

**TRADITIONAL JUSTICE SYSTEMS AS VIABLE MECHANISMS FOR  
TRANSITIONAL JUSTICE.**

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**A RESEARCH PROPOSAL SUBMITTED IN PARTIAL FULFILLMENT OF THE  
BACHELOR OF LAWS DEGREE**

**STUDENT'S NAME:**

**AMANDA KANIA**

**STUDENT'S REGISTRATION NUMBER:**

**072278**

**SIGNATURE OF SUPERVISOR:**



---

**DATE:**


**06/03/2012**

**STRATHMORE UNIVERSITY LAW SCHOOL**

**NAME OF SUPERVISOR:**

**FRANCIS KARIUKI**

**SIGNATURE OF SUPERVISOR:**

  
14/04/2016

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**DECLARATION**

I, Amanda Njeri Kania, declare that this thesis is my original work except where indicated by special reference in the text. The thesis has not been submitted to any other institution for the award of a graduate degree or any other award either in Kenya or elsewhere.

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

**Kania Njeri Amanda**  
(Student Number: 072278)  
Strathmore Law School

Supervisor's Approval  
Signed..... Date.....

**Francis Kariuki,**  
Lecturer  
Scholar and Mentor Alternative Dispute Resolution Mechanisms and Family Law.  
Strathmore Law School

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And to the Lord Almighty, the Author of Life, who has-till now-blessed me with all of the above.

## **LIST OF ABBREVIATIONS**

**ICTR** – International Criminal Tribunal of Rwanda

**ICC** – International Criminal Court

**SCSL**- Special Court of Sierra Leone

**ICTY**- International Criminal Court for the Former Yugoslavia

**ICCPR** – International Covenant on Civil and Political Rights

**UNCRC** – United Nations Convention on the Rights of the Child

**TRC**- Truth and Reconciliation Commission

**ECCC**- Extraordinary Chambers in the Courts of Cambodia

**PEV**- Post Election Violence

**UN**- United Nations

**TDRMS**- Traditional Dispute Resolution Mechanisms

## LIST OF CASES

*R v Amkeyo* [1917] EA 14.

*Nyali Ltd v Attorney General* [1956] 1QB 134.

*Esiroyo v. Esiroyo* [1973] EA 338.

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*United States v. Duarte-Acero* (11th Circuit 2000).

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Constitution of Kenya (2010).

Judicature Act (No.16 of 1967).

The Children Act (No.8 of 2001).

Criminal Procedure Code (Chapter 75 of the Laws of Kenya).

Penal Code (Chapter 63 of the Laws of Kenya).

The Marriage Act (No. 4 of 2014).

The National Land Commission Act (No. 5 of 2012).

Organic Law 40/2000(Rwanda).

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### **LIST OF TREATIES AND CONVENTIONS**

International Covenant on Civil and Political Rights, 16 December 1966, U.N. Doc. A/6316.

United Nations Convention on the Rights of the Child, Resolution 44/25 of 20 November 1989. Treaty Series, vol. 1577, p. 3.

Vienna Convention on the Law of Treaties, 23 May 1969, Treaty Series, vol. 1155, p. 331.

Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6.

Statute of the International Criminal Court of Rwanda, 8 November 1994.

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# CHAPTER 1

## 1.1 INTRODUCTION

### Background

In 2007, Kenya descended into ethnic-induced riots and upheavals which left a model nation bereft with insecurity and political turmoil.<sup>1</sup> This was due to the infamous 2013 general elections which were fraught with rumours that there was massive electoral rigging.<sup>2</sup> This elicited a knee-jerk reaction from the opposition which rejected the results with haste and called for mass action.<sup>3</sup> Ethnic cleansing ensued. By the end of the chaos, more than a thousand people reportedly lost their lives with over six hundred thousand rendered internally displaced.<sup>4</sup> The carnage, is reported to have been perpetrated by actors on both sides of the political and ethnic divide.<sup>5</sup>

