CRITICAL ANALYSIS ON HOW INTERNATIONAL CRIMINAL COURT (ICC) HAS FAILED IN FIGHTING IMPUNITY CASE STUDY KENYA.

BY

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APPROVAL

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable student of scholarly presentation and is fully adequate in scope and quality as a research proposal in partial fulfillment for the award of a degree of bachelor of laws of Kampala International University.

Supervisor Mr. Kahama Dickson

Signature:..... Date: 11/06/19.

DEDICATION

First and foremost, I dedicate this research proposal to my mother Mrs. Monicah Toroitich Leting (nebo Kibongoi) for caring and loving mother for giving me strength and guidance throughout my life's decision. My late father Kimeli A Maina Arap Letting for early guidance and support and care in my life.

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LIST OF ACRONYMS

ICC	International Criminal Court
US	United States
LRA	Lord's Resistance Army
UN	United Nations
AN	Africa Union
UWSS	United Nation Security Council
KACC	Kenya Anti-Corruption Commission
ICTY	International Criminal Tribunal for Yugoslavia
DRC	Democratic Republic of Congo
KANU	Kenya Africa National Union
WDP	Wiper Democratic Party
URP	United Republican Party
NARC	National Alliance Rainbow Congress
TNA	The National Aliance

JUBILEE PARTY.

ABSTRACT

This study critical analysis is how international criminal court ICC has failed in fighting impurity case study Kenya post -election violence 2007/2008. It is mainly concerned with reasons as to international criminal court on failure in trying to bring impurity in Kenya, was specific aims of analyzing the applicability of the Rome statute in ending war, identifying legislative weaknesses, challenges faced by ICC in exercising its mandate in order to provide appropriate interventions for reforms. In comprehension of the study, literature on the specific aims was reviewed from previous writers.

The finding of the study show that the challenges exhibited in the effort of the international criminal court trying to apprehend perpetrators of war crime said crimes against humanity.

The objective of this study was to bring out the reasons as to why international criminal court has failed in fighting impurity especially during post- election violence in Kenya 2007/2005.

The study recommended ICC must secure conviction to ensure its credibility, prosecution by the international criminal court. In one of the few credible threats faced by leaders of warring parties and that impurity should always be a last resort.

CHAPTER ONE

1.0 Introduction

1.1 THE HISTORICAL BACKGROUND OF KENYA

The independent republic of Kenya was formed in 1964 .it was ruled as de facto one-party state by the Kenya national union (KANU).It was an alliance led by Jomo Kenyatta during 1963 to 1978.

Kenyatta was succeeded by Daniel Toroitich Arap Moi who ruled until 2002.moi attempted to transform the defector one party in Kenya into dejure status during 1980s but with the end of cold war the practical repression and torture which had been overlooked by the western powers as necessary evil in the efforts to contain communism were no longer tolerated.

Moi came under pressure notably by us ambassador smith hemp stone to restore a malty-party system which he did by 1991. Moi won the 1992 and 1997 general elections which was overshadowed by politically motivated killings on both sides.

During the 1990s, evidence of Moi's involvement in human rights abuse and corruption (Goldenberg scandal) was uncovered. He was constitutionally barred from running in 2002 elections which was won by kibaki.

Widely reported electoral frauds on kabuki's 2007 election resulting to post –election violence in Kenya 2007/2008.kibaki was succeeded by Uhuru Kenyatta in 2013 general elections.

There were allegations that his rival Raila Odinga actually won the contest however, the Supreme Court through a thorough review of evidence adduced found no malpractice during the conduct of the 2013 general elections both from the IEBC and Jubilee party of Uhuru Kenyatta

1.1.1 How did Kenya joint the ICC and found itself there

Kenya ratified the Rome statute; the founding treaty of the ICC, on March 15, 2005. This allowed the court jurisdiction over war crimes, crimes against humanity and genocide committed by Kenya nationals or on Kenyan territory after July 1, 2002 – the date that Rome Statute entered into force.

After the post- election violence in Kenya in 2007/2008, the investigation had to take place through the Waki Commission Report in 2008, which was the commission of inquiry into the post-election violence chaired by Kenyan Judge Phillip Waki. The Waki Report established that the Kenyan government has to set up special tribunal to prosecute those responsible for the worst crimes.

Although both Kibaki and Odinga voiced support for a local tribunal, the idea was rejected by the National Assembly. Waki Passed his report, including a list of the names of those he considered most responsible for the violence back to Kofi Annan with the instruction that it be passed to the ICC.

On 6th July 2009, the Waki commission delivered a copy of his report along with six boxes of documents of supporting materials to the ICC along with sealed envelope containing a list of people who could be implicated in the violence.

The prosecutors; Luis Moreno Ocampo opened the envelope, inspects its contents and resealed it.

The six suspects were handed over to ICC in 2010 by virtue of Article 15 of Rome statute, does allow for the prosecutor to investigate and prosecute a case of his own violation. This is the most controversial aspect of the ICC. In the ICC's history this case was the first time the prosecutor decided to investigate a case in this manner with all prior cases being referred to court either by a national government, or by the United Nations Security Council.

On 15th December 2010, prosecutor Ocampo Moreno named six suspects and made application to pre-trial chamber II for summarizes, to be issued to them. The six men become colloquially known as the Ocampo six.

The individuals where;

Major General Mohammed Hussein Ali – The Chief Executive of the Postal Corporation of Kenya, who at the time of the post-election violence had been the commissioner of the Kenya police.

Uhuru Muigai Kenyatta – The current President of the Republic of Kenya who was then the deputy Prime Minister and Minister of Finance who is also Chairman of KANU.

Henry Kiprono Kosgey – The Minister for industrialization and member of the National Assembly for the Tinderet Constituency who is also chairman of the Orange Democratic Movement.

Francis Kirimi Muthaura –The head of public service, cabinet secretary and Chairman of the National Security Advisor.

William Samoei Ruto – The Minister for Higher Education, Science of Technology and ODM Member of the National Assembly for the Eldoret North Constituency.

Joshua Arap Sang – The head of operations of Kalenjin language Radio station Kass FM, who at the time of the post- election violence was a radio presenter.

Ref: Situation in the Republic of Kenya – in the case of the prosecutors Vs William Samoei Ruto; Henry Kiprono Kosgey and Joshua Arap Sang < Prosecutor Vs Francis Muthaura, Uhuru Kenyatta and Muhammed Ali.

1.1.2 BACKGROUND TO THE POST ELECTION VIOLENCE IN KENYA 2007/2008- AND ITS JUDICIAL AFTERMATH (Sosteness Francis Materu and Geoffery Lugano)

Literature indicates that the violence accompanying the 2007/2008general elections in Kenya was a spill -over effect of the country's previous history hence, the need to scrutinize the historical antecedents to these elections. This literature identifies five factors namely, the negative ethnicity, dictatorship, political alliance, criminal gangs and impunity which prior to the 2007 election had characterized the Kenyan politics.

Certain ethnic communities had been deliberately marginalized since independence while others had been highly privileged or favored In different ways. This gave rise, inter alia, to a number of historical fears and grievances mostly in relation to land. It shown that this state of affairs become a recipe for the election violence accompanying all the multiparty elections prior 2007 and since the grievances were not addressed, and in view of the previous trend of election violence, it indeed become certain that even the 2007 general elections would not be free from violence. For example, (the Ndungu commission report) on illegal and irregular allocation of public land provides an insight into a critical recent episode in the struggles over land and graft in Kenya

The discussions on the adoption of the Rome Statute in 1998 occurred when Kenya was under the authoritarian rule of Daniel Arap Moi's Kenya Africa National Union (KANU) whose performance on the rule of law, protection of human rights, free speech and the economy were at an all-time low. It is this regime that was responsible for the 1992 and 1997 PEV.

Due to pressure from local human rights groups, Kenya signed the Rome Statute in 1998 (Mueller 2014, 29), but its non-retroactivity principle 'meant that there were no worries that the ICC would prosecute Moi and his supporters for instigating the violent tribal clashes during the 1992 and 1997 elections' (Mueller 2014, 29).

The country eventually ratified the Statute in 2005 (CICC 2005) under Kibaki's National Rainbow Coalition (NARC) that had won the 2002 elections on a platform of institutional reforms, guarantees for human rights, economic growth and redress to historical grievances. As Mueller argues, when Kenya signed and ratified the Statute, 'the ICC was still in its infancy; the political situation in Kenya was improving; it appeared inconceivable, if not preposterous, that any Kenyan would ever be charged by the ICC' (Mueller 2014, 29). Nonetheless, NARC's disintegration (into Odinga's ODM and Kibaki's PNU) and Kibaki reneging on his campaign promises escalated group grievances in the run up to the 2007 elections.

Although PEV had been part of Kenya's electoral cycle since the re-introduction of multiparty politics in 1992, the 2007 events were unprecedented. The Commission of Inquiry into Post Election Violence (CIPEV or Waki commission) documented that approximately 1,300 people were killed, hundreds of thousands were displaced and several victims suffered sexual and gender based violence (SGBV) (Republic of Kenya 2008). The Waki commission also discerned the patterns of violence as spontaneous in some geographic areas, planned and organized in some instances and also state sanctioned (involving security agencies).

The ICC concluded that the 2007/8 PEV amounted to crimes against humanity, noting:

> '[t]he gravity and scale of the violence, including elements of brutality such as burning victims alive, attacking places sheltering victims, beheadings and using machetes to hack people to death [and that] perpetrators, among other acts, allegedly terrorized communities by installing checkpoints where they would select their victims based on ethnicity, and hack them to death, commonly

committed gang rape, genital mutilation and forced circumcision, and often forced family members to watch' (ICC 2016, 1).

The ICC intervened in Kenya's 2007/8 political crisis in December 2010 after two years of domestic inaction. The Court's geographical focus was six of the eight Kenyan Provinces; Nairobi, North Rift Valley, Central Rift Valley, South Rift Valley, Nyanza Province and Western Province (ICC 2016, 1).

The Court's investigations resulted in two cases. First, six suspects were charged for their alleged responsibility in the commission of the crimes against humanity. The list of suspects included an equal number of individuals from the two antagonistic parties. They were senior government officials, political actors and a radio journalist (ICC 2011). These were Ambassador Francis Muthaura (Head of Civil Service), Uhuru Kenyatta (Deputy Prime Minister and Minister for Finance) and Hussein Ali (Police Commissioner) from the PNU side, William Samoei Ruto (Minister for Education), Henry Kosgey (Minister for Industrialization) and KASS FM radio journalist Joshua Arap Sang from the ODM side.

By selecting an equal number of suspects from the two warring parties, the ICC sought to have a representative selection, as opposed to earlier self-referral situations (Uganda and Democratic Republic of Congo) in which the Court selectively investigated one party to the conflicts. Nonetheless, charges against Muthaura, Kosgey and Ali were vacated at the pre-trial stage, with Kenyatta, Ruto and Sang proceeding to full trial. The latter sets of cases were later terminated, with Kenyatta's case termination in December 2014 due to insufficient evidence. Ruto and Sang's cases ended in a mistrial ruling in April 2016.

The ICC issued arrest warrants for offences against the administration of justice for three individuals. According to the Court, these suspects were involved in interfering with witnesses in the initial cases. First, the ICC issued an arrest warrant under seal for Walter Osipiri Barasa on 2 August 2013 and unsealed it on 2 October 2013 (ICC 2013, 1). Second, the ICC issued warrants of arrest under seal on 10 March 2015 for Paul Gicheru and Philip Kipkoech Bett, after which they were unsealed on 10 September 2015 (ICC 2015, 1).

