

**THE INTERNATIONAL CRIMINAL COURT AND THE PROMOTION OF  
PEACE AND JUSTICE  
CASE STUDY OF KENYA**

**BY**

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**THIS DESERTATION HAS BEEN SUBMITTED TO THE FACULTY OF LAW  
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## DECLARATIONS

I, **VIOLA OGIRE ROGATO**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been dully acknowledged in this dissertation.

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## APPROVAL

This is to certify that this dissertation has been done under my supervision and subsequently approved by me as a University Lecturer and Supervisor.

Ms. Esther Kisubi

Signature



Date



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And last but not least to the Faculty of Law, **Kampala International University** who made me know the true meaning of exploring the heights.

## **DEDICATION**

To my family, my Mother and Brothers whose presence in my life played a big role of ensuring that I finish my studies well without unbreakable obstacles standing on my way.

## **ACRONYMS**

UN- United Nations

ICC- International Criminal Court

PTC-Pre Trial Chamber

TJRC-Truth, justice and Reconciliation Committee

ICJ- international criminal justice

## **LIST OF STATUTES**

**1998 The Rome Statute of the International Criminal Court**

**The Hague statute**

**The Geneva Conventions (Amendment) Act 1998**

## LIST OF CASES

*Prosecutor v. Taylor*, SCSL-03-01-A

*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*  
ICC-01/09-02/11-781

*The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11-291

## **ABSTRACT**

This article investigates on the role played by the International Criminal Court and the promotion of peace and justice in Kenya. It also seeks to see the potholes in the system and give recommendations where needed. Issues such as the post election violence in Kenya have also been discussed. Such includes the problems faced during the elections violence and the solutions that have been used and the ones that have already been used to promote peace and justice. Victims that have been affected during the elections have not been forgotten in this research. This has been discussed as a subtopic in the third chapter of the research. The International Criminal Court has also been looked at in chapter Four. The ICC has faced a lot of problems when trying to help Kenya rebuild itself as a nation, such problems have been looked at in the same chapter four.

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## CHAPTER ONE

### 1.1 Introduction and Background

#### 1.1.1 History of the International Criminal Justice

After the Nuremberg Tribunal, the world began in the 1990's another experience of the international criminal justice with the UN ad hoc Tribunals, conceived as subsidiary bodies of the security Council. This new experience led to the creation of a permanent international body called the International Criminal Court<sup>1</sup>.

The history of the establishment of the International Criminal Court (ICC) spans over more than a century. The "road to Rome" was a long and often contentious one. While efforts to create a global criminal court can be traced back to the early 19th century, the story began in earnest in 1872 with **Gustav Moynier** – one of the founders of the International Committee of the Red Cross – who proposed a permanent court in response to the crimes of the Franco-Prussian War. The next serious call for an internationalized system of justice came from the drafters of the 1919 Treaty of Versailles, who envisaged an ad hoc international court to try the Kaiser and German

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<sup>1</sup> The Challenges facing the international criminal justice regarding fair trial standards Jean Yaovi Degli (Dissertation from Yale University)

war criminals of World War I. Following World War II, the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals.<sup>2</sup>

The **International Criminal Court**<sup>3</sup> (commonly referred to as the **ICC**) is a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression<sup>4</sup> (although jurisdiction for the crime of aggressive will not be awakened until 2017 at the earliest).

### **1.1.2 Crimes within the jurisdiction of the court**

Article 5 of the Rome Statute grants the Court jurisdiction over four groups of crimes, which it refers to as the "most serious crimes of concern to the international community as a whole": the crime of genocide, crimes against humanity, war crimes, and the crimes of aggression. The Statute defines each of these crimes except for aggression.<sup>5</sup> The crime of genocide is unique because the crime must be committed with 'intent to destroy'. Crimes against humanity are specifically listed prohibited acts when committed as part of a widespread or systematic attack directed against any civilian population.<sup>6</sup> The Statute provides that the Court will not exercise its jurisdiction over the crime of aggression until such time as the states parties

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<sup>2</sup> Hauser center for non- profit organization. 'international relations meet international justice'

<sup>3</sup> Article 1 of the Rome Statute establishes the ICC as permanent institution with power to exercise jurisdiction over persons for the most serious crimes of international concern

<sup>4</sup> Article 5 of the Rome Statute

<sup>5</sup> Article 5 of the Rome Statute. Retrieved 20 March 2008

<sup>6</sup> Tamfuh Y.N Wilson (July 2008). "THE INTERNATIONAL CRIMINAL COURT: CREATION, COMPETENCE, AND IMPACT IN AFRICA.". *African Journal of Criminology and Justice Studies* ISSN 1554-3897. Retrieved 26 June 2011

agree on a definition of the crime and set out the conditions under which it may be prosecuted.<sup>7</sup>

In June 2010, the ICC's first review conference in Kampala, Uganda adopted amendments defining "crimes of aggression" and expanding the ICC's jurisdiction over them. The ICC will not be allowed to prosecute for this crime until at least 2017.<sup>8</sup> Furthermore, it expanded the term of war crimes for the use of certain weapons in an armed conflict not of an international character.

