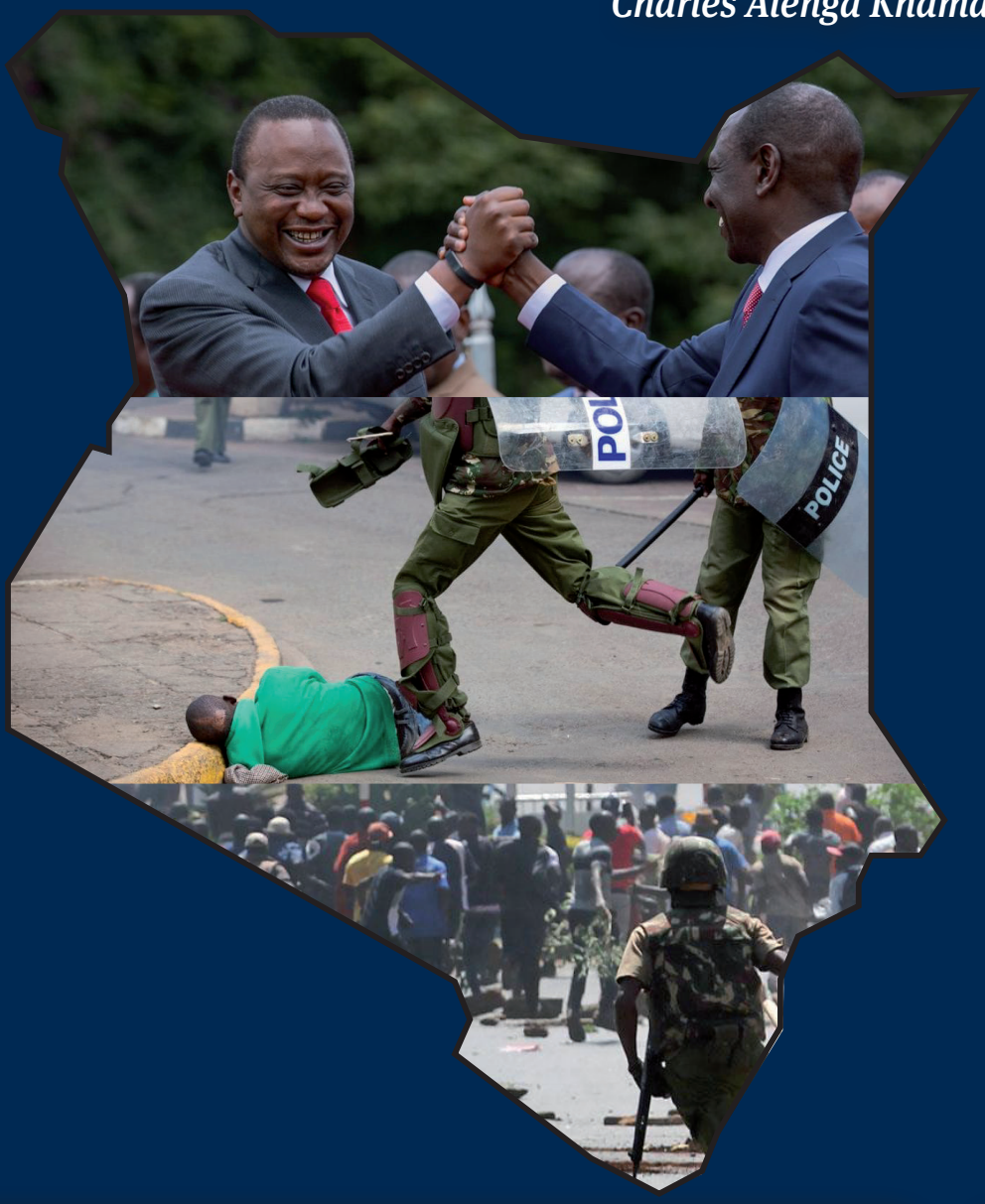
Crimes against Humanity in Kenya's Post-2007 Conflicts: A Jurisprudential Interpretation

Charles Alenga Khamala



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FOREWORD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dedication

For C. D. N.

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

A Jurisprudential Interpretation

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

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

About Author

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

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

ACKNOWLEDGEMENTS

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

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

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

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

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

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

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

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

C.A.K.

CONTENTS PAGE

TABLE OF CONTENTS

LISTS OF TABLES AND APPENDICES

TABLES

TABLE OF STATUTES

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

Attorney General's Act no. 49 of 2012.

