

THE AU AND ICC'S DISAGREEMENT OVER THE 2007/8
KENYA'S POST-ELECTION VIOLENCE: A CHALLENGE TO
POST CONFLICT RECONSTRUCTION IN AFRICA

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Dissertation submitted in fulfilment of the requirements for the degree
of Master of Social Sciences in Conflict Transformation and Peace
Studies in the School of Social Science, University of KwaZulu-Natal

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November, 2014

DECLARATION

I **Joseph Makanda** declare that;

1. The research reported in this dissertation, except where otherwise indicated, is my original research.
2. This dissertation has not been submitted for any degree or examination at any other university.
3. This thesis does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
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DEDICATION

This treatise is in memory of men, women and children who had to lose their lives during the 2007/8 PEV in Kenya. Unto your lives, strategies are being put in place to bring closure to a culture of impunity and deliver justice in Kenya and the rest of Africa.

ACKNOWLEDGEMENT

As a free thinker I am deeply indebted to that which makes me think- the found of human knowledge as it enabled me to complete this dissertation.

My heartfelt gratitude goes to my father Mr Indumuli Nicholas(RIP) and my mother Pascalia Abuna for your her deep love and support throughout my education.

To my Supervisor, Mr Mark Rieker, I am thankful for your material, time, advice and for your meaningful suggestions. Without your contributions, this dissertation would have lacked quality and readability.

Special thanks to my Girlfriend, Faraja Mboya. Faraja, *Asante Sana* for your constant kind words and support that you gave me during the writing and completion of this dissertation. To all my dear friends whom I will not be able to mention in this Acknowledgement, I am grateful for your care and concern on how my dissertation was going on.

I am indebted to Mpatso Moses Kaufulu and Emmanuel Matambo for editing this dissertation. You ensured that this dissertation reached the required standard of English that it deserved, *Zikomo Kwambiri Madala*

I cannot miss the opportunity to thank the postgraduate administrative staff of the school of Social sciences, Nancy Mudau and Tenji Duma. You never relented my unending questions and visits to your offices, *Ngiyabonga Khakhulu*. I also take this opportunity to all my former lecturers and fellow students.

Finally, it is my wish that the ICC and the AU for whom this dissertation is written, will overcome their disagreements by relooking at ethnic composition and disparities in resolving the 2007/8 Post-election violence in Kenya. By focusing on Uhuru Kenyatta and William Ruto, the ICC and the AU will not address post-conflict reconstruction of Kenya

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ABBREVIATIONS

ACJHR- African Court of Justice and Human Rights

AMICC- American Non-Governmental Organisation Coalition for the International Criminal Court

AU- African Union

AUCA- African Union Constitutive Act

AUPSC- African Union Peace and Security Council

CAR- Central African Republic

CIPEV- Commission of Inquiry into Post-Election Violence

CORD- Coalition for Reforms and Democracy

DRC- Democratic Republic of Congo

ECOWAS- Economic Community of West African States

FDLR-FCA- *Forces Démocratiques pour la Libération du Rwanda - Forces Combattantes Abacunguzi*

FNI- National Integrationist Front

FPLC- Patriotic Force for the Liberation of Congo

HRW- Human Rights Watch

ICC- International Criminal Court

ICGLR- International Conference for the Great Lakes Region

ICTYR - International Criminal Tribunal for Yugoslavia and Rwanda

IDP- Internally Displaced Persons

IIEC- Ivoirian Independent Electoral Commission

ILC- International Law Commission

IMF- International Monetary Fund

IOM- International Organization for Migration

JEM- Justice and Equality Movement

KADU- Kenya African Democratic Union

KANU- Kenya African National Union

KNAR- Kenya National Accord and Reconciliation

KNCRH- Kenya National Commission on Human Rights

LRA- Lord's Resistance Army

MRC- Mombasa Republic Council

NARC- National Rainbow Coalition

NATO-North Atlantic Treaty Organisations

NGO- Non-governmental Organizations

ODM- Orange Democratic Party

PCPB- Post-conflict Peacebuilding

PCPBR- Post-conflict Peacebuilding and reconstruction

PEV- Post-election Violence

PNU- Party of National Unity

SRLDRC- South Africa's Regional and Local Dispute Resolution Committee

TRC- Truth and Reconciliation Commission

UN- United Nations

UNDP- United Nations Development Program

UNESCO- United Nation Education Scientific and Cultural Organisation

UNSC- United Nations Security Council

UPC- Union of Congolese Patriots

USA- United States of America

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ABSTRACT

Ever since the unprecedented post-election violence that rocked Kenya in 2007/8, a lot of ink has been poured in explaining its causes and how to avert future recurrence of similar violence in Kenya. To-date, many commentators have turned their attention to the AU's discontent on the ICC process in post-2007/8 Kenya. However, what has conspicuously moot in their literature is the impacts of the AU and the ICC's disagreement on post-conflict peacebuilding and reconstruction. In one way or another, many analysts have either faulted/supported the AU or the ICC. This study seeks to fill in the gaps left in the existing literature by analysing the lingering threats of the AU and the ICC disagreement on post-conflict peacebuilding and reconstruction in Kenya. This study acknowledges that neither the rectificatory justice that the ICC seeks to promote nor the alternative solution that the AU suggests (withdrawal or deferral of the cases facing Kenya's president Uhuru Kenyatta and his deputy William Ruto at the ICC) can sufficiently address post-conflict peacebuilding and reconstruction in Kenya. The study argues that the causes of the 2007/8 PEV are rooted in a history of social, economic and political exclusion of other tribes practiced by all post-colonial regimes: use of tribalism in appropriating privileges to tribes affiliated to the presidential office. What transpired during the 2007/8 PEV underscores that violence is a process, not an event. Although violence may be unprecedented, it is a product of a history of actions and decisions of political process.

In offering an attempt of addressing the causes of the 2007/8 PEV, firstly, the study sees both the approaches of the AU and the ICC as lacking. In doing so, the study warns that by maintaining their functional based stands, the AU and the ICC are inflaming and widening ethnic disharmony, discord and polarization in Kenya. Secondly, by problematizing the usefulness of the AU and the ICC (function-based institutions) in post-conflict peacebuilding, the study through *negative-positive peace and horizontal inequality frameworks* argues that the AU and the ICC stands on post-2007/8 PEV Kenya are tenable, if and only if, the ethnic division, polarisation, politics of domination and seclusion, land injustices and poor governance in Kenya need to be addressed.

The study proposes addressing ethnic inequalities, politics of domination and seclusion, land injustices and discriminatory governance, healing of the ethnic hostilities as the most effective approaches of mitigating the simmering cauldron of election-related violence in Kenya

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CHAPTER ONE

INTRODUCTION, BACKGROUND AND RESEARCH OUTLINE

1. Introduction and background to the study

A universal challenge faced by post-conflict societies from the post-communist states of Eastern Europe to the post-dictatorship states of South America and post-apartheid South Africa, amongst others, is how to bring effective closure to the era of repression (McLean and McMillan 2009). The challenge is how to go about the peacebuilding process – which is a very delicate, multifaceted and complex exercise. This entails finding or devising strategies or mechanisms that would bring justice to the perpetrators and victims of violence alike and ensure that society moves on. That is, to bring the perpetrators to account for their actions and heal the wounds of the victims (Wallenstein, 2011:8). There is no one-size-fits-all strategy in dealing with post-conflict situations. This being the case, strategies used to bring closure and deliver justice must be sensitive to the unique conditions or circumstances prevailing in the society in question. Different mechanisms like tribunals, truth commissions and judicial hearings have been employed by various post-conflict societies with varying degrees of success in addressing the need for justice. As such, in most cases more than one strategy is employed which attests to the variegated nature of peacebuilding exercise (Reychler and Colorado, 2001:12).

Against this background, this study focuses on the application of justice in Kenya vis-à-vis the differences between the ICC and AU over the handling of 2007/8 post-election violence (PEV) in that country.¹ In post-2007/8 PEV Kenya, Rabkin (2010 cited in the *Business Daily*, July 20, 2010) argues that the former coalition government of Kenya was reluctant to form a tribunal to prosecute the suspected perpetrators of the 2007/8 PEV. This was attributed to the complications which arose as a result of the machinations of high profile politicians who were implicated in the case, bent on frustrating the efforts of judiciary and the police. Also,

¹ Kenya is a post-conflict country in that it is still recovering from the 2007/8 post-election violence (PEV). The 2007/8 PEV threatened the peace and human security of Kenya and neighbouring countries. It left over 1000 people dead and over 600 000 people internally displaced (IDP). Other effects of this violence were economic stagnation, destruction of private property and infrastructure. It also left Kenyans divided along social, ethnic and party lines.

there was lack of faith by both the perpetrators and victims of 2007/8 PEV in the local judiciary's capacity to handle the matter competently: both parties preferred the ICC.

Just like it did in the Democratic Republic of Congo, Ivory Coast, Uganda and Sudan, the ICC is currently prosecuting the Kenyan President, Uhuru Kenyatta, and his deputy, William Ruto (Arieff and Coen, 2013). The Kenyan duo is alleged to have had a hand in the crimes against humanity committed during the 2007/8 post-election violence (Rabkin, 2010). However, the ICC's actions in Kenya have drawn sharp criticism from the African Union (AU).

In consecutive summits held in October 2013 and June 2014, the AU insisted that the ICC should withdraw or defer the cases facing Uhuru and Ruto. The continental body argued that the court's involvement would undermine Kenya's sovereignty and hamper its progress towards reconciliation, stability and reconstruction. The AU expressed concern that the ICC's actions would destabilize Kenya and argued that the court was furthering the agenda of the West (Patel, 2013). The AU also used the Kenyan situation to question why the ICC is yet to take action in Iraq, Sri Lanka and Syria (Gatehouse, 2013 in BBC News, September 5, 2013).

As a way of maintaining stability and continuity in post-conflict African states, the AU suggested that the ICC should not prosecute any sitting head of state, government or anybody acting or entitled to act in such capacity. The AU argued that this non-prosecution of heads of state or senior government officials would be a way of safeguarding the constitutional order, stability and integrity of member states (<http://www.africa-union.org/root/au/organs/assembly/2013/10/20>). It suggested that the ICC can prosecute any head of state after the expiry of their term of office. However, despite this suggestion, the ICC is proceeding with the prosecution of Uhuru and Ruto. The ICC argues that this is the only way of achieving international justice and to eliminate the culture of violence, impunity and human right's abuses (ICC, 2013).

The ICC's action in Africa has brought the establishment of an African Court of Justice and Human Rights (ACJHR) back on the agenda of the AU. Although this is a big step for Africa to have her continental judicial mechanism free from Western interference, the ACJHR gives immunity to serving heads of state and senior government officials. According to Article 46(a) of the ACJHR; 'No charges shall be commenced or continued before the court against any serving African Union head of state or government, or anybody acting or entitled to act

in such capacity, or other senior state officials based on their functions, during their tenure of office’.

Scholars (like Jalloh, 2014), human right activists and political commentators argue that the foregoing AU proposal is a means of protecting a handful of Africa’s most powerful people. It is thereby seen, by this cohort, as a barrier to international justice in the post-conflict peacebuilding and recovery in Africa. Other than promoting democracy and peaceful transition, the Human Rights Watch (2013) argues that the AU’s proposal is a disincentive for any leader to cede power at the expiry of his/her tenure. In fact, the AU’s proposal may be seen as an incentive for anyone to unscrupulously ascend to power at whatever cost – be it by murder, coup, or fraudulent elections (Human Rights Watch, 2013).

In a bid to offer a broad-based approach to analyzing the 2007/8 Kenya’s post-election violence and other violent conflicts in Africa, this study is of the view that the *rectificatory justice* that the ICC seeks to promote is not the only possible option for post-conflict peacebuilding and recovery. On the other hand, although the AU’s proposal may promote stability in Kenya, the study demonstrates that it entrenches and encourages the culture of impunity. Due to the complexity of the Kenyan situation, the study argues that neither the ICC’s or AU’s position, will effectively nurse the ruined social capital of Kenya caused by the 2007/8 PEV. As a result, other than promoting reconciliation and forgiveness, whichever way, the ICC/AU disagreement may divide Kenyans even further. Consequently, this may hinder constructive conflict transformation in Kenya.

Whatever the options, the complexity of the ICC/AU disagreement in the Kenyan situation raises a series of questions: why is the AU ill-at-ease with the ICC’s process in Kenya? Why is the AU partisan in its proposal? – favours heads of states and does not consider the plight of the victims of the 2007/8 PEV. Why is the ICC adamant in prosecuting Kenyatta and Ruto amid the AU’s discontent? What effects does this disagreement pose to peace and stability of post-2007/8 PEV Kenya? These preceding questions form the pith of this study. To answer some of these questions, the study, through the use of *horizontal inequalities*, *Negative-positive peace and functionalism*, will explore the 2007/8 PEV in Kenya. This will be in attempt to understand factors that led the ICC in prosecuting the perpetrators of the 2007/8 PEV. Similarly, the study analyses and evaluates both the AU and ICC positions in addressing justice in post-2007/8 PEV Kenya.

1.1 Post-conflict peace-building strategies: exploring the toolbox

Many efforts have been made towards post-conflict peacebuilding and recovery in Kenya. Post-conflict peacebuilding and recovery refers to the short, medium and long-term process of rebuilding war-affected communities so as to reduce the likelihood of recurrence of war and/or violence (Ramsbotham *et al*, 2011:199). This entails rebuilding the political, security, justice, social and economic fabric or institutions of a society emerging from conflict. It also involves addressing the root causes of the conflict by promoting social and economic justice as well as putting in place institutions of governance and rule of law which will serve as a foundation for peacebuilding, reconciliation and development (Nkhulu, 2005).

The current literature on conflict transformation and peace argues that there are several factors that can hinder peacebuilding in post-conflict societies like Kenya. Lambourne (2004:18) suggests that post-conflict peacebuilding and reconstruction (PCPR) should involve all strategies that are designed to promote a secure and stable lasting peace in which the basic human needs are met and violent conflicts do not recur. Lambourne further argues that the end of overt violence through peace agreements or military victories does not necessarily mean that peace has been achieved. A post-conflict situation only gives rise to a new set of opportunities in which peacebuilding can be effected. This, however, depends on the significant actors involved, who can either play a nurturing or undermining role of the fragile peacebuilding process (Botes, 2001:43).

Justice, reconciliation and forgiveness are essential factors in the construction of a successful post-conflict peacebuilding and recovery processes and mechanisms. For instance, in the aftermath of the Rwandan genocide of 1994, the international community and the Rwandan government regarded legal justice as crucial to the peacebuilding process (Lambourne, 2004:16). The government saw legal accountability as an integral part of this process because they were of the view that reconciliation would not be achieved without justice. However, neither justice nor reconciliation has been achieved in Rwanda due, mainly, to mismanagement and lack of resources in the International Criminal Tribunal for Rwanda (ICTR). The Rwandan government has failed to provide justice as a result of the slow trial and inadequate sentencing (Staub, 2006:870).

The success of post-conflict peacebuilding and recovery lies in understanding and addressing the root causes of the conflict. Ramsbotham, Miall and Woodhouse (2011) argue that the uniqueness of each post-conflict situation determines the approach to be taken when addressing the root causes of war. In some instances, the root causes of war can be addressed through (re)building institutions, eradicating endemic poverty and crippling debt. However, (re)building institutions is difficult and often fails because it requires serious and long-term commitment (Manning, 2003:28).

In some post-conflict situations, the root causes of conflicts can be addressed when the terms of negotiated political settlements are adhered to. It has been widely recognized that most peace agreements are incomplete and inadequate so they leave much work to be done during the period of implementation (Manning, 2003:30). While the terms of the peace agreement govern the people who control power, it should be noted that those who lose it often seek some other means to retain power particularly in the part of the country where they have support. Local level challenges tend to expose and emphasise weaknesses in the peace agreements and often constitute potential exit strategies of one of the parties to the agreement (Staub, 2006:874). However, a key element of post-conflict peacebuilding (particularly in Africa) is to address the damaged relations between communities, groups and tribes of a post-conflict society. This can be done through seeking forgiveness, reconciliation and justice (Mani, 2005:512).

Forgiveness is 'the abandonment of revenge-seeking and the intention to seek genuine renewal of human relationships' (Diegeser, 1998:24). This is the genuine renewed human relationship that brings healing effects to both perpetrators and victims. As a result, it addresses the lingering social wounds and historical wrongs (Moolakkatu, 2011:11). However, 'key to achieving forgiveness appears to be the offended's willingness to explore the range of options within the process and to persist until genuine forgiveness is attained' (Radhi, 1995:58). As Tutu (1999:17) argues, a post-conflict society has no future without forgiveness; as it precludes harboring negative feelings towards the perpetrator.

Reconciliation is seen as acquiescence, cognizance of accounts, mending the opposites and a relationship (Ramsbotham, Miall and Woodhouse, 2011). As acquiescence, reconciliation seeks to make parties or one of the parties in a post-conflict society to accept conditions which may not be palpable, in an effort to build peace. In the Kenyan situation, the February

28, 2008 peace deal (commonly known as National Accord and Reconciliation Act (<http://news.bbc.co.uk/2/hi/africa/7269476.stm>): brought former President, Mwai Kibaki and Prime Minister Raila Odinga together in a coalition government (Annan, 2008). As cognizance of accounts, reconciliation allows different people/parties to a past conflict to accept their contribution to that conflict while considering those who have committed gross crimes of human rights (Ramsbotham, Miall and Woodhouse, 2011: 659). For example, the South African Truth and Reconciliation Commission (TRC) facilitated a forum that brought together perpetrators of past human rights abuses with their victims (Enslin, 1999:54). In mending or reconciling the opposites, reconciliation ensures that a post-conflict society establishes mutual interest, equal access to opportunities by both the victims and perpetrators. As a relationship, reconciliation aims at ensuring that both parties in a post-conflict society put aside their differences and are willing to accept ways of reforming their relations (Staub, 2006:877).

While reconciliation and forgiveness may be achieved without many challenges, application of justice in post-conflict peacebuilding and recovery is a formidable challenge. Ramsbotham, Miall and Woodhouse (2011), Mani (2005) and Staub (2006) argue that there are three major alternatives to achieving justice other than vengeance: legal, rectificatory and distributive. *Legal justice* seeks to address the issues that are connected to political manipulation of the legal system. These include corruption within the law-making body and judges, and lack of legal redress for injustices and grievances experienced by the population (Mani, 2005). This is because in most situations, people are compelled to engage in violence when they are denied provisions for legal justice.

Rectificatory justice seeks to address the past abuse in response to crime against human rights. Rectificatory justice is concerned with righting wrongs or injustice (Rigby, 2001:190). The aim of the preceding dimension of justice is to set unjust situations right, for example, South Africa's TRC, the International ad hoc Tribunals for Yugoslavia and Rwanda and International Criminal Court, put in efforts in addressing human right abuses, war crimes, and crimes against humanity (Mani, 2005:520).

On the other hand, *distributive justice* aims at addressing the structural and systemic injustices such as political and economic discrimination and inequalities of distribution. Distributive justice concerns itself with the nature of a socially just allocation of goods in

society. It is evident that underlying causes of conflict in the society are inherent in structural and systemic injustices (Lambourne, 2004:22). In this case, uneven distribution of resources, ethnic disharmony, seclusion and negligence to individual's needs and overall common good, need to be addressed. Although the need for distributive justice and peace is more appealing than targeting perpetrators/victims, peacebuilding should be tailored to meet the needs of the society in question (Lambourne, 2004:22).

However, to avoid a relapse into war, Ramsbotham, Miall and Woodhouse (2011) Mani (2005) and Lambourne (2004) posit that the three dimensions cannot be fully maximized independent of the other. An observed interdependency is evident in the process of rectifying past wrongs that rely on the rule of law. In the same strain, the relevance and confidence of the populace in rule of law is strengthened in seeing effective redistributive justice. Scholars, like Van Zyl (2005), argue that in some situations, there is a need for transitional justice. According to Van Zyl (2005:209), 'transitional justice involves prosecuting perpetrators, revealing the truth about past crimes, providing victims with reparations, reforming abusive institutions and promoting reconciliation'. Transitional justice is an intermediary set of strategies that helps deal with the events of the past while setting a solid background for the future. However, care has to be taken while implementing transitional justice so as to balance the demands of justice with the realities of what can be achieved in the short, medium and long-term periods (Van Zyl, 2005: 209).

In some post-conflict situations, it is a necessity for countries to have a form of justice in dealing with gross human rights abuses, genocides, crimes against humanity and war crimes so as to progress politically and socially (Connolly, 2012:3). For example, as a way of transition, Sierra Leone introduced a new transitional justice mechanism by employing the Truth and Reconciliation Commission and a Special Court which operated simultaneously. This combined transitional justice mechanism aimed at addressing silent injustices that occurred during the civil war, that is, gender and sexual violence (Filipov, 2006:79). There was a belief that inclusion of the above issues in PCPR would help denounce these horrors and hold perpetrators accountable for their past brutality.

In some post-conflict situations (Mozambique, Angola and Somalia), Nordstrom (2006:39) and Bradlond and Healy (2010:3) argue that the use of traditional mechanisms in offering justice and reconciliation, often sufficed. In Mozambique, it was assumed that civil war was

as a result of bad spirits that had imposed calamity upon the land and not as a result of individual wilful commission (Nordstrom, 2006:60). In Somalia, the success of traditional ways of realizing justice was recorded in the use of a mixture of unwritten customary law, Somali *sharia law* within the Islamic *Sunni Shafi'I* School, traditional values and local codes of social conduct by clan elders, Muslim *Ulama* and women's group (Bradford and Healy, 2010:60). On the contrary, a similar approach in South Africa's Regional and Local Dispute Resolution Committee set up after September 14, 1991 National Peace Convention, was criticized for being elitist (Enslin, 1999:40). This was because it involved political and church leaders who were out of touch with grassroots culture, white business and legal leaders. Notwithstanding, experts warn that caution has to be taken in employing an indigenous process that is likely to be traditional a tool for the local system of oppression, exclusion and exploitation (Parkhurst, 1998:308).

In other post-conflict situations involved parties agree to forgetting about the past conflict. *Collective amnesia* was used in post-conflict Cambodia and Spain, Rigby (2001: 2-3) as an alternative to justice, in the preceding countries, it was agreed that no party should seek revenge or be brought to book for crimes it committed. As Rigby (2001:3) notes, mutual consent to amnesia may have been the complicity by both parties in conflict so as to curb family divisions. However, the limitation of this is that presently, it is giving way to a new phenomenon in which younger generations who are ignorant of these past events are demanding information. As a result, the youth are calling into question the past acts of crime so as to forestall future occurrence of such crimes.

In many post-conflict situations, justice has been achieved through National and International Criminal Tribunals, which have carried out the duty of investigating criminal conduct and prosecuting those who committed serious crimes during violent conflicts and wars (Connolly, 2012:5). It is on this basis that the International Criminal Court (ICC) was founded in 2002 under the Article 5(2002) of the Rome Statute. According to Article 5 of the Rome Statute, the ICC is an independent international court that has jurisdiction of trying the crime of genocide, crimes against humanity, war crimes and crimes of aggression (Coalition for International Criminal Court, 2011).

1.2 Research problem

This study explores a number of complex effects of the AU and the ICC fallout over prosecution of Uhuru and Ruto over their roles in 2007/8 PEV. As a post-conflict and a polarised society, Kenya is still struggling with reconciling tribes that were torn apart by the 2007/8 conflict. Still, the country is in the process of (re)building and reforming institutions in an attempt to avert future violence; through processes of nation-building² and state-building³

In line with the recent developments, the ICC/AU disagreements pose adverse impacts in Kenya. Firstly, the abandonment of its proposed February 28, 2008 Kenya National Accord and Reconciliation act(a peace deal that ended the 2007/8 PEV) after the election of Uhuru and Ruto as president and deputy president respectively, the AU proposal does not address a culture of impunity in Kenya. Based on this, the AU discontent with the ICC can be seen as a power struggle between the West and Africa. It does not necessarily, prioritises the interests of ordinary Kenyans. Since the AU's proposal favours Uhuru and Ruto, it, inadvertently, favours the tribes affiliated to the two. As a result, it risks future violent conflicts due tribal disharmony. Secondly, the ICC proposal maybe a better alternative in addressing justice in Kenya as it seeks to offer justice to the victims of 2007/8 PEV. However, the link that exists between the presidency and control of public resources, benefits communities that are aligned to the president and not the opposition (Mutua, 2010:6). This threatens political stability in Kenya. Therefore, the prosecution of Uhuru and Ruto may still cause violent conflicts between their supporters (communities that are aligned to them) and those who do not support them.

1.3 Research objectives

The four main objectives of this study are to:

1. Identify the remote and the immediate root causes of the 2007/8 PEV in Kenya;

² Nation-building is process of (re)building a common identity among citizen of a country either culturally, politically (Fukuyama, 2007:10)

³ State-building is the process of (re) building legitimate and functioning institutions to enable a country to effectively deliver economic, political and social service to its citizens. Nation and state building complement each other (Fukuyama, 2007:10)

2. Identify and examine major challenges of the AU and ICC to post-conflict peacebuilding and recovery efforts in post-2007/8 PEV Kenya;
3. Assess the relevant dimension and approach to justice in post-2007/8 PEV Kenya that can address the current ethnic disharmony and polarization brought about by the 2007/8 PEV, and;
4. Offer recommendations as to how the Kenya's 2007/8 PEV can be addressed, through the roles of the AU and ICC, in bringing about social and ethnic cohesion in Kenya.

1.4 Research questions

On the basis of the foregoing research problem, this study is defined by four main research questions:

- i. What were the remote and immediate causes of 2007/8 Kenya's post-election violence?
- ii. What are the state and human security implications of the AU and ICC disagreements on post-conflict recovery of Kenya and the rest of Africa?
- iii. What effects does the AU's proposal of non-prosecution of Uhuru and Ruto pose to post-conflict peacebuilding and reconstruction in Kenya?
- iv. What is the capability of the AU to address PCBR in Africa?

1.5 Research hypothesis

There are two assumptions that the study makes. Firstly, the ICC's prosecution of Uhuru and Ruto may not be an effective tool for addressing the 2007/8 PEV in Kenya. However, if the AU blocks the process, it will be a severe blow to the ICC's capacity to hold into account the powerful people who commit serious crimes against their own people (Jobson, 2013). Secondly, post-2007/8 PEV challenges can be addressed locally without involving the AU and the ICC through dialogue in addressing: (1) ethnic inequalities and discord, nation-building and (2) reconciliation that will heal the Kenyan populace (Lederach, 2003).

The first hypothesis vindicates the reasons why the decade-old ICC has only handed down two verdicts; to the two little known DRC warlords (Jobson, 2013). It supposes that powerful suspected African leaders like Bashir, Uhuru and Ruto will remain at large due to their protection from the AU (Dersso, 2013:3). The second hypothesis supposes the importance of

constructive ethnic relationships as a pathway to post-conflict peacebuilding and reconstruction of Kenya other than the political power struggle between the AU and the ICC (Galtung, 2001:16). In sum, the second hypothesis sees the AU and the ICC disagreements to be a hindrance to post-conflict peacebuilding and reconstruction of Kenya other than a conflict transformation and resolution approach.

1.6 Justification of the study

The history of PEV in Kenya, starting from the dawn of *multipartyism* in 1991, is a rich area of study if the Kenyan impasse is to be addressed. Unfortunately, it was only after the 2007/8 PEV that efforts were being made to address its root causes. The heart of election-related violence is rooted in politics of negative ethnicity that politicians use as a means of ascending to power. Many efforts to avert PEV has been hampered by the immunity given to the perpetrators of such crimes. By failing to address ethnic inequalities and disharmony and not prosecuting the masterminds of election related-violence, the government has internalized, to a large extent, the violations of human rights. While the 2007/8 PEV ended, post-conflict peacebuilding and reconstruction in Kenya is facing a number of challenges. Given this Kenyan situation, this study is motivated to explore how the AU/ICC antagonism over the prosecution of Uhuru and Ruto, poses threats to post-conflict peacebuilding and recovery in Africa. Secondly, the study is motivated to use the Kenyan situation to investigate what factors are constraining both the ICC and the AU in addressing post-conflict peace processes in Africa and how their antagonism can be addressed.

The researcher is hopeful that this study will be among significant additional and related literatures on conflict transformation and post-conflict peacebuilding. One recommendation of this study is that both the AU and ICC need to consider the role of Kenya's different communities and tribes in post-conflict peacebuilding and reconstruction process of their country rather than involving themselves in a supremacy battle. The study maintains that the key in addressing post-conflict peacebuilding is building ethnical harmony among divided Kenyan tribes. Therefore, policy makers in Kenya need to consider ethnic divisions and ruined relationships in their intervention post-conflict peacebuilding strategies and building democratic institutions. The study draws a link between the AU and ICC in addressing and applying justice in post-conflict societies in Africa.