Many states wanted to add terrorism and drug trafficking to the list of crimes covered by the Rome Statute; however, the states were unable to agree on a definition for terrorism and it was decided not to include drug trafficking as this might overwhelm the Court's limited resources.<sup>9</sup> India lobbied to have the use of **nuclear weapons** and other **weapons of mass destruction** included as war crimes but this move was also defeated.<sup>10</sup> India has expressed concern that "the Statute of the ICC lays down, by clear implication, that the use of weapons of mass destruction is not a war crime. This is an extraordinary message to send to the international community."<sup>11</sup>

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<sup>7</sup> United Nations Department of Public Information, December 2002. The International Criminal Court. Retrieved 5 December 2006

<sup>8</sup> Official records of the review conference. Retrieved 6<sup>th</sup> of March 2011

<sup>9</sup> United Nations Department of Public Information, December 2002. The International Criminal Court. Retrieved 5 December 2006.

<sup>10</sup> Dilip Lahiri, 17 July 1998. *Explanation of vote on the adoption of the Statute of the International Criminal Court*. Embassy of India, Washington, D.C. Retrieved 31 December 2006.

<sup>11</sup> Dilip Lahiri, 17 July 1998. *Explanation of vote on the adoption of the Statute of the International Criminal Court*. Embassy of India, Washington, D.C. Retrieved 31 December 2006.

Some commentators have argued that the Rome Statute defines crimes too broadly or too vaguely. For example, China has argued that the definition of 'war crimes' goes beyond that accepted under **customary international law**.<sup>12</sup>

The ICC was created by the Rome Statute which came into force on **1 July 2002**. The Court has established itself in The Hague, Netherlands, but its proceedings may take place anywhere<sup>13</sup>. It is intended to complement existing national judicial systems, and may only exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes.

### **1.1.3 Jurisdiction of the court**

#### **1.1.3.1 Territorial jurisdiction**

During the negotiations that led to the Rome Statute, a large number of states argued that the Court should be allowed to exercise universal jurisdiction. However, this proposal was defeated due in large part to opposition from the United States.<sup>14</sup> A compromise was reached, allowing the Court to exercise jurisdiction only under the following limited circumstances:

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<sup>12</sup> Lu Jianping and Wang Zhixiang. "China's Attitude Towards the ICC" in *Journal of International Criminal Justice*, July 2005

<sup>13</sup> Article 3 of the Rome Statute. Retrieved 20 March 2008

<sup>14</sup> Elizabeth Wilmshurst, 1999. 'Jurisdiction of the Court', p. 136. In Roy S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*. The Hague: Kluwer Law International. ISBN 90-411-1212-X

- where the person accused of committing a crime is a national of a state party (or where the person's state has accepted the jurisdiction of the Court);
- where the alleged crime was committed on the territory of a state party (or where the state on whose territory the crime was committed has accepted the jurisdiction of the Court); or
- where a situation is referred to the Court by the UN Security Council.<sup>15</sup>

### **1.1.3.2 Temporal jurisdiction**

The Court's jurisdiction does not apply retroactively: it can only prosecute crimes committed on or after 1 July 2002 (the date on which the Rome Statute entered into force). Where a state becomes party to the Rome Statute after that date, the Court can exercise jurisdiction automatically with respect to crimes committed after the Statute enters into force for that state.<sup>16</sup>

## **1.2 Statement of the problem**

The ICC is giving Kenya too much pressure as a State to answer to the crimes accused against them particularly their leaders. Compare this particular case of Kenya to that of other countries on trial ,like the Liberian case of **Prosecutor** verses **Charles Ghankay Taylor** .Of recent it seems that the major role of the international criminal court is to deal thoroughly

<sup>15</sup> Articles 12 & 13 of the Rome Statute. Accessed 20 March 2008

<sup>16</sup> Article 11 of the Rome Statute. Retrieved 20 March 2008.

with their suspects. Funny though is that most of these suspects come from the African countries. This then raises eyebrows and to questions that most have feared to ask in public. Such as is the international criminal court targeting only African leaders as their prime suspects or is it nothing but mere coincidence?

### **1.3 Purpose of the study**

This study seeks to find out the effectiveness of the international criminal court and its major statute to wit the Rome statute have been in trying to deal with the conflicts in Africa. Kenya being the case study , and the challenges that hinder it from achieving its goals as well as finding out the weakness in the law , for instance how the international criminal court can effectively achieve peace in Africa and Kenya in particular as well as bring to justice the war perpetrators. Hence the major purpose of this research is to analyze the performance of the international criminal court.

