008 in Case II. In sum, two months of violence in the Rift Valley were reduced to a few spread incidents in some villages on specific dates.

In practice, for victims that means, for example, that those who were victimized in Nandi Hills Town on January 2, 2008 late at night can participate in the case and may benefit from reparations in the event of a conviction, while their neighbors who suffered harm as a result of acts committed by the same attackers in the early morning of January 3 will neither participate in the case nor receive reparations. That limitation appears shocking and arbitrary, especially considering that most public reports on the post-election violence refer to acts of violence that took place over longer periods of time.

Consideration of the interests of victims during the pre-trial phase of the cases was therefore far from optimal. The situation does not seem to have improved at the trial stage of the case, specifically in relation to the Trial Chamber V's approach to the issue of victim participation. A decision implementing major changes to the victim participation regime was taken in October 2012 (October 3, 2012 Decision on Victims' Representation and Participation; see Case I decision [here](#) and Case II [here](#)). That

decision touches not only upon the system for victims to access the court but also on their legal representation in the proceedings.

Regardless of whether those changes are fair or unfair, the process leading up to that decision does not seem to have conformed to the highest standards of justice when it comes to the genuine involvement of victims. It is relevant to recall that the reason for the introduction of victim participation was to allow victims to give their views on the proceedings and how they are conducted. Strikingly, however, neither the parties nor the victims were consulted before the October 3, 2012 decisions were issued in the cases, yet, the decisions make extensive reference to the interest of victims. Presumably, those references were drawn from an understanding or belief of what could be in the interest of victims and not their actual stated interest.

Judges have a responsibility to manage the proceedings and, as a consequence, may make decisions to ensure that the proceedings run smoothly and effectively. However, on an issue that goes to the core of the rights of one of the main actors in the proceedings and the way to exercise them, it is natural to expect that those actors be given a chance to be heard. Decisions of this nature can also affect the rights of the accused and fair trial standards both for the accused and for the victims. Finally, it is submitted that the trial chamber, whose members do not often travel to the field, could have benefitted from information on how victim participation operates in practice. Often, the most important aspects of victim participation unfold in the situation country where the victims are located and not only or necessarily before the court in The Hague. The prosecutions of several high ranking Kenyan officials in the future may have a potential symbolic effect and 'should be able to shatter the country's complete record of complete

impunity for high-level officials’, but are unlikely to satisfy high expectations of victims and of the general population¹⁷⁴. There is a general potential for the ICC to ‘positively participate in the democratization process by making leaders accountable’, to provide a degree of deterrence of future crimes and to encourage domestic forces to advance justice and the respect for human rights¹⁷⁵. Therefore, transitional justice can be seen as the initial test for the inauguration of democratic culture in a post-conflict country¹⁷⁶.

¹⁷⁴ Sriram, C. L. (2009) ‘Transitional Justice and Peacebuilding’, In: Sriram, C. L. and Pillay, S., eds. (2009) *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, Scottsville: University of KwaZulu-Natal Press

¹⁷⁵ Aptel, C. (2011) ‘International and Hybrid Criminal Tribunals: Reconciling or Stigmatizing?’, In: Arthur, P., ed. (2010) *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, Cambridge: Cambridge University Press

¹⁷⁶ Mindzie, M. A. (2009) ‘Transitional Justice, Democratisation and the Rule of Law’, In: Sriram, C. L. and Pillay, S., eds. (2009) *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, Scottsville: University of KwaZulu-Natal Press

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 SUMMARY AND CONCLUSION

Central to retributive justice are the notions of merit and desert. We think that people should receive what they deserve. This means that people who work hard deserve the fruits of their labor, while those who break the rules deserve to be punished. In addition, people deserve to be treated in the same way that they voluntarily choose to treat others.¹⁷⁷ If you behave well, you are entitled to good treatment from others.

Immanuel Kant uses a debt metaphor to discuss the notion of just desert. Citizens in a society enjoy the benefits of a rule of law. According to the principle of fair play, the loyal citizen must do their part in this system of reciprocal restraint. An individual who seeks the benefits of living under the rule of law without being willing to make the necessary sacrifices of self-restraint is a free rider. He or she has helped themselves to unfair advantages, and the state needs to prevent this to preserve the rule of law.¹⁷⁸

Terrence Lyons talks about the balance that lies between providing incentives for dictators to step down and enforcing punishment mechanisms for leaders who have behaved unjustly. In cases of wrongdoing, someone who merits certain benefits has lost them, while someone who does not deserve those benefits has gained them. Punishment "removes the undeserved benefit by imposing a penalty that in some sense balances the

¹⁷⁷Rachels, James. "Punishment and Desert." In *Ethics in Practice*, ed. Hugh LaFollette, (Malden, Massachusetts: Blackwell Publishers, 1997), 466. <<http://www.jamesrachels.org/punanddes.pdf>>.