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

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Republic v Joseph Lokuret Nabanyi, Nakuru High Court HCCR 40/08.
Republic v Paul Kiptoo Barno James Yator Korir and Isiah Kipkorir Leting: The Killing of Benedict Omolo and Elias Wafula Wakhungu, Eldoret Magistrate's Court, CR 387/08.
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ABBREVIATIONS

AC ..... (ICC) Appeals Chamber

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

AfriCog ..... African Centre for Open Governance

AG ..... Attorney General

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

ARK ..... Autonomous Region of Krajina

ASP ..... Assembly of States Parties

AU ..... African Union

BVR ..... Biometric Voter Registration

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

CA ..... Court of Appeal

CIL ..... Customary International Law

CJ ..... Chief Justice

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

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

CORD ..... Coalition for Reform and Democracy

COTU ..... Central Organisation of Trade Unions

CR ..... cosmopolitan rights

DPP ..... Director of Public Prosecutions

DTL ..... Domestic Tort Law

EA ..... East Africa

EAC ..... East African Cooperation

ECK ..... Electoral Commission of Kenya

EHCR ..... European Court of Human Rights

EU ..... European Union

EVID ..... Electronic Voter Identification system

FE ..... The Far East

FRPI ..... Patriotic Resistance Force in Ituri

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

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

INTRODUCTION

KENYA'S POST-CONFLICT JURISPRUDENCE

0.1. Transitional Justice and Ethnic Conflicts

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

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

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

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

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

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

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

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

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

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[6] Xan Rice and David Batty *et al*., "Opposition to Resume Protests after Kenya Talks Fail," *The Guardian* 11th January 2008.

[7] "Kenya's Reality Check as Annan Jets in," *The East African Standard*, 23rd January, 2008; see also *KTN Jioni*, *post* p 68.
allafrica.com/stories/200801221259.html <accessed 14th September 2014>

[8] National Accord and Reconciliation Act no. 3 of 2008.

[9] *The Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007* (The Government Printer, Nairobi, 2008)(20th October 2008)(Hereafter *the Kriegler Report*); See Appendix IV.

[10] Truth, Justice and Reconciliation Commission Act no. 6 of 2008, to investigate historical injustices, including gross human rights violations, in Kenya between 12th December 1963 and 28th February 2008 *supra* note 10.

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

[12] *The Judicial Commission of Inquiry into Post-Election Violence* (The Government Printer, Nairobi, 2008). (Hereafter *the Waki Report*).

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

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

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

[14] International Criminal Court Statute of Rome 1998, the text of the Rome Statute circulated as document A/CONF.183/9 of 17th July 1998 and corrected by *process-verbaux* of 10th November 1998, 12th July 1999, 30th November1999, 8th May 2000, 17th January 2001 and 16th January 2002. The Statute entered into force on 1st July 2002. http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

[15] *Ibid.* article 1 <accessed 9th February 2013> (hereafter Rome Statute).

[16] George P. Fletcher, "Justice and Fairness in the Protection of Crime Victims," in Christopher Russell (ed.) *George Fletcher's Essays on Criminal Law* (New York: Oxford University Press, 2013) 254-263.

[17] Fourth paragraph of the Rome Statute, *supra* note 14.

[18] *Ibid.*

[19] *Ibid.*

[20] Thabo Mbeki and Mahmood Mamdani, "Courts Can't End Civil Wars," *New York Times*, 5th February, 2014 (hereafter the Mbeki-Mamdani thesis).

[21] First paragraph, Rome Statute, *supra* note 14.

[22] Mbeki and Mamdani, "Courts Can't End," *supra* note 20.

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

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

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

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

0.1.2. The Rome Statute's Complementary Role

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

[30] Ruti G. Teitel, *Transitional Justice* (Oxford University Press, New York, 2000); See also Thomas Obel Hansen, "Transitional Justice: Toward a Differentiated Theory" (2011) *Oregon Review of International Law*, 13, 1-46.

[31] Sikkink, *The Justice Cascade*, supra note 26; See also Olsen, Payne and Reiter, *Transitional Justice, supra* note 29.

[32] Jens David Ohlin, "Peace, Security, and Prosecutorial Discretion" in Carsten Stahn and Göran Sluiter (eds.) *Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff, 2007) 185-207.

[33] Luis Moreno-Ocampo, *The Nairobi Star* April 2013; See also Michela Wrong, "Indictee for President!" 11th March 2013, http://latitude.blogs.nytimes.com/2013/03/11/being-prosecuted-by-the-i-c-c-helped-uhuru-kenyattas-chances-in-kenyas-election/<accessed 25th September 2014>

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

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

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

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

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[34] *Ibid*. p. 7

[35] N. Cheeseman, G. Lynch and J. Willis (2014) "Democracy and its Discontents: Understanding Kenya's 2013 Elections," *Journal of Eastern African Studies,* 8 (1), 2-24, pp 3-4.