### **1.4 Objectives of the study**

#### **1.4.1 General objective**

The general objective of the study is to examine the effectiveness of the International Criminal Court (ICC) in dealing with the post elections violence of the 2007 to 2008 Kenyan elections. It also tries to find out the possible obstacles in the highway such as why most suspects are from Africa.

### **1.4.2 Specific objectives**

1. To examine how the ICC promote peace and justice
2. To examine effects the international Criminal court in Kenya
3. To determine the challenges of ICC in promoting peace

### **1.5 Research Questions**

1. How does the ICC promote peace and justice
2. How has the works of the ICC affected Kenya as a nation
3. What are some of the challenges faced by the ICC in the promotion of peace

### **1.6 Scope of the study**

#### **1.6.1 Time scope**

This research aims at Kenya's progress from the first and famous post elections violence of 2007 to present date.

#### **1.6.2 Content scope**

The research was focused on whether international criminal justice has been served by the International criminal courts in the Kenyan post elections violence of 2007. It also examines if peace has prevailed in Kenya due to the intervention of the ICC.

Arrogance of the respondents towards the researcher was not of benefit. Lack of adequate information due to lack of trust on the researcher hindered the process of collecting data.

## **1.9 Research Methodology**

### **1.9.1 Research Design**

The resource was adopted as case study process whereby qualitative and quantitative methods and data analysis will be used. Quantitative strategy techniques will be used to formulate to numerical data base. Qualitative techniques will be used to collect the attitudes and opinions about the phenomenon being investigated since it is hard to measure it qualitatively.

### **1.9.2 Research Population**

The research was conducted in Kenya as said earlier. A country that lies across the equator in the east-central Africa, on the coast of the Indian Ocean. The research population estimated of an area known to have a population of 43,013,341 people and the growth rate of 2.4 percent.<sup>18</sup>

## **1.10 Data Gathering Procedure**

Data will be collected from the field using both primary and secondary methods of data collection.

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<sup>18</sup> [www.infoplease.com](http://www.infoplease.com)

### **1.10.1 Primary data**

The research will use qualitative techniques of data collection such as interviews and observations. This will enhance the credibility and consistency of data to be collected.

### **1.10.2 Secondary data**

This will involve the use of qualitative techniques of data collection. The researcher will use record information such as newspapers, magazines, books and internet.

## **1.11 Data Analysis**

After collecting the data, the researcher corrected errors that might have been identified and also eliminated the unwanted data. After the errors were eliminated, data was written as topics and sub-topics in the research. Editing was done looking through each field responses from both primary and secondary guides.

## **1.12 Operational Definition Of Key Terms**

**Peace** – a state of public tranquility; freedom from civil hostility or disturbance.<sup>19</sup>

**Justice**- the fair and proper administration of law. Further on justice has been defined as a moral ideal that the law seeks to uphold in the protection of rights and \*punishment of wrongs. Justice is not synonymous with law - it

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<sup>19</sup> Blacks Law Dictionary

is possible for a law to be called unjust. However, English law closely identifies with justice and the word is frequently used in the legal system; for example, in justice of the peace, Royal Courts of Justice, and administration of justice.<sup>20</sup>

**Victim** –the person against whom an incident related to domestic violence, sexual assault or stalking is perpetrated.<sup>21</sup>

**Natural law**- The permanent underlying basis of all law. The philosophers of ancient Greece, where the idea of natural law originated, considered that there was a kind of perfect justice given to man by nature and that man's laws should conform to this as closely as possible. Theories of natural law have been an *important part* of jurisprudence throughout legal history. Natural law is distinguished from **positive law**, which is the body of law imposed by the state. Natural law is both anterior and superior to positive law.<sup>22</sup>

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<sup>20</sup> Oxfords law dictionary

<sup>21</sup> Oregon legislature dictionary

<sup>22</sup> Oxford law dictionary

## 2 CHAPTER TWO

### 2.1 Literature Review

This chapter was discussing on the ideas written by other authors in relation to the promotion of peace and justice by the International Criminal Court. The collection of different authors' ideas does not only deal with ICC in Kenya but it also talks about ICC and its relations with other countries worldwide. It sees on both the theoretical and reviews of related literature.

#### 2.1.1 Theoretical framework

On research on the works of other authors, I have come to read that different authors have different ideas on the promotion of peace and justice by the ICC. Below is some of the literature review I found in my research.