1.7 Theoretical framework

Conflict resolution and peace scholars have an array of approaches that seek to understand the root causes of violence and war, and how to resolve them, non-violently. This study consulted a number of frameworks drawn from political science, international relations and conflict transformation and peace research. One of the theories consulted is the *Horizontal Inequalities* framework - a combination of greed and grievance coupled with economic, social and political inequalities - as a relevant framework of explaining the root causes of 2007/8 PEV in Kenya. Frances Stewart (2000) in *Crisis Prevention: Tackling Horizontal Inequalities* espouses that violent conflicts arise when ethnic or cultural differences blend with 'economic and political differences between and within groups in a country... [and] creates aggressiveness and tensions' (Stewart, 2007: 222) that lead to violent conflict. According to *horizontal inequality* framework, factors that cause violent conflicts are complex and mutually-reinforcing (Keen, 2012:757).

This study will use *Negative-Positive Peace Theory*; a conflict transformation framework maintains that the understanding of the root causes of conflicts holds key to non-violent resolution and transformation of them so as to bring long-term individual, relational, cultural and structural changes (United States Institute of Peace, 2011: 16). According to *Negative-Positive Peace Framework*, there are two descriptions of peace. Firstly, there is *negative peace* which is the absence of turmoil, tension, conflict and war. Secondly, there is *positive peace*, which entails the presence of conditions good for management, 'orderly resolution of conflict, harmony associated with mature relationships, gentleness, and love' (Boulding, 1978: 3). Mmbali (2012:19) argues that the 2007/8 PEV ended at a superficial level (*negative peace*). However, Mmbali (2012:23) says that conditions that led into the 2007/8 are still at large. *Negative-Positive Peace* theory is relevant in explaining why the AU and the ICC disagreements over 2007/8 PEV may bring to live the conditions that led to 2007/8 PEV; by escalating further divisions among Kenyans. It still explains why policy makers and ordinary Kenyans need to be involved, constructively, in addressing post-2007/8 PEV peacebuilding and recovery so as to avert future violence and increase justice.

In the application of international justice in post-conflict Kenya, this study found *Functionalism* as a relevant framework. As Mani (2005:17) posits, the process of rectifying past wrongs in a post-conflict society relies on the rule of law. However, the relevance of the rule of law relies on the confidence of people in seeing effective redistributive justice. Although the need for distributive justice and peace is more appealing rather targeting perpetrators/victims, different post-conflict society, require, different dimensions, meaning and application of justice. Contrary to negative-positive peace, functionalism insists that trials against war crimes, crimes against humanity and genocides are to be sanctioned by a function-based neutral international body (*jus cogens*) like the ICC (Morgenthau, 1940:226). With regards to this study, functionalism provides sufficient basis under which the ICC may prosecute Uhuru and Ruto irrespective of their position in government of Kenya: all are equal before the law.

1.8 Research methodology and methods

Social research can be divided into three broad approaches - qualitative, quantitative or mixed-method approaches. In qualitative research, a phenomenon is analyzed without the use of statistics and other forms of quantification. One of the strengths of a qualitative research is that it allows flexibility in its approach. However, it incurs the weakness of biasness due to its subjectivity (Anderson and Kanuka, 2003:10). In quantitative research, the use of mathematical technique is employed. A quantitative research tests samples and draws general conclusions from them. As such, quantitative research has the merits of objectively explaining one phenomenon in a way that allows the results to be universally applied to sufficiently similar cases (Thomas and Magilvy, 2011:152).

However, regardless of statistical exactness of quantitative research, it has limitations in exploration of the social phenomena similar to the one under investigation in the present study. Since it is outcome-oriented, quantitative research approach gives results that are close to the theory that is being tested (Creswell and Clark, 2007: 24). Ironically, it denies a researcher room for flexibility and creativity (Ngulube and Ndwandwe, 2009:108).

In a mixed method research, there is a combination of both quantitative and qualitative research methods in an inquiry (Venkatesh, Brown and Bala, 2013:21). Although it requires a skilled researcher who is able to identify the limitation of quantitative or qualitative, mixed

method research has the most insightful understanding and finding of a particular study (Ngulube and Ndwandwe, 2009:108).

Some of the methods of carrying out qualitative, quantitative or mixed research approaches are: historical, experimental/positivist and interpretive (Ngulube and Ndwandwe, 2009:110). A historical research method is a research about people, places or events in the past. This method is suitable for carrying out qualitative research due to its narrative, literature and mythical data (Creswell and Clark, 2007: 24). Experimental or positivist research method is concerned with carrying out research that aims exploring correlations of causal and effect variables (theory testing). It is usually suitable for quantitative research (Ngulube and Ndwandwe, 2009:110). Interpretive research method employs the analysis of words, ideas and theories, in a bid to discover, understand and describe a phenomenon. Although it is mostly used in qualitative research, to some extent, it is also appropriate in quantitative research (Thomas and Magilvy, 2011:155).

This study will use a combination of both qualitative and historical research approaches in unpacking the challenges of the AU/ICC confrontation over the post-conflict politics of sovereign states like Kenya. The researcher arrived at this decision due to the needs of the research questions of this study. These questions mandate the study to unearth enormous amounts of information (Keohane and Verba, 1994:12 in Shulika, 2013:9). On the other hand, a historical method was favoured because this study is about people, places and events of the past and links them to the present (Ngulube and Ndwandwe, 2009:108). Ngulube (2009:109) asserts that, a historical research method is suitable for carrying out a qualitative research (like this one) as it is concerned with case studies of the past. It involves using past information sourced from both primary and secondary sources in understanding present events.

Furthermore, this study consists, primarily of a desk top review of the relevant literature and scholarly works that focus on the roles of the AU and ICC, post-conflict peacebuilding and reconstruction in Africa, and the politics of post-1991 Kenya.

1.9 Sources of data

This study will use data that consists of first-hand, second-hand research and some material from the analysis of the ICC, the AU and Kenyan politics. A combination of all these data sources will culminate into an even-handed analysis of the impacts of the AU and ICC on post-conflict peacebuilding and recovery of Kenya.

Primary sources command more authority because they are ‘original’ and unsullied (Hopkins 1980:256). Primary sources of data for the present study will include governmental, the ICC and AU documents and reports. Secondary sources will be drawn from books, peer-reviewed journal articles, online journal articles, newspapers and published and un-published theses. Many researchers argue that secondary data exaggerates or distorts facts and can easily be manipulated for propagandist reasons (Punch, 2013:33). Such researchers fail to understand that, although secondary data is remote from primary one, this does not mean that it is inferior. In fact, secondary data has certain advantages which primary data cannot proffer. A person who observes phenomenon from an outside perspective could provide a neutral assessment free of emotional judgement and compromised conclusions. In this study, secondary data used will be based on what meaning and interpretations people attach to phenomena (Punch, 2013:33). The study has identified the African Union Act 2002, the ICC and the impacts that the AU/ICC disagreement pose in countries such as Kenya, to be issues of interest.

In relation to the foregoing assertion, this study undertakes a textual analysis of material that document the AU and ICC post-conflict intervention in political conflicts in Sudan, Liberia and the DRC. It compares these with reports on the AU and ICC interventions in post-2007/8 PEV Kenya. While primary data may be more credible, in this study, secondary data will be useful in cases where primary data is not available (Hopkins 1980:256).

1.10 Limitation of this Study

The major challenge that this study faces is that it is being written at the time when the ICC is still in the process of prosecuting the two (Ruto and Uhuru). Therefore, the study is incurring lack of comprehensive scholarly analysis and literature to reach at its desired goal. A study like this one could have realised its goal if primary data (interviewing/surveying Kenyan on the way forward for their post-conflict peacebuilding and reconstruction) could have been

used. However, due to financial and time constraints, the study relied on relevant secondary sources of data. As such, this study will try, as cogently as possible, to ensure that the theories and secondary data arguments encased herein are fairly representative of the AU/ICC disagreement over the prosecution of Uhuru and Ruto. Therefore, the limitation that this study may come with should not be seen or interpreted as invalidation. In fact, the lack of primary data on the AU/ICC disagreement over the prosecution of Uhuru and Ruto provides new opportunity for those who are interested in writing scholarly journals and publications on the issue.

1.11 Research Outline

This study is divided into seven chapters.

Chapter one: General Introduction. The chapter sets the scene and the map that the study follows. The chapter does not delve into the AU, the ICC and the Kenyan politics. It, however, briefly introduces the research questions, objectives and theories that will dominate the arguments encapsulated in this research.

Chapter Two: A Historical Review of Election Violence in Kenya. The chapter presents a historical discourses and root causes of election-related violence in Kenya. This chapter explores further, the February 28, 2008 Kenya National Accord and Reconciliation Act: a peace deal that ended the 2007/8 PEV.

Chapter Three: Literature Review: The chapter reviews literature on foundation of the ICC and AU and their role in post-conflict peacebuilding. It also reviews literature on the involvement of the AU and the ICC in Liberia, Democratic Republic of Congo and Sudan.

Chapter Four: Theoretical Framework. This chapter presents relevant theoretical frameworks of analysing the impacts of the AU/ICC disagreement over the prosecution of Uhuru and Ruto, and on post-conflict peacebuilding in Kenya.

Chapter Five: The clash of titans: the AU/ICC Confrontations in details. This chapter explores the three main AU's proposal on dealing with Kenya's post-conflict situation. The chapter also discusses why the ICC is adamant in prosecuting Uhuru and Ruto.

Chapter Six: Analysis: the lingering threats of the AU and the ICC disagreement on post-conflict peacebuilding and reconstruction in Kenya. The chapter uses the proposed frameworks to discuss and analyze the effects of the AU and the ICC antagonisms on post-conflict peacebuilding in Kenya.

Chapter seven: Summary, Recommendation and Conclusion: The chapter is conclusive in its manner. It recapulates the main arguments of this study and prescribes the possible ways of tackling the AU/ICC antagonism over the 2007/8 PEV in Kenya. It also offers some recommendations and proposes further studies that need to be carried in exploring the AU/ICC disagreement in Kenya and the rest of Africa.

1.12 Conclusion

This chapter is introductory in its thrust. It has set the scene for what the study seeks to do and how it seeks to do it. It has provided a general background to the study, laid down research questions, problems and relevant theoretical framework that the study will use to address the AU and the ICC disagreements in post-conflict Kenya. The study retains the view that there are various possible ways of addressing post-conflict peacebuilding and reconstruction in Kenya. However, by choosing to involve themselves in political supremacy debate, the AU and ICC may polarize and divide Kenyans further. As a result, ethnic disharmony will be the basis on which future violent conflict will recur. The next chapter is a historical background of the development of election-related violence in Kenya.

CHAPTER TWO

AN HISTORICAL BACKGROUND OF ELECTION-RELATED VIOLENCE IN KENYA

2. Introduction

On the 29th of December 2007, the world was shocked by the violence that erupted in different parts of Kenya after the announcement that the incumbent president, Mwai Kibaki, had been victorious in a disputed general election (Hansen, 2013). The violent confrontation was quickly branded post-election violence (PEV) by both local and international media. Some commentators referred to it as genocide-in-the-making (Chedotum, *et al*, 2013:62).

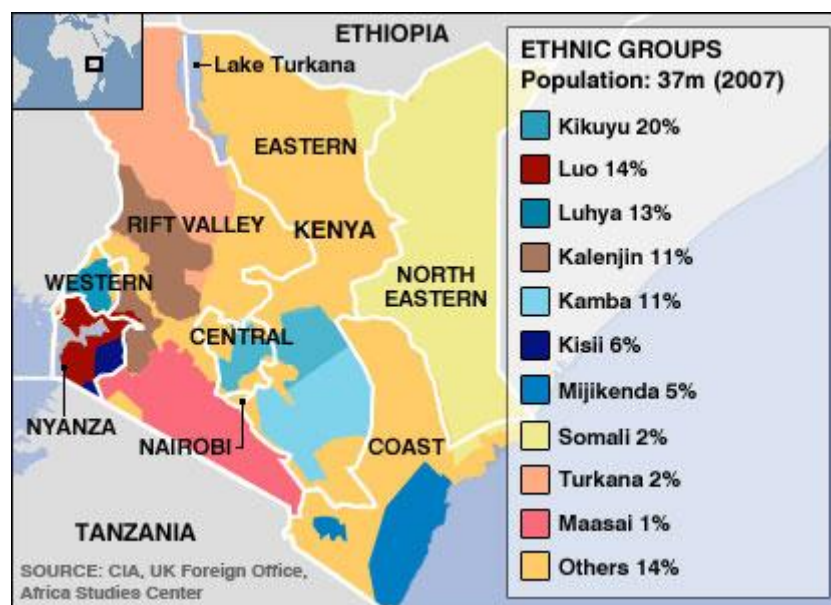
This chapter is a discussion of election-related conflicts in Kenya since the dawn of multiparty democracy (1991) to 2007/8. It seeks to offer a comprehensive explanation of how election-related violence in Kenya has been tribal in its development and consequence. The assumption in this chapter is that it is through this historical background that the multifaceted events of the 2007/8 PEV can be understood. The chapter argues that although the 2007/8 PEV happened within a span of 30 days, Mapeu (2008:1) among other analysts have contextualised it within the framework of protracted conflict. The chapter also seeks to show that the 2007/8 PEV has historical roots to 'broad powers that made the presidential office equivalent to a dictatorship; giving the president the ability to use and abuse this power without restraint' (Roberts, 2009:2). To understand the causes of violent conflict in any situation, offers possible edifices on how such conflicts can be resolved (Michailf, Kostner and Devictor, 2002:2). The chapter ultimately aims at finding out some attempts that have been made in prosecuting the perpetrators of election related-violence in Kenya.

This chapter incorporates an evaluation of the February 2008 Kenya National Accord and Reconciliation: a peace deal that was negotiated by former United Nations Secretary General, Kofi Annan (2008) -who was appointed by the AU. It is the February 2008 Peace Deal that brought an end to the 2007/8 PEV in Kenya and ushered in a power-sharing government that facilitated some reforms; a new constitution in 2010. The chapter contends that it was the failure of the coalition government to constitute a local justice mechanism to prosecute the identified masterminds of the 2007/8 PEV that made Annan to hand over the names of those who were identified as suspected perpetrators of the 2007/8 PEV to the ICC

2.1 Kenya from Independence to Multiparty (1963 – 1991)

Kenya became independent in 1963. Before independence, there were two competing African political parties: the Kenya African National Union (KANU) under the leadership of Jomo Kenyatta (Kikuyu), and the Kenya African Democratic Union (KADU), under the leadership of, among others, Daniel Moi (Kalenjin). The leadership and the composition of KANU accommodated the interests of the two largest ethnic groups in the country at that time, Kenyatta's- Kikuyu and Oginga Odinga's Luo (Throup et al, 1998). 'KADU emerged, in reaction to KANU, as a coalition of smaller ethnic groups' (Orvis 2001: 2) in fear of Kikuyu and Luo domination. It was feared that the ancestral land of the Kalenjin was under the threat of the Kikuyu and the Luo domination (Orvis 2001:3).

Figure 1: the Map showing the ethnic groups of Kenya during 2007 (www.mapsoftheworld.com).



From 1963 to 2002, Kenya was ruled by two ironmen in succession: Jomo Kenyatta (1st June 1963 - 22 August 1978) and Moi (1978 - 2002). As the first president, Jomo Kenyatta (a Kikuyu) used his presidential influence to encourage KANU's members to amend the constitution so as to create a powerful presidency: this created a dictatorship (Roberts, 2009:10). In doing so, Kenyatta ensured that KANU's hegemony swayed over the country's politics. Kenyatta presided over a growing economy that allowed him to distribute patronage

with relative ease (Branch, 2011:3). He allowed regional and ethnic power barons a great deal of local autonomy as long as they did not publicly question his decisions and ultimate power (Mutua, 2008:14).

As the first president, Kenyatta was tasked with addressing challenges that were inherited from the colonial regime. From the 1960s to 1980s (the era of independence in Africa), many new independent African states were faced with myriads of challenges (Branch, 2011). Like other newly independent states, Kenya lacked qualified labour (Jones, 2009). This hampered the Africanization of the public service. Former Nobel Peace Laureate, Wangari Mathaai (2006) in the *Unbowed*, argues that the impact of the Cold War and the ethnic rivalry and disharmony were two of the challenges that the Kenya faced during her nascence. Branch (2011:14) and number of scholars argue that ethnic rivalry and disharmony was created by colonial government so as not to face a unified revolt. According to Orvis (2001:1), in British colonial policy the African political associations were restricted within the borders of ethnically defined administrative districts. This was after colonial administration had allocated European settlers free land to establish plantations (Maupeu, 2008). As a result many Kikuyus were pushed out of Central Kenya and forced to the Rift Valley where they became intruders to the indigenous Kalenjins.

So as to thwart opposition, Kenyatta extended an olive branch to KADU requesting its leaders to dissolve it and become part of the government. This became the genesis of a one-party system, with KANU as the only party under the central control of President Kenyatta. Moi, formerly of KADU, was made Vice President; a move which brought a fall-out between Kenyatta and Oginga Odinga. The latter accused the former of using state resources to uplift only his ethnic group (Kikuyu). Due to powers he had amassed to himself through the mono-party system, Kenyatta banned Odinga from any political participation in the country and later detained him (Anderson, 2008:20).

On the other hand, Moi became a symbol of loyalty to Kenyatta; quietly serving as the Vice President while building up his own sources of patronage (Branch, 2011:37). Kenyatta continued to prove Odinga's allegations right by using the land redistribution mechanisms to move more members of his Kikuyu tribe to the fertile parts of the Rift Valley and the Coast (Orvis, 2001:17). Unfortunately upon Kenyatta's death in 1978, his inner circle (Kikuyu) was unable to keep the presidency. Daniel Arap Moi (a Kalenjin) became the president on August

24, 1978. Moi quickly took advantage of the executive power that Kenyatta had created (Mueller, 2008:190). He officially abolished multiparty politics through a constitutional amendment in 1982: making himself both the head of the executive and parliament (Mutua, 2008:13 cited in Roberts, 2009:5). Moi began to address the challenges of transition politics and nationhood that Kenya was faced with, by coining what became commonly known as “the Moi Philosophy”, emphasizing peace, love and unity (Kagwanja, 2009:370). Moi started to purge the government and to systematically replace the existing Kikuyu political elite with his own former KADU and Kalenjin members (Frederiksen, 2010:1081). This saw a dramatic rise of the Kalenjin elites who started to use their patronage and political power to wrest control of private assets (Mutua, 2008).

As the rest of the Sub-Sahara Africa, grappled with the adverse impacts of Cold War and structural adjustment programs (Jones, 2009), Kenya, was not exempted. The difficult global economic situation led to economic stagnation from the mid-1980s to early 1990, and it became difficult for Moi to generate adequate patronage for his supporters (Michela, 2010:46). At the same time, the Moi regime was faced with animosity from other tribes that had been excluded from political participation in the country. However, this continued economic difficulty and inter-tribal disunity became a blessing in disguise, as it laid the groundwork for popular demands to change (Mueller, 2010:202).

Several underground political movements that were demanding change started to emerge. For example, Lonsdale (1994:132) observes that in 1982 there was an aborted coup attempt that had been organised by the Kenyan Air Force. Since most Air Force leaders were from the Luo tribe, political commentators like Chedotum, Cheserek, Kiptui and Arusei (2013:68) argue that the coup was, therefore, an attempt by the Luo tribe to capture the state. However, the failed 1982 coup only made Moi to consolidate his one-party (KANU) dictatorship. Like Kenyatta, Moi started to detain his opponents and critics without trial and use other forms of repression against any form of real or imagined dissent (Lonsdale, 1994: 134). Unaware that detentions and repression are some of the key foundation of rebellion (Stewart, 2009), Moi was creating a foundation for resistance to his rule. There were more demands for change from the oppositions and human rights activists. This was explicit on July 7 1990 - a day commonly known as *sababa* - when the demand for democracy and an end to the one-party state exploded countrywide, especially in regions that were considered opposition strongholds (Barkan, 2011: 16). Despite this, Moi did not relent. This angered the international financial institutions (World Bank and IMF) and other donors, who reacted to

his autocratic means by cutting aid and diplomatic ties with Kenya. This economic pressure, demand for change and the increasing levels of poverty in Kenya made Moi to eventually give in to the demands for democracy (Nairobi Chronicle, 2009).

In 1991, the Moi regime allowed competing parties to exist. A study done by Collier and Hoeffler (2009) suggest that in third world democracies, the sitting head of state uses “dirty” politics to maintain power, and to subvert laws and institutions that keep them from maintaining and keeping power. Despite allowing multipartyism, Moi clung to full authority and power, in a *de facto* one-party state. This may be indicative of the fact that it may not have been Moi’s intention to turn Kenya into a multiparty-state; as some scholars argue, were it not for the domestic and international pressure exerted on him, he would have liked to maintain the status quo. For instance, Barkan (2011:18) argues that Moi was motivated to allow multiparty democracy in Kenya so as to keep international aid flowing into the country. The flow of international aid was necessary for the maintenance of his extensive patronage for his Kalenjin community.

2.2 Kenya from 1991-2001: Locating the History of Election-Related Violence

Robert Dahl (1992:46) contends that there are two caveats that underlie the heart of any multiparty democracy. Firstly, in multiparty elections, there is a common understanding that there has to be a winner and a loser. Secondly, there is a unified understanding that democratic institutions uphold integrity and the rule of law. The success of a democracy is, thus, measured by matching the operations of democratic institutions in practising integrity and the rule of law. In Kenya, the introduction of multi-party politics led to the first multiparty election later in 1992. This was followed by some electoral reforms before the second general elections in 1997 (Brown and Sriram, 2012: 247). The mismatch in the operations of democratic institutions and the application of integrity and the rule of law made Moi to win both the 1991 and 1997 general elections. The multiparty system that came into place in 1991 could not stop Moi from limiting the power of the opposition. As a president, Moi used intimidation, election malpractice and voting fraud in both the 1992 and 1997 elections to win (Bjork and Goebertus, 2011:206). For instance, in the 1992 election, Moi ensured that about 1 million youth did not register to vote, by denying them their national identity cards needed for registration (Mutua, 2008:12). He also ensured that the federalism debate of 1960s resurfaced within the Rift Valley (his electoral support base) before the 1992 and 1997 general elections; this led to violent expulsion of non-indigenous peoples from the

Rift Valley. Tribes such as Kikuyu, Luo, Luhya and Gussi who were aligned to the opposition were forced out of the Rift Valley. This elicited fear for those who anticipated voting for opposition within the Rift Valley and Coast provinces of Kenya (Cussac, 2008: 98).

In as much as there were institutional checks and balances and rules of accountability during the Moi era, such institutions and rules were only good on paper and did not make any difference in practice. Moi ensured that democratic norms were undermined by his cronies, senior civil servants and corrupt judges. As a result, the trust of the public in the judiciary dissipated. It became implicit that electoral-related contests could be resolved through violence rather than in courts (Mueller, 2011:102). Rather than using democratic institutions to address pertinent issues that Kenya was facing, Moi used inter-ethnic violence as an essential element of thwarting political opposition in his strongholds (Brown, 2001:106).

Democracy is the genesis of nationalization and state-building (Dahl, 1971). However, in Kenya, multiparty democracy led to tribalisation of politics. Major tribes like the Kikuyu, Luhya, Luo and the Kamba voted for politicians that were affiliated to their tribes, as a way of competing for public resources (Lonsdale, 1994). Both the '1992 and 1997 elections were preceded by the explicit mobilization of ethnic constituencies and substantial violence' (Stephen and Rosalinda 2014:4). The Akiwumi Commission (2001) which was formed in 2001 to investigate the causes of 1990s violence reported that, during the 1992 and 1997 election campaigns, supporters of KANU and Moi deployed state resources to stir up violence in the Rift Valley. According to the Commission, violence was a way of evicting opposition voters from the Rift Valley and other KANU strongholds. These tribes were predominantly immigrant populations (Kikuyus), who were resettled in the province by Kenyatta during his tenure as the president. The election violence of 1991 and 1997 left more than 1500 people dead and over 250 000 displaced, in the Rift Valley alone (Roberts, 2009:4).

Due to privileges that are associated with political power, many incumbent politicians do not want to lose an election. Instead, they use many tactics to stay in power. One of the tactics used is violence (Collier and Hoeffler, 2009). During their tenure in office, such politicians use their power to deinstitutionalize and frustrate the rule of law. Once they have ensured that

institutional constraints are no longer there, only violence becomes sufficient as means to retain power (Collier, 2009). This was no different in Kenya.

From 1991 to 2001, a section of Kenyan politicians financed different violent and outlawed movements and groups to keep or gain power. One such a group was the *Youth for KANU 92*, which was used to sell the KANU manifesto across the country (Anderson, 2008:330). Many analysts argue that the aforementioned group was responsible for organizing violent attacks in the Rift Valley Province in 1992–93 (Cheeseman, 2008: 175). Another group was the *Mungiki* movement, which was supposedly funded by a Central province politician to fight for the rights of Kikuyus (Frederiksen, 2010:1065). There was also the *Kaya Bombo* movement in the Coast, which is claimed to have been funded by Moi in 1993 after the first multiparty election so as uproot Luo belonging to the opposition from the Coast province (Kloop, 2002: 288). However, the *Kaya Bombo* defected from Moi's directives and started to root out all non-indigenous, especially the Kalenjin and Kikuyus. Due to the power he had, Moi managed to silence all the groups except the *Youth for KANU 92* (Mueller, 2011: 115). As a result, this organized, ethnic-specific violence, dictatorship and other electoral malpractices ensured that Moi and KANU remained in power until 2002 (Lynch, 2006).

Many peace scholars argue that ethnic harmony lays the best foundation of addressing structural injustices (Ramsbotham, Miall and Woodhouse, 2011). There are five main tribes in Kenya: Kikuyu (22%), Luhya (14%), Luo (13%), Kalenjin (12%), and Kamba (11%) (Roberts, 2009). Rather than practising tribal harmony in their politics, political parties in Kenya typically follow the preceding tribal lines. Many Kenyans value ethnicity above political ideology and policy (Kagwanja, 2009:380). Due to the powers that the presidential office holds, there is a perception among Kenyans that the party offers the best hope for one within the tribe to assume power and then share state resources with his/her tribal members (Mutua, 2008: 22 in Roberts, 2009:7). This perception has led to an enacted tribalism or prejudice across tribes, and favouritism within the tribe in the history of the Kenyan politics.

The only time that tribal harmony as a tool of democratic growth was shown in 2001, when major political parties and tribes merged under the National Rainbow Coalition (NARC). This was a merger of all tribes in Kenya in resisting the discriminatory rule of KANU (Kloop, 2002: 272). During the 2001 general election, NARC won and ushered in Mwai Kibaki as the President. This was the first time that Kenya experienced a peaceful election

since the dawn of multiparty. It brought to an end a 24-year Moi and KANU dictatorship (Cheeseman, 2008: 169).

2.3 The 2007/8 Post-Election Violence

In a developing democracy like Kenya, a consensus exists between the promise of creating or improving institutions and using the institution in practise to improve the lives of the populace (Mueller, 2011). Many Kenyans had voted in for the NARC administration due to its promise of creating a new constitution that was going to allow a culture of accountability and freedom (Cheeseman, 2008). However, this short-lived optimism among Kenyans began to fade in 2004. The making of a new constitution split the NARC administration into two camps (Hansen, 2011:3). One camp that was led by Mwai Kibaki, supported a new constitution. The other camp, led by Raila Odinga, opposed the Kibaki team because they were supporting a constitution that did not offer sufficient reforms that Kenyans deserved (Bratton and Kimenyi, 2008:273).

A referendum had to be carried out in 2005. As part of his campaign, Raila solicited the support of key regional (tribal) leaders such as William Ruto (Rift Valley), Kalonzo Musyoka (Eastern region), Najib Balala (Coastal region), and Musalia Mudavadi (Western region). This ensured that he had the vote of the majority of the Kenyan tribes. During the referendum, with its symbol of an orange, the Raila team emerged victorious (Lynch, 2006:270). This victory marked the birth of a new political party; the Orange Democratic Movement (ODM) and a split between Odinga and Kibaki.

During the 2007 general elections, Kibaki and Raila stood as rival candidates. Odinga and his ODM movement became a symbol of 'change'. Lynch (2008: 544) argues that poll survey affects the voting outcome in one way or another. However, some research organizations like *Infotract Kenya* (2007) argue that politicians do not accept the effects of poll surveys on the voting patterns. Before, the 2007 general elections, all poll surveys rated Odinga as far ahead of Kibaki and it was eminent that he was going to be the new president (Branch and Cheeseman, 2009:22). Despite the election being disputed, On December 29 2007, the Electoral Commission of Kenya announced the incumbent, Mwai Kibaki, as the victor. This triggered unprecedented violence across the country (Cheeseman, 2009:24). In Nyanza, Odinga's home province, there were many non-violent public demonstrations that later turned

violent. Within the Rift Valley and in some parts of Nairobi's informal settlements, it took overtly ethnic lines, pitting Kalenjin, Luo and other ODM supporters against the Kikuyu (widely seen as Kibaki's core supporters) and the Kisii (who had divided their vote between the Party of National Unity (PNU) and the ODM) (Kriegler and Waki Reports, 2009: 4).