In October 2008, the Commission of Inquiry into Post-Election Violence (CIPEV) published a report that adequately captured the plight Kenya was facing and also proposed several recommendations on how to remedy the tumultuous situation.<sup>6</sup> Key among them being that a special tribunal composed of both Kenyans and foreigners be established to prosecute cases arising from the post-election violence.<sup>7</sup> The special tribunal would have sufficient authority to conduct investigations and recruit staff to conduct prosecutions on those suspected to bear the greatest responsibility for crimes committed in Kenya.<sup>8</sup>

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<sup>1</sup> Kinoti K, *'Is justice for post-election violence victims a myth or a reality?'* ICJ Kenya, <http://www.icj-kenya.org/index.php/media-centre/commentary/611-kinoti-kibera> on 06 February 2015.

<sup>2</sup> Kinoti K, *'Is justice for post-election violence victims a myth or a reality?'* ICJ Kenya, <http://www.icj-kenya.org/index.php/media-centre/commentary/611-kinoti-kibera> on 06 February 2015.

<sup>3</sup> Kinoti K, *'Is justice for post-election violence victims a myth or a reality?'* ICJ Kenya, <http://www.icj-kenya.org/index.php/media-centre/commentary/611-kinoti-kibera> on 06 February 2015.

<sup>4</sup> Boell, *'Perspectives: Political Analysis and Commentary from Africa'* [http://www.boell.de/downloads/2012-08-Perspectives\\_Africa\\_1\\_12.pdf](http://www.boell.de/downloads/2012-08-Perspectives_Africa_1_12.pdf) on 09 February 2015.

<sup>5</sup> Materu F, *The post-election violence in Kenya: domestic and international legal responses*, ed, T.M.C. Asser Press, Nairobi, 2015, 46.

<sup>6</sup>Waki Commission, 'Commission of Inquiry into Post-Election Violence' Kenya law, [http://www.kenyalaw.org/Downloads/Reports/Commissi of Inquiry into Post-Election Violence](http://www.kenyalaw.org/Downloads/Reports/Commissi%20of%20Inquiry%20into%20Post-Election%20Violence) on 08 February 2015.

<sup>7</sup>Waki Commission, 'Commission of Inquiry into Post-Election Violence' Kenya law, [http://www.kenyalaw.org/Downloads/Reports/Commissi of Inquiry into Post-Election Violence](http://www.kenyalaw.org/Downloads/Reports/Commissi%20of%20Inquiry%20into%20Post-Election%20Violence) on 08 February 2015.

<sup>8</sup>Waki Commission, 'Commission of Inquiry into Post-Election Violence' Kenya law, [http://www.kenyalaw.org/Downloads/Reports/Commissi of Inquiry into Post-Election Violence](http://www.kenyalaw.org/Downloads/Reports/Commissi%20of%20Inquiry%20into%20Post-Election%20Violence) on 08 February 2015.

Ethnic violence has intermittently bedevilled this nation since 1991 and has significantly hampered our progression as a united, dynamic and prosperous country.<sup>9</sup> It has resulted in innumerable loss of lives and destruction of property.<sup>10</sup> It has caused fear and suspicion among the general populace and fuelled their scepticism of free and fair democratic institutions capable of protecting their rights. Detrimental to flourishing democracy, it has inhibited significant advancements towards national tranquillity, unity and stability that would graciously manifest in significant economic and social development.<sup>11</sup> Yet, despite the recommendations put forth by the Akiwumi Commission geared towards engendering national pride, unity in diversity and tribal harmony has never been a more far-fetched reality.