A failure to prosecute may encourage 'vigilante justice', create feelings of distrust towards the new government and the political system, and encourage cynicism towards the rule of law.<sup>23</sup>

Criminal accountability for the perpetrators of mass abuse may, at first glance, appear to be the most appropriate means of achieving some semblance of justice. However, a fledgling democracy, recently arisen from the ashes of gross human rights violations, must also evaluate the risk of

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<sup>23</sup> Luc Huyse, 'To Punish or Pardon: A Devil's Choice' in Christopher Joyner and M Cherif Bassiouni (eds), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17–21 September 1997* (1998) 79, 80–1.

vitiating the stability of the newly democratic or transitional society, and impairing its long-term development.<sup>24</sup>

In the case of Darfur, the relevant question relating to **complementarity** is whether or not national institutions have instituted or will pursue genuine investigations or prosecutions in cases currently under investigation by the ICC. Sudan has adequate international human rights legal standards in its constitution that also mandate legislative reforms to reconcile existing laws with international obligations. Both the 2005 Interim National Constitution (INC) and 2005 Interim Constitution of Southern Sudan (ICSS) mandate the integration of all the rights and freedoms enshrined in the human rights instruments ratified into the Bill of Rights.<sup>25</sup>

## **2.2 The Complimentarity Principle**

The ICC is intended to complement existing national judicial systems, and may only exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes. The current ICC President, **Sang-Hyun Song**, has described the Court as a 'failsafe' justice mechanism which holds that States have the primary responsibility to investigate and prosecute Rome Statute crimes occurring within their jurisdiction.<sup>26</sup>

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<sup>24</sup> David Crocker, 'Reckoning with Past Wrongs: A Normative Framework' (1999) 3 *Ethics and International Affairs* 43, 43.

<sup>25</sup> Suliman Baldo Sudan: "impact of The Rome statute and the international criminal court."2010

<sup>26</sup> Article 17 of the Rome Statute retrieved 20<sup>th</sup> of March 2008

Under the principle of complementarity, States have the right to challenge the jurisdiction of the Court in any case before it or to question the admissibility of a case.<sup>27</sup> In this way, effective and genuine proceedings on the same case by national authorities will serve to prevent further proceedings before the Court. Moreover, in order to grant States the earliest opportunity to exercise their own domestic jurisdiction, article 18 requires the Prosecutor to notify all States Parties and other States that would normally exercise jurisdiction over the crimes concerned of his determination to initiate an investigation, and to defer to investigations undertaken at the national level. Where an investigation is deferred to a State, the Prosecutor may request periodic updates from the State concerned. In order to avoid abuse of the complementarity principle, however, the Statute enables the Court to authorise the Prosecutor to proceed where he can prove a lack of genuineness on the part of the State claiming jurisdiction.

The emphasis of the Rome Statute, thus, is on a presumption towards well functioning national systems and preference for action at the domestic level. As a result, States can, in effect, exercise strong checks over the cases heard before the Court by bringing forward their own genuine national proceedings.

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<sup>27</sup>Articles 17 and 19, ICC Statute

## 2.3 Natural Justice

Natural justice is a technical terminology for the rule against bias (*nemo iudex in causa sua*) and the right to fair hearing (*audi alteram partem*) and the term natural justice is often retained as a general concept, it has largely been extended by the more general 'duty to act fairly'.<sup>28</sup>

The basis for the rule against bias is the need to maintain public confidence in the legal system. Bias can take the form of actual bias, imputed bias or apparent bias. Actual bias is very difficult to prove in practice while imputed bias once shown, will result in a decision being void without the need for any investigations into the likelihood of suspicion of bias.

### 2.3.1 The Principles of Natural Justice

Aristotle notes that **natural justice** is a species of political justice, viz. the scheme of **distributive** and **corrective justice** that would be established under the best political community; were this to take the form of law, this could be called a natural law, though Aristotle does not discuss this and suggests in the *Politics* that the best regime may not rule by law at all.<sup>29</sup>

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<sup>28</sup> English Law

<sup>29</sup> [www.wikipedia.org](http://www.wikipedia.org)

## 2.4 Criminal Law

### 2.4.1 The Principles of Criminal Law Applied By International Criminal Court

#### 2.4.1.1 Principle of Retrospectivity

A legislative act that looks backward or contemplates the past affecting acts or facts that existed before the act came into effect.<sup>30</sup> Kenyatta, along with his running mate William Ruto, is facing crimes against humanity charges at the International Criminal Court (ICC).<sup>31</sup>

#### 2.4.1.2 Principle of legality

The principle of legality or **nullum crimen, nulla poena**, sine lege covers both prohibited criminal conduct (nullum crimen sine lege) and sanctions for it (nulla poena sine lege). In its broadest sense, the principle encompasses the following in respect of criminal provisions

1. The principle of non-retroactivity
2. The prohibition against analogy
3. The principle of certainty
4. The prohibition against uncodified, unwritten or judge made criminal provisions.