Daily Nation. 2016. 'PEV victims speak out about ICC ruling, want compensation.' *Daily Nation*, 7 April. Accessed 11 May 2016. http://www.nation.co.ke/news/Compensate-us now-say-IDPs-as-DP-Ruto-set-free/-/1056/3149148/-/pgq0qj/-/index.html.

Frank, Homquist and Githinji, Mwangi. 2009. 'The default of ethnicity in Kenyan politics.'
Brown *Journal of World Affairs* 16(1):101-117.

Although the Office of the Prosecutor (OTP) engaged state authorities in the course of the investigations and trials, victim groups, governance and human rights civil society organisations (CSOs) were the most notable supporters of the Court's activities in Kenya.[1] The ICC's outreach office in Nairobi was active at the onset of the Court's investigations, facilitating the participation of the affected communities and victims in the Court processes.[2] As an ICC outreach official noted, 'there was early outreach intervention in Kenya to manage expectations; show people what the Court can and cannot do; who should be indicted, how many can be indicted and how to address middle level perpetrators'.[3]

However, after two of the ICC accused - Kenyatta and Ruto - won the 2013 elections as President and Deputy President respectively under the Jubilee Alliance and subsequently formed the Government, there were mixed perceptions on Kenya's engagement with the ICC. Whereas President Kenyatta, his Deputy and Sang continued appearing for trials and obeying the Court's summons, the OTP consistently complained about Kenya's non-cooperation. Kenyatta's and Ruto's allies also renewed calls for Kenya's withdrawal from the ICC as they had been doing before their elections, despite their compliance with the Court's summons (BBC 2013; Ridgwell 2013).

According to the OTP, Kenya's non-cooperation included not turning over crucial evidence, witness intimidation and interference, as well as political and diplomatic attacks on the Court. Commenting on Kenya's cooperation, the ICC's prosecutor, Fatou Bensouda concluded that:

> 'Contrary to the Government of Kenya's (GoK) public pronouncements that it has fully complied with its legal obligations [...] it has breached its treaty obligations under the Rome Statute by failing to cooperate with investigations' (ICC 2014, 1).

[1] Interviewees consulted for this research project affirmed the position that victims and CSOs were the most significant support base for the ICC's activities in Kenya.
[2] Interview with ICC outreach official, Kampala, 20 February 2019.
[3] Ibid.

Kenyan authorities vehemently contested the OTP's assertions. For example, while refuting Bensouda's claims of non-cooperation, Kenya's Attorney General Githu Muigai, stated that they submitted documents to the OTP and instead blamed the case termination on the ICC's incompetence (Murimi 2016). Similarly, President Kenyatta defended Kenya's cooperation, declaring that they 'cooperated because they believe in the rule of law and international justice and it was the reason for his and Ruto's voluntary submission to the Court's processes' (Daily Nation 2015, 1). According to President Kenyatta, 'if Kenya believed in impunity, it would nct have submitted to the Courts as it did' (ibid).

Since the ICC's intervention has been the only genuine efforts at criminal accountability for Kenya's 2007/8 PEV, several actors interacted with the Court either directly or indirectly. These include CSOs, victims, political leaders in both Government and the opposition, and the directly affected Kikuyu and Kalenjin communities.

1.1.3 HISTORY OF ICC

The history of the establishment of the international criminal court (ICC) spans over more than a century. The "Road to Rome" was long at often a contention one. Efforts to create a global criminal court can be traced back to the 19th century; the story began in earnest in 1872 with gustar moyner. One of the founders of the international committee of the red cross who proposed a permanent court in the response to the crimes of the France-Prussian war. The next services call for an internationalized system of justice crime from the drafters of the 1919 treaty of Versailles who envisage an adhoc international court to try the Kaiser at German war crimes.

In the 1948, the united nations general assembly (UNGA) adopted the convention on the prevention at punishment of the crime of genocide in which it called for criminals to be tried "by such international penal tribunals as may have jurisdiction" and invited the international law commission (ILC) to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide" while ILC drafted such as statute in the early 1950's the cold war stymied these efforts and the general assembly effectively abandoned the effort pending agreement on a definition for the crime aggression and an international code of crimes.

In June 1989, motivated in part by an effort to combat drug trafficking, Trinidad and Tobago resurrected a pre-existing proposal for the establishment of an ICC at the (UNGA) asked that the ILC resume. It works on drafting a statute.

The conflicts in Bosnia-Herzegovina el 1990's of the mass communication of crimes against humanity, war crimes el genocide led the UN Security Council to establish two separate temporary as "hoc" tribunals to help individuals accountable for these atrocities, further highly need for a permanent international criminal court.

In 1994, the ICL presented its final draft statute for conference of plenipoteriavles be convened to negotiate a treaty and enact the statute. The general assembly establishes the adhoc committee on the establishment of an international court that met twice in 1995.

After considering the committee on the establishment of the ICC, to prepare a consolidated committee were held at the united nations headquarters in new York in which Ngo's provide input into the discussions of attended meetings under the umbrella of the NGO coalition for an ICC (CICC) in January 1998, the Bureau at coordinators of the preparatory committee covered for an auteur sessional meeting in Zulphen, the Netherlands to technically consolidate and restrictive the draft articles into a draft.

Based on preparatory committee's drafted the (UNGA) decided to convene the United Nations conference on the establishment of an ICC at its fifty second session to finales el adopted a convention on the establishment of an ICC. The Rome conference took place from 15 June to 17th July 1998 in Rome, Italy with 160 countries closely participating in the negotiation at the information worldwide on developed and facilitating the participation of parallel activities of more than 200 NO's. At the end of five weeks of intense negotiations, 120 nations voted in favor of the adoption of the Rome statute of the ICC, with nations voting against the treaty including (United States, Yemen, Israel, China, Iraq and Libya Qatar, el 21 states abstaining.

The preparatory commission (pre com) was changed with competing the establishment of smooth funding of the court by negotiating complementary documents including the rules of procedures and evidence, the elements it crimes the relationship agreement between the court of the united nations, the financial regulations, the agreement on the privileges and immunities of the court

1.1.4 THE LEGAL FRAMEWORK OF THE ICC

The headquarters of the ICC is based on Netherlands' Geneva. Article 5 of the Rome statute established, entered into force on July 1, 2002 after receiving the ratifications from the requisite states parties thus signing the genesis on the formation of the ICC.

ICC is majorly concerned with Article 5 of Rome statute on the most serious crimes of international concern as a whole as stated in the statute which are, the crimes of genocide, crimes against humanity, war crimes, the crimes of aggression.

The ICC is intended to be an autonomous supranational institution that possesses international legal personality. As such, it is required to work alongside sovereign states in a wide array of investigative, prosecutorial and administrative activities

The monumental and controversial development in the Rome statute is that the proponents of international justice established a framework for a supranational court that enshrines the principle that a state sovereignty can on occasional be subordinated to the goal of achieving accountability for violation of international humanitarian law

Cases come in three ways, one by UN Council, acting under chapter vii of the UN charter, may refer to the prosecutor a situation in which one or more of such crimes appears to have been committed.

1.1.5 The jurisdiction of the ICC

Under this phenomenal it is important to look at the jurisdiction rational temporisratione personal and rational materials of the ICC. The jurisdiction temporis deals with the period of time within starts the competence of ICC. The jurisdiction ratione persona explore the category of subjects over which the court is competent and the jurisdiction material exposes the crimes over which the ICC is competent.

The Rome statute clearly addresses the question of jurisdiction rationetemporis and limits the court's jurisdiction to crimes committed after the entering into force of the statute. However, there are instances where a state ratified the statute after entry into the force.in such circumstances, the jurisdiction of the court can be exercised only with regard to crimes

committed after the entry into force of the state, unless that state has made a declaration under article 12 paragraph 3

The ambit of the court's jurisdiction varies depending on the mechanism by which the case come to the court.in the event that the security council refers the matter jurisdiction covers the territory of every state in the world, whether or not the state in question is a party to the statute. The case of Sudan where it was referred in 2005 to the ICC by resolution 1593 of the security council, regardless of the facts that it is not party to the Rome statute.as a result, in 2007, the ICC issued summons to appear for alikushayba former Sudanese military leader of ahmad Muhammad haruna, the former Sudanese minister of internal affairs.

Regarding situations where matters is referred by the state party or initial (propriomutu,) by the prosecutor the court's jurisdiction is more restricted. In such instance, jurisdiction extents to the territory of the party state only if that state consents to the jurisdiction of the court and either the acts were committed in the territory of the consenting state or the accused is a national of the consenting state.

Daily Nation. 2016. 'PEV victims speak out about ICC ruling, want compensation.' *Daily Nation*, 7 April. Accessed 11 May 2016. http://www.nation.co.ke/news/Compensate-us now-say-IDPs-as-DP-Ruto-set-free/-/1056/3149148/-/pgq0qj/-/index.html.

Frank, Homquist and Githinji, Mwangi. 2009. 'The default of ethnicity in Kenyan politics.' *Brown Journal of World Affairs* 16(1):101-117.

1.1.6 The jurisdiction ratione personae

The court can only exercise jurisdiction for the most serious crimes committed by the individual. Thus unlike the ad hoc, tribunal and his line with a principle general knowledge in international law, the Rome statute puts aside any idea of criminal responsibility of state and retains only the notion of individual criminal responsibility.

However, article 26 of the statute stipulates that the persons who are under the age of eighteen at the time of alleged commission of crime and furthermore, under article 27 of the statute, declared that the official capacity cannot constitute a bar to prosecution or a ground for reducing sentence.

1.1.7 Jurisdiction ratione materiae

The ICC can take up only the most serious crimes of concern to the international community as a whole. Those crimes are genocide, crimes against humanity and war crimes of which all are defined in the statute.

Aggression also falls within competence of the ICC but an acceptable definition of this crime has yet to be added to the statute.

1.2 Statement of the problem

African countries are critical actors for the international criminal court (ICC). While it is clear that Africa forms the largest bloc of ICC member's stats, the ICC's work in Africa is at the center of the peace verses justice controversy.

In the absence of national initiative to establish the truth and bring perpetuators to account, the ICC is the only available option currently in existence for most victims.

This study critically analyses on how international criminal court ICC, failed to fight impunity in Kenya post –election violence 2007/2008 which leads to loss of lives yet it was established for that purpose.

1.3 Purpose of the study

The overall purpose of the study is to analyze how international criminal court (CC) has failed in fighting impurity.

1.4 Research objective

To critically analyze on how international criminal court ICC failed in fighting impunity in Kenya

To find out reasons why Kenya post – election violence occurred in 2007/2008.

To find out whether victims and witnesses of crime were bribed to drop the case.

1.5 Research questions

Has international criminal court ICC been successful to bring justice to any of the victims of gross crimes against humanity and genocide?

Have any of the alleged perpetrators faced justice through free and fair trial before the court?

Have the political and social situations in these countries brought before the ICC been better or worse?

What key factors has the ICC ignored in relation to bringing or fighting impunity in Kenya?

1.6 Scope of the study

This study seeks to look at the critical analysis on how international criminal court has failed in relation to providing impurity in Kenya post-election violence 200/2008.

The study basically concentrates on Kenya that have faced these crimes that are under the court's jurisdiction at whose case have been brought before the ICC basically in eastern African.