¹⁷⁸Murphy, Jeffrie G. *Retribution Reconsidered* (Norwell, Massachusetts: Kluwer Academic Publishers, 1992), 23. <<http://books.google.com/books?id=p2EeefbHk-QC>>.

harm inflicted by the offense."¹⁷⁹ It is suffered as a debt that the wrongdoer owes their fellow citizens. Retributive justice in this way aims to restore both victim and offender to their appropriate positions relative to each other.

Retributive justice is in this way backward-looking. Punishment is warranted as a response to a past event of injustice or wrongdoing. It acts to reinforce rules that have been broken and balance the scales of justice.¹⁸⁰ Protracted conflicts often involve violence or cruelty suffered by innocent civilians. In some cases, this violence is carried out systematically, in the form of genocide, ethnic cleansing, enslavement, or systematic racial discrimination. In other cases, rapes, murders, and acts of torture may be carried out more haphazardly.

In those cases where the parties involved are "at war," such actions violate the war convention and the rules of *jus in bello*. They are war crimes. But even when a war has not been officially declared, these cruel acts of murder and torture constitute human rights violations, prohibited by international law.

Many believe that those who perpetrate such war crimes, or crimes against humanity, should be brought to justice. This is typically accomplished through international courts or tribunals that carry out war crimes adjudication. Retributive justice is a matter of giving those who violate human rights law and commit crimes against humanity their "just deserts." Punishment is thought to reinforce the rules of international law and to deny those who have violated those rules any unfair advantages. Together

¹⁷⁹Cragg, Wesley. *The Practice of Punishment: Towards a Theory of Restorative Justice* (New York, Routledge, 1992), 15. Updated edition (2002) [available here](#).

¹⁸⁰ See Jeffrey A. Jenkins's discussion of retributive justice in *The American Courts: A Procedural Approach*, (Jones & Bartlett Publishers, 2011).
<<http://books.google.com/books?id=yvT5SVwbakUC>>.

with restorative justice, retribution is concerned with restoring victims and offenders to their rightful position.

The idea that we should treat people as they deserve is commonly accepted. We do not think that war criminals should be allowed to live carefree lives after committing unspeakable crimes against humanity. However, there is a dangerous tendency to slip from retributive justice to an emphasis on revenge. Vengeance is a matter of retaliation, of getting even with those who have hurt us. It can also serve to teach wrongdoers how it feels to be treated in certain ways. Like retribution, revenge is a response to wrongs committed against innocent victims and reflects the proportionality of the scales of justice. But revenge focuses on the personal hurt involved and typically involves anger, hatred, bitterness, and resentment. Such emotions are potentially quite destructive. Because these intense feelings often lead people to over-react, resulting punishments can be excessive and cause further antagonism.

In addition, punishments dictated by revenge do not satisfy principles of proportionality or consistency. This is because revenge leads to punishments that vary according to the degree of anger provoked. Wrongs that do not provoke anger will receive no response. Acts that provoke a great deal of anger will, on the other hand, provoke an overly intense response and lead to reciprocal acts of violence. For example, resentment about past injustice can "motivate people who otherwise live peaceably to engage in torture and slaughter of neighbors identified as members of groups who committed past atrocities."¹⁸¹ Devastating inter-group violence in the form of mass killings can result.

¹⁸¹Minow, Martha. *Between Vengeance and Forgiveness* (Boston, Massachusetts: Beacon Press, 1998), 11.<<http://www.amazon.com/Between-Vengeance-Forgiveness-Genocide-Violence/dp/0807045071>>.

It is not surprising that revenge seldom brings the relief that victims seek. The victim simply gets caught up in feelings of hatred.¹⁸² Vengeful motives lead individuals to exact more than necessary, causing even further harm and setting in motion a downward spiral of violence.¹⁸³ Once there is this sort of violence break over, it is difficult to break out of the cycle of revenge and escalation. Overly harsh punishments do not make society any more secure and only serve to increase the level of harm done. In addition, in an atmosphere of heightened violence, there is little room for apology or forgiveness for wrongs committed.

Many believe that "the victim should not seek revenge and become a new victimizer but instead should forgive the offender and end the cycle of offense."¹⁸⁴ However, forgiveness does not take the place of justice or punishment, nor does it rule out giving the wrongdoer their just deserts. Mark Amstutz, a professor at Wheaton College, finds fault with retributive approaches to justice because they do not pay sufficient attention to how individuals are to reconstruct their lives. The idea that wrongdoers should be "paid back" for their bad deeds need not lead to a demand for primitive vengeance.

Retributive justice requires that the punishment fit the crime and that like cases be treated alike. Wrongdoers deserve blame and punishment in direct proportion to the harm inflicted. Retribution can therefore be seen as vengeance curbed by outside intervention and the principles of proportionality and individual rights.¹⁸⁵ Indeed, one way to avoid the escalation of violence is "to transfer the responsibilities for apportioning blame and

¹⁸²Minow, 13.

¹⁸³Minow, 10.

¹⁸⁴Minow, 14.

¹⁸⁵Minow, 12.

punishment from victims to public bodies acting according to the rule of law.”¹⁸⁶ It is commonly thought that formal institutions with trained judiciaries are best equipped to carry out just retribution. Such institutions can effectively bring offenders to justice by giving them the punishment they deserve.