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<sup>30</sup> Blacks law dictionary

<sup>31</sup> Section 58(1) of the International Crimes Act

The principle of legality does not bar progressive development of the law, provided that the developed law retains the very essence of the original crime even though not corresponding to every detail of it.<sup>32</sup>

## **2.5 Principles of the Rome Statute Used by the ICC in the Handling of the Post-election Violence In Kenya**

### **2.5.1 Nullum crimen sine lege**

A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.<sup>33</sup> During the 2007 to 2008 post election violence in Kenya a lot of people died. This caught the interest of the ICC which immediately decided to look into the case of the violence.

In 2010, the Prosecutor of the ICC Luis Moreno Ocampo announced that he was seeking summonses for six people: Deputy Prime Minister Uhuru Kenyatta(the current president of Kenya), Henry Kosgey, William Ruto, Francis Muthaura, radio executive Joshua Arap Sang and former police commissioner Mohammed Hussein Ali—all accused of crimes against humanity.<sup>34</sup>

### **2.5.2 Irrelevance of official capacity**

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or

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<sup>32</sup> [www.wikipedia.org](http://www.wikipedia.org)

<sup>33</sup> Article 22 of the Rome Statute

<sup>34</sup> "Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang". International Criminal Court. 15 December 2010. p. 6. Retrieved 2011-07-12.

Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.<sup>35</sup> Deputy Prime Minister Uhuru Kenyatta, Industrialization Minister Henry Kosgey, Education Minister William Ruto, Cabinet Secretary Francis Muthaura, former police commissioner Mohammed Hussein Ali were issued arrest warrant by the ICC despite having governmental post, a true indication that indeed the ICC uses some of the Rome Statute's principle. <sup>36</sup>Radio executive Joshua Arap Sang was also among the six people wanted by the Hague Body of ICC.

### **2.5.3 Duties and powers of the Prosecutor with respect to investigations**

In order to ensure the effective investigation and prosecution of the crimes under the jurisdiction of the Court, the Prosecutor shall "take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children". <sup>37</sup>

### **2.5.4 Protection of the victims and witnesses and their participation in the Proceedings.**

The Rome Statute imposes an obligation on the Court with particular reference to the Prosecutor to take appropriate measures to protect the

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<sup>35</sup> Article 27 of the Rome Statute

<sup>36</sup>"Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang". International Criminal Court. 15 December 2010. p. 6. Retrieved 2011-07-12.

<sup>37</sup> Article 54 of the Rome Statute

safety, physical and psychological well-being, dignity and privacy of victims and witnesses in particular when the crime involves “gender” violence.<sup>38</sup>

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<sup>38</sup> Article 68(1) of the Rome Statute

## **3 CHAPTER THREE**

### **3.1 Procedures used by the ICC in the promotion of peace and justice**

The Rome statute talks on how the ICC promotes peace and justice. Below are some articles that show how they do it.

#### **3.1.1 The Court**

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.<sup>39</sup>

#### **3.1.2 Relationship of the Court with the United Nations**

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.<sup>40</sup>

#### **3.1.3 Seat of the Court**

The Rome Statute further on has articles that continue to explain how the ICC promotes peace and justice in conflict ridden countries. For example:

- The seat of the Court shall be established at The Hague in the Netherlands ('the host State').

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<sup>39</sup> Article 1 of the Rome statute

<sup>40</sup> Article 2 of the Rome statute

- The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
- The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.<sup>41</sup>

#### **3.1.4 Legal status and powers of the Court**

- The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.
- The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.<sup>42</sup>

Anderson, senior researcher with Hague institute for Global justice recently travelled to Al Ain in United Arab Emirates to deliver a lecture on the principles and jurisdiction of the International Criminal Court. The lecture was part of an event on the law and practice of the ICC held on February 19, under the Patronage of H.H Sheikh Nahayan Mabarak Al Nahyan, UAE minister of education and jointly organized by the coalition for the ICC and the United Arab Emirates University. There is growing interest in the Middle

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<sup>41</sup> Article 3 of the Rome Statute

<sup>42</sup> Article 4 of the Rome statute

East in the ICC's work. The Hague institute will provide technical assistance to countries implementing criminal law within their national justice systems through the Model Code for international Criminal Procedure project.<sup>43</sup>

Any state party to the Rome Statute can request the Prosecutor to carry an investigation. A state not party to the statute can also accept the jurisdiction of the ICC with respect to crimes committed in its territory or by one of its nationals and request the prosecutor to carry out an investigation. The United Nations Security Council may also refer a situation to the court. Hence from the above statements I cannot help but ask how else can justice prevail if there is omission of the prosecuting of criminals by the ICC?