1.7 significance of the study

The creation of the ICC was inspired by the Nuremburg trials at the international criminal tribunals for Rwanda and the former Yugoslavia, since the international community agreed that impurity is unacceptable. The purpose of this permanent court is to prevent perpetrators of the most atrocious crimes eluding justice. The ICC is the independent court that investigates and brings to justice individuals who commit the most severe crimes that are of international concern. The ICC is also a foundation of an emergency international norm which is designed to

defer such crimes against humanity and to respond effectively were they occur i.e. war crimes, crimes against humanity and genocide.

It is clear that African countries form the largest block of ICC member states. However, the operations of the ICC are enclosed in ongoing conflicts from out of five African countries that have been brought before the courts are engulfed in fine insurrections. The DRC has continuously experienced war and desolations since 1996, including a sustained pattern of sexual violence. Uganda's battle with Joseph Kony's (LRA) was already affecting Sudan and has spitted over north-western DRC and CAR. The CAR is still in a "no peace no war" situation, with war hostilities reported between government forces and the popular army for the restoration of the republic and democracy in north while also raping the bitter fruit of the LRA's violent tactics and Sudan's Darfur region is not yet at peace.

Hence, this study seeks to address the fact that ICC by investigating and prosecuting those responsible of com Smitting mass atrocities as a method for deterring and preventing future atrocity crimes from being committed. The effectiveness of this deterrence and prevention depends on the certainty and sovereignty of the consequences of committing these crimes.

Other researchers, legal and judicial systems of the affected African countries will benefit from this study by making judgments on whether justice or peace be more important in terms of ending a conflict, such as those in Kenya, Somalia, Uganda and Sudan or whether justice should prevail al perpetrators be persecuted even at the expense of atrocity crimes being perpetrated. Finally, whether justice should be sacrificed for peace at an end to conflict and ultimately the great good. African countries will be able to decide for themselves whether to still keep its factor on the ICC for delivery of justice to victims of mass atrocities and perpetrators or opt for their own local judicial systems to handle these cases.

CHAPTER TWO

LITERATURE REVIEW

2.0 Introduction

Literature on the international court is written much and addresses various aspects of the ICC. **Denine Walters** writers that the creation of the ICC governed by the Rome statute, signifies a gigantic step forward in international efforts to prevent and punish certain gross human rights abuses. In particular it is a critical move in tackling mass atrocities such as crimes against humanity, war crimes at genocide.

Evans in 2008, the responsibility to protect; finding mass atrocity crimes once and for all brooking institution. Washington DC contents that 'the strongest direct capital weapon to employ against those initiating unlawful violence and in practical threatening or perpetrating mass atrocity crimes, is to arrest, try if properly convicted, punish the perpetrators in a competent criminal cord" The ICC has become such a court that aims to convict perpetrators of gross human rights abuse and therefore, to put an end to authority crimes being committed.

To date, only four state parties to the Rome statute namely the Central African Republic (CAR) the democratic republic of Congo (DRC) Uganda and Kenya have referred situations which have or acquiring on their theories to the ICC. Moreover, the UN Security Council referred the situation in Darfur, Sudan known state party to the ICC for investigation.

It is important to note that a current and prominent international debate is whether the demand of justice ever yields. In the case of conflict, to the demands of peace-amending conflict that has wreaked countries destruction and misery and which may continue under a peace agreement is reached.

In 2005, arrest warrants were issued by the ICC to the senior leaders of LRA (Grow N, 2009, LRA of Uganda) an advocate states that there seemed to be an overall improvement for the security situation since their issuance.

However, this seemed to have risk been positive since the LRA moved its operation to the DRC in 2008, has stayed raids across the north east allegedly raping, adultery, burning villages in retaliation for attacks by the Uganda army. There have been more than 2000 abductors, 1250 killing and in excess of 300,000 people displaced in Uganda the DRC, Sudan and CAR.

Oliver Kambala Wa Kambala advocator states that the ICC's work in Africa is at the center of the peace versus justice controversy. The supporters of the prosecution argue that the establishing effects of the ICC are overstated, and cited the fact that the Kenya post-election violence 2007/2008 it was inhibiting a factor they failed to put in place a fundamental justice to Kenyans.

Kambala Wa Kambala indicated that the prosecutor of the ICC finds his work complicated. On the other hand, he possesses an irrevocable mandate to carry on with the indictment. On the other hand, to juggle the severe political and social consequences that the exercise of his mandate may cause to vulnerable civilians bearing the brunt of hostilities potential consequences may include increased instability and violence. Despite the risks, whether hypothetical or real, the prosecutor finds himself in situations where national politics influence his "imperium".

As much as above writers, Oliver Kambala Wa Kambala, Walter and Garden tend to rely so much on the weaknesses of the ICC, there are some strength that the ICC has shown especially since it was created for UN, the international community, much credit can be given to it with regard to the Rwanda genocide though formulation of the (ICTR) which gave confidence to many African Nations to trust the ICC since it was another formation of the UN.

The Kenya case, regarding the past election violence 200/2008 was founded to the ICC by the Kenyan government. Summary were issued to the six suspects of the 200/2008 past election violence and the changes were spelt out in September 11, 2011. There have been efforts to set up reconciliation in Kenya justice of truth organization. The Kenyan government also has been on its toe to clean up its judiciary though vetting processes for the citizens to have faith in it.

Hence the ICC through quick handling the cases, without taking into account whether a person is of high profile or not in government has convinced the citizens that justice peace can be found after.

The ICC had no good understanding on the background majorly of the Kenya, the mode of collecting evidence and the influence of media had to put the chart before the house. Totally leading to failure to fight impurity.

2.1 Conceptual framework

The reasons as to why International Criminal Court (ICC) failed to fight impunity case study Kenya post -election violence 2007/2008 were as discussed below.

2.1.1 Mode of collecting evidence

It is of paramount that the major reason as to why ICC failed in fighting impunity in Kenya is due to mode of collecting evidence. The exercise was not in a manner that will give the real image on fighting to know the truth.

In Kenya, there are 42 tribes and there are conflicting tribes in terms of politics and social of economic competition. Following the mode of collecting evidence, the ICC majorly was collecting evidence without proper knowledge of political difference. For example, the tribes that witness violence majorly were Kalenjin and Kikuyu. Some witnesses were not in position to talk in English in this tribes and they end up being misled by so called the ICC Kenya agents how were interpreting to the personnel from ICC. For example, they took advantage of their illiteracy and poverty level to live with money in order to give/record fake evidence.

Moreover, on collecting evidence, there was intimidation of the witnesses as they were to be given new IDS change the names. The witness protection was not observed by the ICC as it was a key factor in order to get enough evidence.

In addition to that, the evidence that they collected was incompetent as it lacks maturity. The evidence was full of propaganda and hearsay for which hearsay is not admissible. The language barrier was not favoring them as interpretation was hard for them.

The time was very short from collecting evidence of it was purely appreciation to the procedure of collecting evidence. In most cases, crime concerning humanity has to take time to cater enough evidence but it was a shock that the ICC used very little time to come up with the evidence to pin on their persons the Ocampo six.

ICC failed to look much on evidence from the grassroots for example villagers and locations, they only based on towns for which it was void and that make them to cater for fake information hence leading to the case being dropped yet innocent life were claimed. This mode of collecting evidence portrayed the weak point of ICC in failing to fight impunity in Kenya Post Election

Violence 2007/2008 for example,Mode of collecting evidence, Media influence, Lack of the General Kenya background knowledge and historical injustices.

2.1.2 Lack of The Kenya General background knowledge and the historical injustices

More so, it is of paramount to assert that Kenyan politics from early independence were played and led by two tribes to date. For example, it has been a culture whereby, if a President would not come from Kalenjin community then, it is Kikuyu but no other tribe will taste.

It is true as however, the Luo tribe has tried but it is too hard because they do consider the majority in voting as you can't compare the Kikuyu who are about 15 million, Kalenjin about 10 million and Luo who are about 3 million. The Luo had tried but all in vain as once their leader failed during independence by giving Mzee Jomo Kenyatta to lead the country. This was the Luo leader, the later father to Raila Odinga, Mr. Jaramogi Odinga Oginga.

The ICC investigators were not in position to understand this drama in Kenyan politics and end up missing and mixing the facts. On the corridors and functions of confusion.

The lack of understanding of the Kenyan background was the real blow to ICC has to failure to fight impunity in Kenya yet it was establishment for such purposes.

2.1.3 Land issues

Displacement of local communities by colonial Government Committee especially for Rift Valley and Central provinces faced injustices with those in Coast Province.

2.1.4 Collective punishments

Measures resulting in many others, the law, massacre of torture of Mau-Mau suspects during the emergency.

Against Kalenjin, Masai, Turkana at the shift war in the Northern Frontier Districts.

After independence the Kisumu riots of 1969, 1982, attempt to coup, the 1984, Wagalla incident of 2007/2008 post-election violence in which hundreds of innocent people were killed.

2.1.5 Political assassination

Of Argwings Kodhek, Pio Gama Pinto, Tom Mboya, JM Kariuki, R. Ouko, Bishop Muge, Mbal etc. leave the bad taste in the mouth.

Thus cause of all what happened in Kenya as it is contributory of historical injustices. At the point of de factor and de jure, it is of premature that the ICC has no any information in the background of the Kenyan historical injustices and general welfare principles to the people.

As at the material time, it is hard to state that ICC could be in position to come up with the right coverage on the Kenyan issues as to fight impunity.

2.1.6 The influence of media

The influence of media. The media is the everything in update on what is taking place in Kenya and other places. On the basis of the violence the media acted as catalyst as it was giving out the propaganda and photo shops of viral videos that were not true.

Most media centers were bribed to announce what was not true using their native local languages. The media for example KASS FM of Kalenjin, Inooro FM Kikuyu, Mlembe for Luyah from west.

The media put the state on fire as it was trying to sell themselves on market but it was too bad as the leader used to rush to radio stations and TVs to talk on what is basically hearsay. They end up showing live fights and killings and this made the relatives of the deceased to erupt violence in Kenya.

ICC was not in position to warn the media to stop exaggerating to information as they had to call ICC death row and ICC is in Kenya basically to kill the suspects of which they were the leaders of different communities in Kenya.

Insight into a critical, recent episode in the struggles over land and graft in Kenya. This including former President Daniel Toroitich Arap Moi where he gave the title land to Kalenjin community and neglecting other communities

2.1.7 The situation and cases

Pursuant to the Rome statute, the prosecutor can initiate an investigation on the basis of referral from any state party or from the United Nations Security Council. In addition, the prosecutor can initiate investigation proprio muto on the basis of information on crimes within the jurisdiction of the court received from individual or organization (communications) to date; three parties to Rome statute Uganda, Democratic Re public of Congo, Central Africa Republic have refereed

situations occurring on the territories to the court. In addition, the Security Council has referred the situation in Darfur, Sudan a non-state party in 31st march 2010, pre-trial chamber II granted the prosecutor authorization to open an investigation proprio muto in the situation of Kenya.

2.1.7(a) The situation in Kenya

The president of the international criminal court ICC issued the decision assigning to pre –trial chamber II the pre trial chamber II granted the prosecutor on 31st march 2010,authorization to open an investigation in Kenya. On 8th march 2011 , the pre trial II by the majority issued its decision to prosecutor to summon ***WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY, JOSHUA ARAP SANG ,as well as FRANCIS MUTHAURA,UHURU MUIGAI KENYATTA AND MUHAMMED HUSSEIN ALI*** **to appear before the ICC on 7th February 2011**. The case was dropped in 2013.nothing

2.1.7(b)The situation in Uganda

The case of *Prosecutor vs Joseph kony,VincentOtti,OkothOdhiambo and Dominic Ogwen*is currently being heard before pre-trial for which the one for Dominic has been concluded before the pre-trial chamber II the LRA members.