[36] Suzanne Mueller, "Kenya and the International Criminal Court (ICC) Politics, the Election and the Law" (2014) *Journal of East African Studies*, 8:1, 25-42 p 35 (footnote omitted).

[37] Stephen Brown and Rosalind Raddatz, "Dire Consequences or Empty Threats? Western Pressure for Peace, Justice and Democracy in Kenya" (February 2014) *Journal of Eastern African Studies*, 8, 1, 43-62 p 52.

[38] Thomas P. Wolf, "Immunity or Accountability? Daniel Toroitich Arap Moi: Kenya's first Retired President" in Roger Southall and Henning Melber (eds.) *Legacies of Power: Leadership, Change and Former Presidents in African Politics* (Uppsala: Nordic Africa Institute, 2006) 197-232 p 207.

[39] Niklas Luhmann, *Law as a Social System*, translated by K. A. Ziegert; F. Kastner, R. Nobles, D. Schiff, and R. Ziegert (eds.) (Oxford: Oxford University Press, 2004 [1993]).

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

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

0.2. Balancing Peace and Justice

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

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

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

0.3. Using Criminal Trials to Complement Political Responses

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

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

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

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

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

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

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

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

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

0.4. The Rights of Nations

0.4.1. The Right to Self-Determination

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

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

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

0.4.2. Anti-Realism

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

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

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

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

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

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

0.4.3. Anti-Cosmopolitanism

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

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

[62] Fletcher and Ohlin, *Defending Humanity, supra* note 49 p140.
[63] Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (London; New York: Allen and Unwin; Macmillan, 1917) AK/III367.
[64] Rawls, *Law of Peoples, supra* note 55 p 119.
[65] *Ibid.* pp 32-3, 40.

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

0.4.4. Cultural Relativity

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

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

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

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

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[66] The Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10th December 1948 at the Palais de Chaillot, Paris, France, http://legal.un.org/avl/ha/udhr/udhr.html<accessed 1st May 2011>

[67] International Covenant on Civil and Political Rights, Gen Ass.res. 2200A (XXI) 16th December 1966 entry into force 23rd March 1976, in accordance with article 49, http://www1.umn.edu/humanrts/instree/b3ccpr.htm<accessed 1st May 2011> See also the International Covenant on Economic, Social and Cultural Rights, UN General Assembly, 16th December 1966, entry into force 3rd January 1976, in accordance with article 27. Kenya has ratified both.

[68] Rawls, *Law of Peoples, supra* note 55 p 59.

[69] *Ibid.* pp 67.

[70] *Ibid.* pp 75-8.

[71] *Ibid.* p 120.

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

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

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

> Currently there is talk of Ruto being Uhuru's running mate. So either the opinion polls are flat out wrong and Kenyans are going to deal a decisive blow to end impunity by choosing the path of peace and prosperity and rising

[72] *Ibid.* pp 105-6.
[73] *Ibid.* p 120.
[74] Rawls does not mention the African (Banjul) Charter on Human and Peoples' Rights, adopted 27th June, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

> above ethnic politics or the popularity of Uhuru and Ruto is real. If the latter, then we are on our way to becoming a pariah state.[75]

0.4.5. Rejecting "Universal" Human Rights

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

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

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

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

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

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[75] Nathan Wangusi, "Kenya: 2013 Election Will Be a Referendum on Integrity" *Pambazuka News*, 25th October 2012 http://allafrica.com/stories/201210260806.html<accessed on October 16th 2013>

[76] Rawls, *Law of Peoples, supra* note 55 p 39.

[77] *Ibid.* p 37.

0.4.6. Criticism of Rawls's Law of Peoples

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

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

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

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

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

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

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

0.5. Three Concepts of the International Relations System

0.5.1. International Realism

0.5.1.1. Legal Positivism and Legal Dualism

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

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

0.5.1.2. The State Sovereignty Model

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

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

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

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

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

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

Conversely:

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

0.5.2. Universalism

0.5.2.1. International Natural Law and Legal Monism

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

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

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

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

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

0.5.2.2. The Human Rights/Cosmopolitan Rights Model

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

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

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

0.5.2.3. Neoliberal Institutionalism and an Atrocities Regime

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

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

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

0.5.3. Globalization

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

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

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

Hegemony: Cooperation and Discord in the World Political Economy (Princeton: Princeton University Press, 1984); Robert Keohane, *Neorealism and Its Critics* (New York: Columbia University Press, 1986); Robert Keohane, *International Institutions: Two Approaches* (December 1988) *International Studies Quarterly*, 32, 4, 379-396, cited in Christopher K. Lamont, *International Criminal Justice and the Politics of Compliance* (London: Ashgate, 2010) p 14.