In the context of international affairs, there is a need to give wrongdoers what they deserve, but in a way that avoids further escalation of the conflict. War crimes adjudication carried out by international courts is one avenue of retributive justice. The International Criminal Court (ICC), for example, operates on the premise that impunity for perpetrators of genocide, crimes against humanity, crimes of aggression, and war crimes is unacceptable. In March 2012, the Court convicted Thomas Lubanga Dyilo, a major player in the Democratic Republic of the Congo’s Ituri conflict, of the war crimes “of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities.”¹⁸⁷ Lubanga was the first person to be convicted by the tribunal.

Trials for war crimes can convert the desire for revenge into state-managed punishment that is proportional and fair. However, in some cases of large-scale war violence such trials may be unlikely or ineffective. Restorative justice, through reparations or compensation, might often be the more effective option. Furthermore, the reluctance to bring those responsible for past crimes to justice made future violations possible which escalated in the recent post-election violence (Brown 2012, forthcoming). The ICC process has so far been the most effective tool in fighting the impunity which is

¹⁸⁶ Id.

¹⁸⁷ Minow, 11-12.

at the heart of Kenyan conflict. It was undermined by the joint effort of individuals within both the Cabinet and the Parliament.

However, the nature of the ICC's external prosecutorial system did not allow the politicians to oppose it as effectively as the domestic TJRC. As Brown and Sriram¹⁸⁸ stated 'slowly chipping away at impunity is far better than nothing'. Still, the prosecution of four high-profile Kenyan individuals is unlikely to serve as sufficient deterrent, nor can it achieve full domestic accountability and effectuate judicial reform. Thus, for the democracy to take root, it is crucial that the domestic political forces intensify the efforts towards accountability by increasing prosecutions and creating independent judicial system.

The complexities surrounding the issue of justice raise important debates not only about defining justice but especially about how to administer justice given the magnitude of atrocities and disruption in the communities. Should restorative and indigenous forms of justice be more readily available and supported to address all areas of dealing with crime? Some advocates for restorative and indigenous justice see this not as full justice, but as adequate or pragmatic for societies undergoing transitions from war to peace merely to be tolerated until justice can be reinstated¹⁸⁹. Implicit and sometimes explicit is the view that restorative justice is a compromise to be made during extraordinary transitions.

However, given the evidence sited in the previous sections, restorative and indigenous forms of justice deserve more support. The choices being made by the

¹⁸⁸ Id.

¹⁸⁹ Llewellyn, J. (2006). Restorative justice in transitions and beyond: The justice potential of truth telling mechanisms for post-peace accord societies. In T. Borer (Ed.), *Telling the truths: Truth telling and peace building in post-conflict societies* (pp. 83–114). South Bend, IN: Notre Dame Press.

international community and by donors have important ramifications for the future of Northern Uganda. Therefore, great care is required to ensure that the best choices for the means of transitioning from violence to peaceful politics are made. This is especially true since, even with international support and intervention, post conflict states are still often left on their own to deal with the consequences of such choices¹⁹⁰.

A restorative approach to justice raises questions as to what extent justice can be delivered to a community, providing the alternative that from a restorative perspective the community is a resource for the generation and sustaining of justice. This is an important reconceptualization of the situation, since the grassroots levels of society have been and must be empowered as the natural partners of the top leaders of liberal peace for social transformation¹⁹¹. Said another way, for justice and peace to move into and be sustained in the future, third-party interventions cannot act independent of local context and cannot simply deliver justice on their own terms.

Outside interveners should fade into background supporting roles in efforts based on local ethos and resources of justice that are themselves crucial for the future¹⁹². The field of conflict prevention and transformation reiterates this insight, advocating for local solutions to local problems¹⁹³.

¹⁹⁰Minow, M. (1998). *Between vengeance and forgiveness*. Boston, MA: Beacon Press.

¹⁹¹Duffield, M. (2001). *Global governance and the new wars: The merging of development and security*. London, England: Zed Books.

¹⁹²John, M. S. (2005). The concept and practice of conflict prevention: A critical reappraisal. *International Studies*, 42, 1–19.

¹⁹³Babbitt, E., & Lutz, E. (Eds.). (2009). *Human rights and conflict resolution in context: Columbia, Sierra Leone, and Northern Ireland*. Syracuse, NY: Syracuse University Press.

Good intentions from the international community, while important, are not enough and can actually do as much or more harm than good¹⁹⁴. Roland Paris¹⁹⁵ offers a word of caution to those doing third-party interventions when he argues:

International efforts to transform war-shattered states have, in a number of cases, inadvertently exacerbated societal tensions or reproduced conditions that historically fueled violence in these countries. The very strategy that peace builders have employed to consolidate peace . . . seems, paradoxically, to have increased the likelihood of renewed violence in several of these states. (p. 6)

At the very least, this statement should promote reflection on whether or not members of the international community. Restorative and indigenous justice should receive further attention as an alternative approach to achieving justice and positive peace.