2.1.7(c) The situation in Democratic Republic of Congo,

four cases are being heard before relevant chambers: *the prosecutor Vs Thomas Lubanga Dyilo, The Prosecutor Vs Bosco Ntaganda, Prosecutor Vs Germain Katanga and Mathew Ngudjolo Chui and The prosecutor Vs Callixte Mbarushimana*. Two cases are at the pre trial and the others are at the trial stage, Chui and Mbarushima are currently in the custody of the ICC.

2.1.7(d) The situations in Darfur Sudan,

four cases are being heard before pre-trial chamber: *Prosecutor Vs ahmad Muhammad harun and ali Muhammad aliabdal-rahman, Prosecutor Vs Omar Hassan Ahmad Al Bashir , Prosecutor Vs Idriss Abu Garda, Prosecutor Vs Abdala Banda Abakaer ,salehmohammed jerboa Jamus*. Suspect Idriss Garda appeared voluntarily for the first time before pre-trial I on 18th may 2009.he is not in custody and the three other suspects remain at large.

2.1.7 (e) The situation in Central Africa Republic.

The case *of Prosecutor Vs Jean Pierre Pemba Gombo*. It is on the trial stage.

Different renown authors have written about international criminal court ICC on how it has failed to fight impunity on the perpetrators of war crimes and violators of human rights in Kenya as it as seen without doubt ICC Has failed to fight impunity following the reasons stated on this research.

International Criminal Court. 2016. *'Kenya, Situations and Cases.'* Accessed 11 May 2016. https://www.icc-cpi.int/kenya.

International Criminal Court, 2011. *'Situation in the Republic of Kenya.* 'ICC-01/09. Accessed 15 May 2016. https://www.icc-cpi.int/Kenya

2.1.8 My own opinion general

The ICC was established to remove the burden of requesting and overseeing the investigation and prosecution of international criminal law violations from the UN Security Council. However, ICC is often criticized for being inefficient, excessive and ineffective, having secured only four convictions (Katanga, Lubanga, Bemba and AL Mahdi) in 15 years of work.

First before a case is formulated against a particular individual, the office of the prosecutor must investigate the situations in the country to consider. Whether ICC can act (based on the principle of subsidiarity) to identify the Michelle defendants and to build a case against them.

Second, cases of genocide, war crimes or crimes against humanity are very complex and involve dealing with large volumes of evidence from a foreign jurisdiction. It is evidence from ad-hoc tribunals that contrary to the ICC are focused on one situation only "the international tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda." Such cases take by time and resources.

Thirdly, ICC is predominantly engaged with situations in African countries. Out of 10 countries under the investigation, nine are in Africa. These include; Central African Republic, Mali, Central African Republic, Uganda and DRC. The investigation into War crimes in these countries was made by self-referral of the respective countries. In the case of Libya and Darfur, it was by the UN Security Council, Cote d'Ivoire (voluntary) Georgia and Kenya; the ICC prosecutor opened (proprio mutu investigation).

On August, 27th2010 the Kenya celebrated the passing of its new constitution with a grand ceremony in Nairobi capital. The world watched in shock and revulsion as standing there on stage alongside the president and his entourage was international fugitive and newly re-elected president of Sudan Omar al-Bashir who is wanted by the ICC. For war crimes was apparently there under personal invitation of President Mwai Kibaki. The international community responded with outrage at the invitation, which rather ironically seemed to undermine the adoption of the new constitution meant to advance human and civil rights in Kenya.

Kenya failed to arrest Bashir a man accused of facilitating the murder of hundreds of thousands has immense implication for the ICC and its ability to seek justice in Africa for Africa victims. For the Kenyan leaders facing charges themselves for their involvement in the 2007-2008 post – election violence. the move implies deeper collusion amongst African accused: recognition that unity could perhaps provide protection, a sort of political reciprocity in the future of need and Kenya is not only the reason of ICC failure to fight impunity but also the decision of AU which instructed AU members not to arrest Bashir—that Provide the mandate of AU to defy ICC authority and ultimately set a dangerous preceeded for future ICC cases and pursuit of justice in Africa. The ICC come into existence in 2002 after the international community recognized the need for the legitimate and independent outlet for trying individuals accused of the most horrific of crimes and whose victims have no other means of seeking justice

Thus far, it has launched investigation in Northern Uganda, the democratic republic of Congo, the central Africa Republic, Darfur Sudan, and recently Kenya, Rwanda ICTR and the former Yugoslavia ICTY, Are being tried in the special tribunals. As the ICC cannot prosecute crimes committed prior to its formation in 2002, the ICC issuance of warrant for Sudan president Omar in march 2009 was the first time the court had issued the sitting head of state a warrant and it come at the time of market political strife. Because the Sudanese governments cooperations was needed to achieve political stability in the region, particularly on the upcoming referendum of the southern Sudanese independence.

Many argued that the warrant issuance would threaten an already fragile peace process in Sudan .it spawned the large debate between importance of achieving peace and obtaining justice and

subsequently pitted the two normally concurrent forces against one another and placed all parties in a rather precarious position.

Although the issuance of the warrant for Bashir was an independent decision made by the ICC, as a result of Darfur investigation, its political implication are considerable and thus it will meet with swift resistance from the Sudanese government.infact prior to warrant issuance, the France had offer a deal to Sudan's state minister of humanitarian Affairs and who the ICC issued FOR in 2007 the ICC would defer its investigation of Bashir, although Sudan's failure to prosecute Haruna nationally or had him over to ICC is reproachful, the existence of such deal by French only worked to undermine The ICC legitimacy. France opened the ICC up to future accusation of political bias and misuse of the authority for which it is true as the chief prosecutor Luis Moreno Ocampo was not free from criticism with regards to the Bashir case. The AU criticism of The ICC warrant against Bashir increased at the summit in Kampala in July .African leaders decided to make AU non Cooperation with the ICC officials by passing a resolution stating that AU would not arrest Bashir and some leaders for stronger responds as that ICC IS biased and purposefully targeted African leaders This probably reflects to reason as to how ICC failed to fight impunity.

The preamble to the Rome statute refers to ending impunity on global level. Despite its best efforts, The ICC alonecannot fulfill these expectation by investigating and trying each of these crimes. The Rome statute enshrine the principle of complimentarily which stipulates that ICC should assume jurisdictions only when the relevant states are unwilling or unable to carry out the investigation or prosecution. The statute provides that the domestic jurisdictions bear the primary responsibility in furthering accountability for the most and serious international crimes.

The involvement of powerful segments of the political, military or other forces in these crime is frequent, as their commission requires planning, organization. Those who are responsible for the crimes are still in power or have means to make sure that they protect their interest.

Security and access issues including a volatile security environment .lack of safe environment for victims and the investigators or legal professions. This termed as the stumbling blocks to ICC towards fighting impunity in Kenya

ICC is slow and formal even where it has been prioritized properly there will remain scores of victims whose plight will not be considered. The cause of international crimes are deeply

embedded in complex, historical, sociological, economic and political factors hence failure to fight impunity.

In Kenya, challenges in activating criminal justice to prevent future violations following decades of law level unrest, Kenya was engulfed in a period of intense violence during and after 2007 elections. an international mediation led by Kofi Annan manage to establish a coalition government based upon power sharing agreement between the two major political forces in the country . Several measures were adopted including the establishment of the commission of inquiry into post-election violence. (CIPEV) also known as waki commission and truth justice and reconciliation commission. The(CIPEV) report issued in 2008 recommended the creation of a special tribunal for Kenya to hold accountable persons bearing the greatest responsibility for crimes particularly crimes against humanity relating to 2007 general election in Kenya. The hope of many in Kenya rests with the ICC due to lack of a profound trust in the domestic justice system

In Kenya, the judicial accountability could be the factor that breaks the vicious cycle of violence perpetuated by impunity. However, in Kenya it remained unclear in the international level (ICC) and this triggered the failure of (ICC) to fight impunity.

In general the (ICC) has faced a lot of challenges in trying to apprehend perpetrators of war crimes against humanity due to heads of states due to these reasons the (ICC)has not succeeded in many ways because of limited resources hence failing to fight impunity.

United Nations. 1998. 'Secretary-General says establishment of international criminal court is major step in March towards universal human rights, rule of law'. Accessed 19 May 2016. http://www.un.org/press/en/1998/19980720.l2890.html.

CHAPTER THREE

METHODOLOGY

3.0. Introduction

This chapter deals with the research instruments to be used to investigate the problem. It involves the ways in which entails the procedure to be followed to realized the research objectives.it includes a description of the sampling techniques instrumentation as well as data analysis techniques it describes in details what will be done.

This research will be investigative and informative. Information will be obtained from both primary and secondary source, these means, through literature review of renowned scholars, locally and globally, internet and relevant sites, Rome statute that is the law governing the international criminal court procedures.

3.1 Research Design

The main reason for the design adopted being the type of results wanted and knowledge of information on the concept on how international criminal court (ICC) has failed to fight impunity in Kenya.

These research was a case study based in Kenya with reference partly in other African countries.it was preferred since the researcher is Kenyan and found Kenya to be an area of interest.

This study will employ descriptive research design. This will focus mainly on using qualitative data collection methods like questionnaire, interviews, focus groups and documentation among others

Under this study the use of cross sectional design is going to be necessary to collect the needed information quickly over a wide area within a short time and its very important means and approach to achieve research objectives

3.2 Area of Study.

The area of study was Kenya, **Eldoret, Nakuru, Nairobi, Kisumu and Kisii**. Because the research problem mainly affected the mentioned areas and the targeted respondents had verse knowledge of the research topic.

In addition, the researcher is a Kenyan born in Eldoret and brought up in Kenya well verse knowledge of the political and constitutional development of the country and hence was in position to establish the relevant areas of study

3.3 Population and Sampling

The researcher aimed at critically analyzing how International criminal court (ICC) failed to fight impunity majorly in Kenya post-election violence 2007/2008.

The study based on interviewing members of Kalenjin, Kikuyu, and Kisii communities who were affected by the violence, section of politicians, and non- governmental organizations.

Further, information was gathered from professionals like advocates and security officers on their take on the consequences of the 2007/2008 post –election violence.

The purposive sampling technique was adopted because the researcher by his own Judgments targeted specific objects I. e voters and politicians to participate in the study.

3.4 Sources of Data

In caring out this research, the researcher will use both primary and secondary sources of data

3.4.1 Primary Sources

This is the first hand information that will be collected from the field by the aid of techniques like the interview guide, observation, among others. Questionnaires will be designed and self-administered by the researcher to select sample population

3.4.2 Secondary Data

Information will be extracted from the text books , and work of the scholars, whether published magazines, written data source including published and unpublished documents, agency reports, newspapers articles, internet source, proposals books, journals, local government publications acts, among others so as to obtain relevant information.

3.5 Data Collection Methods

The researcher will be in the field to use questionnaires and interviews guide at the same time the record will be critically examine the data gathered and extra care will be put in both for better response and findings. The flow ever the main target of the researcher is to gather primary data with the help of the specified target sample population.

This research study mainly utilized both primary and secondary sources. In this vein, data was collected and gathered by means of interviews, observation with targeted groups and documentary review of the legal instruments on the research topic.

Interviews were conducted with people who had key information on the research topic such as advocates para-legends, security officers and the members of the communities in the areas worst hit by the violence across section of the community members particularly in Eldoret and Nakuru were also interviewed to established their views on the critical analysis on how the violence erupted and bring on board the international criminal court ICC to fight for impunity in Kenya which generally ended failing.