[104] Kenneth W. Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts" (1999) *American Journal of International Law*, 93, 361-379; Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals" (Summer 2001) *International Organization*, 55, 3, 659-91 cited in Lamont, *ibid.*

[105] Andrew T. Guzman, "A Compliance-Based Theory of International Law" (2002) *California Law Review*, 90, 1826-1887, p 1826, cited in Lamont *International Criminal Justice, supra,* note 103 p 15.

[106] Lamont *ibid.* p 16.

[107] Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) p 8.

[108] *Ibid.* p 9.

[109] *Ibid.*

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

0.5.3.1. The Information Age and International Criminal Justice

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

0.5.3.2. Communitarianism, Republicanism and Cosmopolitan Pluralism

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

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

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

0.5.3.3. The Domestic Tort Law Model

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

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

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

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

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

0.5.3.4. Communitarian Criticisms of the Rome Statute

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

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

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

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

0.6. Evolution of Crimes Against Humanity

0.6.1. Origins of Ethnic Cleansing in Kenya

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

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

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

However, because "such grave crimes threaten the peace, security and well-being of the world" therefore in 1999, Kenya had signed and in 2005, ratified the Rome Statute establishing a permanent International Criminal Court, based at The Hague. The Statute's preamble[129] is further, "mindful of victims of unimaginable atrocities that deeply shock the conscience of humanity." Therefore "the most serious crimes of concern to the international community as a whole must not go unpunished." While it provides that "their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation," nevertheless, the ICC remains "complementary to national criminal jurisdictions."

0.6.2. Ingredients of Crimes Against Humanity

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

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

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

0.6.3. Jurisdictional Triggers

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

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[136] Article 14, Rome Statute, *supra* note 14.

[137] *Prosecutor v Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06-2842 14-03-2012 1/624 5 International Criminal Court, Trial Chamber I, 14th March 2012.
https://www.scribd.com/doc/.../International-Criminal-Court-Dyilo-case<accessed on 3rd June 2013>

[138] Article 13(b), Rome Statute, *supra* note 14.

[139] The Charter of the United Nations was signed on 26th June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24th October 1945.
http ://www.un.org/en/documents/charter/intro.shtml<accessed 25th September 2014>

[140] *Prosecutor v. Omar Hassan Ahmad Al Bashir* case no. ICC-02/05-01/09 International Criminal Court, Pre-Trial Chamber I.
http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx<accessed 25th September 2014>

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

Mbuthi Gathenji explains that the Waki Report:

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

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

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

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

0.6.4. Admissibility

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

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

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

0.6.5. Between Judicial Conservatism and Progressivism

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

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

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

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

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

0.7.1. Sequencing

Thomas Carothers explains:

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

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

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

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

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

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

0.7.2. Some Dilemmas of International Prosecution

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

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

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

0.7.3. Between Judicial Conservatism and Progressivism

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

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[165] Declan Roche, "Truth Commission Amnesties and the International Criminal Court*"* (2005) *British Journal of Criminology*, 45, 565-581.

[166] Elizabeth Stanley, "Truth Commissions and the Recognition of State Crime" (2005) *British Journal of Criminology*, 45, 4, 582-597.

[167] "Mutahi Ngunyi Predicts a Jubilee Alliance Win – The Tyranny of Numbers (Hypothetically)" http://kenyapolitical.blogspot.fr/2013/02/mutahi-ngunyi-predicts-jubilee-alliance.html<accessed 4th October 2013>

[168] "Is the 'Tyranny of Numbers' Just a Hoax?" *The Nairobi Star,* 16th February 2013. <accessed September 25th 2014>

[169] Schiff, *Building the International*, *supra* note 107.

[170] Guzman, "A Compliance-Based Theory," *supra* note 105.

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

0.8. Law as Interpretation

0.8.1. Key Terms and their Application

0.8.1.1. Key Terms

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

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

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

0.8.1.2. Application of Terms

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

0.8.2. Conceptual Justifications for Hard Cases

0.8.2.1. Within the Penumbra of the Rule

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

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

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

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

0.8.2.2. The Consequentialist Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[195] Jens David Ohlin, "Organizational Criminality," in Elies Van Sliedregt (ed.) *Pluralism in International Criminal Law* (Oxford University Press, Forthcoming) 107-127. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2153818<accessed 24th May 2014>

[196] *Ruto Pre-Trial Chamber,* Confirmation of Charges decision, 23rd January 2012, dissenting Judge Hans-Peter Kaul.