On February 12, 2009, the Kenyan Parliament voted down a bill authorizing the establishment of a special tribunal to deal with Post-Election Violence (hereafter referred to as PEV) matters.<sup>12</sup> This indolence and lack of political will by the government to prosecute the perpetrators of these atrocious crimes only fuelled speculations that the country was not committed to accountability.<sup>13</sup> The Commission also recommended that if it is unable to effectively discharge its mandate for any reason, the cases should be forwarded to the International Criminal Court with a request to proceed with investigations and prosecutions of such persons.<sup>14</sup> Consequently, the cases was referred to the International Criminal Court (ICC).<sup>15</sup>

However, five years down the line, no suspects have been held accountable for these crimes. This is largely attributed to political sway by key players in the international arena.<sup>16</sup> As a result, this proves that international justice mechanisms are highly susceptible to fall victim to factors like political interference, which have so far rendered accountability for the PEV

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<sup>9</sup> Kinoti K, 'Is justice for post-election violence victims a myth or a reality?' ICJ Kenya, <http://www.icj-kenya.org/index.php/media-centre/commentary/611-kinoti-kibera> on 06 February 2015.

<sup>10</sup> Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (2010), ICC Report, 25.

<sup>11</sup> Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (2010), ICC Report, 26.

<sup>12</sup> Hansen Thomas, 'Transitional justice in Kenya? An assessment of the accountability process in light of domestic politics and security concerns', 42 *California Western International Law Journal*, (2011),35.

<sup>13</sup> Brown S and Sriram C, 'The big fish won't fry themselves: criminal accountability for post-election violence in Kenya,' 443 *African Affairs* 111, (2012), 244-60.

<sup>14</sup> Okuta A, 'National legislation for prosecution of international crimes in Kenya', *Journal of International Criminal Justice*, (2009), 1063-1065.

<sup>15</sup> Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (2010), ICC Report, 25.

<sup>16</sup> Brown S and Sriram C, 'The big fish won't fry themselves: criminal accountability for post-election violence in Kenya,' 443 *African Affairs* 111, (2012), 244-60.

international crimes almost non-existent<sup>17</sup>. Furthermore, the international justice mechanisms only prosecute the lead perpetrators and leave other low-level participants to get away scot-free.<sup>18</sup> Over and above that, the allegations of possible witness tampering and obstruction has only fuelled reluctance of witnesses to come forward. This has proved fatal in bringing those responsible to justice.<sup>19</sup>

Moreover, at the time of post-election violence, Kenya had already ratified the Rome Statute but had not domesticated it.<sup>20</sup> Suffice to say, at the time, there was no provision conferring jurisdiction over the crimes on domestic courts. Upon recommendation by the Waki Commission, the International Crimes Act was meant to fast track the domestication of the punishment of international crimes, war crimes, crimes against humanity, genocide and enable cooperation with the International Criminal Court in prosecuting the crimes in question.<sup>21</sup> However, retroactivity, an argument advanced by defendants in the Nuremberg trials could be similarly advanced by the perpetrators.<sup>22</sup> They claimed that prior to their alleged commission, these crimes were non-existent in the law, and thus prosecuting them before the International Military Tribunal was therefore a violation of the principle of legality.<sup>23</sup>

Applying the above IMT jurisprudence in the Kenyan context, one could posit the argument that Kenya wishes to invoke its sovereignty, as has been suggested, it amended its domestic law retroactively to provide for the war crimes and crimes against humanity. As such, the above recourse would not be creating new crimes but would be merely codifying crimes that already existed under international law with the amendments serving the following role; to translate the crimes into written law on which domestic charges can be brought. Retroactive expansion of criminal jurisdiction is also widely evidenced in various common law

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<sup>17</sup> Brown S and Sriram C, 'The big fish won't fry themselves: criminal accountability for post-election violence in Kenya,' 443 *African Affairs* 111, (2012), 244–60.

<sup>18</sup> Brown S and Sriram C, 'The big fish won't fry themselves: criminal accountability for post-election violence in Kenya,' 443 *African Affairs* 111, (2012), 244–60.

<sup>19</sup> Brown S and Sriram C, 'The big fish won't fry themselves: criminal accountability for post-election violence in Kenya,' 443 *African Affairs* 111, (2012), 244–60.

<sup>20</sup> Materu F, *The post-election violence in Kenya: domestic and international legal responses*, ed, T.M.C. Asser Press, Nairobi, 2015, 54.