Literature from the internet, libraries and commission of inquiry on post-election violence and other relevant texts or legal instruments was reviewed for this purpose, more so journals were too relevant

3.5.1 Data Analysis and Processing

This section will deal with the organization, interpretation of the collected data

After data has been collected, editing, cording, classification and tabulation will be done responsive. The process of data analysis will be done on a daily basis to identify any information gaps. A researcher will use this method to examine what will be collected in a survey and making dedication references

3.5.2 Focus Group Discussion.

This will be used mainly for testing preliminary findings and filling in the gaps in data required. This tool will be chosen because it brings together experts whose experience vary ends hence

3.5.3 Interview

Personal interviews will be used to obtain required data. Respondents will be interviewed face to face while filling their answers on the interview scheduled. This method is most preferred because the data given is accurate and reliable since it is from the original source.

The researcher will involve interpersonal talk between the researcher and different respondents in order to obtain useful information on the critical analysis on how international criminal court (ICC) has failed to fight impunity in Kenya

3.5.3(a) Interview Guide

1) Has International criminal court (ICC) been established in your country?
2) Has the international criminal court been efficient enough in solving crimes against humanity and genocide in your country?
3) Is the international criminal court (ICC) more of political court than a judicial mechanism?
4) Do you think the perpetrators of post- election violence will be brought to justice under the ICC?
5) Have the victims of the human atrocities received any justice since the (ICC) took over the case?
6) Have the political and social situations in your country been better or worse?
7) Do you Think International Criminal Court (ICC) has ignored important aspects in your country in solving the case brought before it?
8) Can the international criminal court (ICC) be trusted in handling future cases of crimes against humanity and genocide?

3.5.4 Documentation

Documentation will also be applied since it is a source of supportive information from the agencies that deals with the facts on the topic and have put them in the number of documents, reports, journals and bulletins, text books and work of other scholars whetherpublished magazines written data source among others

This method will be used to critically analyses on how international criminal court ICC has failed to fight impunity.

3.5.5 Observation

This will be contacted during the time for interview to observe the state of the respondents on how international criminal court (ICC) has failed to fight impunity in Kenya.

3.5.6 Questionnaires

This gives the respondents an opportunity to express themselves and work independently hence reducing on bias.

These are different type of questionnaires which will be administered to different categories of the respondents.

These designed in the way that the respondent will be required to give a single answer among other alternatives on the question paper.

3.6 Limitations

Several constrains were anticipated before the research was completed. These include:

(i) Time: The time allowed to contact research was not enough since the researcher was engaged in academic work thus, lack enough duration to conduct a comprehensive and continuers study.

(ii) Financial constraints: These generally hindered the success of the study owing to the facts that the researcher mainly depended on individual funds .the final analysis of the study was also very expensive and costly.

(iii) There was difficulties in interviewing key respondents such as politicians and judicial officers due to their tight schedule.

(iv) The literature available was not adequate enough to complement the research study.

(v) Other respondents and informants especially those who are from areas affected were not willing to divulge much information on the area of study for fear of reprisal.

3.7 Delimitations

Despite the anticipated constraints, the researcher endeavored to find solution to them. The researcher dedicated and sacrificed most of his time to conduct the study and ensure non-interference with the academic work.

Sponsorship was sought from the parents, friends and interested parties to address the problem of inadequate finances

To ensure adequate interviews were achieved prior appointments were made and permission from such information like politicians and judicial officers to have an interviews with them.

The researcher ensure that available literature was used maximally in aiding the research comprehensively.

Most appropriate methods were employed to ensure that at least some of the information was obtained from communities, adversely affected by the violence. Preferably, the researcher sought to integrate himself within the communities and sought the aid of an interpreters where necessary to achieve this end

CHAPTER FOUR

Assessing the Acceptance of International Criminal Justice (ICJ) and general reasoning of the (ICC) failure to fight impunity in Kenya.

4.0 Introduction

This chapter assesses the acceptance of international criminal justice (ICJ) in Kenya among victims, civil society activists, political elites and directly affected communities.[4] In Kenya, ICJ entails the International Criminal Court (ICC), owing to its intervention in the country's 2007/8 post elections violence (PEV). The PEV ensued after the disputed December 2007 presidential elections results involving two antagonistic groups: the then ruling Party of National Unity (PNU) and its main opposition, the Orange Democratic Movement (ODM).

To assess acceptance of ICJ, the actors' positions on the ICC over time, aspects of disagreement with the Court, indications of strategic acceptance and non-acceptance and developments on debates on the ICC over time were scrutinised. Acceptance is defined for the purposes of this chapter as 'the agreement either expressly or by conduct to the principles of ICJ in one or more of its forms: laws, intuitions or processes'[5] (Buckley-Zistel et al. 2016, 2). This includes 'a range of active features from recognising to giving consent and expressing outright approval and belief' (ibid).

The ICC's acceptance here will be assessed by analysing the expressions and conduct of different actors in relation to the Court's intervention. The assessment will be premised on the actors' external judgement of the Court vis-à-vis their interests and circumstances and the Court's effectiveness in conducting investigations and protecting witnesses. It focuses on dominant discourses across actor categories, yet there will also be efforts to capture dissenting voices.

[4] This includes the Kikuyu and Kalenjin communities whose leaders were committed to full trials at the ICC and which accounted for a substantial proportion of victims and perpetrators.

[5] International Nuremberg Principles Academy. Definition of ICJ acceptance. Accessed 15 May 2016. http://www.nurembergacademy.org/resources/acceptance-online-platform/research/acceptance-methodology/.

This chapter argues that in Kenya, actors express consensus on acceptance that places faith in the ICC as a last resort and belief in its potential to prevent the commission of future atrocities, but that they depart from this consensus given their diversity, competing interests and circumstances.

The arguments on this chapter build on fieldwork conducted in Kenya from February to April 2016. The author conducted 55 interviews with representatives from civil society organisations (CSO), political parties and the Kikuyu and Kalenjin communities. The study also draws on over 20 interviews conducted for the 'Acceptance Pilot Study Project' with all actor categories[6]. For primary data on the victims, the author consulted CSOs that worked directly with them (owing to security concerns).[7] The author also evaluated secondary literature from media reports, the ICC and CSOs, and survey reports from IPSOS Synovate[6] and South Consulting[8] to draw conclusions on actor acceptance.

The next part of this chapter analyses the ICC's intervention in Kenya by attending to the Court's history in the country and the scope and forms of crimes under investigations. Thereafter, it documents relevant actors to acceptance: civil society activists, victims, directly affected communities, and the political elites in government and the opposition. It then discusses Kenya's context by identifying other political and historical factors that are relevant to acceptance before turning to an analysis of acceptance by assessing the patterns and dynamics of acceptance. Specifically, this part analyses aspects of ICJ that are relevant to acceptance, forms of acceptance (by conduct and expression), and reasons for acceptance or non acceptance. The chapter concludes with a summary of the discussions.

4.1 Actor constellation: who accepts and who does not?

The actors relevant to studying acceptance of ICJ in Kenya are those who consistently expressed their positions on the ICC's processes and acted with regard to the Court's intervention over time. These include civil society organisations, victims, political leaders and directly affected Kikuyu and Kalenjin communities.

[6] International Nuremberg Principles Academy. Accessed 20 May 2016. http://www.nurembergacademy.org/resources/acceptanceonline-platform/publications/online-edited-volume/.

[7] CSOs mobilised victims into communities of justice and thus this was an easier approach to accessing the victims' views. The victims were scattered across the country and getting individual access was difficult owing to security concerns given the sensitivity of the cases. [6] IPSOS Synovate is a private company that periodically conducted surveys on the ICC processes in Kenya besides other governance and social issues.

[8] South Consulting was contracted by Kenya's mediation team to consistently monitor Kenya's reform frameworks, including the ICC interventions. The company conducted surveys in this regard to assess support for the ICC in Kenya.

First, governance and human rights CSOs came together under Kenyans for Peace with Truth and Justice (KPTJ) for concerted efforts at national and international advocacy on criminal accountability for the 2007/8 PEV and institutional reforms to guarantee non-repetition. Some of KPTJ's members that were vocal in championing for accountability for PEV were the Africa Centre for Open Governance (AfriCOG), the Kenya Human Rights Commission (KHRC), the International Centre for Policy and Conflict (ICPC), the Federation of Women Lawyers (FIDAKenya), the International Commission of Jurists (ICJ-Kenya), the Kenya National Commission for Human Rights (KNCHR) and Kituo cha Sheria.[9]

As a first step, KPTJ documented the atrocities committed, preserved evidence, identified victims and researched long term solutions to Kenya's governance crisis.[10] Thus, recalling on the rise of KPTJ, a CSO activist notes how 'after the ensuing violence in 2007, one of them convened a meeting of Kenyan intellectuals comprising religious groups, CSOs and think tanks to figure out what to do to contain the crisis'.[11] Accordingly, the activist contends, 'it was obvious that the country was at crossroads with PNU and ODM pulling in different directions'.[12] As such, they realised that the best thing to do was to begin collecting evidence.[13]

Next, KPTJ contemplated the potential involvement of the ICC in Kenya's political crisis.[14] As a CSO official reveals, they asked about the Court through proxies and began to gather information concerning the nature of the violence.[15] On the second day of their meeting, KPTJ was unveiled, with a goal of peace and truth with justice.[16] Their recommendations on Kenya's transition to long term peace led to the focus on institutional reforms and criminal accountability for the PEV as envisaged in the Waki report and agenda items in Kenya's 2008 dialogue and mediation process.[17]

The second set of actors are the victims who suffered harm and therefore demand for justice. These include Internally Displaced Persons (IDPs), victims of SGBV, relatives of those who were killed, and victims of police brutality. The victims were spread across the country, and

[9] For a comprehensive list, see KPTJ, 2016.
[10] Several CSO representatives interviewed for this research expressed their activities during the PEV as such.
[11] Interview with a CSO activist, Nairobi, 22 September 2015.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.

more so in the ICC's geographical focus areas of Nairobi, North Rift Valley, Central Rift Valley, South Rift Valley, Nyanza Province and Western Province. As less powerful actors in the PEV, victims were mostly reliant on third parties such as the KPTJ, the government, donors, religious organisations and relatives for psychological and material support and participation in the Court's processes. They participated in the ICC's proceedings with the help of CSOs, the OTP and joint victims' lawyers appointed by the ICC. For their resettlement, victims relied on state institutions that gave land and financial compensation to help them start rebuilding their lives. Some victims resorted to their social networks such as relatives and families who reintegrated them into society.

The third actor category are the directly affected Kikuyu and Kalenjin communities whose political leaders (Kenyatta and Ruto respectively) had their charges on crimes against humanity confirmed at the pre-trial stage. As communities that also fought each other, the Kikuyu and Kalenjin communities accounted for a substantial number of both victims and alleged perpetrators in the 2007 PEV. Given the prevalence of ethnic nationalism in Kenya, the two communities held a critical voice in the discourses on the ICC and the IPSOS Synovate Survey (2011, 3) indicates that among 'ethnic nations', interest in the ICC processes was highest in Central region (88 per cent) and the Rift Valley (85 per cent) which are inhabited by a majority of the Kikuyu and Kalenjin, respectively. The discussions on the Kikuyu and Kalenjin communities will focus on dominant discourses among them.

The final group of actors are the political leaders in both the governing Jubilee Alliance and the main opposition Coalition for Reforms and Democracy (CORD). Formed as a coalition of Kenyatta and Ruto and their allies, the Jubilee Alliance mainly draws its support from the populous Kikuyu and Kalenjin communities[18] in conformity to 'Kenya's default politics of ethnicity' (Holmquist and Githinji 2009, 101). As a result, the Jubilee Alliance and the majority members of the Kikuyu and Kalenjin communities share similar concerns over the ICC.