The state's role can either satisfy or frustrate individual's and identity group needs. Frustration of group needs and demands using government machinery may lead into protracted social conflict that are characterised by unprecedented violence (Azar, 1990:12). Kibaki, through his executive powers, criminalised all peaceful demonstrations that were being done by the ODM (Lafarge & Katumanga, 2008:13). Under the leadership of Major Ali Mohamed - a former police commissioner -the Kenyan Police Force brutally reacted to the protests of the 2007/8 PEV. Some Kenyan political elites who were afraid to lose their political power, access to development funds and under representation of their region, started to fund outlawed groups to cause violence. During the 2007/8 PEV Maupeu (2008:190) notes that members of the *Mungiki* militia - claimed to have been funded by the Uhuru Kenyatta- started to revenge for their tribesmen/women who were being killed and ousted from other regions in Kenya. The *Mungiki* carried out revenge attacks in Nakuru and Naivasha towns in the Rift Valley (Frederiksen, 2010: 1073).

In retrospect, the 2007/8 PEV invoked the history of tribalism. The Kikuyus, Luos and the Kalenjins were the three major tribes that were involved in the 2007/8 PEV (Roberts, 2009:40). The 2007/8 PEV left 1133 people dead (mostly from the Kikuyu and the Kalenjin tribes), thousands were reported to have been raped while over 600,000 people were internally displaced. In addition, a number of private and public properties were either damaged or burnt down and destroyed (Anderson and Lochery, 2008:333).

2.4 The February 28, 2008 Peace Deal: Kenya National Dialogue and Reconciliation

Timing is important in mediating the end of a conflict. Many conflicts are well resolved when there is a

Hurting stalemate and changed power balance force a ripe condition whereby belligerents give in to peaceful resolution efforts. Hurting stalemate is a condition whereby both sides realize that they cannot achieve their aims by further violence and that it is costly to go on (Wolff and Yakinthou, 2011: 56).

Unfortunately, in many conflicts, the conflicting parties reach a hurting stalemate after committing a lot of destruction and when the war is deadlocked due to power politics, force and fear. To end the 2007/8 PEV, a power-sharing deal between the Party of National Unity led by Kibaki and the Orange Democratic Movement led by Odinga was struck on February 28, 2008. This peace deal was referred to as Kenya National Dialogue and Reconciliation (KNDR) and was mediated by an appointee of the AU; former United Nations Secretary General, Kofi Annan (Anna, 2008 in BBC News of Thursday, February 28, 2008).

Galtung (2001:147), Wallenstein and Axell (1994:335) and Fisher (2007: 199) criticise some conflict resolution strategies that mainly concentrate on termination of war. In signing a peace deal, conflicting parties need to understand that this agreement must be honoured. However, this does not mean that the opposing parties and conflicting views cease to exist. Also, a peace agreement should not necessarily entail a zero-sum situation; in which one party ultimately wins and the other loses. A peace deal should be seen as a working compromise in which conflicting parties accept each other in their future dealings (Wallenstein, 2011:8). In the February 28, 2008 peace deal, Kibaki and Raila had to form a coalition government in which the former was to be the president while the latter was made the prime minister. However, both the former and the latter agreed that there was a need for transitional principles and institutional mechanisms. According to Adebo (2005:233), in any post-conflict situation, there is a need for people-to-people, tribe-to-tribe and party-to-party reconciliation and the importance of the democratic choice, particularly the need to strengthen the institutions of local empowerment/government for lasting peace and development in a post-conflict society. In Kenya, the peace deal highlighted some major reforms that the coalition government was to carry out. One of the reforms was to create a new constitution that was to address election malpractices and judicial system before the next general election (Maupeu, 2008: 188).

Transitional justice is relevant to a time and process of change, for instance following a key transformative event such as a peace accord, a power-sharing deal, or elections (Pankhurst, 1999:306). The coalition government was also given a mandate to form a tribunal that was going to investigate and prosecute the masterminds of the 2007/8 PEV (Hansen, 2011: 4).

2.4.1 The Waki Commission of Inquiry

A country that is recovering from war or violent conflict faces a challenge in setting up institutions and tribunals that guarantee the establishment of political processes that can be considered open and inclusive. However, the establishment of such institutions may be a key step in rebuilding the community and common identity; by transforming negative peace to positive peace (Ali 2011:26). To many human rights groups, Kenyans as well as the international community, the 2007/8 PEV offered terrifying need for political reform and the value of peace and stability (Mueller, 2011:102). The coalition government constituted a Commission of Inquiry into Post-Election Violence (CIPEV). The CIPEV was chaired by retired judge Philip Waki (hence the Waki Commission). The Waki Commission was to investigate the causes, the impacts and the financiers of the 2007/8 PEV (Republic of Kenya, 2009). In its investigation, the Commission identified eight individuals who were said to have masterminded the 2007/8 PEV. The Waki Commission then recommended that government should constitute a local tribunal to try and prosecute those who had masterminded the 2007/8 PEV (Calas, 2008: 171).

Due to tedious consultations and long procedural processes, democratic institutions may underpin post-conflict peacebuilding and recovery processes. Lack of political will and the capacity to implement terms of the peace agreement within members of conflicting parties, can thwart all efforts made to address peace in a post-conflict society (Knight, 2009:26). In Kenya, the divided parliament was a threat to post-conflict peacebuilding and recovery. The Parliament and the Cabinet voted against a number of proposals in 2009 that were aimed at establishing a special tribunal to try the cases of those identified in the CIPEV report (Human Right Watch, 2013; Branch and Cheeseman, 2009:19). Many parliamentarians argued that the main reason that they rejected the bill was because they did not have faith in the local judicial system and preferred the cases to be heard at the ICC (Chedotum *et al*, 2013:63). This forced the hand of the government that ended up promising diligence within the national courts when dealing with the particular issue. However, not much was done to manifest these promises. Bjork and Goebertus (2011: 213) argue that the link between the presidential office and the eruption of 2007/8 PEV was the cause of the government inaction. Bjork and Goebertus (2011: 205-208) notes that:

The pattern of unprosecuted election violence has contributed to a culture of impunity, which, together with poverty and unemployment, has led youths to

be willing to take arms as “mercenaries” on behalf of anyone who will pay them.

Different views on a particular issue between opposing parties usually leads to an emergence of new issues. In this case, opposition parties cannot agree even if they are convinced. In the end little progress is made in seeing the way forward (Curle, 2010). In the Kenyan situation, it was the laxity of the coalition government in implementing the recommendations (Barkan, 2011:10) that made the Waki Commission to hand over the outcome of their investigation to Kofi Annan. Annan, later forwarded the names of the eight individuals to the ICC (Human Rights Watch, 2011).

Opposition to domestic judiciary mainly by the PNU coalition is argued to have been the reasons why Uhuru and Ruto case went to ICC (Dicker and Elizabeth, 2013). In some of their arguments, members of parliament that were affiliated to the PNU argued that local judiciary was too ethnic to give Uhuru and Ruto a fair hearing (Dersso, 2013). In reference to Article 15 (3), the OTP of the ICC submitted to the Pre-Trial Chamber, a request to undertake an investigation with an intention to prosecute those who were to be found guilty of orchestrating the 2007/8 PEV in Kenya. The Pre-Trial Chamber gave the ICC a nod to launch an investigation into the Kenyan case (ICC, 2011).

2.5 Uhuru-Ruto versus the ICC

In Africa, many governments have referred to the ICC in their search for justice. Uganda and Democratic Republic of Congo are some of the examples of African countries that referred their cases to the ICC (Annan, 2013). In Kenya, it was the government’s inaction that called in the ICC. After doing its investigation, the ICC found Uhuru Kenyatta, William Ruto and Joshua Arap Sang, greatly responsible for the 2007/8 PEV (Brown and Sriram, 2012: 245).

It is a daunting task for any state to see their president and deputy president being subjected to international justice at the ICC (Zuma, 2013). In most situations, different governments employ some ways of vindicating senior official. In March 2011, the ICC’s move prompted the Kenyan government to write a letter to the ICC - requesting the chamber to have the cases against the six mentioned by the ICC referred back to Kenya (Republic of Kenya, 2011). Some of the reasons that the Kenyan government gave in a 30 page letter- Dated March 11, 2011 were that:

- The New Constitution had a comprehensive range of judicial reforms which had fundamentally transformed the administration of justice in Kenya.
- Deficiencies and weaknesses from the past had been specifically targeted to guarantee the independent and impartial dispensation of justice;
- National courts will now be capable of trying crimes from the post-election violence, including the ICC cases, without the need for legislation to create a special tribunal, thus overcoming a previously major stumbling block;
- The new Constitution guarantees the independence of the State's investigative organs and ushers in wide-ranging reforms to the police services;
- An independent Commission for the Implementation of the Constitution is established to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution (Republic of Kenya, 2011).

However, the ICC rejected the request. The ICC argued that apart from the evidence regarding reforms in the judiciary as rightly established in the new constitution, there was no substantial evidence to show the government's willingness to prosecute the accused individuals indicted with crimes against humanity. The ICC Pre-Trial chamber filed the following reasons that informed their decision to reject the request made by the Kenyan government:

In particular, the Chamber lacks information about dates when investigations, if any, have commenced against the three suspects, and whether the suspects were actually questioned or not, and if so, the contents of the police or public prosecutions' reports regarding the questioning. The Government of Kenya also fails to provide the Chamber with any information as to the conduct, crimes or the incidents for which the three suspects are being investigated or questioned for. There is equally no record that shows that the relevant witnesses are being or have been questioned (ICC, 2013).

The charges against Uhuru, Ruto and Sang were upheld.

In history of international justice, the first time a developed world leader was accused for crimes against humanity was after the World War II; in the Nuremberg Tribunal (Maromo, 2013). In it, the United States accused the Germans who were Hitlerite for committing crimes against humanity. However, before and after the Nuremberg, no single American soldier has been accused for committing similar crimes in Afghanistan, Iraq and Syria

(Maromo, 2013). The cases against Ruto and Sang began in September 2013 while that of Uhuru was scheduled to begin in October 2014 (ICC, 2014).

Subsequently, after the election of Uhuru and Ruto as the President and deputy President in 2013, their cases have become the subject of much debate between the ICC and the AU (Hansen, 2013). In September 2013, the Kenyan parliament - dominated by members of parliament that are aligned to Kenyatta's ruling coalition - voted to withdraw Kenya from the ICC. However, analysts argue that the withdrawal of Kenya from the ICC will not interfere with Uhuru and Ruto cases. Still, it will take a long procedure for Kenya to withdraw from the ICC (Gatehouse, 2013). Despite resentments from the AU and a section of Kenyan law makers, the ICC is adamant that both Uhuru and Ruto, irrespective of their position, should be tried for their roles in the 2007/8 PEV (Hansen, 2013).

2.6 The Role of Government in Protecting Human Rights and Ending Impunity

In any post-conflict society, there is always a dilemma on whether to address the core issues or to concentrate on the peripheral issues in the hope of making early agreements and establishing momentum (Wallensteen, 2002). However, issues such as mass killing, ethnic cleansing, rape, other brutal aspects of war and other violent conflicts, render reconciliation extremely difficult (Curle, 2010:6). In Kenya, ethnic and sub-ethnic factionalism has been the hallmark of elite multiparty politics. With the coming of multipartyism, the 1992, 1997 and 2007/8 general elections were marred with ethnic-related election violence, especially within the Rift Valley (Hansen, 2011:12). According to Kenya National and Reconciliation Agenda (2008), there are indications that the 1992 and 1997 election related-violence had as great impact as compared to that of 2007/2008. The Human Rights Watch (2008) estimated that the 1992 electoral-linked violence claimed the lives of about 1 500 people and left about 300 000 displaced. The 1997 electoral violence was of greater magnitude than that of 1991; affecting the Rift Valley and Coast provinces significantly.

Any post-conflict government faces a huge task of rebuilding the state and at the same time tackling the causes of civil conflicts in a way that will prevent a future return of violence (Wallensteen, 2002:45). The recurrence of violent conflicts in one state shows that the government has failed to secure lasting peace. Brown, Stephen and Sriram (2012) argue that in Kenya, the recurrence of election violence is due to political interference with the judiciary

and the police. As independent institutions, the Kenyan judiciary and the police are viewed as corrupt and lacking sufficient investigative capabilities. The judiciary and the police were rendered dysfunctional by the Moi administration from the 1990s – 2000 (Bjork and Goebertus, 2011:215). Another reason for the resurgence of election violence in 1991, 1997 and 2007 is the extensive system of patronage and nepotism that was institutionalised in the Kenyan presidium by the Kenyatta and Moi administrations (Kagwanja, 2008: 380).

Cannolly (2012) argues that the use of prosecutions in post-conflict situations brings justice and has a profound psychological deterrence on potential perpetrators and on societies. This eliminates the potential for future violence. In Kenya, the government was unable to bring to book those who orchestrated election-related violent crimes in 1991 and 1997. As a result, there was massive violence, loss of lives, destruction of property, and internal displacement of peoples (All Africa, 2012). Also, after the 2007/8 post-election violence, the coalition government was unable to form a tribunal to prosecute the masterminds of the 2007/8 PEV (Human Rights Watch, 2014). It is with such conditions that the plight of the victims of post-election violence seems better off in a neutral body like the ICC (Dersso, 2013).

2.7 Conclusion

Bujra (2002) quotes Adebayo (1999) arguing that political, economic, social and cultural factors are the main triggers of conflicts in the developing world. Furthermore, Clover (2004) notes that the causes of intrastate conflicts are; political grievance, poor governance and economic and social inequalities between different groups within a state.

This chapter has been historical in nature. Firstly, the chapter presented what can be referred to as the benign neglect of the government of Kenya. In doing so, the chapter established that the ethnic antipathy, the politics of reward and tribal marginalization of post-colonial regimes, continue to haunt Kenya. Secondly, it was also argued that, at the heart of post-election violence in multiparty Kenya, is the link between the control of public resources and their benefits to the communities aligned to the president (Calas, 2008:182). The intolerable modes of governance exercised by both the Kenyatta and Moi regime created schisms in Kenya (Lafargue and Katumanga, 2008).

This chapter has established that the financiers of election-related violence in 1992 and 1997 were high-level figures in the government of Moi. However, due to immunity they received from the state, tribal violence was elevated as a means of ascending to power (Roberts, 2009). The pith of the chapter established that corruption, the involvement of high profile political elites, a weak judiciary and ill-equipped and corruptible police service, have contributed enormously to the entrenchment of a culture of impunity. This has led to recurrence of large-scale atrocities. If those who were responsible for the violence in 1991–93 had been held accountable, the 1997 violence would have less likely to occur. Similarly, had those that were responsible for the 1997/8 election violence been prosecuted, the 2007/8 PEV could have been averted; perpetrators would have been behind bars, and potential perpetrators would have been deterred (Anderson and Lochery, 2008; Kriegler and Waki Report, 2009).

The preceding historical background has established that the main cause of the 2007/8 PEV and other election-related violence in Kenya is the immunity given to the perpetrators. This chapter faults post-colonial regimes in Kenya for not fostering an efficient judiciary to address post-conflict peacebuilding justice. By failing to prosecute the orchestrators of election-related violence, the government has legislated the abuse of human rights as essential during electioneering. In reference to the 2007/8 PEV, the laxity of forming a local tribunal to prosecute suspected masterminds forced the ICC to step in as a neutral arbiter for the victims. The next chapter reviews literature on the foundation, role and the mandates of the AU and the ICC.

CHAPTER THREE

LITERATURE REVIEW

3. Introduction

National and International Criminal Tribunals and the International Criminal Court have been tasked with carrying out the duty of investigating and prosecuting war crimes, crimes against humanity and genocides that are committed during wars (Nagy, 2008: 275). Richard Goldstone (1992) argues that a culture of law and order and the gratification of the needs of victims is a vital way of escaping further outbreaks of violence. This chapter reviews literature on the role of the ICC and the AU in post-conflict peacebuilding and recovery. The ultimate aim is to critically assess why the AU and the ICC may be in disagreement over the prosecution of Uhuru and Ruto for their roles in the 2007/8 PEV in Kenya.

The chapter begins by tracing the evolution, foundation and the roles of both the ICC and the AU. The literature on the involvement of the ICC and the AU in some Africa countries (Ivory Coast, Democratic Republic of Congo (DRC) and Sudan) will also be reviewed, in an attempt to establish the *modus operandi* of these organisations. Of utmost importance will be the review of literature on the AU response to the ICC's action in the foregoing selected African countries. By reviewing this literature, it is hoped that the relationship of the AU and ICC will be established, which might explain their current disagreements over Kenya, in particular, and some imminent African cases, in general.

The pith of the argument in this chapter is to see why and how the AU and the ICC have the moral authority to objectively demonstrate their mandate in post-conflict peacebuilding and reconstruction. The review of literature also hopes to demonstrate the positive and negative implications of the AU/ICC disagreement in post-2007/8 peacebuilding and reconstruction project in Kenya.

3.1 Tracing the Origin and the foundation of the ICC

The roles, intervention and conducts of the ICC in post-conflict societies is well-documented and recorded in many academic studies, journals as well as in the ICC documents and reports. Many scholars contend that the quest for international criminal justice dates as far back as 1892 (Laher, 2013). Bassioun Cherif (1997) argues that the real efforts for the establishment of the ICC began in 1948, after the United Nations General Assembly adopted the Treaty on

‘the Prevention and Punishment of the Crime of Genocide’(Bassioun, 1997:1). According to this Treaty, the UN General Assembly adopted that the perpetrators of war crimes, crimes against humanity and genocide be tried by Penal Tribunals. During the assembly, the UN sought the services of the International Law Commission (ILC) in researching on how an ‘international judicial organ can be established to try persons charged with genocide’ (Bassioun, 1997:1).

However, since then nothing much until in the 1990s, when Bosnia-Herzegovina, Croatia and Rwanda were marred with mass crimes against humanity, war crimes and genocide respectively. The preceding conflicts made the United Nations Security Council (UNSC) to swiftly establish two different *ad hoc* tribunals to try the perpetrators of the alleged crimes. The aftermath of the aforementioned conflicts also made the ILC to present its final draft for the foundation of the ICC, to UN General Assembly. Broomhall (2003:155) in *International Justice and International Criminal Court: Between Sovereignty and the Rule of Law*, argues that the real need for the establishment of the ICC came after the Nuremburg and Tokyo trials. The Nuremburg and Tokyo trials laid the foundation of the International Criminal Tribunals in Rwanda and Yugoslavia (ICTRY); whose successes and weaknesses became ‘the edifices on which the International Criminal Court (ICC) was established’ (Broomhall, 2003:155). The incumbent ICC prosecutor, Fatuo Bensouda (2013), observes that the foundation of the ICC came into force after a series of protracted and negotiated treaties among the UN member states, as a result of their legal interests in alleged crimes.

On July 1st, 2002 the ICC was established and ratified - as an independent, permanent court that tries persons accused of the most serious crimes of international concern (Article I of the Rome Statute, 1998) - by 60 countries. The first judges of the ICC were elected in 2003 (Laher, 2013). According to the ICC Today (2014:1), by May 2013, ‘122 countries were parties to the ICC. Of the mentioned countries, 34 are from Africa, 18 from the Asia-Pacific, 18 from Eastern Europe, 27 from Latin America and the Caribbean. There are also 25 Western and North American countries.

3.1.1 Jurisdiction of the ICC

Article 5 of the Rome Statute (1998) gives the ICC its jurisdiction on types of the crimes that the court is concerned with. According to Article 5, *the ICC is a permanent independent*

international court of justice that prosecutes those who commit crimes of genocide, crimes against humanity, war crimes and the crimes of aggression. In Article 9 of the Rome Statute, the ICC may carry out the preceding stipulated mandate under three circumstances: one, ICC may act on a case if it is referred to the court by a state that is party to the Rome Statute; two, the ICC may act to a case on referral by the United Nations Security Council acting under Chapter VII of the United Nations Charter, and; three, the Office of the Prosecutor of the ICC may launch an investigation in a country that is party to the Rome Statute where crimes provided in Article 5 have been committed (Rome Statute of the ICC, 1998).

The understanding of war crimes, crimes against humanity, crimes of aggression and genocide are well articulated in Article 6, 7 and 8 of the Rome Statute. Article 6 states that: *‘genocide means any of the acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’*. For the purpose of this study, genocide will mean either ‘killing members of a particular group or forcibly transferring members of another group to another area’ (Article 6 of the ICC). *Crimes against humanity* as articulated in Article 7 of the Rome Statute mean murder, extermination, enslavement, deportation, severe deprivation of physical liberty, torture, rape, persecution of any identifiable group and enforced disappearance of persons. Article 8 of the ICC defines *crimes of aggression* as;

The planning, preparation, initiation or execution, by person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (ICC, 2010 Para 1 quoted in Loveman and Lira, 2007:25).

Although the preceding crimes may be committed in a state that is party to the Rome Statute, the ICC gives such a state priority to investigate and prosecute individuals who commit crimes as articulated in Articles 6, 7 and 8 of the Rome Statute, before referring them to the ICC. Broomhall (quoted in Laher, 2013) notes that the ICC does so, to promote the concerned state’s right of attaining justice for its citizens and victims of human rights atrocities. In a strict sense, the role of the ICC as outlined in Rome Statute (1998) is to act in situations where the domestic legal structures fail to prosecute the foregoing human rights atrocities. According to Loveman and Lira (2007), this action of the ICC is geared towards respecting the concerned state’s sovereignty while carrying out international law.

3.2 The founding of the AU

The African Union (AU) came into effect in 2002; succeeding the Organization of the African Unity (OAU), which had served as the continental body since 1963. The main objectives of the AU is, *to enhance unity and strengthen co-operation and coordination as well as equipping the African continent with a legal and institutional framework to enable Africa to take its rightful place in the community of nations* (<http://www.africa-union.org>). In relation to peacebuilding and human security, the AU is tasked with the role of, *preventing, transforming and resolving African conflicts*. In its quest for preventing and ending conflicts, the AU has created a new security regime – the African Union Peace and Security Council (AUPSC) - that seeks to guarantee both the state and human security of the Africans (Yobo, 2009). The establishment of the AUPSC is in accordance with the African Union Constitutive Act (AUCA) set in Articles 3(f) and 4(h) of the AU. Article 3(f) mandates the AU *to promote regional peace, security and promotion of human rights* (Kalu, 2009:11). On the other hand, Article 4(h) empowers the AU with a responsibility *to protect civilians and a right to intervene in any member state where war crimes, genocide, and crimes against humanity have been committed* (www.africaunion.org/root/au/aboutau/constitutive-act). Still, Article 4(h) mandates the AU with powers *to create a common security and defence policy*.

Although Article 4(h) gives the AU power to intervene in conflicts, it maintains that the peaceful means should be used in the resolution of conflicts within and among member states. Johan Galtung (1969) argues that peacebuilding is realised when structural violence that lead to conflicts because of the unequal distribution of resources are addressed using non-violent means (Tickner, 1995: 51). Therefore, Article 4(h) prohibits the AU from using force or threats in resolving conflicts. Similarly Article 4 (j) gives any AU member state a right to request for an intervention from the Union in order to restore peace and security in that state (Yobo, 2009: 19).

Cortright and Lopez (2000) argue that sanctions have become means by which regional bodies and powerful states reinforce norms of justice and human rights in a post-conflict society. In this line, Article 23(2) allows the AU to impose sanctions against a state which does not comply with the norms of international justice and human rights. These sanctions may include the denial of transport and communications links with other member states, including other measures of a political and economic nature to be determined by the

Assembly (<http://www.peaceau.org/uploads/au-act>). Owing to the stated legal environment, by joining the AU, any African state surrenders its strict sovereignties to the AU for mutual peer reviews and interventions. As a result, it becomes increasingly difficult for predatory governments to continue with violations of the rights of their citizens (Adebajo, 2011).

Adedeji Adebajo (2011) in *UN Peace Keeping in Africa: From the Suez Crisis to the Sudan Conflicts*, faults the AU for not implementing the foregoing statutes. As a result, many crimes against humanity are being committed by African political elites and ignored by the AU. Since its foundation, the AU is yet to fully utilize its capacity to prosecute African leaders who have committed crimes against humanity, war crimes and crimes of aggression. Adebajo (2011:12) observes that:

The ideals contained in the international and regional bills of human and people's rights remain ideals precisely out of reach of the overwhelming majority of the people in the third world countries, particularly in the Sub-Saharan countries. In most of these countries, pervasive lack of democracy, over-centralization of power and impediments to effective participation of the majority of people in political life of their countries, has been the order of the day.

Rather than implementing the African Union Constitutive Act (AUCA) into practice, the AU is showing African solidarity in condemning the ICC processes in selected African countries. The AU has accused the ICC for targeting African leaders by concentrating its actions in the continent. Many African leaders refer to the ICC as biased, neo-colonial and racist; targeting only poor and weak states (Patel, 2013). To show its discontent to the ICC, the AU has suggested that the court should not prosecute any serving African head of state or government official or anybody acting or entitled to act in such capacity (Dersso, 2013). Also, the AU is in the process of establishing an African Court of Justice and Human Rights (ACJHR) that will have power to prosecute any sitting head of state or a person acting in that capacity and senior government officials at the expiry of their term of office (Jalloh, 2014).

3.3 The ICC's actions in Africa

Although the ICC was established in 2002, it only became operational in 2004 (Laher, 2013:58). The first cases were self-referrals to the ICC by Uganda and the Democratic Republic of the Congo in 2003 and 2004, respectively. However, the court issued no arrest warrants until July 2005; against the leader of the Lord's Resistance Army (LRA), Joseph Kony. The first hearing at the ICC took place in 2006; that of Thomas Lubanga Dyilo, Bosco

Ntaganda and Sylvester Mudacumura, from the DRC. To date, the ICC has passed down only one judgement; against Thomas Lubanga, of the DRC (ICC, 2014).

At present, there are 21 cases at the ICC; the office of the prosecutor (OTP) of the ICC is investigating situations in Uganda, the DRC, CAR, Darfur (Sudan), Kenya, Libya, Côte d'Ivoire and Mali (ICC Today, 2014:2). The ICC is also monitoring situations in Afghanistan, Central African Republic, Colombia, Georgia, Honduras, the Republic of Korea and the Union of the Comoros. However, all cases outside Africa are still under preliminary stages despite them having been brought to the ICC earlier than the African ones (Patel, 2013). Arieff, Browne, Margesson and Weed (2011) in *International Criminal Court Cases in Africa: Status and Policy Issues*, notes that all of the present 8 ICC's arrest warrants targets Africans. Among the arrest warrants are those of Muammar Gadhafi and Raska Lukwinya of Libya and Uganda respectively (Arieff *et al*, 2011). Gadhafi and Lukwinya arrest warrants have been withdrawn following their deaths. The table below is a summary of the ICC's presence in Africa since its establishment:

Figure 2: Summary of ICC Activities in Africa

SITUATION	CASE	STATUS
Libya	Muammar al Gadhafi, his son Sayf al Islam al Gadhafi, and intelligence chief Abdullah al Senussi	Gadhafi case terminated on 22 November 2011, due to his death. Case against Abdullah Al-Senussi was found to be inadmissible before the ICC. Saif Al Islam Gaddafi is before the Appeals Chamber
Kenya	William Ruto, Joshua Arap Sang, Uhuru Kenyatta and Walter Osapiri Barasa	Ruto and Arap Sang trial cases commenced in September 2013. The accused are not in the Court's custody as they are facing trial under summonses to appear. Kenyatta's case commences in November 2014. Kenyatta is not in the Court's custody as he is facing trial under a summons to appear.

		Mr. Barasa is not in the Court's custody
Darfur Sudan	Ahmad Muhammad Harun, Ali Kushayb, President Omar Hassan al Bashir, Abdallah Banda Abakaer Nourain, Saleh Mohammed Jerbo and JamuBahar Idriss Abu Garda	Abdallah Banda and Saleh Jerbo and Bahr Idriss Abu Garda have showed up in the Hague of their own volition. President Al Bashir, Ahmad Harun (head of government's investigation into the human rights violations in Darfur) and Ali Kushayb (Janjaweed leader), have not surrendered and are protected by the government of Sudan

Continues on the next page...

...Figure 2: Summary of ICC Activities in Africa

SITUATION	CASE	STATUS
Uganda	LRA commanders Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya	Raska Lukwinya is dead and proceedings against her have been terminated. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen are yet to be arrested
DRC	Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui, DRC army officer Bosco Ntaganda Calixte Mbarushimana	Lubanga is serving 14 years of imprisonment. Katanga and Mbarushimana are in custody. Ngudjolo Chui was acquitted and released while Mudacumura is yet to be arrested.
Central African Republic	Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido	Jean-pierre Bemba, Musamba, Kabongo, wandu are in the ICC custody while Arido is arrested in France
Ivory Coast	Laurent Gbagbo, his wife Simone Gbagbo and Charles Blé Goudé	Gbagbo is in the ICC custody while someone and Ble Goude are on trial

Guinea		Preliminary examination
Nigeria		Preliminary examination
Mali		Still under investigation by the OTP of the ICC for crimes committed on the territory of Mali since January 2012.

Compiled by ICC Today, 2014; see also Arieff et al, 2011pp 7-8.