<sup>21</sup> Okuta A, 'National legislation for prosecution of international crimes in Kenya', *Journal of International Criminal Justice*, (2009), 1063-1065.

<sup>22</sup> Materu F, *The post-election violence in Kenya: domestic and international legal responses*, ed, T.M.C. Asser Press, Nairobi, 2015, 57.

<sup>23</sup> Materu F, *The post-election violence in Kenya: domestic and international legal responses*, ed, T.M.C. Asser Press, Nairobi, 2015, 60.

jurisdictions such as New Zealand and Canada. However, with regard to the International Crimes Act, no amendment permitting retroactivity has been made in Kenya to date.<sup>24</sup>

Further, there is no doubt that prior to the PEV, international crimes, genocide and crimes against humanity and war crimes were regarded as *jus cogens* crimes by virtue of Kenyan acknowledgement of customary international law. As such, if the criminal violations committed during PEV were to be prosecuted under their respective titles domestically, with sole reliance on customary international law, such charges would not in principle violate the principle of legality.<sup>25</sup> However, as practice shows, domestic courts in common law jurisdictions have expressly declined to entertain an indictment made solely on the basis of customary international law which has not been domesticated. Therefore, it may not be the best prosecutorial strategy for domestic courts to commence prosecution of these crimes solely on their *jus cogens* status.<sup>26</sup>

In light of the above, two problems are apparent. First, the International Criminal Act is not applicable to the 2007-2008 crimes and almost paradoxically, the victims of the crimes that necessitated the creation of the legal instrument have no legal cause of action against any perpetrators of the 2007-2008 mass atrocities. Secondly, the marching off of the alleged lead perpetrators to the International Criminal Court in the Hague and the enactment of the International Criminal Act in Kenya was a mere symbolic ideological homage to the rule of law with little practical significance as it not only failed to address the issues raised by the Waki Report, but also denied victims the very fundamental right accorded to them under Article 48 of the Constitution of Kenya 2010. This position is tenable at best because this outcome only pre-empts rather than prevents a second post-election violence.

## 1.2 STATEMENT OF PROBLEM

Disconcertingly, the above background demonstrates that Kenya faces concomitant challenges as it lacks a formal judicial instrument adept at addressing the international crimes committed during that period; conditions that might pre-empt another PEV in 2017.

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<sup>24</sup> Materu F, *The post-election violence in Kenya: domestic and international legal responses*, ed, T.M.C. Asser Press, Nairobi 2015, 76.

<sup>25</sup> Materu F, *The post-election violence in Kenya: domestic and international legal responses* Springer Publishers, 2015, 78.

<sup>26</sup> Materu F, *The post-election violence in Kenya: domestic and international legal responses* Springer Publishers, 2015, 79.

### **1.3 JUSTIFICATION**

Cognisant of the fact that the International Criminal Act is all but replete with the competent jurisdiction to address the international crimes committed as well as the root causes of the violence highlighted by the Waki Commission, it is evident that a legal vacuum persists.<sup>27</sup> This reveals the burning need to have institutional reforms that produce a locally fused and culturally relevant legal instrument adept at addressing the root causes of the violence, an indelible part of transitional justice not yet discharged.

Moreover, while there is a noticeable dearth of literature that adequately captures the essence of traditional dispute resolution mechanisms in various fields of private law such as family law, none quite pens down their employment in resolving international atrocities committed during transition of political regimes in Kenya. Furthermore, its rather firm foothold in our supreme law evidenced by Article 159(2) (c) of the Constitution of Kenya 2010 only demonstrates the Sovereign's faith in their efficacy; largely lauded for its affordability and flexibility. Furthermore, traditional justice mechanisms can adequately address some of the historical injustices attributed to be a key catalytic element behind the 2007-2008 mass atrocities and waylay the emergence of another massacre in 2017.