[197] *Kenyatta Pre-Trial Chamber,* Confirmation of Charges decision, 23rd January 2012, dissenting Judge Hans-Peter Kaul.

[198] Sadat, "Crimes Against Humanity," *supra* note 193 p 335.

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

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

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

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

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

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

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

[203] Osiel, *Mass Atrocity, Collective Memory, supra* note 164; as distinct from Mark Osiel, *Making Sense of Mass Atrocity* (New York: Cambridge University Press, 2009).
[204] *Ruto Appeals Chamber*, *supra* note 226.
[205] *Ruto Pre-Trial Chamber supra* note 232.
[206] *Kenyatta Trial Chamber,* Majority Judges Kuniko Ozaki and Chile Eboe-Osuji, *The Situation in the Republic of Kenya In the Case of The Prosecutor v Uhuru Muigai Kenyatta the Kenyatta Case*. ICC-01/09-02/11, Public Redacted Version of "Defence Application Pursuant to Article 64(4) for an Order to Refer Back to Pre-Trial Chamber II or a Judge of the Pre Trial Division the Preliminary Issue of the Validity of the Decision on the Confirmation of Charges or for an Order Striking Out New Facts Alleged in the Prosecution's Pre-Trial Brief and Request for an Extension of the Page Limit Pursuant to Regulation 37(2)," 7th February 2013; (hereafter Decision on Defence Application pursuant to Article 64(4) and Related Requests 26th April 2013). http://www.icc-cpi.int/iccdocs/doc/doc1585619.pdf<accessed 8th July 2014> See also Judge Wyngaert concurring opinion *supra* note 202.

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

0.10. Neither Quantitative nor Qualitative Explanations

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

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

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

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

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

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

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

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

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

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

Therefore:

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

Instead:

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

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

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[213] Rob Watts, Judith Bessant and Richard Hil, *International Criminology: A Critical Introduction London* (New York: Routledge: Taylor & Francis Group, 2008).
[214] Olsen, Leigh and Reiter, *Transitional Justice, supra* note 29.
[215] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008); See also Jon Elster, *Closing the Books: Transitional Justice in a Historical Perspective* (UK: Cambridge University Press, 2004).
[216] Solum, "Unity of Interpretation," *supra* note 173 p 571.
[217] *Ibid.* p 572.

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

0.11. Compensate or Co-operate

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

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

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

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

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

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

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

0.12. Between Internal and External Shaming

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

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

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

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

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

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

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

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

0.13. Conclusion

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

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

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

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

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

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

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

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

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

Charles Alenga Khamala

In 2012, the International Criminal Court confirmed trials against four suspects for bearing the greatest responsibility for crimes against humanity perpetrated during Kenya's post-2007 election violence. In 2016, however, the Office of the Prosecutor withdrew all charges, decrying intolerable interference and political meddling in Deputy President William Ruto and journalist Joshua Sang's cases. In President Uhuru Kenyatta's case, the Court ultimately referred the government to the Assembly of State Parties for failing to cooperate with her investigations. The decision to prosecute has sparked outcry from some African countries, not only because the evidence is thin, or even since the suspects are senior leaders enjoying political power, but alleging selective justice. Suspects from strong Western countries tend to be overlooked. This book evaluates the ICC's controversial decisions conferring its jurisdiction over the situation in Kenya, confirming the charges and even compelling unwilling witnesses to appear and testify. It is true that in 1999 Kenya ratified the Rome Statute through which the international community seeks to promote retributive justice to hold leaders accountable and punish mass atrocities. However, in the context of transitional justice, domestic authorities preferred to respond to the alleged mass atrocities through structural reforms. Indeed, two ICC indictees, Kenyatta and Ruto won the 2013 presidential elections, indicating that the local public lacks confidence in the Hague process. From a practitioner's perspective, this book demonstrates the sociopolitical, cultural and contextual background which caused the ICC's legitimacy crisis. It is a must read for international criminal lawyers, policymakers, scholars, and other stakeholders.

Dr. Charles Alenga Khamala, Ph.D. (UPPA), LL.M. (London) and LL.B. (Nairobi) was Andrew W. Mellon Postdoctoral Fellow at Rhodes University, 2016 and KU Leuven Visiting Scholar, 2018. Having commenced at Kabarak University, he is currently a Senior Lecturer at Africa Nazarene University Law School, while practising as an advocate of the High Court of Kenya, is on the List of Counsel of the ICC, UNMICT, ACHPR, ICCBA, ADC-ICT, ILA, ICJ (K), WSV, LSK, EALS; alumni of AFRAKEN and Chevening (K).

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