In developed democracies like the United States of America, legal institutions play a key role in constraining and holding the public and leaders accountable for their crimes (Rosato, 2003:585). The functioning of the ICC is moulded on this principle. Elissa Jobson (2013:1), in *Call for Reflection on Relationship between the AU and the ICC*, avows that the ICC's overemphasis on cases within and not those outside Africa contradicts the foregoing principle of democracy; this is the root cause of the animosity between the AU and the ICC. Jobson (2013:2) says that the AU is accusing the ICC for exercising double standards, by using indictments and warrant of arrests to unfairly target the continent's leaders who are anti-West: such as Bashir and Kenyan leaders Uhuru Kenyatta and William Ruto. The AU sees the ICC actions in Africa as a means through which the West seeks to re-colonize Africa (Nomhlele, 2014). In line with the AU discontent of the ICC's activities in Africa, the following questions are raised: Why are all 8 situations at the ICC from Africa? Why are the cases outside Africa in preliminary stages? Why has the ICC done no investigation in Syria and in the US invasion of Iraq? When will the ICC take action to investigate the Israel incursion of the Gaza and NATO's bombing of innocent Libyans? (Smith, 2013).

Human rights groups, the Amnesty International (2013) and the Human Rights Watch (2013) have argued that it is the increasing number of human rights violation in Africa that have made the ICC to concentrate on the continent. As shown in Table 3.1, the majority of cases at the ICC are either on trial, pre-trial or at stages of preliminary assessment. Among the African states where the ICC is doing investigations is Sudan, DRC and Ivory Coast. A closer look at the involvement of the ICC in the foregoing countries is key to understanding the AU discontent over the prosecution of Uhuru and Ruto by the ICC.

3.3.1 The ICC in Sudan

In 2003, the world was shocked by the insurrections in Darfur, the westernmost part of the then united Sudan. Some scholars branded this violence as an ethnic conflict or race-war (Hassan and Ray 2009:18). Colin Powell – former Secretary of State in the United States of America (US) - called it the first genocide of the 21st century (Cockett, 2010:1; De Waal 2007:26). Powell (in Daly, 2007:178) purports that the Darfur conflict was genocide perpetrated by “Arabs” against “Africans” (Powell quoted in Daly 2007:178). According to Daly (2007:178), the Darfur conflict was due to the drive of Northern Sudanese to force all Sudanese under Arabic rule. The *Janjaweed* - vicious agents of Khartoum government also known as Popular Defence Force (PDF) - used forceful means to achieve this goal, and in the process, physically destroyed large numbers of Zaghawa and Massaleit people of Darfur (Daly 2007:294).

During the Darfur conflict, groups of raiders on horseback, mostly from Arab tribes, known as the *Janjaweed*, terrorized the villagers and fought with the militias established by black Sudanese. In support of the *Janjaweed*, the government of Sudan under the leadership of Bashir, bombarded the villages occupied by the Zaghawa and Massaleit people (Prunier, 2007; Meredith, 2005). Prunier (2007) adds that the Sudanese government also armed the *Janjaweed* and allowed them to loot, kill, rape and burn down Zaghawa and Massaleit people, with impunity. During the conflict, the government also blocked the humanitarian organizations from supplying aid shipments to the victims of the conflict (Prunier, 2007:7). As a result, millions of people in the Darfur region were displaced while hundreds of thousands lost their lives (Yongo-Bure, 2009:68).

The government of Bashir claimed that there was no war in Darfur, refuting many international media reports, which pointed to the contrary (AMICC, 2014). In an interview with Zeinab Badawi of BBC Hardtalk aired on May 14, 2009 (quoted in Jyrkkio, 2012:2), Bashir argued that:

There is a tribal struggle in Darfur. But to talk about crimes committed inside Darfur, this is just hostile and concerted media propaganda to tarnish the reputation of the government and it is a part of the declared war against our government.

Despite Bashir’s denials, the Darfur conflict caught the attention of the world. The UN through UNSC Res (1564) responded swiftly by sending a commission of inquiry led by

Antonio Cassese, to determine the extent of human rights violations (Cockett, 2010). After its inquiry, the International Commission of Inquiry on Darfur requested the United Nations Security Council (UNSC) to refer the Darfur conflict to the ICC; which the council did on the 31st March 2005 (ICC Today, 2014).

This was the first time, in its history, that the ICC invoked its powers as stipulated under the Article 13(b) of Rome Statute. According to Article 13(b), the UNSC acting under Chapter VII of the Charter of the United Nations can refer, to the Prosecutor, one or more crimes that appear to have been committed (Centre for International Law, 1998:14). The Article allowed the ICC to begin its investigation in Sudan, a country which is not a party to the Rome Statute and where the ICC has no jurisdiction. The Darfur conflict made Sudan to be the third country in Africa - after the DRC and the Uganda - to be investigated by the ICC. Contrary to the two, Sudan became the first country with the incumbent president to be indicted by the ICC (Coalition for the International Criminal Court, 2012).

In its investigation, the ICC found Omar Bashir (President of Sudan), Ahmad Harun (former Minister of State for the Interior), Ali Muhammad Rahman (leader of *Janjaweed* militia), Bahar Garda, Abdel Muhammad Hussein (President's Special Representative in Darfur) and Abdallah Banda Nourain, guilty of the violation of human rights during the Darfur conflict (Reeves, 2009:13). To-date, Abdallah Banda and Saleh Jerbo (Rebel Group Justice and Equality Movement (JEM) and Bahr Idriss Garda (United Resistance Front) have shown up to the ICC of their own volition. On the contrary, Bashir (current president), Ahmad Harun (head of government's investigation into the human rights violations in Darfur) and Ali Kushayb (Janjaweed leader), have not surrendered to the ICC and are protected by the government of Sudan (Falligant, 2010). Non-corporation with the ICC has made the court to issue two warrants of arrest against Bashir, in 2009 and 2010 (JAM Sudan, 2005).

In its argument the ICC (quoted in Jyrkkio (2012:6) stated that:

Al Bashir was in full control of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the Sudanese National Intelligence and Security Service (NISS) and the Sudanese Humanitarian Aid Commission (HAC) and used such State apparatus to carry out a genocidal campaign against the Fur, Masalit and Zaghawa people of Darfur.

3.3.1.1. AU's response to the ICC's arrest warrant against Bashir

The ICC's warrants of arrest against Bashir elicited different reactions from different sectors. The Government of Sudan, with the support of the council of Arab Foreign Ministers, dismissed the ICC's arrest warrants against Bashir (Sudan Tribune, 2013). The Sudanese government started to oust several humanitarian aid organizations from the country, who were accused of being partners to the ICC (Reeves, 2009). The AU argued that the arrest warrants against Bashir were going to jeopardize the peace achieved between the North and South (Falligant, 2010). Therefore, the AU asked all its member states to reject, and not to corporate with the ICC on arresting Bashir.

In conflict transformation, negotiation, arbitration and institution-building are some of the approaches that can be used to promote peaceful transition from social conflict or war (Bates, 2008: 256). In the Darfur impasse, the AU formed a panel that was led by former South African president, Thabo Mbeki. The panel advocated for a "hybrid" court-made of both local and international judges - to deal with the Darfur post-conflict peacebuilding and reconstruction. With all the good intentions that the hybrid court was tasked with, the AU failed to recommend whether the court was to try the Bashir case that was already at the ICC (Prendergast and Thomas-Jensen, 200:5). To-date, the AU is yet to constitute the hybrid court on Darfur while Bashir is still free and serving without fear as the President of Sudan (Kinnock and Michael, 2013).

On the other hand, the US and other European countries have placed travel bans and economic sanctions against Bashir. However, Bashir has been travelling in many AU and Arab states, who are signatory to the Rome Statute, without being arrested. For instance, Bashir has visited Mecca on several occasions (Sudan Tribune, 2010). In 2010, Bashir was among the dignitaries that were invited during the adoption of the new Kenyan constitution in 2010 (Jabre and Moni, 2012). This is evidence enough that there are many countries which are disobedient to the ICC (Nouwen & Werner 2011:17).

3.3.2 The ICC in Ivory Coast

Nicolas Cook, in *Cote d'voire Post-election Crisis*, observes that violence arose in the Ivory Coast after a presidential run-off between 'the incumbent president, Laurent Gbagbo, and former Prime Minister, Alassane Quattara on November 28, 2010' (Cook, 2011:2). This was

after the two claimed to have been victors of the disputed presidential election run-off and inaugurated themselves separately, forming rival governments. Ouattara was basing his victory claim on the UN-certified run-off results announced by the Ivorian Independent Electoral Commission (IIEC) which gave Ouattara 54.1% win against Gbagbo's 45.9%. Ouattara's win was legitimately endorsed by the US and the international community. On the other hand, Gbagbo had based his victory claim on the Ivorian Constitutional Court, which gave him 51.5% win against 48.6% for Ouattara (Ipinyomi, 2012:161). This led to unprecedented violence between the supporters of Ouattara and Gbagbo.

According to the UN Agenda for Peace (Ghali, 1992:822), peacekeeping is a third party intervention done by neutral and impartial military forces to create a buffer-zone between antagonists. Of recent, the UN peacekeeping has been criticized for being controlled by the US, Britain, Russia, China and France. During the Ivorian conflict, France and the US with the support of the Economic Community of West African States (ECOWAS), used airstrike to oust Gbagbo from power, other than creating a buffer-zone between Gbagbo and Ouattara supporters. The UN peacekeepers conducted airstrikes against Ivorian military units and areas that were perceived to be President Gbagbo strongholds (Bax and Olivier, 2013). According to the Human Rights Watch Report (2012: 12), 'over 4000 lives were lost in this violence; 1000 out of the 4000 were killed by the UN-French-backed Ouattara forces'. Pauline and Monnier (2011) and the Guardian (2011) argue that the UN peacekeepers later, captured Gbagbo and transferred him to the ICC for prosecution.

According to the ICC Today (2014), the Pre-Trial Chamber III granted the Prosecutor's request for authorization to open investigations, *proprio motu*, into the Ivorian situation with respect to alleged crimes within the Court's jurisdiction, committed since 28 November 2010, as well as with regards to crimes that may be committed in the future in the context of this situation. In carrying out its investigation, the ICC found former president Laurent Gbagbo, his wife Simone Gbagbo and Charles Blé Goudé, to have been responsible for gross violation of human rights (murder, rape and other sexual violence, persecution, and other inhuman acts) in the context of the 2010 post-electoral violence. To-date, Gbagbo is being held at ICC's custody. Some of his followers are in Ivorian prisons (ICC, 2014).

3.3.2.1 AU's response to Gbagbo's arrest

Azikiwe (2011) and Lee (2011: 1) argue that France backed-UN forces used violent means to resolve the Ivorian crisis. This is contrary to what conflict transformation strives to achieve (Galtung, 1969). In using violent means to resolve the Ivorian crisis (ousting Gbagbo and installing Quattara), the impartiality of the UNSC is to be queried (Pauline and Olivier Monnier, 2011). According to Ramsbotham, Miall and Woodhouse (2011:645), peacekeeping intervention is appropriate on three levels: (1) when containing violence and preventing it from escalating into war. (2) When limiting the intensity of war once it has broken out. (3) To secure a cease fire. However, by supporting one part to the Ivorian conflict, the France-backed UN forces contradicted the principles of democracy and human rights enshrined in the UN's Agenda for Peace (Ghali, 1992:823). This is because; the UN justified the violence so as to install France's preferred leaders against the will of the people of Ivory Coast (Pauline and Monnier, 2011). Galtung (1969:3) contends that the contemporary use of violence in resolving conflicts is a liberals' mechanisms of committing violence by self-styled leaders to secure their interests in a conflicting state.

Many commentators argue that the AU was clueless and unable to respond to the Ivorian crisis (Ipinyomi, 2012:163). As a result, the AU had no option but to allow France-backed UN violent means of resolving the Ivorian crisis and forceful handing over of Gbagbo to the ICC (Azikiwe, 2011). The Ivorian conflict made Monnier (2011) to argue that the AU lacks capacity and the will in resolving conflicts in African countries where rulers use violence against their critics and rebels. Due to this inability, the AU succumbs to the demands of the developed world.

3.3.3 The ICC in the Democratic Republic of Congo (DRC)

The World Factbook, (2012), reports that the DRC has sufficient resources to guarantee both the human and state security. In one of Paul Collier's arguments, intra-state conflict is rampant in countries that are endowed with valuable natural resources like diamonds, gold and oil. In such countries, there is a high tendency that elites may finance violence as means of competing for natural resources (Collier and Hoeffler, 2004:563). Due to its richness in valuable natural resources, the DRC has experienced unending wars, especially in the Eastern part, since 1996. In *Breaking the Conflict Trap: Civil War and Development Policy*, Collier (2000) argue that greed for personal, political, social and economic benefit motivates the

formation of militia and rebel groups. In the DRC, there are several militia groups like the Union of Congolese Patriots (UPC), Patriotic Force for the Liberation of Congo (FPLC), National Integrationist Front (FNI), and the *Forces Démocratiques pour la Libération du Rwanda - Forces Combattantes Abacunguzi* (FDLR-FCA). Also, there many multinationals from world's powerful states, like the US, that have backed different militia groups to support and secure their business interests. The presence of the aforementioned multinationals has incapacitated international organisations like the AU and the UN in resolving the DRC conflict (Nyathi, 2012).

Dan Wadada Nabudere (2004) in *Africa's First World War*, describes the DRC civil wars as the first ever unending imperialist war. Like other imperialist wars, Nabudere (2004:3) says that the DRC war was about the distribution of wealth and power. As a result, many crimes against humanity were committed against innocent Congolese. Reports by the Human Rights Watch (2003) and the Amnesty International (2003:15), show that due to the unending civil wars in the DRC, over 3.5 million Congolese lost their lives, hundreds of thousands have become refugees and many women and children were raped.

In relation to the ICC, the DRC situation became a historic one. Karuhanga (2012:2) and Clark (2008:35) argue that it is the DRC that provided the first ever suspects to the ICC since its foundation. In April 2004, the government of Joseph Kabila referred the DRC situation to the ICC. According to Hanson (2008), in *Global Policy Forum, Africa and the International Criminal Court*, the ICC responded to the DRC request by announcing the opening of investigations in June 2004. However, the ICC's announcement coincided with fierce fighting between the Congolese government and rebels in the province of South Kivu (Clark, 2008:37). This posed a challenge to the ICC's investigations (ICC, 2009).

Human Rights Watch (2006), in *The ICC Arrest First Step to Justice*, however argues that despite the fighting, the ICC managed to carry out its investigation. Thomas Lubanga Dyilo, Bosco Ntaganda and Sylvester Mudacumura were found guilty for committing war crimes, while Germain Katanga, Mathieu Ngudjolo Chui and Callixte Mbarushimana were found guilty of committing crimes against humanity (Arieff *et al*, 2011:22).

According to the ICC Today (2014), Lubanga Dyilo was imprisoned for 14 years while the court is yet to sentence Katanga. On the other hand, Ngudjolo Chui was acquitted of all

charges and was released from custody on 21 December 2012. Ntaganda surrendered himself voluntarily to the ICC on 22 March 2013, and is being held in custody. Mbarushimana was arrested in France and is yet to be transferred to the ICC. However, Mudacumura is still at large (New York Times, 2013).

3.3.3.1 AU's response to the ICC's action in the DRC

In relation to Collier and Hoeffler's (2004:570) argument, the DRC's unending wars fits well in the greedy explanation of the genesis of civil war: 'the greedy behaviour of a rebel group in organising an insurgency against the government' (Murshed and Mohamed, 2007:5). In resolving such a conflict, there is a need for a just and equal allocation of resources by the government (Staub, 2005:888). Other than resolving the DRC crisis, the UN, the world's powerful states and the AU have made the DRC war to be a blessing in disguise (Karuhanga, 2012). The unending war in DRC has become a profitable investment to many powerful countries, who gets into the DRC masquerading as peacekeeping forces, while searching for minerals and other natural valuables endemic in that country (Jacobson, 2012:48). This is dubbed *war economics* - where powerful states (multinationals) reap profits by either selling arms to one or all parties to the conflict or by supporting rebel governments so as to buy minerals and other resources at a lower price. In the end, the role of the UN and the AU in resolving the DRC war was severely crippled (Galtung, 2001:23).

In its capacity as a unifying African body, the AU did not protest or blame the Kabila government for referring only the rebels to the ICC. The AU seems to have left its role of resolving the DRC conflict to the powerless International Conference for the Great Lakes Region (ICGLR) (Karuhanga, 2012:1). Brubacher (2007:22) and Clark (2008:36) argue that the AU in turn, supported the UN and international donors and multinationals' opinion that prosecution of government official was going to destabilise the DRC further. In conflict transformation, both parties to the conflict need to be held responsible for their role in the violation of human rights (Lambourne, 2008:3). By supporting the non-prosecution of the senior government officials, the AU fell into to the trap of the UN, international donors and multinationals' war economics (Clark, 007:37).

3.4 Lessons from the AU/ICC relations in Africa

Ramsbotham et al (2011) in *Contemporary Conflict Resolution: Theory and Practise*, argues that conflict resolution is not only removing the sources and causes of the situation that brought about the conflict, but should also necessitate the transformation of attitudes and relationship between the conflicting parties. Desmond Tutu (2009), Caroline Flintoft (2008) and Sara Darehshori (2009) accuse the AU for being criminally inconsiderate in dealing with the Sudan crisis. Tutu (quoted in Arieff et al, 2011: 17) elaborated;

‘I regret that the charges against President Bashir are being used to stir up the sentiment that the justice system—and in particular, the international court—is biased against Africa. Justice is in the interest of victims, and the victims of these crimes are African. To imply that the prosecution is a plot by the West is demeaning to Africans and understates the commitment to justice we have seen across the continent’.

Although the above argument is logically valid, in relation to the Darfur conflict, the ICC’s arrest warrants targeted the main party to conflict – Bashir - other than facilitating conditions that were going to be conducive for strengthening and solidifying peace and addressing the root cause of the Darfur conflict. As such, the ICC’s arrest warrant against Bashir was and still is an impediment to social transformation and peacebuilding in Sudan: it can lead to a relapse to violence (Arieff *et al*, 2011).

Scholars like Doyle and Sambanis (2000:780) argue that constructive conflict resolution - as suggested by Galtung (1990) - is determined by a number of elements. One of the elements, according to Ali & Matthews (2004), is closure of violence; *negative peace*. In retrospect, by defying the ICC’s arrest warrant against Bashir, the AU was genuine in advocating for stability and peace; to end the violence first before the demands of justice in Sudan (Lough, 2011). Abdelmoniem (2009) in “*Defiant Bashir in Darfur, Warns Foreigners*”, argues that timing of the ICC’s arrest warrant against Bashir came when the AU was facilitating a peace talks between the conflicting parties in Sudan. Other than resolving the conflict, the AU saw the ICC’s arrest warrant against Bashir as an obstacle in peacebuilding process in Darfur (in Reuters of November 7, 2010).

The AU action in the Darfur conflict resonates well with Van Zyl’s (2005) argument for application of justice in a post-conflict society. According to Van Zyl (2005:209), care has to be taken in balancing the demands of justice with the realities of what can be achieved in the

short, medium and long-term. At the time when the ICC issued the arrest warrants against Bashir, cessation of violence and peace talks was more appealing than demands for justice.

On the other hand, the literature on the DRC situation showed how the AU cooperated fully with the ICC. According to Clark (2007:38), there are four main explanations that made the AU to fully cooperate with the ICC. Firstly, the DRC President and senior government and military officials were not indicted by the ICC. Secondly, it was the DRC government and not the UN or ICC that referred the situation to the court. These two explanations make it less complicated for the suspects of human rights violations to be pursued. Thirdly, it is the difficult conditions under which the ICC carried out the investigation (ongoing war) that did not allow the ICC to do a comprehensive investigation. There is a possibility that the ICC concentrated on rebel's strongholds (Ituri in Kivu) and not to other areas: this explains why the court could not indict government and military officials (Brown and Rosalinda, 2014).

The fourth explanations queries and puts loopholes in the integrity of the ICC's investigations in a post-conflict society. Xinhua (2009) argues that the interests and the demands of the UN, international donors and multinationals played a crucial role in non-indictment of Kabila (even though he used government forces to back the *Mai Mai* militia involved in serious crimes against humanity and backed Ntaganda). However, the UN and the European missions argued that Ntaganda did not play a role of in military operation in Kivu (Xinhua, 2009). Clark (2008:36), insists that President Joseph Kabila and other senior government officials ought to have been held accountable for abuses of human rights in the DRC conflict. The non-indictment of Kabila and other senior government officials makes Clark (2008) and Xinhua (2009) to argue that the ICC's investigation targeted small rebel and not the government.

In the Ivorian situation, Gbagbo was violently toppled as the president of Ivory Coast, by the French-barked UN forces. This made it easier for the UN to forcefully hand him over to the ICC. In *Defending Democracy and Restoring the Rule of Law*, Omoba Oladele Osinuga (2011) notes that the AU opted to cooperate with the ICC after the ECOWAS - which is funded by France, the US and the UN - had demanded a regime change in the Ivory Coast. However, due to lack of funds and military power, the AU was unable to intervene in the Ivorian conflict. Coates (1997), in *Against Realism*, argues that according to realists, the nature of inter-state politics and war makes it such that it is all about 'to reign' or be a

‘subject’. Thus, the stronger nations would want to dominate the weaker. In this regard, the geopolitical situation of African states, made the AU endorse and support the ICC’s arrest and indictment of Gbagbo (Azikiwe, 2011).

One key lesson that can be learnt is the uniqueness of actors in the preceding three post-conflict situations. In one of his arguments, Galtung (2001:17) argues that constructive conflict transformation requires a multi-disciplinary action that has to resonate with the reality and uniqueness of each post-conflict situation. Galtung faults the pre-occupation of world powerful states and organisations like the UN and NATO, in their ‘one size fits all’ approach in resolving different conflicts; use of ceasefires, constitution-making, building of democratic institutions and justice. In the preceding situations, the ICC’s quest for justice did not consider the uniqueness and the position held by the suspects; in contravention of constructive conflict transformation that warns that application of justice need to be unique to each post-conflict situation. For instance, it was established that the ICC’s application of justice in a divided post-conflict Darfur was going to escalate the conflict other than resolve it. Particularly in post-conflict Darfur, it was not easy for the ICC to compel an incumbent president to submit to the court’s jurisdictions, due to the power he held (Arieff *et al*, 2011).

Another lesson to be learnt from the foregoing literature is that lack of political will from the regional bodies and other international players, especially the permanent members of the UN, hinders the functioning of the ICC. Kenneth Rodman (2008:540), in *Darfur and the Limits of Legal Deterrence*, shows how the lack of support from the AU, the Arab League, China and Russia illustrated the unfortunate truism confronting the ICC. On the other hand, the interference of the UN and the US in the DRC hampered the ICC’s investigations there.

3.5 Conclusion

This chapter revealed that both the ICC and the AU were established in 2002. As a permanent international human rights court, the ICC was established to prosecute those who commit crime against humanity, war crimes and crimes of aggression and genocide. The ICC applies its jurisdiction on the aforementioned crimes in situations where domestic legal structures have failed to act swiftly. On the other hand, the AU is tasked with enhancing unity and strengthening co-operation and coordination, equipping the African continent with legal and institutional powers for preventing, transforming and resolving region conflicts. The chapter

also showed that the AU is yet to utilise the mechanisms it has put in place, to resolve major conflicts in Africa.

The crux of the chapter has revealed that it is due to selective action of the ICC in many African situations, and not outside Africa, that has attracted discontent from the AU. The laxity and discrepancies in the ICC's investigation in situation out of Africa - Afghanistan, Central African Republic, Colombia, Georgia, Honduras, the Republic of Korea and the Union of the Comoros - is what is to be questioned in this study.

In its contribution to the debates on the disagreement between the AU and the ICC, this study seeks to build on and fill in the gaps left in the preceding literature. As the chapter has shown, the disagreement between the AU and the ICC in regard to post-conflict Kenya is merely political. By restricting their arguments on their ideological roles, many researchers have left out the social and economic impacts of the AU/ICC disagreement in their analysis of the Kenyan politics. So as to retain its objectivity and cogence, this study, through the lenses of conflict transformation and peace research, explores the sensitivity and complexity of the AU/ICC disagreement and their lingering threats to post-conflict peacebuilding and recovery of post-2007/8 PEV Kenya. Apart from concepts of impunity and immunity, this study adds to the existing literature that both the AU and the ICC disagreements over prosecution of Uhuru and Ruto cannot address the causes of the 2007/8 PEV and other election-related violence in Kenya.

Apart from offering the devastating impacts of the AU and the ICC's disagreements, one reason for choosing this study is to initiate an integrated spirit of questioning, past or traditional influences of historical injustices, ethnic inequalities and impunity on justice in resolving African political conflicts. In this regard, the ICC has prioritized the demand of justice over ethnic harmony and nation-building and stability in Kenya. Similarly, by prioritizing the integrity and respect of the sitting head of state, the AU has overlooked the importance of understanding historical ethnic inequalities and other structural injustices as the root causes of the 2007/8 PEV. Understanding the foregoing historical structural injustices holds the key to resolving the Kenyan situation. Post-conflict peacebuilding and recovery can be successful when the underlying causes of conflict are addressed (Lambourne 2004:21). In the Kenyan situation, ethnic disharmony, reconciling the divided communities

and social justice, is more appealing to post-conflict peacebuilding and reconstruction than the political and ideological supremacy squabble that the AU and the ICC are involved in. The next chapter presents a number of frameworks that that may offer a broader approach in analyzing the 2007/8 Kenya's post-election violence and other violent conflict

CHAPTER FOUR

THEORETICAL FRAMEWORK

4. Introduction

Gschwend and Schimmelfennig (2011), in *Research Design in Political Science: How to Practice what they Preach*, argue that whether qualitative or quantitative or mixed method, social science research becomes relevant when a balance between the apparent competing values of science (theory) and human relations (practice) is reached. Broomhall (2003) purports that the relevance of social research is subjective. Despite Broomhall's assertion, it is imperative that a researcher takes into account both the social and the scientific relevance in any study (Laher, 2013:10). Therefore, theory and practice of research have to be intertwined so as to come up with an interpreting paradigm of a particular phenomenon (Gibson 1986:143).

Many proponents of conflict transformation and peace research argue that the causes of war and problems of sustaining peace are so complex that no single approach can be used to address them in isolation: a multi-disciplinary approach is therefore warranted if these issue are to be adequately addressed (Kriesberg, 2004: 93). This study will therefore use a multi-disciplinary approach to understand the causes and effects of post-2007/8 PEV Kenya, as well the AU/ICC attempts in resolving them. In the Kenyan 2007/8 PEV, there are two competing and parallel approaches: one purported by the ICC and the other one by the AU (to prosecute or not to prosecute Uhuru and Ruto).

In an attempt to apply theory into practice, this chapter explores - *Horizontal Inequalities*, *Negative-Positive Peace*, and *Functionalism* - a multi-dimensional framework of analyzing the effects of the AU /ICC disagreement on post-conflict peacebuilding and reconstruction of post-2007/8 Kenya. Firstly, *Horizontal inequalities* will aid this study in analyzing both the remote and immediate causes of the 2007/8 PEV in Kenya. According to *horizontal inequalities* framework, factors that cause violent conflicts are complex and mutually-reinforcing (Keen, 2012:757). Secondly, *Negative-Positive peace theory* will be relevant in this study in understanding how the root causes of the 2007/8 PEV may be managed and transformed so as to bring long-term individual, relational, cultural and structural changes (United States Institute of Peace, 2011: 16) in Kenya.

Functionalism argues that within the international arena, there are function-based international bodies like the ICC that are endowed with the responsibility of sanctioning, prosecuting and trying the suspected masterminds of genocides, crimes against humanity and war crimes (Soper, 1996). This is irrespective of the position they hold in their countries or discontent that the process may cause among regional bodies like the AU. Despite the dangers to peace that the ICC process may pose in divided societies like post-2007/8 PEV Kenya, *functionalism* validates reasons as to why the ICC need to prosecute Uhuru and Ruto, even though in their capacities they may have immunity such treatment within Kenya.

Rigby (20001) in *Justice and Reconciliation After the Violence* and Mani (2005) in *Beyond Restriction: Seeking Justice in the Shadows of War*, argue that justice and peace are key tools for rebuilding post-conflict social relations. However, in conflict transformation the application of justice has to be sensitive to the causes of violence, the needs and the interests of the locals, and the uniqueness of each post-conflict society (Van Zyl, 2009).

The major theoretical framework in this study is the *negative-positive peace*. The other two are auxiliary. *Horizontal inequalities* framework will exclusively be used to identify some of the causes of the 2007/8 PEV and other election-related violence in Kenya. On application of justice, *functionalism* will show how the AU and the ICC are using their function-based ideologies in their disagreements over the 2007/8 PEV in Kenya. However, through the tenets of *horizontal inequalities*, *negative-positive peace* and *functionalism*, the researcher intends to move this study from a mere description of the 2007/8 PEV events in Kenya, to a more dynamic explanation.

4.1 Reason for choosing the Frameworks

In choosing the foregoing frameworks, the researcher was informed by a number of reasons. One of the reasons was to answer one of the research questions: what are the remote and immediate causes of the 2007/8 PEV in Kenya. The researcher concluded that the *horizontal inequalities* framework sufficed, among other theories, as a better explanation of in unpacking and answering the preceding research question.