Finally, this thesis will seek to imbue the streams of legal knowledge with an additional spectrum on the subject by examining the efficacy of traditional justice mechanisms from an economic lens; a feat yet to be accomplished.

### **1.4 STATEMENT OF OBJECTIVES**

#### **a) General Objective**

The overarching objective of this research is to investigate the efficacy of traditional justice in realizing Article 48 of the Constitution of Kenya in the context of the mass atrocities committed in 2007/2008 PEV.

#### **b) Specific objectives**

Specific objectives stemming from this are:

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<sup>27</sup> Mbaku Mukum J, *International Justice: The International Criminal Court and Africa* Brookings, <http://www.brookings.edu/~media/research/files/reports/2014/foresight%20africa%202014/03%20foresight%20inter-national%20criminal%20court%20africa%20mbaku.pdf> on 08 February 2015

- To investigate the legal framework anchoring transitional justice in the international and domestic arena.
- To investigate the efficacy of traditional justice mechanisms as a viable transitional justice mechanism in the context of the 2007/2008 framework.
- To determine what lessons can be drawn from Rwanda to enhance the efficacy of Kenya's criminal justice system.

## 1.5 RESEARCH QUESTIONS

Discussions in the research proposal will be guided by the following research questions:

- What is the current international and domestic legal framework for transitional justice?
- What is the role of traditional justice mechanisms in the transitional justice context?
- What was the efficacy of the Gacaca Courts in prosecuting international crimes committed during the 1994 genocide?
- What lessons can be drawn from Rwanda to enhance the efficacy of Kenya's criminal justice system?

## 1.6 THEORETICAL FRAMEWORK

### a) Legal pluralism

Legal pluralism connotes a reality in which two or more legal or normative orders coexist contemporaneously within the same societal construction.<sup>28</sup> It is often juxtaposed against legal centralism which describes a society in which all law is viewed as emanating from the state.<sup>29</sup>

Griffith introduced a binary distinction between what he termed "strong" and "weak" legal pluralism.<sup>30</sup> He delineated legal pluralistic regime that is strong to refer to a situation in which not all law is administered by a singular set of legislations. Conversely, weak legal pluralism is said to arise in situations where parallel legal regimes co-exist but depend on the dominant state law for recognition and legitimacy.<sup>31</sup>

<sup>28</sup>Griffiths J, 'What is legal pluralism?' *Journal of Legal Pluralism* (1986), 1.

<sup>29</sup>Griffiths J, 'What is legal pluralism?' *Journal of Legal Pluralism* (1986), 2.

<sup>30</sup>Griffiths J, 'What is legal pluralism?' *Journal of Legal Pluralism* (1986),3.

<sup>31</sup>Griffiths J, 'What is legal pluralism?' *Journal of Legal Pluralism* (1986), 2.

Winfred Kamau argues that Kenya has been characterized by a pluralistic regime where indigenous, religious and state laws co-exist within the same social context.<sup>32</sup> However, in Kenya, this plurality is marked by weak legal pluralism, a phenomenon where there is domination of the normative state order and all other laws are considered insignificant.<sup>33</sup>

Since independence, the state approach to traditional law has focused on subsuming traditional justice systems within formal legal structures.<sup>34</sup> Furthermore, the application of indigenous law has long been limited to the sphere of personal law and is curtailed by the requirement that it must not be repugnant to morality and justice.<sup>35</sup> Under the current legal framework for prosecution of international crimes in Kenya, exclusive territorial jurisdiction has been donated to the formal justice system to the exclusion of traditional justice systems.<sup>36</sup> This runs counter to the reality on the ground where people constantly traverse the boundaries of legal systems.<sup>37</sup> For these reasons, this research will adopt a legal pluralistic lens.