By starting with needs of individuals and communities rather than exclusive focus on offenses, restorative/indigenous justice is positioned to address the overarching concerns of making contributions to the process of rebuilding civil society in the process of restoring justice. The demands of justice and peace are often viewed as an either/or proposition, either justice will be served or peace can emerge¹⁹⁶. The inclusive approach of restorative justice combined with its forward looking orientation to addressing wrongdoing is one of the features that render it most attractive to peace building efforts.

¹⁹⁴Anderson, M. B. (1999). Do no harm: How aid can support peace—Or war. Boulder, CO: Lynne Rienner.

¹⁹⁵Paris, R. (2004). At wars end: Building peace after civil conflict. Cambridge, MA: Cambridge University Press.

¹⁹⁶Oola, S. (2010). Global justice! The future of international justice in Africa. Retrieved from http://www.beyondintractability.org/reflections/personal_reflections/global_justice.jsp?nid%46828

5.2 Recommendations

Restorative justice attempts to entrench peace and stability through the process of restoring justice itself. Since the ICC does not allow amnesty, a compromise could be made in which the court began with a commitment to restorative/indigenous justice as an animating goal in integrated peace building efforts. This should help clarify the potential role of the ICC to deal with those leaders who have both committed human rights violations and are not willing or able to participate in restorative processes. However, first, caution must be taken not to put too much “hope” in the reach of the impact of incarcerating a few individuals nor too much currency to the general and specific deterrent effects of such arrests and incarcerations, since there is simply no evidence as yet to support these positions.

The ICC and other third-party international interventions can perform the function of complementing and reinforcing pursuits of restorative/indigenous justice to build and sustain peace and justice. It is here that the judicial principle of complementarity of the ICC reflects and supports a domestic rather than international response wherever and to the greatest extent possible. As argued previously, a more flexible role is possible if the ICC combines this role with providing justice for victims of mass human rights violations.

Second, the international community needs to reflect on what is meant by “justice”—whether procedural, retributive, distributive, and/or restorative—and to search for better ways to integrate justice and peace pursuits, and not simply operate from a position, or positions, that may do more harm than good¹⁹⁷.

¹⁹⁷Anderson, M. B. (1999). *Do no harm: How aid can support peace—Or war*. Boulder, CO: Lynne Rienner.

Conflict scholar–practitioners are becoming more critical of past attempts and assumptions at transitioning from violence to peaceful politics and are developing promising new models and orientations that emphasize the local and domestic population as crucial to the process itself¹⁹⁸, as resources for and not simply recipients of justice and peace. Restorative justice works since it is on the principle of complementarity, having a high concern for victims, and providing a way to “make” justice using the community through this process as a resource. Furthermore, Western nations’ definitions of justice should not be privileged because they are the primary funding source for the ICC.¹⁹⁹

Revisiting the opening paragraph, questions emerge about Kofi Annan’s overstatement of the role of the ICC. Critical examination is needed of the assumptions that the ICC and especially whether retributive justice alone can bring much “*hope . . . that, by punishing the guilty, the ICC will bring some comfort to the surviving victims and to the communities that have been targeted.*” While it may bring some “hope,” the evidence above suggests that it is a small amount and that there is limited reason to believe it will provide general deterrence to “future war criminals.” If only justice and peace were that easy and uncomplicated.

Given the ICC refuses to recognize amnesty arising from the peace agreement, a trial may be warranted for those in senior leadership roles in Northern Uganda for gross human rights violations. However, we need to be careful not to place too much hope in the extent to which these prosecutions alone can build the infrastructure of peace. Peace and justice are not easy, nor is a restorative/indigenous justice approach to contribute

¹⁹⁸Lederach, J. P. (2005). *The moral imagination: The art and soul of building peace*. Oxford, England: Oxford University Press.

¹⁹⁹Ssenyonjo, M. (2007). The international criminal court and the lord’s resistance army leaders: Prosecution or amnesty. *International Criminal Law Review*, 7, 361–389.

toward achieving them. What is required is to use the title of Lars Waldof²⁰⁰, is using “*mass justice for mass atrocities*” in rethinking the positive role of traditional justice as transitional justice. Rather than playing the leading role, the ICC and international third-party actors should play supporting roles, complementing the difficult and successful work that has already been done by regional and local actors toward promoting the transition from violence to peace.

²⁰⁰Latimer, J., Dowden, C., & Muise, D. (2001). *The effectiveness of restorative justice practices: A meta-analysis*. Ottawa, Canada: Department of Justice.