Conflict resolution emerged as a non-violent response in offering ways of “resolving” rather than containing or managing conflicts. However, the understanding of the root causes of any conflict is a positive starting point in resolving and transforming them (Galtung 1969:4). One framework that has been used by researchers in this regard is *negative-positive peace* theory (United States Institute of Peace, 2011: 16). The researcher, in the current study saw no compelling reasons to depart from this precedent, as the *negative-positive peace* theory also promised to be invaluable in unpacking the political disagreement over the prosecution of Uhuru and Ruto between the AU and the ICC. According to *negative-positive peace* theory, any efforts in post-conflict peacebuilding and reconstruction should promote conditions that are good for management, ‘orderly resolution of conflict, harmony associated with mature relationships, gentleness, and love’ (Boulding, 1978: 3).

Article 3(f) and 4(h) of the AU Constitutive Act, mandates the union to promote regional peace, justice, security and promotion of human rights. Similarly, the ICC is a function-based international body that was convened and established to prosecute those who commit crimes against humanity, war crimes and genocide. In situating the abuse of human rights within the responsibility of the international government, *functionalism* was chosen as a relevant theoretical framework. In seeking to promote justice as an important process of post-conflict recovery, the study sees the ICC as *jus cogens*. *Jus cogens* is an internationally established body that is responsible for objectively prosecuting those who violate human rights irrespective of their position in government or rebel groups (Laher, 2013).

In this study, the tenets of *functionalism* may run parallel to those of *negative-positive peace* in determining the demands of justice in constructive conflict transformation of post-2007/8 PEV Kenya. In as much as *functionalism* gives the ICC the norms and authority to indict and prosecute Uhuru and Ruto. Depending on the uniqueness of a post-conflict situation, this may seem to contradict the demands of *negative-positive peace theory*, which seems to rate peacebuilding and restorative justice higher than retributive justice. However, in using these two seemingly contradicting frameworks, the study takes advantage of the analytic synergy of both in providing an effective framework for the holistic analysis of the research question: exploring the lingering threats that the AU and the ICC disagreements poses to post-conflict peacebuilding and reconstruction of Kenya.

4.2 Horizontal Inequalities framework

Since the end of the Cold War, there has been an increase in intra-state conflicts, especially in Africa (Lambourne 2004:21). This is as a result of many post-independent African governments' poor governance and frustration of the peoples' basic needs (Connolly 2012).

However, many political scientists have been preoccupied with the quest of understanding the causes of these conflicts. Paul Collier (1999), a professor of economics and public policy and Director of the Centre for the Study of African Economies at Oxford University, became the first to establish a theoretical background for the theory in understanding these conflicts (Collier, 2000, p. xi). In *Doing Well out of War*, Collier (cited in Rienner 2000:91) argues that 'a useful conceptual distinction in understanding the motivation for civil war is that between greed and grievance'. According to Collier, the causes of intrastate conflict are as a result of greed and the rebel's quest for looting (Rienner, 2000:96). In 2009, after empirically using a global panel data to examine different factors that had caused intrastate wars from 1960 – 2004, Collier and Hoeffler found that there was little evidence to link grievance as a determining cause of conflict, and that neither 'inequality nor political oppression increase the risk of conflict' (Collier and Hoeffler 2002:1).

While other scholars were arguing that poverty is a proxy that increases grievance for conflict, Collier contends that there is no sufficient evidence linking poverty and rebelliousness, or showing that all poor people are rebellious. The only grievance that Collier and Hoeffler found to be causally efficacious in conflict was political exclusion, vengeance and inter-group hatred. However, Collier maintains that this type of grievance can only lead to conflict only if a group has a strong sense of grievance that can lead into rebellion (Collier and Hoeffler, 2004:578).

Berdal and Malone (2000:100) in a study done in Colombia seem to corroborate Collier's hypothesis, by concluding that many grievance-motivated groups become greedy for economic reasons and turn into illicit practices like drug dealing and insurgences. According to Berdal and Malone (2000:101), because many grievance-motivated groups depend on the country's primary mineral resource, a greed-motivated rebellion may erupt and lead into war. As such, Collier adopted this explanation and consolidated his theory, arguing that greed was the primary motivation for conflict (Keen: 2012:757) thereby excluding grievance factors like inequality, from this causative role.

On the contrary, Olsson and Fors (2004:325) in *Congo: The Prize of Predation*, contend that the war between Mobutu Sese Seko and Laurent Kabila was triggered by institutional grievance and not greed. Ballentine (2003:265) quoting Walter (2003:371) argues that conflicts are evident where; first, 'there is a situation of individual hardship or severe dissatisfaction with one's current situation, and second, the absence of any nonviolent means for change'. The preceding finding seems to combine grievance and greed in conflict causation. As a result, France Stewart (2009) came up with the *horizontal inequality* framework, making inequality a proxy to grievance factors and refuting Collier's bi-factorial framework: greed and grievance.

According to Stewart (2011:542), Collier's greed cannot be seen as the prime motivator of violence. Stewart contends that an explanation of why violent conflicts occur has to put into consideration the political, ethnic and consequently economic inequalities within a country. Basing on this assumption, Stewart (2011:545) expounded Collier's *greed and grievance theory* and espoused a *Horizontal Inequalities* theory.

In *Crisis Prevention: Tackling Horizontal Inequalities*, Stewart (cited in Keen 2008:757) argues that political, social, cultural and economic inequalities among groups are important catalysts to violent conflicts. Furthermore, Stewart says that it is the horizontal inequalities between groups- ethnicity, religion, age and gender that may lead into problems with poverty reduction, which in turn leads to violent conflict (Stewart, 2011:541). This enabled Stewart to incorporate cultural differences in the horizontal inequality framework, contending that these are conflated with economic and political differences between groups, leading to tensions, aggression, and eventually, violent conflict (Brown and Stewart, 2007:222).

Horizontal Inequality in income, social or civil rights are differences that appear between groups of people. These differences are not as a result of a difference in an inherent profitable quality, but a form of a forced inequality between different subcultures living in the same society (Stewart, 2011:542). Keen (2012) argues that there are several studies that have been done that vindicates Stewart's assertion; many violent conflicts arise as a result of grievance due to horizontal inequality other than greed. For example, the Sri Lankan 1983-2009 conflict occurred as a result of the discrimination of previously favoured Tamils (Grievance). This was due to the greediness of the Sri Lankan government (Korf, 2005:2014). Also, in 2008

xenophobia in South Africa is attributed to grievance that arose from deprivation of basic needs (grievance). This was a result of greed among the political elite/individual's quest to accumulate wealth at the expense of the poor (greed) (Ramsbotham, Miall and Woodhouse, 2011). In Philippines, a study done by Penetrante (2011) found that the Philippine conflict was a rebellion of the Muslim population of Mindanao (grievance) against corrupt government (greed). Other than insisting on greed or grievance as the primordial causes of violent conflict, *Horizontal inequality* argues that the causes of violent conflict are complex and that they inform each other depending on the variables in each context (Keen, 2012:757).

Although the horizontal inequality framework is sufficient in understanding the root causes of intra-state conflict, it is often criticised for neglecting the external factors (international actors) that may escalate violent conflicts, especially in African context (Obi, 2009: 112). This view has tended to give credence to what the analysts call, *economics of war theory*. According to economics of war theory, war is a profitable investment for multinational and powerful states (Ostby, 2008: 143). As such, it is in their interests that it escalates and lasts as long as it takes.

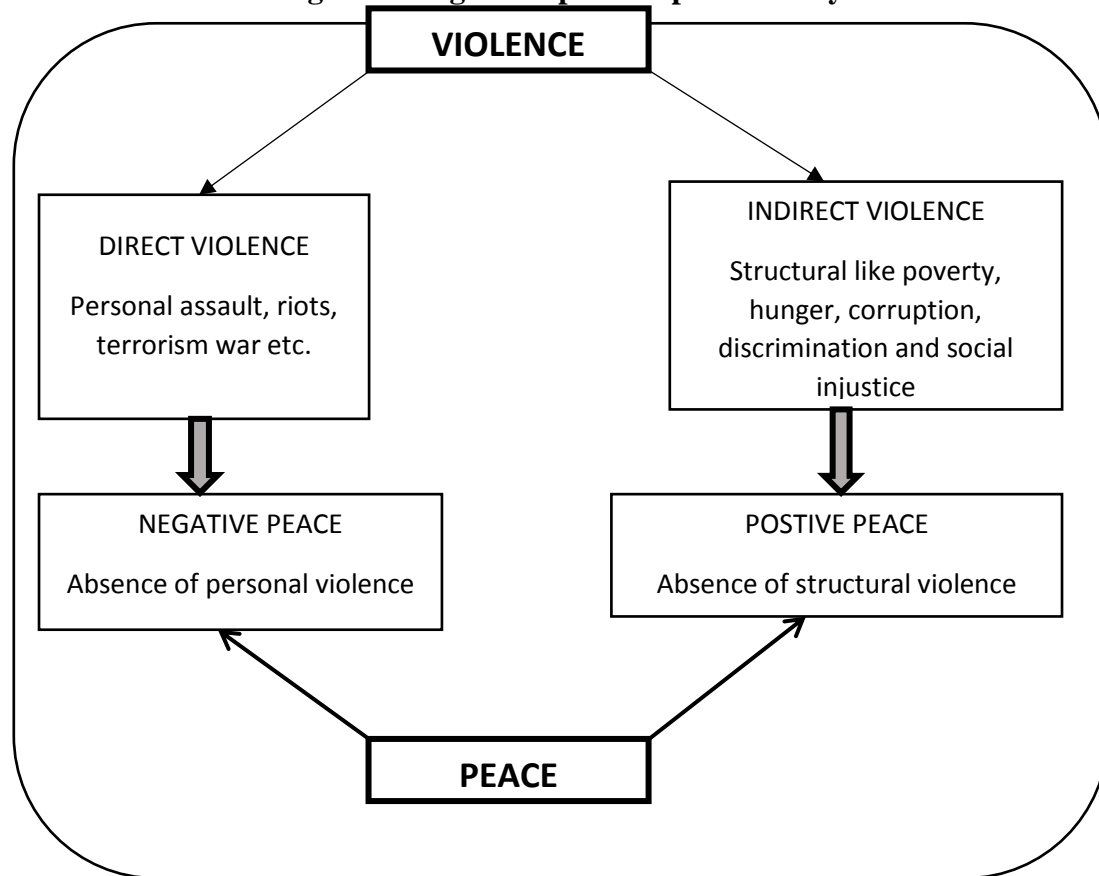
Despite the foregoing criticism leveled against the *horizontal inequalities*; as an interpretivist framework, the theory suffices in explaining the causes of violent conflict from the link between human behavior and socio-political institutions (Bryman, 2012: 28). To reach the desired goal of this study, the application of *horizontal inequalities* framework will be helpful in two ways. Firstly, *horizontal inequality* framework seeks to identify factors, or a mixture thereof, that were causes of the 2007/8 Kenya's PEV. For instance, Hansen, (2013) argues that the 2007/8 Kenya PEV began as a protest for an election malpractice and manipulation that created a speculation that Raila Odinga's victory was rigged. This led to peaceful protest that eventually turned into unprecedented violence. Secondly, *horizontal inequalities* framework, will determine whether the 2007/8 PEV was sectoral, done by a section of Kenyans who were discontent with the Kibaki regime, or there were other factors involved. Some commentators have argued that Kenya's 2007/8 PEV a result of ethnic, economic and political inequalities between different groups (Brown and Sriram, 2011:248).

4.3 Negative-positive peace theory

Johan Galtung (1969), a renowned founding father of peace studies, argues that the definition of peace depends on one's grasp of what violence is. Galtung (1964:432) in *An editorial Armed Conflicts 1946-2010* was the first peace scholar to envisage two descriptions of peace; *negative peace* (the absence of turmoil, tension, conflict and war), and *positive peace* (conditions that are good for management, orderly resolution of conflict, harmony associated with mature relationships, gentleness, and love) (Boulding, 1978: 3).

Negative-positive peace theory bases its conceptualization of conflict resolution on understanding of violence, as both direct and indirect violence. Galtung saw peace research as research into conditions that draws closer to peace while averting violence. This led him to conceptualize negative peace as the absence of violence and positive peace as an integration of the human society (Galtung 1969: 2). However, he argued that these two dimensions of peace are inseparable; one leads to the other. Negative peace is characterized by ceasefires or the efforts of the world's powerful nations (or the United Nation or NATO) in using their condign power to bring about end to war or violence. Although he does not advocate for this type of peace, he asserts that it may lead to positive peace. Sandole (2010:9), like Galtung, contends that 'negative peace might be a necessary condition for positive peace ...but falls short of transforming deep-rooted causes and conditions of conflict'. This is because, when violence or war ends, many strategies of conflict resolution tend address antagonisms between top leaders without addressing the root cause(s) of war (frustrated basic human needs).

Figure 3: Negative - positive peace theory



Adapted from Baljit, 2003:3.

According to Galtung, effective conflict resolution and rebuilding peace in a post-conflict society requires engaging all actors of the conflict (victims, perpetrators, society, policy makers) (Staub, 2005:890). The development of *negative-positive peace* theory was inspired by the conceptualization in health sciences, whereby health is defined as seen as either the presence of total wellbeing, as well as the absence of disease or ailment. Galtung in *positive-negative* peace theory likens negative peace to curative health while positive peace is likened to preventive health (Galtung 1985:144). According to Galtung's *negative- positive peace* theory, peace research should be involved in researching the conditions that bring about violence and conflicts and their relation to negative and positive peace (Wolff and Yakinthou, 2011:188).

Galtung (1969:171) in *negative-positive peace* theory, is preoccupied with the notion of structural violence which he sees as a consequence of cultural violence. He argues that contemporary conflict resolution done by the liberal states, was serving the interest of the

powerful in maintaining the status quo in the society. This, he argues, creates favourable conditions for endorsing a culture of violence. As such, Galtung ruled out the liberals' *just war theory* arguing that it was violence committed by self-styled leaders in the world. Just war theory argues that there are cases where war is justified and permissible. Also, just war theory, gives norms that justifies war and how soldiers ought to carry out a just war (Clark, 1988, Norman, 1995 and Walzer, 1977). In his support of just war, Brandt (1972: 153) uses Winston Churchill as an arbiter of just war theory. According to Brandt, Churchill justified obliteration bombing as retaliation (1972:158).

After, rebutting the just war theory, Galtung (2001:24) redefined violence as 'the avoidable insults to basic human needs'. According to Galtung, violence runs from a created liberal culture of violence (cultural violence) to socio-political and economic structures that do not meet the basic needs of all (structural violence). This leads to war and upheaval (direct violence). Therefore, structural violence exists when economic and social conditions lead to loss of life and suffering, as a consequence of unequal resource distribution, and not only as a result of physical violence. Other scholars like Doyle and Sambanis (2011:31) add that the success of positive peace, as suggested by Galtung, is determined by a number of elements that contribute to the enhancement of peace. These elements according to Ali and Matthews (2004:12) includes; negative peace (closure of violence), a healthy economy, resettlement of displaced persons and refugees, new political institutions that are broadly representative, and mechanisms which deal with the injustices of the past and the future. There is also a need for interventions that aim at healing traumas. This is to ensure that there is a positive orientation between antagonizing groups after violence – reconciliation (Staub, 2005:894).

In this study, *negative-positive peace* framework will be utilized to explain the alternative and effective post-conflict peacebuilding processes in post-conflict 2007/8 PEV Kenya. In one of the arguments, the researcher will use the framework to recommend the best way forward, and contending that the AU and ICC need to engage in seeking alternative means of addressing the need for justice in a way that will not compromise people and stability.

4.4 Functionalism

Functionalism is an international relations theory that emphasises 'the common interests shared by state and non-state actors' (Laher, 2013: 13). According to the theory's major

proponent, David Mitrany (1943 quoted in in Laher, 2013:12), functionalism is built on the principle that the function of today's world is 'to develop and co-ordinate the social scope of authority that is no longer a question of defining relations between states but of merging them'.

As such, functionalism promotes the development of global institutions that serve specific fields in advancing international affairs. In coming up with international organizations as a function of time, functionalism enhances an inter-state relationship that cuts across different ideologies, politics, race and geographical distinctions. Through function-based institutions, the world order realizes that, 'no country and no region can insulate itself against their effect'.... With satellites and space travel we have, in truth, we have reached the "no man's land " of sovereignty' (Mitrany, 1943:19). It is through function-based institutions that the world is awakening to the reality that there is a need for an active interstate coordination in responding to global issues like climate change, international trade, hunger, migration, human rights and justice, among others. As a response to the preceding global issue, international organizations like the United Nations Development Program (UNDP), International Organization for Migration (IOM), the International Criminal Court (ICC) and the AU, were established. However, all the preceding function-based institutions are loose associations for occasional specific joint action, with each member state retaining its freedom to participate or not (Soper, 1996:30).

One of the criticisms levelled against functionalism is that it makes some states surrender their sovereignty to foreign jurisdictions in favour of forming voluntary associations like the UN. Realists also criticize functionalist international arrangements, as a way of powerful states dominating the weaker states. However, Keohane (2003:11) observes that states do act unselfishly in the international system as they are inclined to pursue parochial objectives, which they often explain as their "national interests". In applying international law and treaties, it is the laws of the powerful states - developed democracies - that dominate those considered weak and undemocratic states (Cerny, 1997:263).

Proponents of functionalism respond to the foregoing criticism arguing that some global issues favour states to surrender their sovereignty in addressing them. By surrendering their sovereignty - in responding to global issues - more cooperation between states is encouraged.

This is evident where states may vote for a particular state to a seemingly special position in order to perform a service that is of mutual or global benefit (Mitrany, 1943:23).

In relation to international law, functionalism argues that legislation on human rights cannot be arbitrary rules of one state. Norms on human rights have to be determined objectively on consensus of international governments through conventions based on the guidance of experts (Mitrany, 1943:21). In doing so, functionalism advocates for the establishment of international institutions (*jus cogens*) that promote and protect international treaties on human rights, and be also responsible for prosecuting those who are indicted for committing crimes against humanity, war crimes and genocide. Accordingly, it is therefore the duty of *jus cogens* to coordinate, formalise and enforce a culture of international criminal justice - as a moral function of our time (Morgenthau, 1940:275).

Although Keohane (1988:383) criticizes functionalism for neglecting the anarchic nature of international government, he affirms that multilateralism and function-based institutions promote international cooperation in tackling issues of common global interests. According to Keohane (1988:384) the principles of multilateralism organize inter-state cooperation without given rules. This allows the development of function-based institutions that provides rules and norms on how states will engage with each other in confronting a common global issue; enhances trust and alleviates fear of unequal gains (Keohane and Martin 1995: 42).

Functionalism came into the arena of international law as a response to the dominance of the thinking of the positivists, that state laws and statute books are pure and do not depend on social moral standards of human behaviour. According to positivists 'law is a self-sufficient set of rules with obligations applicable to all people in all places and at all times' (Nino, 1980: 519) and can only be enforced by the domestic state (Morgenthau, 1986:3). According to legal positivists, law and social norms are separate entities and what is valid as international law may not be valid as domestic law.

Boyle (1980) purports that the foregoing legal positivists' assertion is limited in two ways: Firstly, it is not immune to the functionalists' criticism that positivists advocate for domestic laws that cannot qualify to be enacted as international laws. Legislation such as slavery in Europe, racial segregation in America, apartheid in South Africa and the eugenics in Nazi Germany, were domestically self-sustaining and abiding to all people of the mentioned

countries. However, such laws perpetuated historical human rights violations. Secondly, from a functionalist point of view, positivists do not recognize valid rules of international law that are not written down in domestic laws. In the second case, positivists are criticized for failing to understand that some international laws are written drawn during bilateral and multilateral treaties and conventions on human rights (Soper, 1996:216). Contrary to domestic jurisdictions; where laws arise from the state officials, who still have the monopoly to selectively enforce them, functionalism insist that international law arises from international treaties and conventions and are enforceable well-enforced by neutral international bodies - *jus cogens* (Laher, 2013:64). In relation to human rights, it is the responsibility of *jus cogens* to objectively prevent any arbitrary and selective application of law (Boyle, 1980). Therefore, function-based institutions promote the development of norms that serve the interest of the community and not those of political elites, exclusively, as does many domestic norms.

In this study, both the practice and the application of international criminal justice and trials are exemplified within the ideals of the ICC (*jus cogens*). Similarly, the AU is a functional-based regional body that enhances African unity and strengthens co-operation and coordination, as well as equipping the continent with legal and institutional frameworks. Looking exclusively on the 2007/8 PEV, the tenets of functionalism favour, to some extent, both the competing approaches of the AU and the ICC: this is a clash of two function-based institutions. On the one hand, functionalism sees the ICC as *jus cogens*: international body that was established to prosecute those who violate human rights (Morgenthau, 1940:10). On the other hand, the AU can also be seen as *jus cogens*, in its own right; promoting common interest of African states, and in its capacity responsible, within the African context, for what the ICC is responsible for in the rest of the world.

The weakness of functionalism is that it does not offer solutions to such clashes of jurisdiction. As such, these bodies end up subscribing to the realist description of events; with the most powerful body taking precedence and the weaker one cowering. As has been argued by some scholars, in such situations, despite cooperation within international institutions, some powerful states will use international institutions to advance their political, social and economic interests, and hence gain more by exploiting others (Baylis, 2005:56).

In relation to this study, the AU and the ICC are using their function-based ideologies to assert their power in handling the Kenyan situation. As an African regional institution, the

AU has put in place measures thought to be necessary and appropriate for promoting continental peace; including post-conflict peacebuilding (Bizos, 2011). The ICC, being an intercontinental body, feels mandated to cross continental borders should it sees fit for the maintenance of human rights. However, the parallel and competing ideological approaches in tackling the 2007/8 PEV in Kenya, rather than respective powers and jurisdictional boundaries, are what is in question in this study. The study, therefore, argues that, if the resolution of the Kenyan crisis is what is at stake for both institutions, it would be of mutual benefit if the two re-think their strategies and work in co-operation, than against each other. This will be of mutual advantage given the indications that the situation at hand is more complex than the strategies of each organization.

Figure 4: A summary of the theoretical framework

FRAMEWORK	OBJECTIVE	SUCCESS	LIMITATION
<i>Horizontal inequality</i>	What are the remote and the immediate causes of the Kenya's 2007/8 PEV. What are the causes of AU's animosity towards the ICC	With identification of the causes and the effects of the 2007/8 PEV, will assist <i>negative-positive peace</i> in addressing the roots causes of the 2007/8 PEV in Kenya	Does not offer the role of external actors in the 2007/8 PEV
<i>Negative-positive peace</i>	Ascertain the implication of the AU and the ICC's disagreement on PCB and PCR of Kenya. Evaluate the state of human security and the implications of the AU and the ICC disagreements in Kenya	The major theoretical framework of addressing post-conflict peacebuilding in Kenya.	Advocates for rectificatory justice after post-conflict peacebuilding. May suggest for non-prosecution of main conflicting parties: may be seen to be upholding impunity
<i>Functionalism</i>	How best the ICC and the AU may read use their functional-based powers to address justice in the post-2007/8 PEV	Shows a clash of functional-based interests between the AU and the ICC on application of international law in Kenya	Does not show the way forward in situations where two functional-based institutions clash in ideology

Compiled by the Author

4.5 Conclusion

The chapter has discussed three theoretical strands that make underwrite this study: *horizontal inequalities, negative-positive peace and functionalism*. The use of such a comprehensive, multi-dimensional framework is based on the arguments by experts that no single theory is sufficiently cogent to explain the causes and effects of a complex phenomenon like violent conflict. So as to fulfil the mandate, conflict transformation argues that it is when the root cause(s) of a conflict is understood, that a way forward of transforming and resolving can be sought (Klein, 2002:161). In as much as the three theoretical strands approach the subject matter from different angles, and at times containing apparently parallel tenets, it is the hope of tapping into the analytical synergy of the three theories that motivates for their usage in the present study.

The next chapter is an elaborated discussion on points of contestation between the AU and the ICC. Its main aim is to provide the key issues making the AU to fault the ICC's action in Africa.

CHAPTER FIVE

THE CLASH OF IDEOLOGIES: THE AU/ICC CONFRONTATION IN DETAILS

5. Introduction

At the heart of the post-election violence in multiparty Kenya, was the struggle to control public resources to benefit the communities aligned to the president's ethnic affiliation (Mutua, 2008). The study has also, so far, established that the election-related violence in Kenya has been a result of the three consecutive post-colonial government's failure to prosecute the perpetrators of such crimes (Hansen, 2011:15). This chapter explores, in detail, the three main AU's proposals as alternatives to the ICC: non-prosecution of Uhuru and Ruto and other incumbent African heads of states, the deferral of Uhuru and Ruto case and the establishment of the African Court on Human and Peoples' Rights. Before discussing the AU's proposals, the chapter seeks to show why the AU and the ICC are using the Kenyan situation as a test for their institutional mandates.

5.1 When and how the AU is involved in the Kenyan Situation

The end of overt violence through peace agreements or military victories does not necessarily mean that peace has been achieved (Lambourne, 2004:18). However, a post-conflict situation like the 2007/8 PEV in Kenya gives provision to new set of opportunities that can either be grasped or thrown away. A number of actors that are involved in post-conflict peacebuilding can actually play a significant role either in nurturing or undermining this fragile peacebuilding process (Klein, 2013). In the Kenyan situation, the ICC indicted Uhuru and Ruto in 2011, after the government had failed to constitute a local tribunal to try and prosecute them for their alleged roles in masterminding the 2007/8 PEV. At the time of their indictment, Uhuru and Ruto were not president and deputy president, respectively. Ruto's trial commenced in 2013, where he became the first serving senior government official to appear at the ICC, since its foundation (Escritt, 2013). Uhuru's trial is yet to begin in October 2014, also making him the first sitting head of state to appear before the court (ICC Today, 2014).

At the time when Uhuru and Ruto were indicted, the AU had stood by the February 28, 2008 Peace Accord: that was mediated by former United Nations Secretary General, Kofi Annan (an appointee of the AU). The AU supported the need for investigating, trying and prosecuting the masterminds of the 2007/8 Kenya's PEV (Dersso, 2013). The Commission of Inquiry into Post-election Violence (CIPEV, 2009) found Uhuru Kenyatta, Francis Muthaura, Mohammed Hussein Ali, William Ruto, Henry Kosgei and Joshua Arap Sang, responsible for orchestrating the 2007/8 PEV (Roberts, 2009:9). However, the Kenyan government failed to constitute a local tribunal to try them. All government's effort to come up with a mechanism of trying the suspected perpetrators of the 2007/8 PEV were vetoed by parliament. It was only then that the CIPEV approached the ICC with the names of these suspects (Lough, 2011).

The ICC gave the Kenyan government one more year to constitute a local tribunal to try the suspects, a task in which the government repeatedly failed (Human Rights Watch, 2011). All the suspects were asked to step down from their official government positions. Out of the six, Francis Muthaura, Mohammed Hussein Ali and Henry Kosgei were later acquitted, while Uhuru, Ruto and Sang, were found to have strong cases to answer. The ICC judges issued summons to the suspects who were cooperative and appeared before the court on their own volition (Jalloh, 2014).

After their election as the president and deputy president in March 2013, Uhuru and Ruto respectively promised to cooperate with the ICC (Mueller, 2013:112). However, the Kenyan government started to lobby regional bodies like the East African Cooperation (EAC) and the AU to pressure the ICC to defer Uhuru and Ruto's cases. At home, the parliament, dominated by members affiliated to Uhuru's ruling coalition, passed a bill to withdraw Kenya from the Rome Statute. This move elicited mixed reactions from Human rights activists, civil society organisations, political parties and western diplomats (Gatehouse, 2013). In his maiden speech at the extra ordinary AU summit in November 2013, Uhuru argued that African leaders should not surrender their sovereignty to foreign jurisdictions (Jobson, 2013). It was during the November 2013 summit that the AU member states rallied behind Uhuru and Ruto and became active entrants in the Uhuru and Ruto case (Kelly and Oluoch, 2013).

The AU used the Kenyan case to accuse the ICC for bias, as they argued that it selectively concentrated its action in Africa, leaving other regions, equally culpable, to go unpunished (Rashmi, 2013:1). For instance, the AU lamented why all the 8 identified cases, currently in from of the ICC, were from Africa (Igunza, E. 2013), while cases from outside Africa were at preliminary stages or not investigated at all (Patel, 2013). This made the AU to propose the following alternatives;

5.1.1 Non-prosecution of sitting heads of state and senior government officials

The UN Res 1/95 of December 1946 and the Year Book of International Law (1946), Article 27 of the ICC, Article 7(2) and Article 6(2) of the ICTY and ICTR Statutes, argue that all persons irrespective of their official capacity or the position they hold in government are subject to law. Similarly, Article 27 of the ICC states that;

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

However, in its two consecutive summits (October, 2013 and June 2014), the AU rescinded from this position, and stated that the ICC should not indict or prosecute any sitting head of state of the AU member state (Jobson, 2013). This was assumed to ensure that they carry out their constitutional mandates and to protect the sovereignty of their countries (Zuma, 2013).