#### **b) Restorative justice**

Restorative justice is not a novel concept, its origin being traced back to numerous indigenous cultures.<sup>38</sup> The aim is not punishment, but the incorporation of the offender back into the flow of the community and environment.<sup>39</sup>

Braithwaite, a key pioneer of this theory, asserts that restorative justice has been the dominant model of criminal justice throughout numerous communities throughout the world for most of human history.<sup>40</sup> For Braithwaite, restorative justice theory adequately remedies the deficiencies of the retributive justice theory. Braithwaite gives an account of why restorative

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<sup>32</sup> Kamau W, 'SM Otieno revisited: A view through legal pluralist lenses', 5 *The Law Society of Kenya Journal*, (2009), 61.

<sup>33</sup> Kamau W, 'SM Otieno revisited: A view through legal pluralist lenses', 5 *The Law Society of Kenya Journal*, (2009), 62.

<sup>34</sup> Section 3(2), *The Judicature Act*, (Cap 8 of The Laws of Kenya). The standard of justice and morality has been held to the British standard of morality and justice; see *R v Amkeyo* [1917] EA 14.

<sup>35</sup> Section 3(2), *The Judicature Act*.

<sup>36</sup> Kamau W, 'Law, pluralism and the family in Kenya: Beyond bifurcation of formal law and custom', *International Journal of Law, Policy, and the Family*, 23 (2) (2009), 133.

<sup>37</sup> Kamau W, 'Law, pluralism and the family in Kenya: Beyond bifurcation of formal law and custom', *International Journal of Law, Policy, and the Family*, 23 (2) (2009), 134.

<sup>38</sup> Skelton A, *Regional Views: Africa, in Handbook of Restorative Justice*, ed, G. Johnstone & D. Van Ness, 2007, 468-469.

<sup>39</sup> Skelton A, *Regional Views: Africa, in Handbook of Restorative Justice*, ed, G. Johnstone & D. Van Ness, 2007, 468-469.

<sup>40</sup> Braithwaite J, *Restorative Justice and Responsive Regulation: The Question of Evidence*, RegNet Research Paper No. 2014/51, <http://ssrn.com/abstract=2514127> or <http://dx.doi.org/10.2139/ssrn.2514127>, accessed on 17 November 2015.

justice processes prevent crime more effectively than retributive practices. His reasoning relies on three core claims. First, that tolerance of crime makes things worse. Second, stigmatization of criminals makes the level of crime increase even further and lastly, disapproval of the act by society, accompanied by rituals of forgiveness, serves as an adequate incentive for deterrence for future crimes.

In Kenya, the practice and principles of restorative justice resonate with the application of traditional justice mechanisms.<sup>41</sup> Traditional justice mechanisms seek to restore balance within the community.<sup>42</sup> Given the inability of the formal justice systems to adequately dispense justice for the 2007-2008 crimes, the restorative justice theory would be an appropriate lens to analyse the viability of traditional justice mechanisms to fill the legal vacuum highlighted by this research.

## 1.7 LITERATURE REVIEW

### Historical onslaught of traditional dispute resolution mechanisms in Kenya

As previously mentioned, Winfred Kamau posited that the national legal system of any typical African country is pluralistic consisting largely of statute law, religious law and African customary law.<sup>43</sup> Pre-colonial law in Kenya was largely customary in character; largely comprising the indigenous laws of a myriad of ethnic tribes in Kenya.<sup>44</sup> Traditional justice systems derive their authority from these laws.<sup>45</sup> However, upon colonization by the British, the once luscious legal status of traditional justice systems was severely desiccated and left unceremoniously for decades to roam in the ominous shadows cast by colonial law.<sup>46</sup>

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<sup>41</sup> Skelton A, *Regional Views: Africa*, in *Handbook of Restorative Justice*, ed, G. Johnstone & D. Van Ness, 2007, 468-469.

<sup>42</sup> Muigua K, *'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010'* Kariuki Muigua and Company Advocates, <http://www.kmco.co.ke/attachments/article/1111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> on 13 February 2015.

<sup>43</sup> Kamau W, 'Law, pluralism and the family in Kenya: Beyond bifurcation of formal law and custom', *International Journal of Law, Policy, and the Family*, 23 (2) (2009), 133.