REFERENCES

- Adam, R. & Timothy G.A (eds.), *Civil Resistance and Power Politics: The Experience of Non-violent Action from Gandhi to the Present*, (Oxford University Press, 2009).
- Anderson, M. B. *Do no harm: How aid can support peace—Or war*, (Boulder, CO: Lynne Rienner, 1999).
- Antonio, C., Paola G. & John R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*. (Oxford: Oxford University Press 2002).
- Aptel, C. (2011) *International and Hybrid Criminal Tribunals: Reconciling or Stigmatizing?*, In: Arthur, P., ed. *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, (Cambridge: Cambridge University Press, 2011).
- Arenhövel, M. Democratization and Transitional Justice, *Democratization*, 2012, 15: 3, 37 – 41
- Arthur, P. Fear of the Future, Lived through the Past: Pursuing Transitional Justice in the Wake of Ethnic Conflict', In: Arthur, P., ed. (2010) *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, (Cambridge: Cambridge University Press, 2011).
- Asaala, E. Exploring transitional justice as a vehicle for social and political transformation in Kenya', *African Human Rights Journal*, 2010, 377 – 406.
- Babbitt, E., & Lutz, E. (Eds.). (2009). *Human rights and conflict resolution in context: Columbia, Sierra Leone, and Northern Ireland*. (Syracuse, NY: Syracuse University Press, 2009).
- Bayazit, M. & Mannix, E. A. Should I stay or should I go? Predicting team members intent to remain in the team. *Small Group Research*, 34(3), 2003, 290-321.

- Braithwaite, J. Restorative Justice and De-Professionalization, *The Good Society*, 13, 2004, (1): 28–31.
- Bridget, O. Marxist Approaches in Anthropology, *Annual Review of Anthropology* Vol. 4: 1975, 341–70.
- Brown, S. (2012, forthcoming) ‘The National Accord, Impunity and the Fragile Peace in Kenya’, In: Sriram, C. L., García-Godos, J., Martin-Ortega, O., Herman, J., eds. (2012) *Transitional Justice and Peace building on the Ground: Victims and Ex-Combatants*, London: Routledge
- Cheldelin, S., Druckman, D., & Fast, L. *Conflict Second Edition*. (New York: Continuum, 2008).
- Christian, T. *The United Nations at Age Fifty: A Legal Perspective*. Martinus Nijhoff Publishers, 1995)
- Cicero. *De Legibus*, 106 BC; see also Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 *Tenn. L. Rev.* 177 (2006); Ronen Perry, *The Third Form of Justice*, 23 *Canadian Journal of Law and Jurisprudence* (2010)
- Clark, P., Kaufman, Z. D. & Nicolaidis, K. *Tensions in Transitional Justice*, in Clark, P. & Kaufman, Z. D. (2008) *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*. (London: Hurst & Company, 2008).
- Cragg, Wesley. *The Practice of Punishment: Towards a Theory of Restorative Justice* (New York, Routledge, 1992).

- Duffield, M. *Global governance and the new wars: The merging of development and security*. (London, England: Zed Books, 2001).
- Dukalskis, A. (2011) 'Interactions in Transition: How Truth Commissions and Trials Complement and Constrain Each Other', *International Studies Review*, 13:3, 432 – 451
- Durkheim, E. *The Rules of Sociological Method*. (Chicago: The University of Chicago Press, 1938).
- Dzur, Albert W. & Susan M. Olson, Revisiting Informal Justice: Restorative Justice and Democratic Professionalism". *Law & Society Review* 38 (1): 2004, 139–176.
- Forsyth, D. R. *Group dynamics* (5th ed.). (Pacific Grove, CA: Brooks/Cole, 2009).
- Goldfien, J. H., & Robbennolt, J. K. (2007). What if the lawyers have their way? An empirical assessment of conflict strategies and attitudes toward mediation styles. *Ohio State Journal on Dispute Resolution*, 22, 277-320.
- Holsti, K. *The State, War, and the State of War*. (Cambridge, UK: Cambridge University Press, 1996).
- Horowitz, I. L. *Taking lives: Genocide & state power*. (New Brunswick, NJ: Transaction Books, 1980).
- Jarboe, S. C., & Witteman, H. R. Intragroup conflict management in task-oriented groups: The influence of problem sources and problem analysis. *Small Group Research*, 27, 1996, 316–338.
- Jean-Marie Henckaerts & Louise Doswald-Beck, 2005. *Customary International Humanitarian Law*, Volume I: Rules, pp. 613–614. Cambridge: Cambridge University Press.

- John, M. S. The concept and practice of conflict prevention: A critical reappraisal. *International Studies*, 42, 2005,1–19.
- Kellett, P. M. *Conflict Dialogue*. (London: Sage Publications, 2007).
- Knapp, P. (1994). *One World – Many Worlds: Contemporary Sociological Theory* (2nd Ed.). Harpercollins College Div, pp. 228–246.
- Latimer, J. The Effectiveness of Restorative Justice Practices: A Meta-Analysis. *The Prison Journal* 85 (2): 2005, 127–144.
- Lawrence W. S. & Heather S. (University of Pennsylvania, 2007).
- Lederbach, J. *The Little Book of Conflict Transformation*. (Intercourse: Good Books, 2003).
- Lindblom, Anna-Karin, *Non-governmental organisations in international law*, (Cambridge University Press, New York, 2005).
- Livesay, C. Social Inequality: Theories: Weber. Sociology Central.A-Level Sociology Teaching Notes. Retrieved on: 2010-06-20.
- Llewellyn, J. Restorative justice in transitions and beyond: The justice potential of truth telling mechanisms for post-peace accord societies. In T. Borer (Ed.), *Telling the truths: Truth telling and peace building in post-conflict societies* pp.83–114. (South Bend, IN: Notre Dame Press, 2006).
- Marx, Karl. 1971. Preface to *A Contribution to the Critique of Political Economy*, Tr. S. W. Ryanzanskaya, edited by M. Dobb. London: Lawrence & Whishart. Skocpol, Theda. 1980. *States and Social Revolutions: A Comparative Analysis of France, Russia, and China*. New York: Cambridge University Press. Wallerstein, Immanuel M. 1974.