### **3.2 The Implication of the International Criminal Court in Kenya**

The international criminal justice is hurting Africa. Britain's support for the international criminal court is wrong and undermines its credibility in African countries.<sup>44</sup>

Imagine the British Government appointed as minister for Africa a man close friends with a mercenary who attempted to overthrow an African President. Imagine this same minister was in support of an international court that, during its nine- year history, had only prosecuted black Africans. Imagine that this courts high-profile case, against the then deputy prime minister of

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<sup>43</sup> [www.thehagueinstituteofglobaljustice.org](http://www.thehagueinstituteofglobaljustice.org)

<sup>44</sup> Courtenay Griffiths on "the international criminal court is hurting Africa"

Kenya had been based solely on evidence from a single witness chosen by associates of his political opponent, the favorite of the British Government.

This is not a **Frederick Forsyth novel**, but the dangerous reality of Britain foreign minister policy towards Kenya. **Henry Bellingham**, our minister for Africa, is close friend of **Simon Mann**; the mercenary who tried and failed to orchestrate a coup in Equatorial Guinea. Mr. Bellingham has supported the law which has only tried African leaders.

Some would argue it reasonable till they look at the case of **Uhuru** the president of Kenya. The case is of serious concern not only because of the lack of evidence against him, but also because of the methods used to obtain this evidence. The ICC did not directly source witnesses for this case, nor has it done so in any other case. Instead it outsourced evidence gathering to local intermediaries. In Kenya his associates happen to be close associates of Raila Odinga, the then prime minister of Kenya and Mr. Kenyatta's long term political opponent. Shouldn't this raise eyebrows as to the validity of the evidence used by the ICC?

### **3.3 Impact of the Rome Statute and the International Criminal Court in Kenya**

Kenya plunged into a dark episode of violence following the controversial presidential election of 2007. This chapter analyses the impact of the investigations into issues of complementarity, peace, justice, victims and

affected communities in the country. It discusses the government's failure to set up a special tribunal for Kenya or to initiate any effective proceedings for the international post election crimes at the domestic level. While the truth, justice and reconciliation commission established to investigate past human rights violations could provide a platform to unearth the truth and identify potential cases for prosecutions, it is unlikely to have the capacity to ensure comprehensive, genuine investigations of alleged perpetrators of post-election violence. Victims and communities affected by the violence have continuously expressed their strong support for the ICC investigations.

As much as people love it when justice prevails in a conflicts ,a threat to potential witnesses remain a critical concern and necessitate the prompt establishment of an effective protection mechanism for witness and victims. Moreover, timely action by the ICC as well as commitment by Kenyan government not only to cooperate with the court but also to establish mechanisms to address all perpetrators locally is imperative to curb entrenched impunity and redress the harm victims have suffered.

### **3.4 The General Role Played By the International Criminal Justice**

International criminal justice has been credited to participate in various conflict ridden areas. Such conflict areas are places such as Kenya, Tanzania, Libya and Uganda.

In Uganda the ICC's intervention is controversial and has prompted criticism from different sides. For instance there is a notion that the ICC imposes a Western notion of retributive justice, which clashes with the local tradition and desire for restorative justice. According to **Katherine Southwick**, the ICC in Uganda is "widely opposed by those groups the Rome Statute is designed to serve the victims."<sup>45</sup>

Though this is just the general role played by the ICJ, the following topics would look at the specific role of the ICJ in Kenya.

### **3.4.1 In the promotion of peace and 'sanity' in Kenya**

'We cannot change the past, but we can change our attitude toward it. Uproot guilt and plant forgiveness. Tear out arrogance and seed humility. Exchange love for hate....thereby making the present comfortable and the future promising.' <sup>46</sup>Words of the famous American poet and writer Nobel peace prize winner, Maya Angelou. Many at times we do not listen to such words that would have helped us avoid conflicts. In my opinion if politics was played fair and square then Kenya would not have had to undergo such difficult and traumatizing era as it did in the 2007 and 2008 post election violence.

Some of the politicians who were involved in the Kenya National Dialogue and Reconciliation Process and the National Accord argue that criminal

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<sup>45</sup>Katherine Southwick, "Investigating War in Northern Uganda: Dilemmas for the International Criminal Court," *Yale Journal of International Affairs* 1 (2005), 105-119, at 113.

<sup>46</sup>Maya Angelou (an American poet) quotes on peace

accountability for the post- election violence will ignite further violence, and that it is important to focus on forgiveness and reconciliation.<sup>47</sup> These statements however appear self-interested, because some of these politicians could be implicated in the violence. The idea is opposed by calls for justice from members of the wider public and to some extent the international community.<sup>48</sup>

The ICC's role is perceived as particularly crucial in regard to balancing peace and justice, since many hope that the accountability for those responsible for past violence will deter future violence during the next elections. It is widely hoped that criminal accountability will end this cycle of violence-keeping politicians from establishing and using militias or their own political gain and manipulating ethnic divides, which creates long term grievances for short term political gains.