According to Mueller (2013:115) human rights movements and civil society organisations contested the aforementioned AU proposal as a setback to international law on human rights, criminal justice and democracy. They argued that this was tantamount to allowing impunity since many African countries have weak institutions to deliver justice for the victims of political and civil crimes, orchestrated by the political elite (Amnesty International, 2013). In such countries, the ICC represents an objective justice to the victims of human right injustices. To overrule Article 27 of the ICC, with no alternative recourse to justice, is therefore, frustrating the arms of justice (Mueller, 2013:114).

What the AU did in overruling Article 27 of the ICC was, essentially, putting the African presidents above both domestic and international laws. Again, by overruling Article 27 of the ICC, the AU is contravening the Kenyan Constitution, which according to Article 2 (5),

states that ‘the general rule of the international law shall form part of the law of Kenya’(Republic of Kenya, 2010). In Article 2 (6) the Constitution further elaborates that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya’. Article 21(4) commits Kenya to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms. One way of looking at this is to argue that, in essence, the AU is asking Kenya to disobey its own constitution. However, due to the nature of the Kenyan law, a referendum is needed to change any part of the constitution. This may, therefore, need the consultation of the ordinary Kenyans, whom the AU and ICC have forgotten in their dealing with the Kenyan situation.

Dersso (2013) argues that the AU proposal means that victims of crimes against humanity, genocide and war crimes have to wait for 5 or 10 years, for the head of state to cede power before getting their justice. This version of delayed justice can have a negative effect on the victims, who may feel compelled to avenge themselves through violent means, thereby derailing the peacebuilding process in Kenya (Mani, 2005:867). The history of election-related violence in Kenya has already proved that non-prosecution of perpetrators of violence has a cascading effect in violence (Okuta, 2009:1065).

The non-prosecution of suspected perpetrators may also undermine the development of a democratic society in African states (Dhandia, R. 2013). This is because, among other things, the AU proposal is a disincentive for any leader to leave power even at the end of their term, for fear of being prosecuted. It also offers great incentive for someone to seek public office as a way of evading prosecution; and this can lead to unscrupulous means of doing so, be it murder, coup, or fraudulent elections, as long as someone secures the public office (Human Rights Watch, 2013). By overruling Article 27 of the ICC, the AU, inadvertently promotes and protects violent leadership in African countries. As a result African countries will remain moribund and teeter on the precipice of social, economic, and political disaster. This will be contrary to the promise that independence embodied (Bullock, 2013).

However, many societies in Africa are suffering from identity conflict. Due to tribalism, nepotism and politics of cronies, indicting a sitting head of a state poses threats to peace, human security and stability of a country (Mueller, 2011:111). In post-conflict peacebuilding, care need to be taken when applying justice to those who hold power. In chapter three, the study showed how the ICC’s arrest warrants against Bashir were untimely; as they could have

led to the escalation of violence in Darfur. Reading from the Darfur conflict, the AU is aware that the different post-conflict contexts need different approaches; a one-size fits all application of the ICC justice may not yield the desired peace (Jalloh, 2014:3). According to Schirch (2008: 9), other than arresting conflicting elites, post-conflict peacebuilding should aim at rebuilding damaged relationships and other institutions that may enhance peace, stability and long-term development.

Although the AU may be faulted in its proposal, of non-prosecution of incumbent presidents, it may also be seen as a desirable way forward in setting up initiatives that seek to address post-conflict peacebuilding and recovery (Ball, 2002: 38). To indict or/and prosecute a head of state in a divided society may lead to relapse to violent conflict. This is the reason why many peace scholars argue that a multidisciplinary approach needs to be employed in rebuilding peace in a post-conflict society. Galtung (2001:7) is at leery with the blanket application of liberal democracies' model of justice in divided post-conflict societies. For Jalloh (2014), the pursuit of justice should go hand in hand with that of peace. However, in cases that involves heads of the state, it may appear that the ICC would need to employ the right policy, timing and mutual trust.

5.1.2 The deferral of Uhuru and Ruto cases

Merriam Webster dictionary describes deferral as an act of putting off or delaying to start something till a later date. Applied in this case, the AU argues that the ICC should delay Uhuru and Ruto's prosecution so that they can carry out their constitutional mandates and fight terrorism (Desalegn, 2013). In relation to Article 16 of the ICC, it is the UNSC that can permit deferral for cases of crimes against humanity, genocide and war crimes. Deferral of such cases can be permitted if it is perceived that pursuance of such cases poses threats to international security (Luigi and Santiago, 2002). In relation to Uhuru and Ruto, Jalloh (2014) argues that there is no indication that their prosecution can pose any threat to international security.

In its October 2013 summit, the AU argued that deferral of Uhuru and Ruto cases was going to enable the two leaders to fight terrorism their country was facing after the Westgate attack. This was, however, dismissed by the UNSC special summit (BBC News, 2013), when Kenya failed to obtain a threshold of nine votes to have the deferral request approved. While seven

members (Rwanda, Togo, Morocco, China, Russia, Pakistan, and Azerbaijan) supported the resolution, eight (U.S.A, Britain, France, Guatemala, Argentina, Australia, Luxembourg and South Korea) abstained (<http://www.unsc.org>). However, a recent insecurity crisis warrants a dialogue and referendum, since tribal profiling indicates that Kenyans are more worried about their harmony more than the ICC process (The East African Standard, 2014).

Adebayo (2005: 33) and Galtung (2001:20) argue that there is no post-conflict peacebuilding and reconstruction that does not require transforming and mending damaged relations between antagonists and the re-establishment of amicable cooperation. The prosecution of one party to the conflict is a threat to social cohesion and ethnic harmony, especially in the African context. Kenya is a perfect example of a country torn apart by ethnic disharmony and polarization as a result of 2007/8 PEV.

There are several implications the deferral Uhuru/Ruto case can have. First, since Kenya is yet to pass a bill for witness protection, any witnesses against Uhuru and Ruto may be in danger of attacks, enticement and intimidation (Odhiambo, 2013). In addition, the Kenya National Commission on Human Rights (KNCRH) argues that some key witnesses in Uhuru and Ruto cases were bribed so as to recant their statements to both the KNCRH and the Waki Commission (Rajab, 2013). Due to poverty and corruption, there is no guarantee that Uhuru and Ruto will not lobby around and bribe key witnesses to recant their statements. Some witnesses could even die for intending to testify against their officials (Kenya Human Rights Commission, 2013).

However, if deferral is done accordingly it may be a way of strengthening the domestic local judiciary and (re)building trust of the citizens in the rule of law (Mani, 2005: 520). By allowing deferral, all the conflicting parties may have an opportunity to reconcile their divided communities so that whichever outcome comes out of the prosecution does not threaten social cohesion. The deferral of Uhuru and Ruto case is a viable option for justice. However, it is lacking in drawing the mechanisms or a policy under which reconciliation, forgiveness and the guarantee of witness protection.

However, given the track record of many, African countries, one could not overrule the possibility of inaction, even if the deferral would have been granted. In Sudan, the AU had suggested a hybrid court consisting of both local and international judges to handle the case.

However, to this day such a court is yet to be constituted. Similarly, there is the same fear that the AU deferral proposal, even if granted, may not provide sufficient guidelines for peacebuilding and reconstruction in Kenya. Lack of mechanism on how the deferral period will be used to build peace in Kenya, may play in the hands of African politicians who act as if they are above the law; hence perpetuate impunity (Posner and Young, 2014:126).

The disagreement on whether (or not) to defer the Uhuru and Ruto cases is double edged to post-conflict peacebuilding. In supporting deferral of the case, the AU is implicitly violating, demeaning and debasing the suffering of the 2007/8 PEV victims (Human Rights Watch, 2013). In turning down the deferral, and subordinating peace to retributive justice, the ICC may be blocking a great opportunity to mobilise conditions necessary for reconciling a society torn apart by the 2007/8 PEV; which ultimately would be a hindrance to post-conflict peacebuilding and reconstruction in Kenya.

As a response to the AU concern, the latest development by the ICC has given Uhuru and Ruto some excuse for being continuously at the trials. This move addresses the ICC concern of Uhuru and Ruto carrying out their constitutional mandate as president and deputy president, respectively (Jalloh, 2014).

5.1.3 The African Court of Justice and Human Rights

In *Practical Peace-making Wisdom from Africa: Reflections on Ubuntu*, Murithi (2006: 30) argues that, other than employing foreign mechanisms, African societies are founded on shared communal human relations. Therefore, when a conflict occurs, these shared beliefs, values and unity, are key in resolving disputes. Other than insisting on the ICC mechanism, there are alternative African communal mechanisms that can be used as global conflict resolution approaches; African approaches like Ubuntu.

In its effort to provide an African-grounded justice avenue, the AU has proposed the establishment of an African Court of Justice and Human Rights (ACJHR). Angela Mudukuti (2014:1) of Southern Africa Litigation Centre (SALC) observes that according to the AU, ACJHR will be able to prosecute 14 international crimes; genocide, war crimes, crimes against humanity, piracy, corruption, money laundering, unconstitutional changes of government, illicit exploitation of minerals, dumping of toxic chemicals and corporate greed.

Franz Fanon (1967:82) in *Black Skins, White Masks*, contents that Africans still portray a sense of dependency, helplessness and inadequacy in a “Whiteman world” after they lost their cultures and languages and were disfigured, marginalized and suppressed.

The establishment of the ACJHR is, therefore, to be lauded, as it offers a genuine effort by Africans striving to move away from Western domination and influences. The use of external methods to resolve different conflicts is a challenge to post-conflict peacebuilding and recovery. Ramsbotham, Miall and Woodhouse (2011:680) argue that contemporary conflict resolution mechanisms overemphasises the use of liberal democracies’ peace building initiatives; it focuses on termination of war, courts of justice, drafting constitution and electioneering to suit their political, economic and military interests in different post-conflict situations. Therefore, there is a need for regions and countries to set up institutions that guarantee the establishment of political process that resonates with the needs and culture of the locals (Pankhurst, 1999:239; McAskie, 2008:18).

To allow the use of foreign mechanism of conflict resolution that does not resonate with the needs of Africans is to allow neo-colonialism. Nkrumah (1965) described neo-colonialism as a situation ‘where a state, in theory, is independent and has all the outward trappings of international sovereignty, while in reality its economic, social, political and justice system is directed from outside’ (1965:30 ix). Therefore, the establishment of ACJHR would seem to be a big step for Africa’s independency; freeing her member states from selective purging by the biased ICC. However, time will tell whether the development of African institutions like the ACJHR will not protect the greed and the interests of the political leaders at the expense of the common citizen. This is because, Article 46 (a & b) restricts the ACJHR from prosecuting a sitting African head of state or a senior government official. According to Article 46 (b), one who holds ‘official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case, exempt a person from criminal responsibility’.

Many analysts applaud the AU’s move to create the ACJHR. However, they argue that the court’s defence of heads of state is tantamount to allowing impunity. Human Rights Watch (2014) and Amnesty International (2014) argue that the ACJHR will target rebels and minor offenders while it protects the interests of African leaders. Apart from being an African court, the creation of the ACJHR seems to be a retaliation of African leaders to Article 27(1) of the

ICC, which imposes liability of prosecution even on sitting heads of state and other government officials.

The formation of the ICC was informed by the fact that there was no international court to prosecute leaders and those who violated human rights. In Africa, due to constitutional manipulation, many African leaders are already exempt from the local judicial process (Block, 2014:56). Therefore, to create a court that gives immunity to the head of a state is duplication of an already existent legal provision (Mnaju, 2014:156). According to Galtung (2001:14), violence runs from an already existing culture of violence (cultural violence). If, creation of institutions does not challenge the socio-political and economic injustices (structural violence), it leads to violent conflict (direct violence). By creating ACJHR which cannot challenge the already existing structural injustices, the AU is endorsing violence as a conflict resolution strategy in two ways (Otieno, 2014).

Firstly, an immune sitting head of state will not allow implementation of laws that can off-sit him/her. Such a president will be pre-occupied with changing or being rigid on laws that will favour him/her to retain power. This seems to serve only the needs of corrupt African leaders like Teodoro Obiang Nguema Mbasogo, of Equatorial Guinea, and Zimbabwe's Robert Mugabe, who have been in power since 1979 and 1980, respectively (Kariri, 2014). Secondly, the AU is deferring the institution of an organisation that promotes pluralism, participation, impartiality, accountability and fairness. In doing this, the only way will be for critics and rebels to wage war their governments so as to ascend to power, and implement their ideas. In *Wretched of the Earth*, Fanon (1969) emphasize on the need for a revolutionary violence as a required and necessary tool for liberation. Although all peace scholars do not endorse violence as a conflict resolution strategy, an ACJHR that gives immunity to the heads of states will be playing into Fanon's assertion: legitimating violence as a liberation strategy (Otieno, 2014:24).

One of the AU's concerns about ICC's operations is lack of the courts' enthusiasm in investigating situations outside Africa, and the non-indictment of leaders of world powerful states, who have instigated wars in Iraq, Afghanistan and Syria. By not investigating these situations, the ICC is to be blamed for bias and malicious conduct against weaker states and defenceless leaders (Nmehielle, 2014). Such behaviour from the ICC play into the AU's argument, that the court is an appendage of the West. If that is so, then the AU may seem

justified in the establishment of the ACJHR, as an African-based justice and human rights institution. However, the fact that ACJHR that does not prosecute a sitting head of state also plays back to the hands of the ICC, whose *raison d'être* is to curb impunity by government officials, and provide justice to the defenceless victims (Frans, 2012:2). By being biased towards sitting heads of states and senior government officials, the AU denies both interveners and recipients of a post-conflict state an opportunity to serve the needs of victims whose lives have been ravaged by the scourge of destructive conflict (Fisher, 2001:73). This seems to be a credible reason for the ICC intervention.

With all the good intentions that the ACJHR seeks to serve, the protection of the sitting head of states from the law should be seen as an act of fear of African leaders being accountable for their actions. With the development of human rights and democratic institutions, many African leaders are becoming liable to the law (Otieno, 2014:10). On realization that the establishment of democratic institutions will hold them accountable for committing crimes against humanity, genocides and war crimes, the AU through the establishment of the ACJHR is absolving them and granting them an escape avenue (Amnesty International, 2014).

5.2 Why the ICC is adamant on prosecuting Uhuru and Ruto

The application of justice in post-conflict societies requires that there be sufficient correlation of accounts - defusing of issues of rectificatory justice (Diegeser, 1998:70). In the post-2007/8 PEV Kenya, the Waki Commission found that the violence was a product of unequal land distribution, tribalism and marginalization of sections of the society. Other than reducing justice to revenge, Kenya needs to opt for restorative and distributive ahead of retributive justice of the ICC. As the previous segment has reiterated, the AU argued that non-prosecution, deferral of Uhuru and Ruto cases and formation of the ACJHR are the best 'alternatives of strengthening African mechanisms to deal with African challenges and problems' (Jobson, 2013:1). However, the ICC insists the cases facing Uhuru and Ruto have to proceed as planned. The ICC has given the following reasons for this stance;

5.2.1 Upholding equality for all before the law

Jalloh (2014) argues that there is no need for both the AU and the ICC to be at loggerheads over the Kenyan situation, since the AU's concerns can be addressed within the confines of

the existing international law - Rome Statute and the Charter of the United Nations. Therefore, since the ICC is molded on the democratic norms that emphasize on legal justice more than peace; it may seem futile to expect it to do otherwise when engaging with cases in Africa of dealing with the AU. This is more so given the fact that Kenya failed to meet the expectations of international law and its own domestic laws, when given the chance to do so. Firstly, the Kenyan government failed to convene a local mechanism to prosecute Uhuru and Ruto (Brown and Sriram, 2012:248). Since Kenya is a signatory to the Rome Statute, the indictment of Uhuru and Ruto can only be seen as a logical step by the ICC, in its duty to complement weak domestic legal institutions (ICC, 1998).

Secondly, with regards to the deferral of Uhuru and Ruto case, it is not within the dictates of the ICC to decide, but the UNSC. This is the reason why the ICC referred the Kenyan situation to the UNSC. The AU is also aware that the only way to defer the Kenyan case is through the UNSC, as per Article 2 of the ICC. According to Article 2, the ICC ‘shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf’(Coalition for the International Criminal Court. 2012). Other than involving the ICC in its disagreement, the AU should engage the UNSC. However, scholars argue that due to the structure of the UNSC, the AU may still not get its way with this body either. This may be pre-empted in Article 63 (2) of the ICC, which states that:

If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required (ICC, 1998).

In fulfilling this Article, the ICC is aware that there is no need for crafting unnecessary add-on rules for cases involving heads of state. However, the ICC has made provisions for both Uhuru and Ruto, to exercise their constitutional mandates and at the same time attend the trials. As such, this interpretation of Article 63(2) makes the deferral of the cases against Uhuru and Ruto baseless (Escritt, 2013). However, with the adoption of the ACJHR, the ICC may be pressured into thinking of how some of its statutes can be amended (Jalloh, 2014).

Anthony Oluoch (2014), a Nairobi lawyer, argues that within the hierarchy of laws, where there is a disagreement between the AU and the UN-sanctioned international law, the AU

argument defers to the UN argument. Therefore, due to this hierarchy of laws, the ICC cannot be intimidated to give in to the AU demands. Still, the ICC views Uhuru and Ruto to have been sued in their personal capacity by the ICC and not the republic of Kenya or the ICC. According to Oluoch, the interests of Uhuru are subordinate to those of Kenya and the AU (Daily Nation, 2014).

5.2.2 To Deter future violation of human rights

The quest for developing a system of international justice was to bring an end to the global culture of impunity, in relation to human rights violations. By establishing the ICC, all signatories to the court saw it as the only institution that can deter future human rights atrocities (Murithi, 2014: 183). In civilized society, only the rule of law has become a means of deterring future offenders. In its response to the AU, the ICC prosecutor, Fatou Bensouda (2013), argued that the court's acts in Africa should be judged in terms of how it averts the future violation of human rights (in ICC today, 2013:2).

Arieff *et al* (2012) and Amnesty International (2013) see the objection of the AU to the ICC process as a proof enough that the court's process was beginning to bear fruits in Africa. Arieff *et al* (2012) argues that if the African heads of states were not guilty of crimes against humanity, the AU would have nothing to worry about. Arieff adds that the panic that the ICC is causing among the African heads of state shows that the culture of human rights violation is being deterred. The ICC sees this development as desirable as a deterrence mechanism of potential perpetrators of human rights.

Empirical evidence would suggest that, to argue that there are fewer crimes against humanity in Africa is to be delusional. Amnesty International (2013) notes that since 1960s, Africa has been recording the highest number of reported major human rights abuses. Frank Rabkin (2010) in *No Anti-African Bias at ICC*, quotes Sandile Ngcobo, a prominent South African Constitutional Chief justice, who argues that there are more serious human rights abuses in Africa than any other place in the world. However, Ngcobo and the Amnesty International's claims can be justifiable if the ICC would have investigated crimes committed in Syria, Iraq, Afghanistan and Palestine. However, regardless of how morally repugnant this may seem, it is the reluctance of the ICC in investigating situations outside Africa that is of concern to the

AU and not the magnitude of the abuse of human rights in Africa. It raises the question why should ICC only concentrate in Africa? (Murithi, 2014: 186)

5.3 Re-evaluating the AU/ICC disagreement

To avoid relapse into war Mani (2005:33) and Lambourne (2004:15) posit that justice and peace are separate yet intertwined processes. Retributive justice alone may either strengthen or weaken post-conflict peacebuilding process. In post-conflict peacebuilding and recovery, there is a need to engage all actors to the past violence: victim and perpetrators, policy makers, civil society organisations, as well as relevant international organizations. One criticism that can be levelled against the AU/ICC debate is that it has concentrated on settling political squabbles while disregarding the conciliatory needs of the ordinary Kenyans and the victims of 2007/8 PEV. In doing so, both the AU and the ICC have failed to understand that reconciliation and forgiveness is also significant to the construction of a successful post-conflict peacebuilding and recovery process. For instance, in the aftermath of the Rwandan genocide in 1994, the international community and the Rwandan government regarded legal justice as crucial to the peace-building process. The government saw legal accountability as an integral part of this process because they were of the view that reconciliation would not be achieved if there was no justice. However, reconciliation process in Rwanda has not been successful because of insistence on legal justice and lack of resources in the International Criminal Tribunal for Rwanda (ICTR). The Rwandan government has also failed to provide justice as a result of the slow trial and inadequate sentencing of perpetrators (Lambourne 2004:22; Staub, 2006:890).

With regards to the AU/ICC case, the study notes that there has been lack of trust between these international institutions. Compounded by their plight for political supremacy, both the AU/ICC debate is negatively impacting post-conflict peacebuilding in Kenya, and elsewhere. Tiemessen (2014:4) argues that for the AU to trust and respect the integrity of the ICC, the court has to re-evaluate its selection criteria for prosecutions. Murithi (2014:181) for example, contends that the AU may only have faith in the ICC if the latter starts to investigate cases and prosecute leaders outside Africa. In essence, this entails a self-criticism exercise for the ICC, particularly in its dealings with international bodies like the UNSC and the European Union (EU (Klein, 2013).

The thrust of this chapter agrees that more crimes against humanity are committed in Africa than in any other part of the world. However, this does not mean that the ICC should exclusively focus on Africa and neglect other continents, in its bid to fight human rights abuse. Barnes, Julian and Gorman (2013) contend that in Syria, the conflict has left over 100 000 Syrians dead. It would seem odd that, in such glaring instances of human rights violations, the ICC and UNSC are yet to act. This may seem to be indicative of the conflict of interests in these bodies, since the major players in Syria (US, Russia and China) are also the permanent members of the UNSC (Barnes, Julian & Gorman, 2013). From this standpoint, the swiftness of the ICC in acting on cases in the South, may justify the query on the integrity of these two institutions. The UNSC's referrals and the ICC's investigations and selection of cases, may appear to be nothing but appeasement of powerful states (Suever, 2013). If this is the case, then the negative response of other continental bodies, like the AU, to the court's decisions may be justified.

In line with the foregoing view, Kazooba (2010:1) argues that the ICC's actions in Africa are as a result of geopolitical pressure and a tool of avoiding confrontation with developed countries' foreign policies. It is such discrepancies in the ICC's applications of international justice that makes the Rwandan President (a country which is not party to the ICC), Paul Kagame (2008) contend that the ICC is part of the new form of Western imperialism. According to Kagame (2008), the ICC is concentrating its actions in Africa because of the continents' high level of poverty; as such, the West uses institutions like the ICC to have control of Africa's economic and political development (quoted in Sudan Tribune of 1/7/2008)

In lieu with the foregoing assertions, it is not the prosecution of the heads of state that agitates the AU; it is the ICC's biasness in selecting African cases while avoiding or neglecting cases outside the continent. In doing so, the ICC is giving the AU a moral authority to protect the continent from this form of global structural injustice (Witcher, 2013). The use of a body that represents international justice to target one or two continents cannot be a means to post-conflict justice. As such, the AU is justified in its action of establishing the ACJHR, to deliver desirable context-based justice and resolution of post-conflict situations. However, the establishment of such a court may have to learn from the flaws of the ICC (Murithi, 2014:185).

5.4 Conclusion

Murithi (2006:18) notes that post-conflict peacebuilding and recovery should address the root causes of the conflict while ‘promoting social and economic justice and putting in place political structures of governance and the rule of law which will consolidate peace-building, reconciliation and development’. This chapter has established that, as functional-based institution, both the AU and the ICC arguments are not concerned with post-conflict peacebuilding. This is because neither the ICC nor the AU has raised any argument concerning the root causes and the effects of the 2007/8 PEV in Kenya. The AU/ICC conflict may be understood as a territorial squabble on who has the moral authority on African matters. The chapter sees this political supremacy battle as futile to the concerns of ordinary Kenyans. Other than seeking to understand how the prosecution of Uhuru and Ruto will address post-conflict peacebuilding process, the AU and the ICC are using the 2007/8 PEV in Kenya to settle their political squabbles.

The chapter recommends that the process needs to be neither over-vindictive nor protective of Uhuru and Ruto. This is because such a move may be injurious to the needs of the 2007/8 PEV victims and the divided communities of Kenya. On the same note, the chapter faults the conservative nature of the ICC retributive justice: which aims at an inflexible solution without considering contextual dynamics, like ethnic divisions in Kenya. However, the victim-orientated stance of the ICC may seem desirable in a context of averting endemic impunity within the Kenya’s political, social and economic structures. The criticism levelled by the study on both the AU and the ICC is their one-sidedness. The AU vindicating the African heads of state from justice at expense of the victims. On flip of the coin, the ICC is ignoring the implications of prosecuting the heads of state, in its plight to providing retributive justice to the victims (Staub, 2005:875). On this note, the study is in favour of a comprehensive, home-grown solution to the problem.

Ramsbotham, Miall and Woodhouse (2011) and Annan (2013) argue that in post-conflict society, both peace and justice can be pursued vigorously. However, in applying justice, the right dimension, timing and other practicalities need to be considered. The uniqueness of each post-conflicts situation calls for a unique dimension of justice. For instance, in resolving identity conflict like that of Darfur and Kenya, the ICC dimension may not be viable (Van Zyl, 2005: 211). In such situation healing communal divisions, reconciling divided ethnic

communities and enforcing national cohesion is a more wanting alternative (Moolakkatu,2011:16). This desirable framework has to balance the need for peace and justice, in the resolution of post-conflict issues like the one in Kenya. Most, importantly, any conflict resolution strategy that would be desirable, will, of necessity, incorporate the analysis of ethnic divisions, community and party disharmony and lack of national cohesion, in the context under investigation (Block, 2014:10).

The next chapter analyses and discusses, in detail, the effects of the AU and ICC disagreements in Kenya.

CHAPTER SIX

ANALYSIS: THE LINGERING THREATS OF THE AU AND THE ICC DISAGREEMENT ON POST-CONFLICT PEACEBUILDING AND RECONSTRUCTION IN KENYA

6. Introduction

This study has so far argued that the disagreements between the AU and the ICC on whether to prosecute Uhuru and Ruto do not support post-conflict peacebuilding in Kenya. This study emphasizes the point that post-conflict peacebuilding and recovery in Kenya requires more than settling political differences: it needs social cohesion and nation building. Therefore, as argued in the previous chapters, the disagreements between the AU and the ICC expose Kenya to a myriad of challenges.

Deliberating on why the antagonism between the AU and the ICC poses threats to post-conflict peacebuilding, this chapter presents three arguments. Firstly, it will maintain that the AU and the ICC disagreements lack an inclusive approach of addressing the root causes of the 2007/8 PEV and that it excludes ordinary Kenyans in the debate. Secondly, by using Kenya to settle their political ideologies, the AU/ICC disagreement does not guarantee or promote long-term peace. In the end, the AU and the ICC confrontation may escalate Kenya's protracted social conflict. Thirdly, the AU and the ICC disagreements over the prosecution of Uhuru and Ruto overlook the importance of re-building national identity, social cohesion and the deconstruction of tribal disharmony.

6.1 Locating power, negative ethnicity and identity in election-related conflicts

Partridge (1963: 235) defines power as 'the ability for one actor to do something affecting another actor, which changes the probable patterns of future events'. According, this can be envisaged most easily in decision making. In line with this observation, the *Communist Manifesto* claims that it is the ideas and constructs of the powerful that run the world (Marx 1867 edited in Feuer, 1959:26). According to Marx, these constructs persist because people in power have the capacity to force those who disagree with them into submission.

As shown in chapter two, most post-colonial regimes in Kenya favoured the communities that were affiliated to the president, at the expense of other groups. As a result, relations and friends of those in power hold senior government's positions. This is seen as an attempt by the president to lure ethnic support from his home area. However, to avoid total rebellion from other communities, regional and ethnic power barons were selectively used as long as they did not question presidential decisions and ultimate power (Mueller, 2011:103). Driven by power and negative ethnicity, post-colonial administrations in Kenya played a key role in ethnic disharmony and categorization. The use of ethnic division as a means to ascend to power obliges the president to reward his ethnic community, as means of assuring his stay in the powerful position. Although ethnicity is not political, in Kenya, its power is harnessed in capturing and running the state (Barkan, 2011:5).

Charles Mills (1997:7) in *The Racial Contract* argues that identity injustices may be committed when a "superior" race, group or community stamps a contract with itself, allowing no input from other races, groups or communities. Mills' assertion can help to clarify the use of negative ethnicity in Kenyan politics. There has been a shifting (re)alignment of communities during election years. However, due to poor governance and negative ethnicity, post-colonial regimes have justified exclusion of other tribes from participating in political process. For instance, the system has always allowed the president to build his support base through patronage; by appointing senior governmental officials elites from tribes that are affiliated to him/her. As a result, the aforementioned elites and individuals use their powers to create wealth for themselves and their communities, at the expense of everyone else (Goldsmith, 2012:211). This is how such powerful leaders have been able to interfere with the functioning of institutions that are charged with oversight and accountable. This lucrative position of power motivates many political elite to use every means to retain power and political privilege. These include promotion of ethnic division and violence, youth militia and autocratic security forces. In most cases, poverty and unemployment has been used to recruit youths into mercenary militias, to intimidate and attack members of opposition parties. In doing so, the political elites and government officials have managed to secure their positions, and successfully thwarted opposition of and divergent views (Mueller, 2008: 196).