- Martin Van Creveld, *The Transformation of War*, New York, Free Press, 1991;
- Marx and Engels, *The Communist Manifesto*, introduction by Martin Malia (New York: Penguin group, 1998), pg. 35
- Martin, Jacqueline (2005). *The English Legal System* (4th ed.), p. 174. London: Hodder Arnold.
- Martin, V. C. *The Transformation of War*, (New York, Free Press, 1991).
- Max Weber, 1922, *The Nature of Social Action*
- Mindzie, M. A. (2009) 'Transitional Justice, Democratisation and the Rule of Law', In: Sriram, C. L. and Pillay, S., eds. (2009) *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, Scottsville: University of KwaZulu-Natal Press
- Minow, M. (1998). *Between vengeance and forgiveness*. Boston, MA: Beacon Press.
- Morris, Allison (2002). "Critiquing the Critics: A Brief Response to Critics of Restorative Justice". *The British Journal of Criminology: An International Review of Crime and Society* 42: 596–615.
- Musila, G. M. (2008) 'A Preliminary assessment of the Kenyan Truth, Justice and Reconciliation Commission Bill, 2008', *African Renaissance*, 5: 1, 40 – 46
- Nozick, R. *Philosophical Explanations*. (Cambridge, MA: Harvard University Press, 1981).
- Ojijo. 2012. *Afrikan Jurisprudence. Luo Theories, Systems and Procedures of Law and Justice*. Kampala. All public speakers
- Paris, R. *At wars end: Building peace after civil conflict*. (Cambridge, MA: Cambridge University Press, 2004).

- Peter T. C. (2011). *The Five Percent: Finding Solutions to Seemingly Impossible Conflicts*.
- Rachels, James (2007). *The Elements of Moral Philosophy*
- Ramsbotham, O., Woodhouse, T., & Maill, H. *Contemporary Conflict Resolution*. Cambridge, UK: Polity, 2011).
- Raymond. A. , *Penser la guerre: Clausewitz, Tome II, l'âgeplanétaire*, Gallimard, Paris, 1976, p. 185 (Clausewitz: *Philosopher of War*, London: Routledge, 1983).
- Robin, G. 'Asymmetric conflict structures', in *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, pp. 757–777; Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', in *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 149–174.
- Sears, A. *A Good Book, In Theory: A Guide to Theoretical Thinking*. North York: Higher Education University of Toronto Press, 20008, pp 34-6.
- Sen, Amartya. 1980. "Equality of What?" in *The Tanner Lectures on Human Values*, v. 1, pp. 197-220. Utah U.P. and Cambridge U.P.
- Simpson, G. (2008) 'One among Many: The ICC as a Tool of Justice during Transition', In: Waddell, N. and Clark, P., eds. *Courting Conflict? Justice, Peace and the ICC in Africa*, (London: Royal African Society, 2008).
- Shank, G. & Paul, T. 'Critique of Restorative Justice'. *Social Justice* 31 (3): 2004, pp147–163.
- Sriram, C. L. 'Transitional Justice and Peace building', In: Sriram, C. L. and Pillay, S., eds. (2009) *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, Scottsville: University of KwaZulu-Natal Press, 2009).

- Ssenyonjo, M. (2007). The international criminal court and the lord's resistance army leaders: Prosecution or amnesty. *International Criminal Law Review*, 7, 361–389.
- Sternberg, R. J., & Dobson, D. M. Resolving interpersonal conflicts: An analysis of stylistic consistency. *Journal of Personality and Social Psychology*, 52, 1987, 794–812.
- Teitel, R. G. *Transitional Justice*, Oxford: Oxford University Press, 2002).
- Van de Vliert, E., & Euwema, M. C. Agreeableness and activeness as components of conflict behaviors. *Journal of Personality and Social Psychology*, 66, 1994, 674–687.
- William, R. *Marx and Anthropology Annual Review of Anthropology*, Vol. 26: pp. 25–46 (October 1997)
- Weitekamp, E. Reparative justice: Towards a victim oriented system. *European Journal On Criminal Policy and Research* 1 (1), 1993, pp 70–93.
- Weitekamp, E. Reparative justice: Towards a victim oriented system. *European Journal On Criminal Policy and Research* 1 (1): 1993, pp 70–93.
- Zehr, H. *The Little Book of Restorative Justice*, Intercourse, (PA: Good Books, 2002)
- Hansen, T. O. (2011) 'A Holistic Look: How the ICC Process Shapes Transitional Justice in Kenya', *The International Criminal Court Kenya Monitor*, 19 September, [online] available at: <http://www.icckkenya.org/2011/09/a-holistic-look-how-the-icc-process-shapes-transitional-justice-in-kenya/>
- Jeffrey A. Jenkins's discussion of retributive justice in *The American Courts: A Procedural Approach*, (Jones & Bartlett Publishers, 2011).
- <<http://books.google.com/books?id=yvT5SVwbakUC>>.