CORD's constituent coalition partners are the Orange Democratic Movement (ODM) led by RailaOdinga (Luo), the Wiper Democratic Movement (WDM) of Kalonzo Musyoka (Kamba), and FORD Kenya of Moses Wetangula (Luhyia). None of CORD's members were accused at the ICC, and they articulated opposing opinions on the ICC. In a similar vein, CORD draws its support mainly from the Luo, Luhyia, Kisii, Kamba and the coastal communities.

[18] The Kikuyu and Kalenjin are two of the largest ethnic groups in Kenya according to the 2009 census. See Republic of Kenya, 2010.

The political actors partly shared concerns for justice as leaders and their representation of victims and the directly affected communities. However, at times, their interests fundamentally departed from these concerns and instead shifted to personal preservation for the accused or political expediency. This led to strategic acceptance or non-acceptance. For the purposes of discussions in this chapter, strategic acceptance denotes agreement either expressly or by conduct with the ICC for ends that are not entirely premised on justice, such as self-preservation and local political calculations.

4.2 The salience of ethnicity in Kenya's political context

Several accounts of Kenya's governance crisis ultimately identify ethnicity as one of the main challenges for the country (Weber 2009). Thus, the instances of election-related violence in 1992, 1997 and 2007 are attributed to the political leaders' manipulation of ethnicity (Osamba 2001, 40; Oyugi 2000; Brown 2001, 727; Gona 2008).

Most notably, the 2007 elections campaigns reignited ethno-regional rivalries which culminated in the catastrophic PEV among ethnic groups. Ethnic tensions were accentuated by institutionalised impunity; thus, perpetrators were guaranteed protection from domestic prosecution. Consequently, the Waki commission reported that the 2007/8 PEV followed the ethno-regional patterns that demarcated political party mobilisations (Republic of Kenya 2008). In ODM strongholds and in towns, attacks were specifically targeted at perceived PNU supporters, mainly in the Kikuyu community. PNU militias attacked perceived ODM sympathisers from the Luo, Luhyia, Kalenjin and Kisii communities in their strongholds and cosmopolitan locations (Kanyinga 2011).

The importance of Kenya's ethnicity accounts for the acceptance of ICJ on two fronts. First, as a space for political mobilisation and competition for political and economic resources, it intensifies ethnic rivalries, and thus the likelihood of violence. This is accentuated by institutionalised domestic impunity for the political leaders. Because of this, ICJ appeals to many as redress for mass atrocities or even belief in its potential to deter future crimes. Second, ICJ is likely to be interpreted from an ethnic perspective in the same way as other national social, economic and political issues. Communities whose leaders are accused of committing mass

atrocities are less likely to accept ICJ, owing to collective community justification for and rationalisation of their violence.

4.3Acceptance: drivers, patterns and dynamics of acceptance

As a country that was accustomed to PEV and impunity for the perpetrators, the ICC's intervention in Kenya's 2007/8 PEV was a significant change in local discourse on violence and expected conduct. In this regard, criminal accountability for the crimes committed formed a significant part of national discourses on the transition to long term peace.

The ICC's acceptance was to be put to test during the duration of Kenyans' trials at The Hague, and several aspects of the ICC's intervention in Kenya are relevant to its acceptance across actor categories, including: the outcomes of the Court's processes, actors' faith in the Court as a last resort and its potential to deter future crimes and the Court's effectiveness in conducting investigations and protection of witnesses.

4.4 Consensus on acceptance: the International Criminal Court as a last resort and its potential to deter future crimes

Against the backdrop of Kenya's history of PEV and the accompanying impunity, all actor categories express consensus on acceptance of ICJ. They placed faith in the ICC as a last resort and in its potential to deter future crimes. The ICC, unlike local judicial institutions, signifies the will and capacity to investigate and prosecute political leaders as it did in 2010 when impunity was the norm. As Erick Shimoli (2016, 1) reveals, 'a team mandated to clean up the local courts admitted that the judiciary is as corrupt as ever'.

In the aftermath of the 2007/8 PEV, actors across all categories expressed acceptance of the ICC and the South Consulting (2010, 42) survey concluded that support for the ICC was at 75 per cent amongst victims, 55 percent in the Central region (Kikuyu) and 48 per cent in the Eldoret region (Kalenjin). The survey attributed support for the ICC to the actors' understanding of local impunity for political leaders.

At the same time, there were calls from political actors for a potential ICC intervention. For example, a visibly angry Uhuru Kenyatta while addressing a crowd expressed the need for justice for the atrocities even if it meant at 'The Hague' (KTN 2016). KPTJ also contemplated a

potential ICC intervention due to a looming domestic inactivity.[19] This consensus was altered after the naming of suspects with some actor categories (Kenyatta, Ruto and their allies and their respective Kikuyu and Kalenjin communities) departing because their power position was threatened by the indictments.

Despite these specific reservations, the Court's demonstration on the capacity and willingness to prosecute the heinous crimes in Kenya remained. The Court is accepted across the actor categories not least because it can prosecute political leaders, as is apparent in the following statements. For instance, a Kikuyu youth, who was generally critical of the ICC, remarked 'yes, I accept the ICC because justice is elusive in Kenya'.[20] For many Kalenjin, the ongoing ICC cases also demonstrated the Court's will to prosecute perpetrators. A Kalenjin peace activist remarks: 'I remember I was in a workshop and the issue of the ICC among participants came up [...] they wish it to be in place to tame people'.[21] A Jubilee Alliance interviewee revealed that consciously, some leaders believe in the ICC, but they must be seen as if they are fighting it for strategic reasons of preserving the accused.[22] Similarly, according to a CORD interviewee, 'local courts can't handle such cases [...] we have more faith in the ICC than local processes'.[25]

Furthermore, actors across all categories expressed faith in the ICC's potential to deter future crimes due to the interconnectedness of ethnic identity and political affiliation at the heart of political violence. With the fear of ethnic conflagrations during future elections, the ICC enjoys substantial acceptance across actor categories, thus the Court's functional role as a potential preventive measure. As veteran politician Koigi Wamwere noted, the current political formations of Jubilee Alliance and CORD are driven by dangerous ethnic ideologies, and:

> 'Elections are an ethnic battlefield, into which we go, not to elect good leaders for ourselves and everybody else but to defeat enemy ethnic leaders from other communities whom we must vanquish or perish' (Wamwere 2016, 1).

KPTJ (2015, 3) observes that:

[19] Several CSO officials who were interviewed for the context of this research articulated this position.
[20] Interview with Kikuyu youth, Nairobi, 2 March 2016.
[21] Interview with Kalenjin peace activist, Nakuru, 22 February 2016.
[22] Interview with a Jubilee actor, Nairobi, 9 February 2016. [25]
Interview with CORD activist, Nairobi, 18 March 2016.

> 'As Kenya enters another pre-election season characterised by hate speech, inflamed rallies and vituperation of the ICC, the Court remains the only viable hope for justice and the only credible deterrence'.

Similarly, a Kikuyu youth opines that given shifting political alliances, the Kikuyu might use the threat of the ICC as a deterrent to violence against their people.[23] For CORD's Senator Hassan Omar, 'the potential of the ICC has scared off war mongers' (KTN 2016, 1). And in the wake of Ruto's case termination and calls for Kenya's withdrawal from the ICC, a Jubilee Alliance MP differed with his party's general line and argued that 'our country was usually torn along tribal lines and it would be inappropriate to withdraw from the Court that could tame any individual out to cause chaos' (See for example, Wanyoro 2016, 1). Likewise, Jubilee Alliance's Laikipia East MP rejected calls for withdrawal, affirming that 'the function of the ICC as a court is important as it acts as a check on authoritarian leadership' (cited in Wafula, 2016, 1).

Among victims, Amnesty International (2014, 48) shows that some of them expressed fears of more human rights violations if Kenya exits the ICC and expressed faith in the Court's capability to prevent future crimes. For example, a victim noted how he:

> 'Has a lot of hope that the success of the ICC will bring some change on what is happening in Kenya [...] anybody will fear to violate rights if he or she thinks about what the ICC does on these issues' (Amnesty International 2014, 48).

The most consistent actors on acceptance of the ICC are CSOs (KPTJ) and to some extent victims. On its website, KPTJ contends that 'there can be no peace without truth and justice - truth and justice for the failed presidential election and the violence that followed' (KPTJ 2016, 1). Indeed, KPTJ (2010: 6) argued that 'a preferable outcome would have been for Kenya to investigate and prosecute those responsible for the violence'. In this vein, a former KPTJ official reveals their preference for local judiciary due to their long-term impacts in strengthening local systems and trying a larger number of suspects, and sees the ICC as a last resort.[24]

KPTJ's acceptance of ICJ stems from a firm ideological position on the significance of justice for positive peace, which Galtung (1967, 14) defined as 'the search for conditions that facilitate the presence of positive relations'. As KPTJ's Ndun'gu Wainaina opines, 'lasting peace and

[23] Interview with Kikuyu youth, Nairobi, 2 March 2016.
[24] Interview with former KPTJ official, Nairobi, 13 February 2016.

justice can only be achieved if past crimes are punished' (Wainaina 2016, 1). With Kenya's impunity for the 1992 and 1997 violations and the failure to act on Waki's recommendations regarding a local tribunal in 2007, Wainaina suggests that 'the ICC represents what generations of Kenyan leaders have failed to give the country: a check against impunity' (Wainaina 2016, 1). On Kenya's inability and unwillingness to prosecute the power leaders, Wainaina remarks:

> 'Kenya is facing a deep crisis of impunity. It is increasingly difficult, in fact nearly impossible, for people who have suffered serious violations of their human rights to receive justice and accountability. Victims and survivors do not receive redress and perpetrators are not brought to justice. Kenya typifies the exercise of authority without accountability' (Wainaina 2016, 1).

Since the ICC's intervention in December 2010, a CSO official notes that KPTJ's support for the ICC has been consistent.[25] At the national level they continue to harness victims' voices by creating their networks and mobilising them into a community of justice,[26] and at both the Assembly of State Party (ASP) meetings and the ICC trials, KPTJ countered the Government's narratives on cooperation and domestic investigative efforts.[27]

Conversely, the Kenya Citizen Coalition (KCC) does not accept the ICC. In CSO circles, the KCC's convener Ngunjiri Wambugu was co-opted by the Jubilee Alliance to counter KPTJ's support for the ICC. As a human rights activist reveals, 'under the outfit Kikuyus for Change, Wambugu raised his profile by leading the pro–ICC campaign, helping other CSOs to collect one million signatures in support of the Court' (cited in The Hague Trials 2015, 1). Thereafter, Wambugu backtracked, publishing articles that argued the ICC was not a solution for justice, supported two of the ICC accused suspects' political ambitions and countered KPTJ's positions on the Court (ibid, 1). According to the activist, Wambugu 'used the knowledge he gained while working with pro–ICC organisations to relentlessly attack the very groups that let him into the fold and trusted him with their tools of the trade' (ibid, 1).

For their part, victims' preliminary acceptance is expressed in their high expectations at the outset of the ICC interventions.[28] An Amnesty International (2014, 48) report reveals that most victims had 'high hopes and expectations of the ICC because of increasing disillusionment with

[25] Interview with CSO official, Nairobi, 18 February 2019
[26] Interview with CSO official, 8 February 2019
[27] Interview with former KPTJ official, Nairobi, 8 February 2016.
[28] Interview with CSOs, Nairobi, February - April, 2019.