This preceding sub-section shows how power, negative ethnicity and tribal identity has been at the heart of the election related-violence in Kenya. Chapter two showed how Kenyatta and

Moi – who were in power after independence in 1963 and during the dawn of multiparty in 1991, respectively – were influential in buttressing tribal stratification in Kenya so as to keep power, and privilege the Kikuyu and Kalenjin communities (Roberts, 2009:8). Kibaki had similar power to construct tribalism in a way that privileged Kikuyu community over others. One of the study's research questions was to identify both the remote and immediate causes of the 2007/8 PEV (Cheeseman, 2008:177). This resonates with Stewart's (2000: 247) analysis that group identity causes intra-state conflict when political leaders use group/ethnic cohesion and mobilisation as a tool for competing for power and other public resources. The Kenyan situation re-echoes the former UN Secretary General, Kofi Anan(1998:4) argument that in some situation rival communities use control of power as a tool of safeguarding their security. To this end, it is the use of power, negative ethnicity and tribalism in selectively awarding privileges to communities that analysts see as proxy causes of the 2007/8 PEV in Kenya(Roberts, 2009:10).

6.2 Horizontal inequalities in Kenya

The majority of Kenyan tribes are agrarian. This has made land a central issue in the history of the Kenyan conflicts, and as one example of structural injustices (Maupeu, 2008:188). However, government officials redistributed land to their tribesmen at the expense of other tribes, equally in need of land (Roberts, 2009:9). The research done by the Commission of Inquiry into Land Injustices (2003) and the CIPEV (2009) found that all post-colonial governments were using discriminatory policies in distributing land (Okuta, 2009:1066). The regimes of presidents Kenyatta, Moi and, to some degree, Kibaki, are blamed for blatantly favouring Kikuyus and Kalenjins, in the allocation of land. For instance, after independence, President Kenyatta, using his presidential powers, ensured that many people from the Kikuyu community settled in the Rift Valley. Following in Kenyatta's footsteps, Moi used his presidential powers to give the Mau⁴ forest to his Kalenjin tribesmen. Kibaki, similarly, used his executive powers to eject the Kalenjins from the Mau forest in 2003 (Cussac, 2008:62).

Even though Kenya turns 50 years, this year (2014) as an independent country – large tracks of fertile land are still consolidated in the hands of the few, from two dominant communities (Daily Nation, 2014). The discriminatory allocation of land has contributed immensely to 2007/8 PEV in the Rift Valley. At the heart of the 2007/8 PEV, the Rift Valley (mostly

⁴ Mau forest was a government forest and the most fertile area of the Rift Valley.

affected province) continues to experience the historic land conflict between the Kikuyu and the Kalenjin communities (Roberts, 2009:11). At the Coast, the elite and powerful civil servants from the preceding tribes have benefited from illegal government allocation of large estates at the expense of the indigenous dwellers. This has led to emergence of a militant group known as the *Mombasa Republic Council*, which is fighting for land rights of the coastal people (Goldsmith, 2012: 24).

During electioneering period, the issue of land injustice resurfaces. This leads to the hardening of social boundaries along ethnic lines. This is what has given those treated unjustly to resort to the usage of violence in gaining access to land (Mazrui, 2000: xii). Although the unequal access to land was a policy that was introduced in Kenya by the British, the Kenyatta administration used it to consolidate power, in post-colonial Kenya (Calas, 2008:178). When Moi took over from Kenyatta, there was fear that the Kalenjin ancestral land was under the threat of the Kikuyu domination (Bratton and Kimenyi, 2008:273) as such apart from awarding the Mau forest to his Kalenjin tribe, Moi sponsored selected land clashes in Molo and other parts of the Rift Valley, to root out Kikuyu (Anderson and Lochery, 2008:230). When Kibaki took over, he refused to implement the recommendations of the Commission of Land Inquiry, which had identified individuals and companies that were illegally allocated land under Kenyatta and Moi administrations. The CIPEV (2009) found that grievance against discriminatory allocation of land was one of the main triggers of the 2007/8 PEV (Mghanga, 2010:21).

Another inequality observed in Kenya, was the tribal exclusionary strategies of successive post-colonial government in addressing poverty. This is coupled with marginalization and deprivation of the basic needs and rights of majority of the population. Since the dawn of multiparty politics in 1991, the presidency has instituted tribalisation of politics in Kenya (Bjork and Goebertustt, 2011:206). Those in power have used their position as a measure of appropriating privileges to their tribesmen. This politics of exclusion has failed to adequately address the problem of poverty, land, security, unemployment, development; on the contrary it has pitted one community against another, and instigated violent conflicts. By 2007/8, these structural injustices had escalated to violent points, resulting in unprecedented suffering of many during the 2007/8 PEV (Kriegler and Waki Reports, 2009).

These tribal inequalities, which have been bolstered by post-colonial administrations, have created notions of inferiority among other tribes of Kenya. To those who are poor as a consequence of discriminatory governance, to be a rich is to be a political elite or a member of ruling tribe(s): currently you have to be either from the Kikuyu or Kalenjin tribe (Mueller, 2011:115). This is also true with social and political mobility. To be affiliated to the opposition, is to be poor, landless and unemployed, and in most cases at risk of being persecuted (Mghanga, 2010:21).

It is the preceding land and ethnic inequalities that this study finds to have led to identity crisis and categorization that caused the 2007/8 PEV. As such, it is on these that the efforts of AU and the ICC should be focused. During the 2007/8 PEV, there were two types of categorizations (Roberts, 2009:14). The first one was based on the power struggle between the Kalenjin and the Kikuyu. While in KANU, both the Kalenjin and the Kikuyu had developed an identity of the ruling class. However, during the 2007 general election they belonged to opposing parties: Kikuyu belonged to the Party of National Unity (PNU) of Kibaki while the Kalenjin belonged to Orange Democratic Movement (ODM) of Odinga (Mutua, 2010: 12). When Kibaki was announced as the winner of the presidential contest, the victory seemed to have been for the Kikuyus, who felt entitled to government favours, while Kalenjin saw themselves as losers (Opondo, 2013: 12). As such, the Kalenjin attacked the Kikuyu and rooted them of the Rift Valley (where they had been put by Kenyatta, a few decades earlier). This explains why the Rift Valley was the worst affected region during the 2007/8 PEV; leading to major life losses among the Kikuyu and Kalenjin (Hansen, 2011:8).

Another identity categorization that was created during the 2007/8 PEV was based on the ethnic disharmony that pitted majority of other ethnic groups against the Kikuyu (Roberts, 2008:12). The announcement of Kibaki as the win of the 2007 general election made other ethnic groups be estranged to the Kikuyu (foreign and an oppressor). In the long run, this categorization justified the killing or evicting of Kikuyu from their regions and destroying their property (Browne and Sriram, 2012:252).

Using the *horizontal inequalities* perspective, this study purports that the 2007/8 PEV was a result of a section of some Kenyan tribes turning their grievance and frustration to the government, in response to the discrimination and seclusion. The study retains the argument that structural and systemic injustices such as political and economic discrimination and

inequalities of land distribution coupled with greed are rooted in Kenyan political history (Mueller, 2011:117). To-date, land injustice and ethnic disparity are yet to be addressed in Kenya. The recent tribal animosity in some parts of Kenya attests to this- in Lamu and Mpeketoni areas of the coastal Kenya. Although Uhuru, who is a Kikuyu, is the President, the recent tribal killings that were experienced in Lamu are indicative of endemic anti-Kikuyu sentiments (Daily Nation, 2014). As such, the study contends that dispelling these divisive sentiments is an integral part of peacebuilding, whether by the AU or the ICC. Anything less than this is a superficial and peripheral debate that poses threats to human security in Kenya and other post-conflict African countries.

The implementation of the new constitution (2010) was meant to address the foregoing structural injustices in Kenya. On the contrary, much has not changed. The current president, Uhuru, in his cabinet appointments has continued with the politics of appointing his cronies and tribespeople in lucrative government positions. For example, out of 22 ministerial positions, 9 and 8 ministers are from Uhuru's Kikuyu and Ruto's Kalenjin regions, respectively. This is also reflected in his allocation of heads state-owned enterprises and senior public servants (Daily Nation, 2013). The actions of Uhuru re-affirm the Marxist argument that the world is described and run according to the ideas or constructs of the powerful (Marx 1959:26). By overlooking the demands of the constitution (2010) that emphasizes on regional balance in allocation of cabinet posts and resources, the Uhuru administration is sending a clear message that the Kikuyus and the Kalenjins have a better standing with the government than the rest of Kenyans (Otieno, 2014:86)

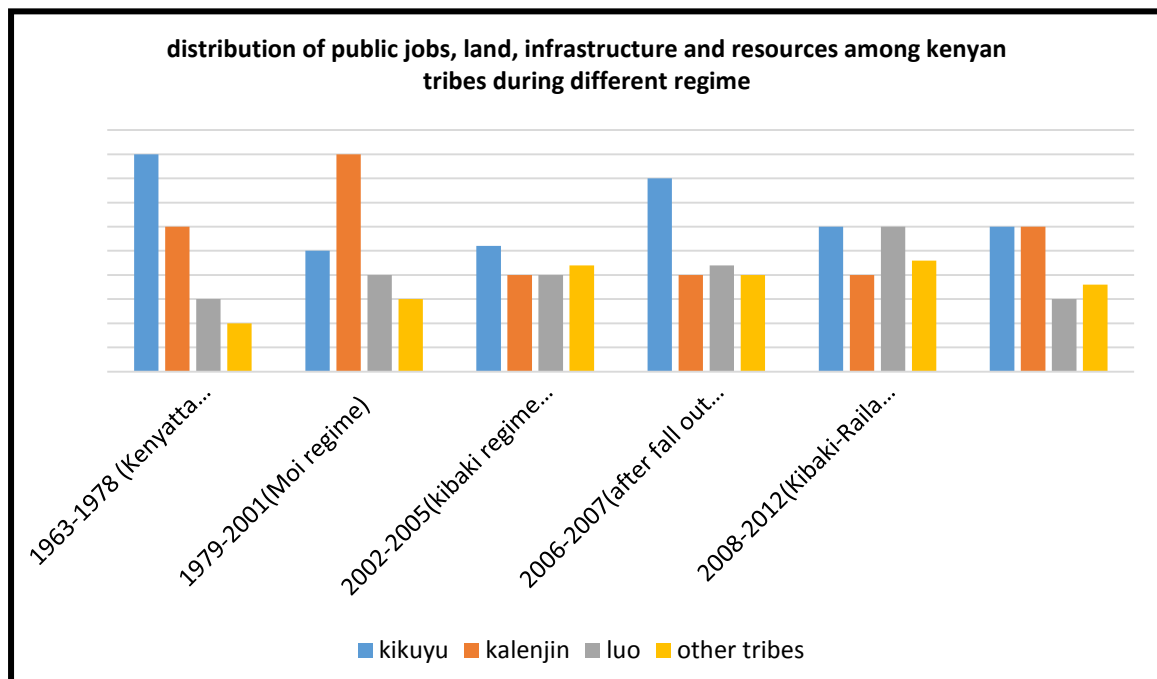
At the time this study was conducted (October 2014), these actions of government are already escalating the existing ethnic divisions. The tribes affiliated to the rivalling political parties, Jubilee and CORD, are at loggerhead. The leader of CORD, Raila Odinga, is campaigning for a referendum that seeks to change some parts of the constitution to compel the president to adhere to regional allocation of resources (The Standard, 2014). From these preceding events there is a clear indication that the 2007/8 PEV was ethnically motivated. What is motivating the current ethnic discord is to strive for power: 'power to do' (Heywood, 2013:5). It is fitting to argue that during the 2007/8 PEV, the rest of Kenyan communities wanted to raise their grievances through violence to force the Kikuyu out of power (Roberts, 2009:12). Although the 2007/8 PEV ended, the grievances of the conflicting communities have not changed, nor addressed: are lingering at negative-peace (Galtung, 2001:13).

As such, instead of advocating for power balance among Kenyan tribes, the AU and the ICC are pre-occupied with the prosecution of Uhuru and Ruto; a position which may even contribute to more tribal disharmony. This is against the demands of conflict transformation and post-conflict peacebuilding and reconstruction in Kenya. However, as long as the ideological differences between the AU and the ICC on how to resolve the 2007/8 PEV exists, this study warns that ethnic and land inequalities and other structural injustices will not be addressed. Therefore, there is no guarantee that the forthcoming 2017 general elections will be devoid of violence. Understanding these inequalities as the triggers of election-related violence invalidates the respective positions of the AU and the ICC (Lafargue and Katumanga, 2008: 23).

Through the tenets of *horizontal inequality*, the election-related violence in Kenya can be seen to have partly been caused by politically expedient leaders, who used ethnic disharmony and tribal politics to ascend to power (Mueller, 2011:113). Although many analysts argue that ethnic disharmony is the sole cause of electoral violence, it does not happen in isolation, other forms of forms of structural inequality compound the problem. Since 1991 to-date, all multiparty regimes have practised politics of patronage, whereby communities affiliated to the president benefits at the expense of others. Mmbali (2012:1) argues that violent conflicts in Kenya are as result of socio-political and economic issues, which have grown deeper and bigger over the years. Due to ascent to political power, the Kikuyu and Kalenjin communities have dominated other communities: receiving favours from most of the post-colonial governments (Wrong, 2010:34).

The ICC process may deter prospective perpetrators of human rights abuses. However, Sandole (2007:201) argues that the absence of war (*negative peace*) can obscure deep injustice, and if unaddressed, contain the seeds of future violent conflict. In retrospect, as long as tribal politics of reward continues as the measure of appropriating privileges and powerful positions – whether (or not) the ICC arrests Uhuru and Ruto - election-related violence will persist in Kenya. In addressing the foregoing historical systemic and structural injustices, Truger (2001:10) argues that post-conflict peacebuilding attempts and initiatives need to adopt a flexible approach rather than focusing exclusively on the demands of international actors: the AU and the ICC.

Figure 5: The link between the presidential office and tribal benefits



Compiled by the author

From the above diagram, it can be deduced that, due to their helm at presidency, the Kikuyu and the Kalenjin ethnic communities have used the presidential office to their benefits in government allocations.

6.3 A negative-positive peace approach in post-conflict Kenya

Peacebuilding is a long-term procedure that takes place after the conflict has stopped, and is marked by a cease-fire or peace agreement. It is often described as the last phase in the conflict cycle. This provides participants with the independence to create an environment that will eradicate reasons that made them resort to violence (McAskie2006:18). In Kenya, after 30 days of internal strife, the incumbent President Kibaki and his adversary Raila signed the AU-mediated February 28, 2008 Peace Deal in Nairobi - a power-sharing deal that instituted a unity government between Kibaki and Odinga (Bjork and Goebertus, 2011:209). The

choice of Kofi Annan as the chief AU mediator is informative, following his years of experience as the UN Secretary General. It was through Annan's guidance that Kibaki and Odinga agreed to form a coalition government that was to initiate constitutional, judicial and electoral reforms (Roberts, 2009:16).

Kibaki and Odinga agreed to constitute a commission of inquiry to investigate the events of the 2007/8 PEV. The Waki Report was handed to the President (Mwai Kibaki) and Prime Minister (Raila Odinga) on the 15th of October 2008. The Commission found that there was some link between the presidential office and the eruption of 2007/8 post-election violence. Due to foregoing link, there was reluctance by the Kenyan authorities to prosecute perpetrators of these crimes (Barkan, 2011:10). This made the ICC the only alternative platform for post-2007/8 PEV justice (Patel, 2013). Of the six suspects presented by the Commission to the ICC, Uhuru and Ruto were found to have a case to answer at the ICC (Brown and Sriram, 2012: 250). The two cooperated with the ICC until March 2013, when they were elected as President and Deputy President, respectively. Having gone with the resolution of the Waki Commission, the AU made a *volte-face*, after the election of the two, and is now challenging the ICC to defer their prosecution (Jobson, 2013).

In constructive conflict transformation, the conflicting interests of external actors in a post-conflict state like Kenya, poses a number of threats (Maphosa, 2010). These threats frustrate efforts in post-conflict peacebuilding and reconstruction. One such threat is the possibility of a negative outcome (Maphosa, 2010:711). Kenyan case is facing this particular threat; where the AU and ICC are involved in a political supremacy battle instead of genuinely engaging with the root causes of the 2007/8 PEV. This unfortunate situation may as well have exacerbated the already volatile situation of ethnic disharmony in Kenya. According to Galtung (1996:112), peace-building in a post-conflict society should be considered as a way forward in attempting to overcome the contradictions which lie at the root of the conflict. In Galtung's assertion, the AU and the ICC should strive to achieve the transformation of the actual or potential violent situation into a peaceful (non-violent) process of social and political change in Kenya (Galtung 1985:168). Unfortunately, neither seems to possess a strategy that can offer such transformation, in a people-centred, non-violent, way (Reychler and Colorado 2001:12). According to Kofi Annan, what is needed in post-conflict Kenya is the identification and support of those structures that tend to strengthen and solidify peace with the aim of avoiding a relapse into war (Knight 2010:31).

While expounding the *negative-positive peace framework*, Lederach (1997:17) argues that there are three elements that are key in post-conflict peacebuilding and recovery. Firstly, to think of post-conflict peacebuilding and recovery, without understanding and addressing the causes and the effects of a conflict is to be delusional. In the Kenyan context, one of the explanations of the causes of the 2007/8 PEV was social, economic and political exclusion of some tribes due to negative ethnicity practiced by post-colonial political elites (Barkan, 2011: 13). The Department of International Development (DFID, 2010:15) argues that, other than concentrating on resolving the conflicting elites, post-conflict-peacebuilding initiatives should confront and address different triggers and drivers of different conflicts.

In other post-conflict societies, the control of the arms traffic within society may be an integral step to peace-building (Lambourne, 2004). However, within the Kenyan context, addressing structural oppression based on ethnic inequalities is the way forward in rebuilding peace. Such an act may bolster a democratic society that supports peace and respect social justice (Connolly, 2012:20). This has been lacking in the AU/ICC approach so far; and as a result has denied Kenya an early post-conflict peacebuilding and reconstruction. An early resolution in the preceding countries limited the damage caused by violence and laid a foundation for a stronger peace-building effort (Reychler & Colorado 2001:13). Applied to the Kenyan context, this early post-conflict peacebuilding resolution has to include, of necessity, the curbing presidential powers in tribal politics and nepotism. The need to address the poverty, land injustices, security, unemployment, development and ascent to political power through mobilisation of tribal politics, ought not to be overlooked (Goldsmith, 2012:89).

Secondly, Lederach (1995:a&b) posits that post-conflict peacebuilding and recovery need to identify mechanisms through which local, national and international actors can engage each other constructively. This should be through non-violent and non-contradictory ways. Jalloh (2014) argues that Uhuru and Ruto are being prosecuted by the ICC in their individual capacity and not as a nation. For Jalloh, Uhuru and Ruto need to bear their individual responsibility by being answerable to the ICC and not for Kenya or the AU. Jalloh's argument can be validated if ethnic inequality that is causing negative ethnicity is addressed first, before considering prosecuting Uhuru and Ruto. If not, the prosecution of Uhuru and

Ruto, even in their individual capacity, may be viewed as the prosecution of their respective tribes.

On one hand, the quest for justice by the ICC is a way forward in redressing past abuses of human rights (Cannolly 2012:22). In as much as this form of justice is desirable, it is inadequate in addressing the ethnic inequalities and other structural injustices in Kenya. In fact, if not handled properly, it can be the ground on which ethnic disharmony may thrive. As such, this study may serve as an early warning sign to the ICC, in its action in Kenya. The over-emphasis on the ICC process seems to overlook national dialogue geared towards the resolution of the current texture of ethnic inequalities and disharmony. As such, this emphasis may become a ticking time-bomb for future violence in Kenya. This ticking bomb scenario assumes a situation where the causes of conflict are known but those involved do not know how to effectively investigate and avert the recurrence of future violence (Fisher, 2007:199).

Thirdly, post-conflict peacebuilding and recovery relies on the good will of international actors, as providers of material support to facilitate the favourable environment for inclusive peace processes (DFID, 2010:23). It is upon the good will of international actors to ensure that peace agreements are honoured and in realising an amicable political settlement of a post-conflict society. Cannolly (2012:22) contends that many peace accords have a tendency of failing within the first two years if international actors concentrate on pushing their interests. This threat has a chance of materialising in the Kenyan context should the AU/ICC disagreement persist. The shifting of positions by the AU is also a cause for concern. According to (Mueller, 2013:210), the AU took a contrary stand to that of February 28, 2008 after Uhuru and Ruto became president and deputy president, respectively. This disfigures the capability of the AU in resolving the Kenyan crisis. It also puts the integrity of the AU in implementing Article 4(h) of its Constitutive Act of 2004 at peril (Dersso, 2013).

The foregoing paragraph shows why neutral international and domestic civil organisation is suitable in rebuilding peace in a post-conflict society (Ramsbotham, Miall and Woodhouse, 2011). However, there are many international and domestic actors (human rights groups and other non-governmental organisations) that are in favour of the ICC process over the Kenyan judiciary. As such, these international and local actors are putting pressure on the regime of Uhuru and Ruto to build institutions (state-building). Instead of focusing on nation-building, dialogue and social cohesion before state-building, the Uhuru government is under pressure

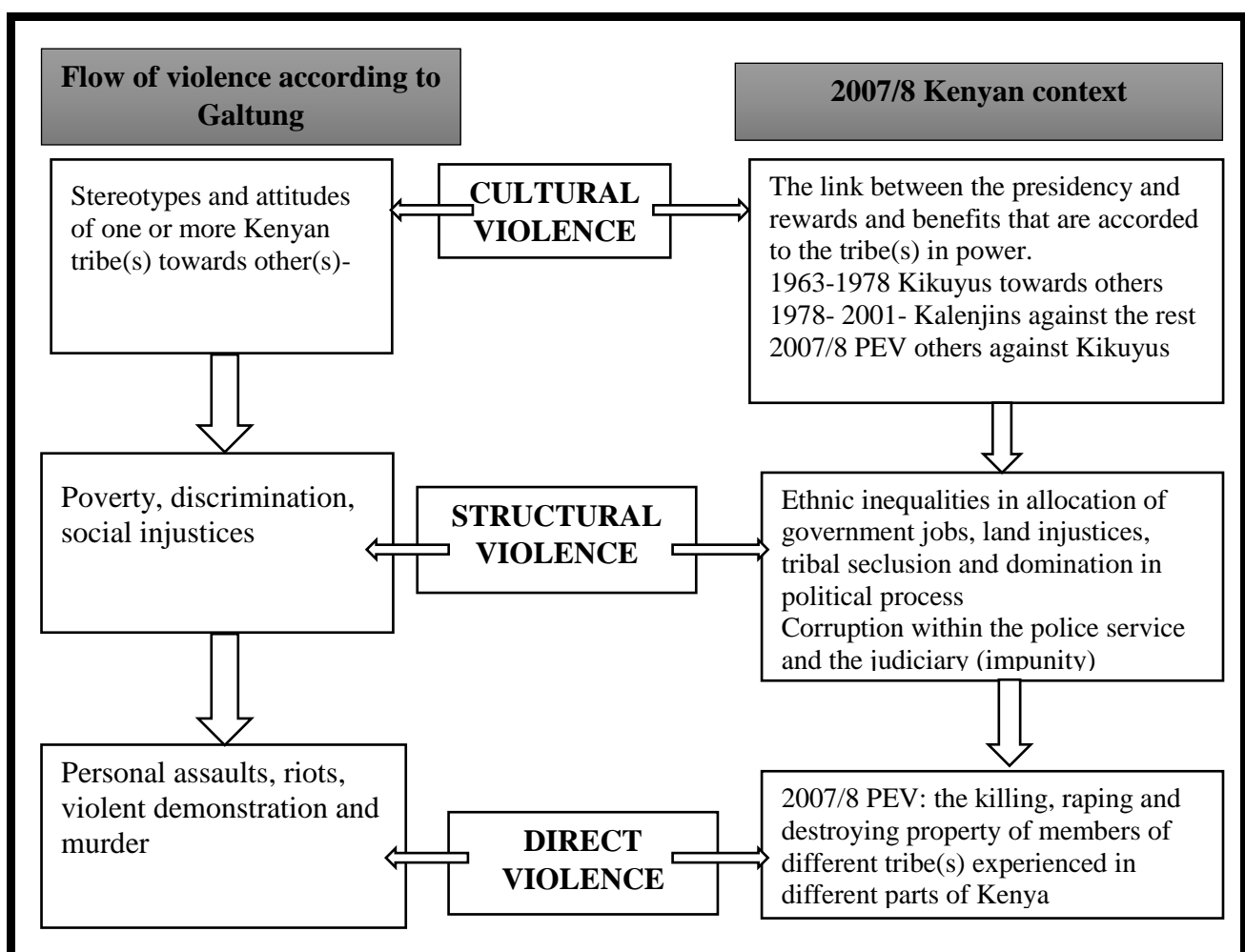
to build institutions; a stance that may, in real sense, be injurious to post-conflict peacebuilding. Futumura, Newman and Tadjibakhsh (2010:2) warn that care has to be taken as many international actors and other organisations concentrate more on promoting institutional growth at the expense of reconciliation and the development of social capital. Through the lenses of *Negative-positive peace* theory, the future stability, security and peace of Kenya can be a success if the tribal mind-set and attitude that has been breeding violence since independence are constructively addressed. Creation of institutions without changing the mind-set and attitude of those who run institutions is a hindrance to post-conflict peacebuilding.

This study faults both the AU and the ICC for not considering the foregoing three major separate, yet intertwined, elements of post-conflict peace-building and reconstruction. Through the tenets of *negative-positive peace*, this study accuses the ICC and the AU for being inconsiderate in understanding the ethnic identities that made the suspected perpetrators of the 2007/8 PEV to act in the way they did (Staub, 2006:890). In one of its arguments, the ICC contends that the prosecution of Uhuru and Ruto will deter future perpetrators of crimes against humanity. On the other hand, the AU argues that to prosecute Uhuru and Ruto is to disrespect their integrity as sitting heads of state and an abuse to their constitutional mandates. However, both the AU and the ICC arguments do not challenge the inequalities that breed perpetrators of future crimes against humanity: poverty, land injustices, discriminatory governance and negative ethnicity. In doing so, there is no guarantee that the AU and the ICC will find an amicable solution to the tendencies of a section of disadvantaged and marginalised Kenyan tribes in challenging the *status quo* (Browns, 2014). Other than resolving different identities in Kenya, the AU/ICC disagreement may even motivate more Kenyans to participate in future violent conflicts, as a sign of loss of faith in the judiciary systems to deliver justice for the victims (Stewart, 2000:251).

In recommending an approach that is contrary to both the AU and the ICC stands, this study resonates with the current needs of post-conflict peacebuilding in Kenya. Many commentators contend that there are several triggers of the 2007/8 PEV (Branch, 2011:50), as such any strategy aiming at an amicable resolution and peacebuilding in Africa has to encompass all these prospective explanation. Hence, through the lenses of *negative-positive peace*, this study recommends that the AU and the ICC need to find a tenable alternative to

their current disagreement so as to enhance their capability of addressing the root causes of election-related violence in Kenya (Galtung, 2001:24).

Figure 6: Analysis of the 2007/8 PEV in Kenya using *negative-positive peace* theory



Adapted from Galtung (1969:4)

Before mentioning how the AU/ICC disagreement is a lingering threat to post-conflict peacebuilding and reconstruction of Kenya, this study maintains that there is a need to rebuild ruined relationships and to address psychological traumas of the victims and

perpetrators of the 2007/8 PEV (Manning 2003:27). Other than involving themselves in a political debate on whether or not to prosecute Uhuru and Ruto, the focus of the AU and the ICC should be: firstly, on rebuilding, strengthening and promoting mutual non-violent relationships between the divided Kenyan communities, and; secondly, on urging conflicting political elites to engage in constructive dialogue of ethnic harmony (Mitchell, 2012:16).

If the foregoing processes are not done accordingly, this study warns that there is a possibility of the development of a categorization (identity) conflict in Kenya which will inevitably cause future violence. According to Hiebert (2008:329), identity categorization is the situation whereby the conflicting groups may create identities of ‘the self’ and ‘the other’, whereby ‘the other’ is liable to alienation, and if possible, elimination. This categorization ‘depends, traditionally, on representing the other as the existential threat to the self; as inferior to the self; as a violator of universal principles; or merely as different to the self’ (Diez 2005:628 cited in Bischoff and Serrao 2009:370). This quotation seems to explain succinctly the different attitudes, identities and stereotypes that have been created in Kenya since the dawn of independence and after the 2007/8 PEV.

Through the tenets of *negative-positive peace*, this study recommends that, for constructive post-conflict peacebuilding of Kenya, all the historical injustices and political convenience that has been practised in post-colonial Kenya need to be resolved. However, the study warns that the AU and the ICC are using Kenya as a testing ground for pushing their irreconcilable political ideologies. Despite the crucial roles of the two institutions, their disagreement that focuses exclusively on the prosecution (and non-prosecution) is an obstruction to peacebuilding in Kenya.