- Kenya Human Rights Commission (KHRC) (2011) *Gains and Gaps: A Status Report on IDPs in Kenya, 2008-2010*, Nairobi: KHRC, [online] available at: <http://www.khrc.or.ke/component/docman/doc_details/17-gains-and-gaps-a-status-report-on-idps-in-kenya-2008-2010.html>
- Murphy, Jeffrie G. *Retribution Reconsidered* (Norwell, Massachusetts: Kluwer Academic Publishers, 1992), 23. <<http://books.google.com/books?id=p2EeefbHk-QC>>. Minow, Martha. *Between Vengeance and Forgiveness* (Boston, Massachusetts: Beacon Press, 1998), 11. <<http://www.amazon.com/Between-Vengeance-Forgiveness-Genocide-Violence/dp/0807045071>>.
- Musau, N. and Sheikh, S. A. (2011) 'Daring Struggle: The long fight for Justice for Wagalla Massacre Victims', Nairobi Star, 28 June, [online] available at: <<http://www.the-star.co.ke/lifestyle/128-lifestyle/29613-daring-struggle-the-long-fight-for-justice-for-wagalla-massacre-victims>>
- Oola, S. (2010). Global justice! The future of international justice in Africa. http://www.beyondintractability.org/reflections/personal_reflections/global_justice.
- Republic of Kenya (2003) *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, [online] available at: <http://marsgroupkenya.org/pdfs/2008/march_2008/Kenya_Report_of_the_Task_Force_on_the_Establishment_of_a_Truth_Justice_and_Reconciliation_Commission_August_26th_2003>.
- Rachels, James. "Punishment and Desert." In *Ethics in Practice*, ed. Hugh LaFollette, (Malden, Massachusetts: Blackwell Publishers, 1997), 466. <<http://www.jamesrachels.org/punanddes.pdf>>.

Warigi, G. (2011) 'Who gains from Kenya's ICC cases?', BBC News, [online] available at: <<http://www.bbc.co.uk/news/world-africa-12831054>>

Websites

"Article 17 and 20 | Rome Statute".;

"Decision on the Prosecutor's Application for Summonses to Appear for Francis Karma Muthaura, Uhuru Mugnai Kenyatta and Mohammed Hussein Ali". International Criminal Court.\

"ICC judges summon 'Ocampo six'". *Al Jazeera English*. 8 March 2011.

"Kenya diplomatic push for peace". *BBC News*. January 2, 2008.

"Kenya diplomatic push for peace". *BBC News*. January 2, 2008.

"Kenya rivals agree to share power". *BBC News*.

"Kenya unveils 40-seat cabinet", *Al Jazeera*, April 13, 2008.

"Kenyan ethnic attacks 'planned'". *BBC News*. January 24, 2008.

"Key points: Kenya power-sharing deal". *BBC News*. February 28, 2008.

"Odinga sworn in as Kenya PM", *Al Jazeera*, April 17, 2008.

"Parliament pulls Kenya from ICC treaty", *Daily Nation*,

"Participation of victims in proceedings". International Criminal Court; see also "Reparations for Victims". International Criminal Court.

"Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" .International Criminal Court.

"Raila takes the lead in search for a way out". *The Standard* .Hong Kong. 2008.

"State 'sanctioned' Kenyan clashes". *BBC News*. March 5, 2008.

"Waki Commission list of names in the hands of ICC Prosecutor"

"Waki Commission list of names in the hands of ICC Prosecutor" *Annan hands ICC list of perpetrators of post-election violence in Kenya*. The Guardian.

(AFP) – Jan 26, 2008 (January 26, 2008). "AFP: Politician's portrait marks border in Kenyan slum". Google.

"China's Attitude Towards the ICC", Lu Jianping and Wang Zhixiang, *Journal of International Criminal Justice*, 6 July 2005.

"Yin and yang", available at http://en.wikipedia.org/wiki/Yin_and_yang.

Additional Protocol I from 1977.

Alasdair Palmer (14 January 2007). "When Victims Want Peace, Not Justice". *The Sunday Telegraph*.

Amnesty International (11 April 2002). "The International Criminal Court – A Historic Development in the Fight for Justice".

Annan hands ICC list of perpetrators of post-election violence in Kenya. The Guardian.

Anthony Dworkin (December 2003). "Introduction" in *The International Criminal Court: An End to Impunity?* Crimes of War Project..

Barasa, Lucas (10 July 2009). "Parties ask ICC to disclose violence suspects". *Daily Nation*. Retrieved 2011-07-28.