### **3.4.2 In helping victims of the post elections violence**

The fact that the prosecutor has for the first time exercised his **proprio motu** powers to open a case in Kenya remains highly significant and demonstrates the Courts ability to come to the aid of victims of international crimes. The lack of effective measures on behalf of the government to address post-election violence further points to the need for ICC involvement in Kenya.

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<sup>47</sup> See "Ruto urges clergy to back reconciliation", The Standard newspaper, online edition, Aug. 3 2009 (<http://www.standardmedia.co.ke/InsidePage.php?id=1144020630&cid=4&>).

<sup>48</sup> *Situation Analysis of Post-election Violence Areas*, South Consulting, May 2009, 26-28. The analysis was conducted through a survey; which found 86 percent of those most affected by post-election violence Favor prosecutions, 53 percent preferring prosecutions at the ICC, and 33 percent prefer the local courts. Only 9 percent felt that suspects should not be prosecuted; 4 percent did not know while one percent refused to answer.

Several public opinion poll undertaken since CIPEV recommendations illustrate overwhelming public support for the ICC, which has been summarized in a well-known chant; **'don't be vague, go to the Hague'** In November 2009, an annual survey by infotrack Research concluded that 62 percentage of Kenyans would like those who committed crimes in the post election violence to be tried at the ICC, while only 2 percentage supported a local tribunal.<sup>49</sup>It is clear that the national judicial system lacks public confidence effectively prosecutes and convicts alleged perpetrators, especially senior political leaders. The main reason why affected populations support the ICC in Kenya is because they presume it will be free from political interference.

These are significant and grave concerns about witness protection in Kenya, especially considering the alleged direct role of the police in the post-election violence.<sup>50</sup> This prompted the prosecutor to urge the government to do more to provide protection to potential witnesses, as the ICC will be dependent on Kenya for such cooperation. To this end, a witness protection bill to amend the Witness Protection Act of 2006 passed in Parliament on April 7 2010. The amendment would establish an independent, autonomous Witness Protection Agency and victims' Trust Fund to provide restitution to victims and their families in case of death. However, the bill is still fundamentally flawed in

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<sup>49</sup>See also the section on Kenya in the OTP Weekly Briefing, Jan. 12-18, 2010, Issue 20 ([www.icc-cpi.int/NR/rdonlyres/BEDF7DF7-76FD-4116-8D08-A92E2454CC9A/281459/OTPWBJanuary\\_Issue20.pdf](http://www.icc-cpi.int/NR/rdonlyres/BEDF7DF7-76FD-4116-8D08-A92E2454CC9A/281459/OTPWBJanuary_Issue20.pdf)) and *Situation Analysis of Post-election Violence Areas*, 19, 26-28.

<sup>50</sup>Several witnesses to the post-election violence have already faced threats and harassment, while two of the witnesses are reported to have been killed following the Prosecutor's request for authorization to institute an investigation.

several key respects.<sup>51</sup> The Witness Protection Act therefore requires additional amendments to ensure effective witness protection in Kenya and will need to be effectively implemented. Moreover, the question of the ICC's ability to provide reparations for the post-election violence is still a key concern, especially with the high expectations the public has vested in the court. The TJRC is mandated to make recommendations for reparation for victims of human rights violations and may well also consider the plight of some of the victims of the post-election violence. As such, the overlap between its mandate and that of the ICC Trust Fund Victims will need additional consideration.

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<sup>51</sup>The current act contains an unacceptably narrow definition of witnesses that does not encompass defense witnesses or individuals working with victims who may also be at risk. In addition, the Advisory Board still comprises of, among others, the National Security Intelligence Service (NSIS) and the police commissioner, which may not reassure witnesses in trials against state agents or politically connected criminals. See the International Commission of Jurists, Kenya (ICJ) critique of the Witness Protection (Amendment) Bill, February 2010 (unpublished).

## **4 CHAPTER FOUR**

### **4.1 Problems faced by the International Criminal Justice in the Creation of Peace and Justice in Kenya**

By way of introduction, let me give a very brief summary of the work of the Court over the last four years<sup>52</sup>On 1 July 2002, the date the Rome Statute entered into force, a so called "ICC Advance Team," composed of the first five members of the staff of the future ICC, entered a completely empty office building in The Hague. Their aim was to start the build-up of the Court. Since then and up to the present day, significant, often enormous, progress has been achieved in the build-up of the ICC, in all key areas—in the Registry, in the Office of the Prosecutor and also in the Chambers. The Court has grown from a small embryonic unit to a newly emerging international organization with a current staff of around 700 and growing fast—sometimes maybe even too fast.

Below are some of the challenges the ICC has faced in the promotion of peace and justice in Kenya.