Kenya's legacy of impunity'. In the report, only five out of the 49 victims interviewed did not accept the ICC process. They believed in Kenyatta's and Ruto's message that their decision to form a political alliance was a reconciliation process for the country and thus construed the ICC's trials as undermining these efforts (ibid, 50). Similarly, a CSO official interviewed for this project reflected on the victims' acceptance of the ICC that since 'there was nothing happening nationally [...] all focus was on the ICC'.[29]

In the trials' timeline, victims' priorities also changed, given that they encountered different circumstances besides the violations they had suffered.[33] First, the trials coincided with government plans to resettle IDPs.[30] Second, some victims, especially in the Rift Valley and Central, the home regions of the accused, felt in danger if they continued to express acceptance of the ICC.[31] The Jubilee Alliance was in Government after winning the 2013 elections, and was consequently the Government which rolled out the resettlement programmes and demonstrated hostility to the Court.

The ICC, and by extension justice, was not of immediate concern to some victims whose interests shifted to meeting immediate needs of shelter and social safety.[32] However, support for the ICC was solid among victims who lived far from the strongholds of the Jubilee Alliance, and hence felt less endangered (mostly ethnic Kisii, Luo, and Luhyia).[33] They did not expect too much of IDP support, given their framing as 'integrated IDPs' and the concentration of resettlement programmes in the Rift Valley and Central regions.[38]

With the mistrial ruling in April 2016 that signified the end of the initial six cases, victims expressed different opinions of the ICC, based on their prevailing interests and circumstances. In the Rift Valley, for example, a victim remarked, 'my heart is now at peace now that the cases have been withdrawn [...] it is all history and we should now preach peace and reconciliation' (Nation 2016, 1). Similarly, an IDP chairperson expressed 'satisfaction with the ICC decision and appealed to the Government to embark on compensation' (ibid, 1). By contrast, a victim in Kisumu expressed disappointment with the ICC, asserting that 'the dismissal of the case is a delay for justice to the victims of the violence' (ibid).

[29] Interview with CSO official, Nairobi, 13 February 2019. [33] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid. [38] Ibid.

4.5 Non-acceptance amongst directly affected Kikuyu and Kalenjin communities

Despite the drive and demand for justice, in the trials' timeline there were moments of non acceptance as expressed in sentiments amongst the majority Kikuyus and Kalenjin. This was attributed to their reinterpretation of the Court's intervention against the backdrop of local conflict narratives and political realities.

Critical in the communities' discourses were arguments such as that their leaders were facing trials in a foreign land on behalf of their entire communities. Their rejection of the Court was partly demonstrated in their 2013 majority vote for Kenyatta and Ruto in a joint Jubilee Alliance ticket despite their ICC cases.[34] A Kikuyu youth notes how 'when they heard that Uhuru Kenyatta was in the ICC's list of suspects, they did not believe in it [...] they supported the Court initially because they knew Kenyatta was not in the list'.[35] A Kalenjin youth remarks that 'the community did not accept the ICC process because their sons [Ruto and Sang] were being prosecuted by the Court'.[36] Furthermore, as a Kikuyu youth narrates, whenever the ICC topic came up in social media platforms, a majority of Kikuyu and Kalenjins expressed hostile sentiments on the ICC.[37]

Several Kikuyu and Kalenjin interviewees also revealed that, given the widespread nature of the PEV, the ICC's indictment of their leaders and exclusion of those from rival communities (such as the Luo) was an injustice. The indictment of their key political actors produced narratives of complicity to violence and undue political leverage to rivals.[38] For example, a Kalenjin youth observes that the ICC was not accepted in the community for the mere coincidence that half of the six suspects came from this community, even though Kenya has 42 tribes.[39] Although the Rift Valley was the epicenter of the violence, he argued that it was unfair for their leaders to bear almost the whole blame for the PEV,[40] and that it was argued by the Kikuyu and Kalenjin that the ICC targeted wrong suspects - Kenyatta and Ruto - who were merely foot soldiers for Mwai Kibaki (PNU) and RailaOdinga (ODM) respectively. To them, because Kibaki and Odinga were

[34] Interview with Kalenjins, Kikuyus in the Rift Valley, Central, Nairobi, February - April 2019.
[35] Interview with Kikuyu Youth, Nairobi, 2 March 2019.
[36] Interview with a Kalenjin youth and parliamentary aspirant, Nairobi, 17 February 2016.
[37] Interview with Kikuyu Youth, Kiambu, 2 March 2019
[38] Interview with Kikuyu elder, Kigumo, 29 February 2019.
[39] Interview Kalenjinyouth, Nairobi, 23 February 2019.
[40] Ibid.

the two protagonists in the 2007 elections, they bore the greatest responsibility for the violence in the spirit of the Rome Statute.

Individual community narratives of the conflict contradicted the ICC's mission of justice. Among the Kalenjin, the violence was spontaneous,[41] thus Ruto's and Sang's indictments were unfounded and based on a witch hunt. For the Kikuyu, the community was under attack and retaliation was justified to protect it,[42] and later efforts at prosecuting Kikuyu leadership on the basis of the crimes committed in self-defence was itself an injustice.[43] Therefore, the Kikuyu celebrated Kenyatta's case termination in December 2014[44] as the Kalenjin celebrated the final collapse of Sang's and Ruto's cases in April 2016 (Kamau 2016; Kipkemoi 2016).

4.6 Strategic acceptance and non-acceptance among political leaders

Although the political leaders partly shared concerns for justice with the victims and CSOs, at times their interests in self-preservation and political maneuvers fundamentally departed from these concerns. Tom Maliti, Kenya's International Justice Trial monitor, argues that 'political actors' expressions and actions should not be seen purely as good faith actions, but protection of their interests'.[45] While the Jubilee Alliance demonstrated both strategic acceptance and strategic non-acceptance, CORD expressed only strategic acceptance of ICJ.

Kenyatta and Ruto initially demonstrated strategic acceptance in their preference for ICJ at the expense of a local hybrid process (Government of Kenya 2010). Their initial acceptance of ICJ was premised on self-preservation since the ICC was a distant reality, but the local hybrid was not. The ICC was less active at the time,[46] but a local hybrid tribunal was perceived to be feasible given recent experiences in neighboring Rwanda and Sierra Leone. Thus, with the ICC demonstrating unprecedented activity, Kenyatta, Ruto and their allies resorted to strategic non acceptance, again for self-preservation.

For the ICC accused, access to state power proved the best way to overcome their predicaments, thus partly informing the creation of political alliances that culminated in the Jubilee Alliance in

[41] Nearly all the Kalenjin interviewees articulated this position.
[42] Nearly all Kikuyu interviewees advanced this argument for non-acceptance.
[43] Interview with Kikuyu Lawyer, Nairobi, 9 February 2016.
[44] Interview with Kikuyu youth, Kigumo, 29 February 2016.
[45] Interview with Tom Maliti, Nairobi, 16 February 2016.
[46] Interview with Kikuyu politician, Nairobi, 29 February 2016.

the run up to the 2013 elections. For most of the Kenyan trials at The Hague, the Jubilee Alliance expressed non-acceptance of ICJ in a series of anti-ICC prayer rallies. For example, in one of the prayer rallies in Kericho, the Jubilee Alliance's Senate majority leader KithureKindiki declared Ruto's case termination their main 2016 agenda (KTN 2016). While echoing other speakers at the rally, Kindiki reprimanded 'the ICC and its collaborators that the case is the biggest threat to Kenya's security, stability and prosperity' (KTN 2016). For the Jubilee Alliance and its supporters the trials of President Kenyatta and his Deputy's in a foreign jurisdiction posed diplomatic and sovereignty dilemmas (Kagwanja 2014).

After the final collapse of the six original Kenyan cases with Sang's and Ruto's mistrial ruling in April 2016, President Kenyatta declared 'the end of Kenya's cooperation with the ICC' in a largely publicised and well attended prayer rally in Nakuru (NTV 2016; KTN 2016). For his part, Ruto reiterated that 'the ICC and Hague issue is permanently closed' (NTV 2016). These pronouncements undermined Kenya's obligations under the Rome Statute, given the ICC's arrest warrants for three Kenyans on crimes against the administration of justice.[47]

The Jubilee Alliance also reignited debates on Kenya's withdrawal from the ICC. For instance, President Kenyatta formally asked Parliament to fast track two pending resolutions that asked his Government to suspend any 'links, cooperation and assistance' (Shiundu 2016, 1). Likewise, in an interdenominational prayer rally in Uasin Gishu, some Jubilee Alliance leaders from the Rift Valley declared that they would continue pursuing Kenya's withdrawal from the ICC and block extradition of suspects wanted for witness interfering (Kimuge 2016).

In sum, as strategic acceptance turned counterproductive in evading accountability for Kenyatta and Ruto due to the ICC's unexpected activity, their efforts shifted to acquiring state power under which they would have leverage on circumventing justice. Subsequently, the Jubilee Alliance opted for strategic non-acceptance to frustrate the ICC's prosecution efforts.

By contrast, CORD's political leaders expressed their acceptance of ICJ in public statements in support of the ICC and rejected the Jubilee Alliance's withdrawal proposals. For example, in a statement posted on his website, social media platforms and newsrooms, CORD's leader, RailaOdinga, chided the Jubilee Alliance's Nakuru prayer rally as 'Uhuru and Ruto's dance on the grave of PEV victims' (Odinga 2016, 1). He also expressed his disappointment with the

[47] See ICC, 2016.

collapse of the ICC trials for 'denying Kenya the only chance it had to end the culture of impunity' (Odinga 2016, 1). Concerned with the plight of victims, he lamented, 'we must moan [sic] the continued lack of justice for those who were killed, the helpless women who were raped and the multitude of persons who were displaced' (Odinga 2016, 1). Similarly, in CORD's Nairobi rally held in parallel to the Jubilee Alliance's Nakuru rally, politicians urged attendees 'to push for justice for [the] 2007 victims' (Ongiri 2016, 1), and asked why the Jubilee Alliance had never prayed for them before (Ogina 2016).

Nevertheless, the actions of political actors in CORD over time reveal hints of strategic acceptance. First, in the immediate aftermath of PEV, Odinga (while Prime Minister in the transitional Government) called for a blanket amnesty for the Rift Valley youth who were in custody for their alleged roles in the violence (Cawthorne 2008).His firm stance on international justice emerged after ICC suspects were made public, although he had also supported calls for a local tribunal. Second, the other two CORD principals, Kalonzo Musyoka and Moses Wetangula (Vice President and Foreign Affairs Minister respectively) were part of shuttle diplomacy to end the Kenyan cases.[48] In the Nairobi rally, CORD also questioned their opponents' sincerity while they also staged prayers for the victims for the first time since 2008.

A CORD official also admits to their acceptance of the Court for political ends,[49] and that its motives were premised on projecting a liberal front; championing international norms and victims' needs. This is against the backdrop of the Jubilee Alliance's chequered record on public international relations (with the ICC cases) and accusations of neglecting victims. A CSO official opines that the opposition strategically accepted the ICC as it elevated their status as people who adhere to international law and fight impunity.[50] Besides, she argues, this resonates well with the people and attracts Western sympathy.