Carlan, Philip E.; Nored, Lisa S.; Downey, Ragan A. (2011). *An Introduction to Criminal Law*. p. 24. ISBN 978-1-4496-4721-6.

CliffsNotes.com. Three Major Perspectives in Sociology. 22 Jun 2011. http://www.cliffsnotes.com/study_guide/topicArticleId-26957,articleId-26837.html.

Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute. ICC. p. 138.

Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. International Criminal Court.

Dempsey, Gary T. (16 July 1998). "Reasonable Doubt: The Case Against the Proposed International Criminal Court". Cato Institute. Accessed August 2nd 2013..

<http://webdoc.sub.gwdg.de/ebook/p/2002/carlisle/conflict.pdf> Armed Conflict in the 21st Century: The Information Revolution and Post-Modern Warfare.
<http://www.guardian.co.uk/commentisfree/2012/apr/30/imperialism-didnt-end-international-law>

Human Security Report. (2005). Retrieved October 10, 2011, from Human Security Report: <http://www.humansecurityreport.info>.

Ilaria Bottigliero (April 2003). "The International Criminal Court – Hope for the Victims".32 SJI Quarterly. pp. 13–15.

International Criminal Court, 17 October 2006. Report on the activities of the Court PDF (151 KB).

International Criminal Court. Trust Fund for Victims.

International Criminal Court. Victims and witnesses.

John R Bolton, 6 May 2002. International Criminal Court: Letter to UN Secretary General Kofi Annan. US Department of State.

Kofi Annan (4 October 2000). Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, para. 22.

Maffei, Stefano (2006). *The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses*. pp. 222–225

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America), Merits, Judgment, ICJ Reports 1986, p. 114, para. 220.

Samir Elhawary (2008) *Crisis in Kenya: land, displacement and the search for 'durable solutions'* Overseas Development Institute.

Statement of Seville, from UNESCO: <http://www.unesco.org/cpp/uk/declarations/seville.pdf>

Stephanie Hanson (17 November 2006). *Africa and the International Criminal Court*. Council on Foreign Relations.

The 1969 Vienna Convention on the Law of Treaties, Article 18. Accessed August 2nd 2013.

Tim Cocks (30 May 2007). "Uganda Urges Traditional Justice for Rebel Crimes". *Reuters*.

Timeline-Kenya and the ICC. Reuters.

Uganda offers "blood settlement" to LRA rebels Available at <http://www.polity.org.za/article/uganda-offers-quotblood-settlementquot-to-lra-rebels-2008-03-12>.

Uganda offers "blood settlement" to LRA rebels Available at <http://www.polity.org.za/article/uganda-offers-quotblood-settlementquot-to-lra-rebels-2008-03-12>.

UN Charter.

United Nations Department of Public Information, December 2002. *The International Criminal Court*.

Uppsala Conflict Data Program Definitions, Ceasefire agreements.

US Department of State, 30 July 2003. *Frequently Asked Questions About the U.S. Government's Policy Regarding the International Criminal Court (ICC)*.

Vienna Convention on the Law of Treaties. United Nations. 1969. Retrieved 30 October 2011.

Zhu, Wenqi (2006). "On Co-Operation by States Not Party to the International Criminal Court" (PDF). *International Review of the Red Cross* (International Committee of the Red Cross) (861): 87–110.

ANNEX ONE

KEY INFORMANT INTERVIEW (QUESTIONEER)

Focus Group Discussions & Key Informant Interview Guide

For Research On

Retributive Justice and the International Criminal Court (ICC)

PURPOSE OF INTERVIEW

There are several armed conflicts taking place around the globe, including war in Libya, Syria, Democratic Republic of Congo, Somalia, and South Sudan. In Kenya, we just recovered from the 2008 post-election violence that claimed over 1,300 lives, displaced tens of thousands, and put Kenya at cross roads with the international criminal court (ICC). The events, which have seen Kenya's president and deputy president charged at the ICC, have led to discussions as to the relevance of the ICC in promoting justice through deterring crimes, while also reconciling victims to perpetrators.

The purpose of this research study is to analyse the extent of application of retributive justice, and its merits.

Thank you for giving me your time!

COMPARING RETRIBUTIVE JUSTICE TO RESTORATIVE JUSTICE

How would you compare the restorative, and retributive justice systems in connection

to:

1. Crime Control
2. Conceptualization Of Accountability For Crime
3. The Place Of Victims
4. Focus Of Entire Process
5. On Remedies For Wrongs

ICC MODEL OF CONFLICT RESOLUTION

In your opinion, while making reference to the effectiveness of the ICC:

1. What is the suitability of retributive justice model as applied by the ICC?
2. What is the role of ICC in preventing intra, and interstate conflicts?
3. What are the emerging challenges and opportunities for ICC in promoting intra and interstate conflicts?
4. ICC Response to The 2008 Post Election Violence: Analyzing The Effectiveness To Retributive Justice Over Restorative Justice.
5. ICC and Retribution versus Reparation in 2008 Post Election Violence.