#### **4.1.1 Interference of the Kenyan government with the procedures of the ICC**

The government of Kenya and the National Assembly both attempted to stop the ICC process. The government appealed to both the United Nations

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<sup>52</sup> See generally Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court after Two Years*, 99 AM. J. INT'L L. 370 (2005); *Breakthrough in Rome—The Statute of the International Criminal Court*, 59/60 LAW AND ST. 114 (1999); *Towards a Permanent Criminal Court: Some Observations of a Negotiator*, 18 HUMAN RIGHTS L.J. 169 (1997).

Security Council and the Court itself regarding the admissibility of the case.<sup>53</sup>

The National Assembly voted in favor of removing Kenya as a state party to the Rome Statute, the international treaty which established the ICC.<sup>54</sup>

#### **4.1.2 Language Barrier between the ICC and the Witnesses**

Another problem that continues to vex the tribunal and delay the process is the multiple languages involved. Most witnesses speak only local languages. This slows down the investigation process as interpreters are used during the interviews so that statements can be recorded in either French or English. These in turn often have to be translated into either language for use in court or at the request of the defence, which may only operate in one language and not the other. Often, nuances are lost in the interpretation and translation process thus potentially distorting what a witness may have said or meant. Court pleadings too, filed in one language will often have to be translated before the other party, usually the defence, can respond, thereby slowing down the process even further.<sup>55</sup>

#### **4.1.3 Witnesses**

The preparation though, and conduct of a trial at the Tribunal is a particularly complex and logistical exercise compounded by the location of the courts away from the scene of crime, Rwanda. Locating witnesses, often in the remotest parts of Rwanda, arranging their travel to and from Arusha

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<sup>53</sup> "Kenya petitions UN organ to delay trials". *Daily Nation*. 10 February 2011. Retrieved 2011-04-30.

<sup>54</sup> "Parliament pulls Kenya from ICC treaty", *Daily Nation*, 22 December 2010, retrieved 2011-04-30

<sup>55</sup> Hassan B. Jallow, CHALLENGES OF INTERNATIONAL CRIMINAL JUSTICE

while ensuring anonymity and personal security in the process requires a lot of coordination, not made any easier by the need to keep defense witnesses separate from prosecution ones and perpetrator witnesses apart from survivors.

## 5 CHAPTER FIVE

### 5.1 Findings

After intensive research, I came to find that the ICC has done a lot to try and ensure that Kenya forgets and look at a brighter future after the dark days of the 2007 post 2008 election violence that led to the, mass killings of thousands of people. Sadly though, the most affected people were the women and children who could neither fight back nor defend their homes from vicious attacks.

Recently the 93 victims who were supposed to stand as witnesses to the case of the Kenyan leaders have decided to withdraw from the case saying that they do not see the effect of the trial proceedings on them.

### 5.2 Recommendations and Conclusions

This chapter presents the general conclusions and recommendations made base on the objectives of the study and data collected by the researcher.

#### 5.2.1 Recommendations

Rather than placing peace and justice as opposing aims in situations of conflict, the discussion should be framed as 'peace *with* justice'. This provides scope for considering not only the issue of timing and sequencing (*when* to deploy the varying mechanisms of justice and of peace) but equally important, *what form* these mechanisms should take. Justice in this context is clearly not only about the ICC –rather it includes restorative justice mechanisms (truth commissions), regional and sub-regional judicial

institutions (like the SADC Tribunal, East African Tribunal, and the various regional structures like the African Court), and domestic mechanisms (special tribunals such as that proposed by the Waki Commission, national courts and appropriate traditional justice mechanisms).<sup>56</sup>

Contribute to the process of consultations with victims and affected communities on restorative justice policies that promote reconciliation, while maintaining that government has the primary responsibility for this.<sup>57</sup>

Implement programmes that would educate the electorate on importance of free, fair and peaceful elections, and take necessary measures to dispel fears of recurrence of violence. In this vein, guarantee free, fair and peaceful elections, to counteract violence stemming from flawed electioneering procedures and practices.

### **5.2.2 Conclusions**

After the intense research done on whether peace and justice was promoted in Kenya or not, it is my conclusion that the International Criminal Court has ensured the adequate provision of Justice and Peace in Kenya.

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<sup>56</sup> Waki commission report

<sup>57</sup> Annotated agenda for the Kenya National Dialogue and Reconciliation, Nairobi, Kenya, 1 February 2008.

### 5.3 Research questionnaire

1. Can the ICC be used as an instrument in promoting peace and justice?-----  
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2. Has the ICC done enough to protect the victims and the witnesses of the post election violence in Kenya ?-----  
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3. What do you think the ICC can do to ensure mutual cooperation form both the accused and Victims of the violence-----  
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4. Is the ICC targeting Africans only?-----  
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