Second, CORD's strategic acceptance stems from the Court's potential role in eliminating political opponents;[51] as a CORD official remarks, 'people in CORD were hanging on the ICC to bar Kenyatta and Ruto from vying, so we could celebrate an easy win'.[57]

[48] On Kenya's shuttle diplomacy to terminate the ICC cases, see for example, Nation, 2011.
[49] Interview with CORD official, Nairobi, 15 February 2016.
[50] Interview with CSO official, Nairobi, 13 February 2016.
[51] This position was articulated by several interviewees across all the actor categories. [57] Interview with CORD Official, Nairobi, 28 September 2015.

In summary, the political leaders in Kenya deviated from the ICC's justice dividends and strategically accepted or rejected it, depending on their prevailing interests and circumstances. The Jubilee Alliance strategically accepted the Court to evade a local tribunal, after which they strategically rejected it to circumvent justice after the ICC's unprecedented activity. For CORD, some leaders accepted the ICC after it named political opponents, while some of its actors embraced the Court after shifting political positions that contradicted their previous allies in the Jubilee Alliance.

4.7 The ICC's effectiveness in conducting investigations and witness protection

The ICC's methods in conducting investigations and protecting its witnesses had an impact on its acceptance across all actor categories in Kenya. With its international stature and position as a court of last resort, the Court is uniquely positioned to demonstrate a capacity that might be absent in local jurisdictions. However, in a key note address at Salzburg Law School, a former ICC judge, Hans-Peter Kaul (2011) highlighted some key challenges facing the Court. First, it relies entirely on state cooperation as it does not have executive power and a police force of its own. Second, it faces logistical challenges in carrying out investigations in dangerous and inaccessible places, given that it is a nascent institution with a small budget and few staff or judges.

In Kenya, there were arguments that the ICC's investigations were not properly conducted, resulting in weak cases and their eventual collapse. As Macharia Gaitho (2016) points out, several Pre-Trial Chamber and Trial Chamber rulings in the cases revealed weaknesses in the prosecution case that were otherwise accommodated because of OTP's complaints about lack of state cooperation. Similarly, Joyce Nyairo (2014, 1) opines, 'the OTP had a moral and statutory obligation to investigate these cases while the Court had oversight responsibility in respect of the prosecutor [...] both of them failed to carry out these duties'. Nyairo also claims that hopes were raised but a remarkable opportunity to deliver justice for the victims was squandered by inept investigations (Nyairo 2014).

At least for poor investigations, several interviewees across all actor categories, including those with consistency and high levels of acceptance, contend that the ICC did not conduct proper

investigations. Notably important in KPTJ's statement after the mistrial ruling was to partially blame it on the OTP for poor investigations:

> 'The OTP must share part of the responsibility for under-investing in documentary and forensic evidence and over-relying on witnesses who could be tampered with, bribed, threatened or disappeared' (KPTJ 2016, 1).

In the same vein, Odinga suggested that 'we all agree that our leaders got caught up in a mixture of botched investigations and subversion of the administration of justice' (Odinga 2016, 1). A victim also expressed disappointment with the ICC investigations, remarking '[w]e have been following The Hague process keenly and we realised the prosecution did not carry out enough investigations' (Daily Nation 2016, 1). Kenyatta, Ruto and their supporters also cited rushed Kenyan cases that also lacked proper investigation or preparation (Kinyanjui 2016).

Several interviewees across all categories also cited the ICC's dismal performance in witness protection, and the OTP claimed that some witnesses were subjected to intimidation while others were bribed to recant their testimonies. The OTP consistently mentioned interference with the prosecution witnesses as a reason for the collapse of the Kenyan cases. In this regard, Nyairo (2014) argues that the ICC's witness management programme deserves audit to investigate allegations that witnesses were sought, bought, coached, in hiding, or had disappeared. Arguing on what the ICC should learn from witness messes, Gabrielle Lynch (2014, 2) opines that:

> 'The ICC needs to reconsider whether and how to use witnesses when it is extremely difficult, if not impossible, to provide adequate witness protection to people whose identities are already known'.

The ICC's inability to conduct proper investigations and protect its witnesses also lowered its acceptance across all actor categories. Indeed, the Presiding Judge in Joshua Sang's and William Ruto's case cited witness interference alongside political meddling as justifications for the mistrial ruling in the last case in the situation of Kenya.

CHAPTER FIVE.

This chapter presents the summary of the major findings, the conclusion derived from such findings of the research and the appropriate recommendations and the way forward.

5.1 SUMMARY

It was established that, violence has been part of Kenya's electoral process since the restoration of multi-party politics in 1991. However, the violence that shook Kenya after 2007 general elections was unprecedented. It was the most deadly and destructive in Kenya. It affect all the counties but two counties felt in both rural and urban parts of the country especially rift valley, western and coastal province.

The ICC was not in position to fight impunity in Kenya due to political interference, political assassination, influence of media, lack of background knowledge of Kenya dialects and historical injustices, land issues, collective punishments and mode of collecting evidence. The situation and the cases within the neighborhood states, threats on eye witnesses.

ICC is an international tool but it was seen in reflection of one angle as a tool to oppress the African leaders only. The situations shows that the most cases are situation are from Africa which means the presumption that it is targeting Africa is true.

It was found that ICC lost its mandate when it failed to fight impunity in Kenya as it was defeated to cater enough evidence to pi on the suspects of the post -election violence in Kenya in 2007

The release of the suspect's cases at The Hague in 2013 was enough turning point to say that ICC lost its mandate and it's better for the Africa states to use local avenues available to fight for impunity.

It was also found that the suspects in Kenya post-election violence were the highly respected personnel's known from the grassroots the sons of the founder fathers of the nation and therefore, they have powers to use any means to stop or to be released out of the case.

That, since independence, the Kenyan politics is played by the majority which are two tribes known as kalenjin and kikuyu. The other tribes were not considered as for example the Luo tribe is termed to be (hawajai korokoro) Kiswahili words meaning they can't fill the bucket of 2kgs in their population.

The killing of eye witnesses and use of money to give falls information which made witnesses to disappear at Hague .the ICC FAILLED TO FIGH IMPUNITY AT LARGE.

5.2 RECOMMENDATION

The constitutional reforms were at the care of implementing some of the aspects recommended in the IREC report. The Kenya promulgated the new constitution in august 2010 however, many key institutional reforms are yet to be undertaken and the violence of 2007 may recur at the future if the status quo prevails.

The national accord recognized that the crisis triggered by the dispute in 2007 presidential election was brought by surface deep-seated and long standing division within the Kenyan societies which if left unaddressed, threaten the existence of Kenya as a unified country.

Democracy is a process and there is a need to implement findings and recommendations especially those addressed in the CIPEV and the IREC reports. These commissions have elaborated findings on the factors that caused election violence and examine the integrity of the electoral bodies in Kenya to conduct elections.

Ethnic politics have been found to greatly impair electoral democracy and as a cause of post-election conflicts. The quest for de-tribalisation threats ethnicity as political pathology to the democratic process, indeed, it can be achieved by adopting electoral system that promote merits as opposed to ethnic patronage.

Re- examination of electoral systems may beginning to de-ethicize politics for example proportional representation based on the party list which emphasized on national outlook as opposed to ethnic blocks and clanism.

Therefore, Kenya needs to establish and adopt a systematic political that address national values. The political parties act should be amended to a disband political affiliation that stem up from tribal notion and policies.

To break the cycle of impunity which is at the heart of the post-election violence it is recommended that Kenya fully co-operate with ICC in its prosecution of those named in the WAKI REPORT as the perpetrators of the 2007 post-election violence and hand over to the ICC prosecutor for trial by doing so, Kenyans would have attained justice and impunity would have been defeated.

Civil awareness must be instituted as a means of immunizing the populace from the manipulative ways of ethic propagandists and opportunistic politicians whose ethos is to keep the masses in a profound ignorance to make them perfect for manipulation and cannot fodder for political mortgage market.

The need to be revision of the existing administrative boundaries and were necessary creation of new boundaries to curb ethnicity which has previously led to ethnic tension and clashes.

ICC should style up and analyses proper forms of collecting evidence and following the protocols without favoring.

ICC should put in place the mechanical instruments and reasonable standards to address on right paths to meet the resolution on the victims and protection of human dignity.

The ICC has body of justice should ensure that impunity is preserved in all states and do what is necessary to maintain peace ascertain justice to people all over the world.

ICC should set up justice branches watchdog's institutions in Africa and other outside states to ease the mode of evidence and rationael on the justice evaluation

There is rotting of justice in the world and the justice temples and office should priorities the human rights than money and materials as justice belong to all persons and all persons belong to God.

5.3 conclusion

In Kenya, the actors expressed consensus on acceptance that places faith on the ICC as a last resort and believe in its potential to prevent the commission of future atrocities. This is a result of the significance of Kenya's ethnicity that predisposes electoral processes to violent conflicts between groups. It has also demonstrated institutionalised impunity for the leaders who orchestrate such violence. Thus, there is no greater impetus to acceptance of ICJ in Kenya than its negative ethnicity that pervades everyday social, political and economic life and assurances of local impunity.

They departed on this consensus given their diversity, competing interests and circumstances, and each category reacted to the ICC in relation to its specific interests and circumstances. Human rights and governance CSOs such as KPTJ demonstrated consistent acceptance of ICJ, seeing the Court as a complementary judicial response in their efforts to improve Kenya's governance and break the cycle of violence and impunity. For victims, though their acceptance of ICJ was consistent with their overall aim of justice for the harm suffered, this vision was distracted by intervening circumstances such as a need to secure basic needs such as shelter, personal safety and compensation, thus they might at times place justice as secondary. For the directly affected Kikuyu and Kalenjin communities, there were moments of non-acceptance that accrued from their interpretation of ICJ vis-à-vis local conflict narratives and political realities. For their part, the political leaders in the Jubilee Alliance and CORD either strategically accepted ICJ for local political manoeuvres or self-preservation, or strategically rejected it.

The ICC's effectiveness in conducting investigations and witness protectionhas also had implications on its acceptance across all actor categories. In the Kenyan situation, themes of poor investigations and witness protection recurred and were cited for reservations on acceptance.

As the Kenyan experience has shown, the ICC has great promise for acceptance in local spaces due to its demonstrable capacity to intervene in intractable group conflicts and prosecute powerful leaders. However, for broad acceptance, the Court has to carefully interrogate social tensions that result in conflicts, assess the powers of alleged perpetrators, and conduct proper investigations and protect witnesses. Although in the short term the Court might experience

challenges in addressing these concerns and thus low levels of acceptance, the long-term effects of peace dividends that come with the Court's interventions could potentially boost its acceptance levels.

The post-election violence in Kenya contributed to the failure of the ICC in fighting impunity. It also exposed the weaknesses in the electoral legislation and brought out level of the democratization process. In short, the violence was a catalyst to reforms and a stabling block to portray the weakness of the ICC as it cannot fight impunity but a mere teasing project for making money and not ensuring justice to persons

By putting the country on the reformatory path, the violence greatly contributed to the growth of electoral democracy as a witnessed in the implementation of the Kenya national dialogue and reconciliation agreement under the establishment of the of the commission of inquiry into post – election violence in Kenya. CIPEV The independence review commission IREC, The boundary review commission and the truth justice and reconciliation commission TJRC

The effect of the ICC Failure to fight impunity contributed a step towards end of impunity in Kenya and other states. The perpetrators were brought before ICC of which they might be same helm of previous election related in 1992, 1997 but ultimately Kenya people did not get justice through ICC because it is not well established on background knowledge and historical injustice in Kenya since independence.

ICC to be sincere has tried its level best but due to what is in this report made it failed to fight impunity in Kenya. It's just a mere rag of the rich and a doll to public, thus its moment for ICC to style up and resorgiment and fight impunity as it was meant for that purpose.

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