6.4 The ICC in the post-conflict peacebuilding and reconstruction of Kenya

Justice is a key process in rebuilding peace in a post-conflict society (Diegeser, 1998: 702). However, in a divided and a polarized society like Kenya, justice if not done accordingly, can simplistically be perceived as revenge. Currently, despite the hopes and aspirations that the new constitution instigates, Kenya is faced with deep ethnic divisions after the 2013 general election (The Crisis Group, 2014). For instance, the government of Uhuru is accused by the former Prime Minister (Raila Odinga) for frustrating the full implementation of the new constitution (Daily Nation, 2014). Other than uniting Kenyans, the government has been

accused of side-lining other tribes in the allocation of state jobs and resources (Aljazeera, 2014). As a result, there are ongoing campaigns for a referendum to call the government into the task. This has divided Kenya along ethnic affiliations; tribes affiliated to the President and Deputy President are anti-referendum while those affiliated to Raila and other leaders are pro-referendum (Mutua, 2014).

Functionalism endorses ICC as - *jus cogens* - an international institution that prosecute those who are indicted for committing crimes against humanity, war crimes and genocide. The ICC in its effort to coordinate, formalise and enforce a culture of international criminal justice has the authority to prosecute Uhuru and Ruto irrespective of either the AU's discontent or their political standing (Boyle, 1980). In relation to this study, one question that can be asked is whether the ICC process can contribute positively in the post-conflict peacebuilding and reconstruction of Kenya. Van Zyl (2005: 210) argues that care has to be taken so as to balance the demands of justice with the realities of what can be achieved in the short, medium and long-term (Van Zyl, 2005: 210). The main focus of this study has been the impacts of the disagreements between the AU and the ICC over the prosecution of Uhuru and Ruto to post-conflict peacebuilding and recovery of Kenya. Using the tenets of *functionalism*, the study contends that by becoming signatory to the Rome Statute, Kenya accepted the authority of the ICC; to indict or arrest any Kenyan who commits crimes against humanity irrespective of their position in government. It is based on this reason that many human rights organisations argue that for the sake of victims, it is in the interest of justice that Uhuru and Ruto are indicted by the ICC for prosecution, and if found guilty, face justice (Amnesty International, 2013).

The study argues that during the conventions on the establishment of the ICC, ethnic identities, division and disharmony that characterize African politics as well as African approaches to conflict resolutions were never put into considerations (Murithi, 2006). Having said that, this study considers the ICC as a model and a construct of the West, which may be bent towards punishing the opponents of the west and re-establishing Western imperialism in Africa (Nmehielle, 2014). This dents the theory and the practice of applying the ICC's justice in ethnically divided post-conflict African societies. However, this analysis of the ICC does not seek to disfigure it or buy into its image that is constructed by the AU; the aim is to be cautious and appreciative of all possibilities in institutional analysis of these organisations. In fact the study acknowledges the possible merits of the ICC involvement in Kenya; where it

aims to provide a victim-centred solution to the 2007/8 PEV. Even though the ICC process may be ideologically useful, in practise, it is a threat to post-conflict peacebuilding and reconstruction of Kenya. Through the tenets of *functionalism*, the ICC solution is only tenable in Kenya, after the resolution of the causes and the effects of the 2007/8 PEV, and not as a primary step. The prosecution of the perpetrators cannot bring ethnic harmony and equity; yet the resolution of these inequalities can assure a violent-free society in Kenya.

Therefore, this study concludes that the prosecution of Uhuru and Ruto without addressing the root causes of the 2007/8 PEV can be termed a band-aid; the ICC quick and impetuous solution to an intractable and convoluted problem. This may put many Kenyans in invidious position of seeking justice through other means. If this is conceded to, instead of aiding post-conflict peace-building and recovery, the ICC solution may reverse the gains of peaceful transition made so far, no matter how meagre there might be, and risk future violent conflicts.

Mmbali (2012:76) argues that, as a result of tribalism, the politics of reward, marginalization and seclusion has been the epicentre of violent politics in Kenya. The *negative-positive* framework leads to the realisation that the causes of the 2007/8 PEV- ethnic inequality, divisions and societal stratification- may have been the creation of the political elite in Kenya; as a bid to thwart the protests of oppressed communities (Mueller, 2011: 112). If this is the case, according to *horizontal inequalities framework*, as long as there are struggles for power that revolve around ethnic identity and other forms of group or class injustices, Kenya will still suffer from election-related violence. In this light, while the ICC may carry out its intended role, the impact of its process may be contrary to what it envisaged.

On the other hand, as functional-based institutions, both the AU and the ICC are obligated by their objectives and founding statutes to carry out their functions in Kenya. However, when considering the contextual factors, these functions fall short of achieving constructive conflict transformation in post-2007/8 PEV Kenya. On the contrary, by rigidly adhering to their statutory functions, the AU and the ICC, may exacerbate the problem they aim to ameliorate; inflaming and widening ethnic disharmony, discord and polarization in Kenya.

6.5 Endorsing social cohesion and ethnic harmony over the AU/ICC stands

The 2007/8 PEV that erupted in Kenya was the climax of a troubled history of political exclusion and tribal marginalization. Yahya (2010) argues that the 2007/8 PEV unravelled due to the cupidity of all post-colonial governments. Many scholars portray post-colonial Kenyan governments – after the dawn of multiparty - as a hegemonic villain that preys on the weakness of communities affiliated to the opposition (Wrong, 2010:41). The CIPEV (2009) saw land injustices as the main instigator of the 2007/8 PEV and other election-related violent episodes. Different presidents (Kenyatta, Moi and Kibaki) allocated land to their political elite and individuals affiliated to their tribes, while marginalizing and depriving other communities. While these arguments are tenable, through the *negative-positive peace* framework, this study argues that both the AU and the ICC are inadequate institutions in resolving the foregoing causes of election-related violence.

The argument by proponents of the ICC is that the court is the only hope for the victims of human rights violation. However, such an argument has to consider the existence of inequalities that led to perpetuation of human rights during the 2007/8 PEV. Also, in seeking to resolve the Kenyan crisis by the rule of international law, the ICC may not be able to handle the heterogeneity of identities among the witnesses and victims in Uhuru and Ruto case. This is one reason why the case facing Uhuru is about to collapse (East African Standard, 2014). While the ICC can be seen as a curative solution to the post-conflict situation, post-2007/8 Kenya still has to contend with future ethnic inequalities, divisions and polarization. On the other hand, what the proponents of the AU argue for is tantamount to impunity, since non-prosecution of these perpetrators may give them the impression that they are above the law. As such, any proposed resolution has to take this reality seriously.

Such arguments seem to diminish the capacity of the AU in resolving African political crisis (Otieno, 2014:66). In doing so, the AU is giving power to both Uhuru and Ruto and their respective communities. This may have a negative impact in inter-tribal relations in Kenya. Unfortunately, it is the AU realpolitik that will lead Uhuru and Ruto to use violent means so as to keep their acquired power. The AU realpolitik will also antagonise communities to use ethnic violence as a means of attaining and keeping power. Similarly, communities in opposition will use violence as a means of ascending to power. Whoever ascend to power,

both the “ruling” and the “marginalised” communities will implicitly legislate violence as a means to retaining power or silencing the opposition. From this standpoint, the position of the AU is invalidated.

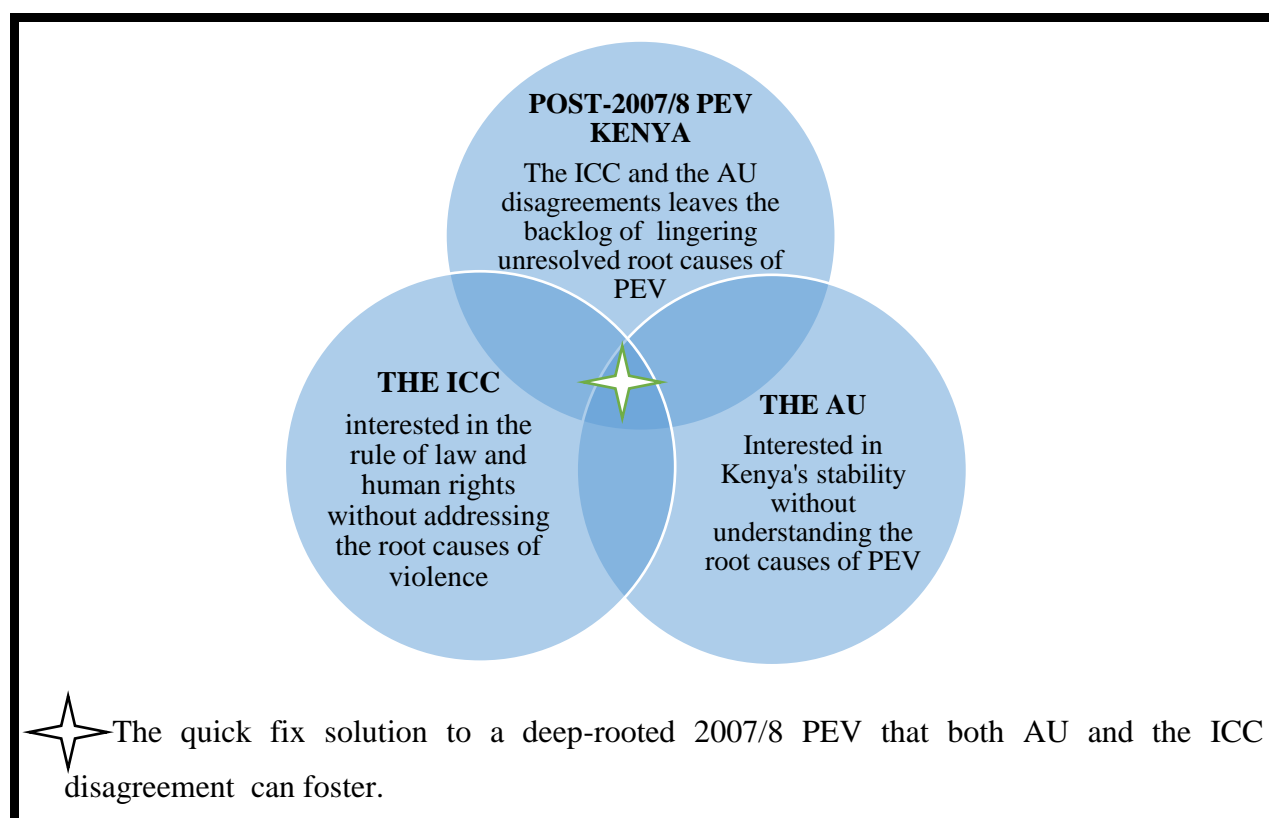
This study contends post-conflict peacebuilding and recovery can only be successful if the misuse of power and ethnic disharmony is analysed and addressed. For this to be addressed there has to be a sincere dialogue between the political elites and community leaders. To achieve this, firstly, politics of tribal dominance have to be discouraged. According to Notter and Diamond (1996:30), political leaders provide a cornerstone on which relationship between conflicting ethnic communities can be understood. Other than engaging in a political squabble, the AU and the ICC need to create a platform under which an authentic dialogue can exist among different stakeholders in the Kenyan crisis.

Another way of addressing the Kenyan situation is for both the AU and the ICC to let local and international organizations that are well grounded in conflict resolution to provide a background on how to address the root causes of the 2007/8 PEV. There are many institutions that promote peacebuilding through peace education programs (NGOs, religious groups and academic institutions and human rights groups) that can be invaluable to this process (Lederach, 1997: 41). Although the preceding groups are vital in post-peacebuilding and recovery, this study cautions against the manipulation of the Kenyan crisis for organizational and partisan reasons. Galtung (1969:23) argues that locals need to put in effort to rebuild broken relationships in a post-conflict society rather than overemphasizing liberalism justice. This is a foundation of rebuilding peace, stability and security of any post-conflict society. Lederach (2003:25) and Miall (2004:8) argue that it is the poor relationship between groups within a post-conflict society that instigate attitudes that lead to violent conflicts (cultural violence). As such, the mending of these relations is an integral part in peacebuilding and recovery.

Due to the complex nature of the post-2007/8 PEV Kenya, this study neither supports the AU nor the ICC - on whether or not to prosecute Uhuru and Ruto - as an integral aspect of post-conflict peacebuilding and reconstruction. In many of its arguments, this study may have subordinated the real function of the ICC: to prosecute those who commit war crimes, crimes against humanity and genocide. This study maintains that restorative justice which focuses on addressing ethnic, economic and social inequalities is a way forward of resolving the Kenyan

situation. Although the AU is an institution that fosters African unity, it needs to facilitate the growth of political access to all Kenyans by advocating for good governance, democracy and inclusive economic development. More so, NGOs, religious groups and academic institutions and human rights groups need to concentrate their efforts in rebuilding the damaged ethnic relationships and in reconciling the opposites in post-conflict Kenya (Miall, 2004: 14).

Figure 7: The impacts of the AU/ICC disagreement on post-conflict peacebuilding in Kenya



Compiled by author

The above diagram shows that how inadequate the AU and the ICC positions are in resolving a complicated identity conflict in post-2007/8 PEV Kenya.

6.6 Conclusion

The pith of this chapter was a reiteration of the disagreement between the AU and the ICC, on whether or not to prosecute Uhuru and Ruto. The chapter was cautionary in its manner; challenging any complacency that may be detected in addressing the post-2007/8 PEV in Kenya. This is so because the mechanisms of addressing post-conflict peacebuilding and recovery after the 2007/8 PEV should be embedded in the history of political and social

structures of Kenya, and not only on the mechanisms of the AU and the ICC. Through *negative-positive peace* theory, the chapter argued that the AU/ICC disagreement, over the prosecution of Uhuru and Ruto, is injurious to post-2007/8 PEV peacebuilding and recovery. Although, *negative-positive* framework does not tally with the role of the ICC in a post-conflict society, *functionalism* argues that the quest for retributive justice by the court can only be a tenable alternative after the causes and the effects of the 2007/8 PEV have been adequately addressed in Kenya.

Against the preference of the ICC, the chapter recommends addressing ethnic inequalities, peaceful negotiations and dialogue between the estranged ethnic communities in Kenya, as a strategy for post-conflict justice. This is supported by the *horizontal inequalities* theory, which sees the consolidation of ethnic inequalities and divisions coupled with other forms of historical political greed, as major root causes of election-related violence. By failing to foresee ethnic inequalities, unemployment, discriminatory governance as triggers of the 2007/8 PEV, the AU/ICC risk widening the rifts between Kenyan communities.

The chapter assailed Galtung's (1985:152) concept that conflict transformation should epitomize the importance of curbing structural injustices that stems from a culture of violence. One assumption of this study is that addressing ethnic inequalities, politics of domination and seclusion, land injustices and discriminatory governance, and healing of the ethnic hostilities, cannot be ignored in the post-conflict peacebuilding and reconstruction of Kenya. However, the overemphasis on addressing the root causes of the 2007/8 PEV should not be taken as an endorsement of a culture of impunity. Although the chapter zoomed in on the 2007/8 PEV in Kenya, this study can be applied to post-conflict societies that are faced with similar context.

The next chapter concludes this study, by offering a summary of all the arguments and recommendations.

CHAPTER SEVEN

GENERAL CONCLUSION AND RECOMMENDATIONS

7. Summary

The study engaged in an analysis of the causes and effects of the AU/ICC disagreement on the (non-)prosecution of Uhuru and Ruto over the 2007/8 PEV in Kenya. One of the arguments made in this study was that the political wrangles in which the AU and the ICC are engaged in do not adequately address the root causes of the 2007/8 PEV and other election-related violence.

The study began by outlining its main arguments, objectives, questions and hypothesis. To gain an understanding of how post-conflict peacebuilding and reconstruction may be addressed, the study sourced information on the history of the causes of election-related violence in Kenya. The study then undertook a historical overview of election-related violence in 1991, 1997 and PEV in 2007/8. In the Kenyan context, one cannot talk of the 2007/8 PEV without looking at the entire history of election-related violence. Accordingly, this history reveals that, in all preceding elections since the dawn of multiparty politics, it was only the 2001 general election that was violence free. This study established that the main root causes of this violence appear to have been ethnic inequalities, politics of reward, marginalisation and seclusion, land injustices, poverty, unemployment and corruption.

This study emphasized that if the root causes of the foregoing election-related violence are to be averted, tribal politics that have been exercised by all post-colonial governments need to be reversed. Notwithstanding, there is no guarantee that the AU/ICC attempts will meaningfully address the historical ethnic inequalities, politics of reward, marginalisation and

seclusion, land injustices, poverty, unemployment and corruption, that mar Kenya's political history.

To situate the study within other scholarly works, the growing literature on the foundation and the roles of the ICC and the AU was reviewed. Within the literature, Sudan, Ivory Coast and the DRC were used as case studies to assess the AU/ ICC engagements in post-conflict situations in Africa. The literature revealed that it is the selective action in Africa and discrepancies of the ICC investigations in situations outside Africa that has attracted the AU discontent.

Despite the lack of relevant primary literature, the study was able to use other data sources in answering its research questions. This limitation, as well as the status of the subject matter of this study, means that there is still opportunity for other scholars to explore the issue as events of the Uhuru/Ruto case unfolds. This is because as this study was sent in for examination (October, 2014) there were many developments, particularly on Uhuru's case. While Uhuru just travelled (October, 7 2014) to appear before the ICC (as the first sitting head of state to appear before the court); Ruto's trial is still ongoing. (The East African Standard, 2014).

Although the study focussed on the 2007/8 PEV in Kenya, it is relevant to other countries like Sudan (the Darfur conflict); Rwanda, (where the 1994 genocide was ethnic-oriented); the Central African Republic (where fundamentalists Christians are violently campaigning for the excision of Islamic identities and influences); as well as South Sudan (whose December 2013 conflict seem to be ethnic-related).

This study applied *negative-positive peace* theory as the major theoretical framework. Using the horizontal *inequalities* framework (Stewart, 2009) to explain the root causes of the 2007/8 and other election-related conflicts, the study offered an under-utilized analysis of Kenyan politics by both the AU and the ICC in their disagreement. Through the *horizontal inequality* framework, the study was explorative and interpretive in two ways. Firstly, it took a historical approach in looking at how ethnic divisions mixed with other forms of inequalities were repeatedly used to cause the 1991, 1997 and 2007/8 PEV. In doing so, the study brought to attention that the disagreement between the AU and the ICC is ideological and does not

address the historical root causes of the 2007/8 PEV. Secondly, it is the horizontal *inequality* framework that provided a solid edifice of how *negative-positive peace theory* can be applied in addressing post-conflict peacebuilding and recovery in Kenya.

As a theoretical framework, *negative-positive peace* established that ethnic inequality was usurped by a catalogue of historical injustices - poor land policy, poverty, unemployment and discriminatory governance - which privileged the communities that were affiliated to the president over those considered as opposition. Given the longevity of these injustices and the influential encouragement it secured to Kenyatta, Moi and Kibaki regimes, ethnic inequality and other tribal discriminations were eventually adopted as an essential entity in Kenyan politics.

7.1 Recommendations

By summoning the influence of ethnic divisions, poor land policy, poverty, unemployment and discriminatory governance, this study has highlighted the fact that election related-violence, politics, culture and social behaviour have been vitally influenced by those in power. Following an interrogation using *negative-positive peace theory*, the study recommends that if the 2007/8 PEV is to be meaningfully addressed, it has to be analysed in a broader platform beyond the use of competing political ideologies of the ICC and the AU. The complexity of application of justice in post-2007/8 PEV in Kenya should neither be confined to the AU nor ICC's positions. Through *negative-positive peace*, the study warns that the root causes of the 2007/8 PEV in Kenya is more serious than political cupidity and older than the roles of Uhuru and Ruto, and their respective prosecutions.

In dialogue with *horizontal inequalities*, the *negative-positive peace* framework established that the main cause of the 2007/8 PEV was poor governance, ethnic inequality and the seclusion of communities that were historically subservient to the central government. By restricting themselves to two parallel positions, the AU and the ICC limits their capacity to resolve the Kenyan conflict. In doing so, they imply that the 2007/8 PEV in Kenya can be resolved by either the AU or ICC's position, and not by both. This unfortunately, reduces a multifaceted and complex post-conflict peacebuilding process to a narrow ideological understanding.

In seeking a way forward, through *negative-positive peace* theory, the study established that the 2007/8 PEV in Kenya was essentially an identity conflict. As such, the 2007/8 PEV was constructed and imbedded by the power of the tribes affiliated to the presidency and the reactions of the oppressed. Therefore, in addressing the 2007/8 PEV, post-conflict peacebuilding and reconstruction efforts should neither be constructed on political ideologies of the AU and the ICC nor on the prosecution of perpetrators (like Uhuru and Ruto). If it is based on the AU/ICC disagreement, it is deemed to construct different yet influential identities. This risks sowing seeds of hatred and animosity between different ethnic communities in Kenya. Other than constructively transforming the conflict, the AU/ICC standoff may lead the recurrence similar violence in Kenya, or elsewhere. If this happens, the under-utilized capacity to resolve African conflicts may as well be compromised even further. On the same note, the ICC would lose meaning as an international body endowed with authority to prosecute those who commit genocides, war crimes and crimes against humanity.

Through *negative-positive peace*, this study warns that both positions, the AU and ICC, are possible quick-fix to a complex post-conflict problem: that of a deep-rooted protracted conflict. The 2007/8 PEV in Kenya fits Edward Azar's (1990) description of protracted social conflict. According to Azar (1990:12) protracted social conflicts arise from communal deprivation of basic satisfaction to a particular or a number of communities on the basis of their communal identity. The current selected run-away insecurity where members of the Kikuyu community have been targeted in Mombasa, Garissa, Lodwar and Malindi (Daily Nation, 2014), threatens to raze the ethnic harmony that Kenya aspires to build. Still, the current campaigns and the agitation for referendum is another cause of ethnic discord in Kenya. Due to the politics of ethnic benefit, communities that are affiliated to Uhuru and Ruto are anti-referendum, while those that are affiliated to the opposition are pro-referendum (East African Standard, 2014).

The endemic ethnic inequality has played a role in marginalizing other communities since independence. Therefore, the process of eliminating it cannot be accomplished simply by engaging in political debates on whether or not Uhuru and Ruto should be prosecuted. As long as ethnic inequalities, politics of rewards and seclusion and marginalization against communities that are considered to be in opposition are maintained, there is no guarantee that

either the AU's or the ICC's quick fix proposals can safeguard Kenya's post-conflict peacebuilding and reconstruction processes.

In their political disagreement, the AU and the ICC need to consider what could be considered a critical question: how can the Kenyan ethnic communities and the general international system be involved in surmounting the problem of ethnic inequalities and animosity? Without answering this question, whether or not Uhuru, Ruto and other future suspects of crimes against humanity are prosecuted, post-conflict peacebuilding and reconstruction of Kenya will not be realised. Therefore anybody interested or engaged in finding solution to the PEV in Kenya, ought to realise that integral to the solution is the decisive address of intoxicated ethnic inequalities, animosity and tribal politics.

While the history of ethnic inequality continues to condemn a section of Kenyan tribes, the AU/ICC disagreement will not avert the violent struggle over scarce resources and offices of power. This will leave ordinary Kenyans with no choice but to continue forming tribal allegiances for survival and sustenance (Mmbali, 2012:98). As such, the researcher views the squabbles between these international bodies as nothing but distractions to Kenya's process of addressing systemic and structural injustices. If the competing views of the AU and the ICC cannot facilitate those in power to address systemic and historical injustices that are drivers of ethnic-related violence, the study warns that Kenya has to prepare itself for violence of high magnitude than that of the 2007/8 PEV.

By opting to use justice without understanding the uniqueness of its effect to post-conflict society, the ICC process may prove unfit alternative to African conflicts. If all post-conflict African countries are to be subjected to the ICC, there is a possibility that the drivers and the causes of violent conflicts will not be understood. Failure to unravel the root causes, cannot guarantee constructive post-conflict peacebuilding and recovery. This may lead to a disaster in post-conflict peacebuilding and reconstruction; more so to conflict transformation as a field of study and profession. The study also established that the shifting of the goals of the AU in relation to post-2007/8 PEV is unwarranted. The AU, during the February 28 Peace Accord, had overwhelmingly endorsed the prosecution of the suspected masterminds of the 2007/8 PEV. However, by shifting its stance after the election of Uhuru and Ruto as president and deputy president, respectively, the AU became bi-partisan. This duplicity is one

of the major reasons why the AU seems powerless in intervening in African conflicts; leaving its member states vulnerable to the ICC, NATO and the UN.

This study has established one main assumption. That is, if the AU and the ICC need to be relevant in Kenya's post-conflict peacebuilding, and indeed any other African conflict, there is need to address political exclusion, ethnic inequality and other structural injustices created by extensive networks of patronage, and nepotism. Ethnic marginalization and alienation of other groups of citizens (not affiliated to the presidency) also need to be. In lieu with the foregoing assumption, this study recommends that post-conflict peacebuilding and reconstruction in post-2007/8 Kenya and other countries is a long-term and an on-going endeavour. As such, any attempt at addressing such complex issue ought to be cognisance of the extensive time needed.

In relation to Kenya, the researcher is of the view that other alternatives to the AU and the ICC's stands needs to be put in place so as to constructively transform and resolve the post-2007/8 PEV Kenya. One way of doing this, is to facilitate a forum for Kenyan leaders, both the suspected and unknown perpetrators of the 2007/8 PEV to apologize and ask for forgiveness. The perpetrator may do this by apologising and confessing (truth telling) after which s/he requests for forgiveness. Through forgiveness and apologies, victims of any political violence are liberated from their burden of 'victimhood' and perpetrators feel some relief. The goal of forgiveness is to heal and restore relationships of former antagonists through an interactive process after the closure of violence. This is the beginning of mending ruptured relationships (Diegeser, 1998). Historically, a culture of political forgiveness and apologies dates back to the 1077s when the Holy Roman Emperor, Henry IV, apologized to Pope Gregory VII for church-state conflicts by standing barefoot in the snow for three days (Sukhdev, 2013:11). According to Moolakkatu (2011:13), it is through forgiveness that the legacy of wrongdoing is redeemed in a post-conflict state. As a result, it removes traumatic memories that may threaten social life after violence.

Seven years down the line, the victims of the 2007/8 PEV are still internally displaced in Kenya (Cusac, 2008:243). If the situation is to be reversed, the Kenyan government through the support of the AU and the ICC needs to amend for the violence through reparation. For example, as an act of amending for Japan's dehumanizing acts, the Japanese Prime Minister Tomiichi Murayama apologized to about 200,000 women who were put into brothels by

Japanese forces to serve as sex slaves or “comfort women”. As part of reparation, Murayama set up a private “Asian Women’s Fund”. This fund served as an expression of repentance on the part of the people of Japan (Dodds, 2003:2). Like Japan, Kenya the AU and the ICC need to set up a fund to help those who lost their properties, breadwinners and their livelihood during the 2007/8 PEV.

An alternative to that of the AU and the ICC stands is to foster a culture of peace. Kenya needs a culture of peace that should be based on the common fundamental interest of people, rejecting ethnic inequality and historical structural and systemic injustices that privileges communities that are affiliated to the president at the expense of the others. A culture of peace should be concerned with the creation of a new human type: who is conscious of his/her powers but at the same time aware of the dangers that his/her powers engenders (Nastase, 1983:394). Kenya needs a culture of peace that resonates with the preamble of the United Nation Education Scientific and Cultural Organisation (UNESCO) *‘Since wars begin in the minds of men it is in the minds of men that defences of peace must be constructed’* (UNESCO, Preamble).

The way forward of building a culture of peace is by implementing Peace education programs in primary, secondary and tertiary curriculums (Adams, 2000: 261). This should be peace education that does not only lead to a greater awareness of problems but also brings about a sense of responsibility and an active involvement in government’s efforts towards promoting equal rights, economic and social development and mutual respect and mutual understanding among all Kenyan tribes. One country that has been successful in implementing peace education at every level of the educational process is Romania (Nastase, 1983:398). In Romania, peace education has been endorsed both by the political will and by the will of the public in its orientation towards the reduction and eventual dismantling of armaments and in its attempts at the same time to catalyse public opinion and government’s policies. Likened to Romania, peace education will yield both short and long-term objectives. In the former, peace education will aid to transform and develop alternatives values, attitudes and behaviors of Kenyan tribes towards each other and not to see the other as enemies. However, this must ensure that there is a transformation of values, attitudes and behaviors that benefit exclusively a clan or a tribe that is affiliated to the presidential office towards those that will benefit the entire Kenyan community (Roberts, 2009:16). In the latter, peace education will avert conditions, structures and mind-sets that breed ethnic-related violence: ethnic inequality

historical injustices, poor land policy, poverty, unemployment and discriminatory governance (Mbali, 2012:12).

Finally, this study recommends further research on how the ICC can come up with alternative approaches to justice, to augment its 'one-size-fits-all' retributive legal justice, which does not seem to do much good. Further research on the establishment of the African Court for Justice and Human Rights (ACJHR) can be also be valuable in future conflict resolution and peace building in Africa, and related context. Since ACJHR provides a new paradigm of how African leaders can deal with the question of human rights independent of the Western influence in enhancing the AU's capacity to deter impunity; therefore the establishment of ACJHR presents unexploited chance for more research that can be added to the current toolkit of post-conflict justice.

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