<sup>44</sup> Kamau W, 'Law, pluralism and the family in Kenya: Beyond bifurcation of formal law and custom', 133.

<sup>45</sup> Muigua K, *'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010'* Kariuki Muigua and Company Advocates, <http://www.kmco.co.ke/attachments/article/1111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> on 13 February 2015.

<sup>46</sup> Ogendo H.W.O, *'The tragic African commons: A century of expropriation, suppression and subversion'* Plass, <http://www.plaas.org.za/sites/default/files/publications-pdf/OP%2024.pdf> on 13 February 2015.

This is best exemplified in the famous words of Lord Denning in respect to the application of common law in Africa in the Kenyan case of *Nyali Limited v. Attorney General*, where he observes that:<sup>47</sup>

*“It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom”*

Okoth-Ogendo made a passionate argument for legislatures to stop churning out exact replicas of Anglo-American law devoid of any characteristic distinct to our culture.<sup>48</sup> He concluded that indigenous law will not succumb so easily and expressed these sentiments using a now widely acclaimed metaphor. Indigenous law, he argued, long regarded as a dangerous weed, simply went underground where it continued to grow despite the overlay of statutory law that was designed to replace it.

Despite the massive onslaught it received, its resilience proved noteworthy. This is illustrated by its recent acknowledgment in the supreme law of the land and is now firmly anchored in Article 159(2) (c), the Constitution of Kenya 2010.

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<sup>47</sup> *Nyali Ltd v Attorney General* [1956] 1QB 134.

<sup>48</sup> Ogendo Okoth H.W.O, *'The tragic African commons: A century of expropriation, suppression and subversion'* Plass , <http://www.plaas.org.za/sites/default/files/publications-pdf/OP%2024.pdf> on 13 February 2015.

### **Traditional dispute resolution mechanisms within the context of Transitional justice systems**

Tim Allen propounds that justice cannot be dictated by an international legislation.<sup>49</sup> It has to be culturally infused and socially recognized.<sup>50</sup> The Acholi people have their own unique indigenous methods of reintegrating individuals who have committed violent acts.<sup>51</sup> Through a ritual called *mato oput*, or 'drinking the bitter root,' they seek restorative compensation rather than punitive penalties.<sup>52</sup> The local populace are willing to welcome back those affiliated with the Lord's Resistance Army (LRA), and can forgive individuals who have committed insufferable actions.<sup>53</sup> Tim Allen summarily asserts that unlike this traditional justice systems, intervention by the International Criminal Court is a euro-centric imposition that ignorant of the reality on the ground.<sup>54</sup>

This stance resonates with Phil Clark's reflections on International Criminal Court's case selection and prosecutorial strategy in Northern Uganda.<sup>55</sup> Clark performs a critical appraisal of the factors that have narrowly identified "where, whom and what" the ICC has decided to investigate and prosecute.<sup>56</sup> The ICC's approach, he critics, has been skewed by the Court's prioritisation of its short-term institutional interest over discharging its mandate.<sup>57</sup> This is majorly motivated by the Court's concern to avoid jeopardising relationships upon which it relies for funding of its daily operations.<sup>58</sup> Such a strategy, Clark argues, has undermined the institution's legitimacy in the eyes of local populace.<sup>59</sup>

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<sup>49</sup> Allen T, *Trial Justice: The International Criminal Court and the Lord's Resistance Army, African Arguments*, ed. Zed Books, United Kingdom, 2006,117.

<sup>50</sup> Allen T, *Trial Justice: The International Criminal Court and the Lord's Resistance Army, African Arguments*, 132.

<sup>51</sup> Allen T, *Trial Justice: The International Criminal Court and the Lord's Resistance Army, African Arguments*, 132.

<sup>52</sup> Allen T, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* , African Arguments, 134.

<sup>53</sup> Allen T, *Trial Justice: The International Criminal Court and the Lord's Resistance Army, African Arguments*, 160.

<sup>54</sup> Waddell N and Clark P, *Courting Conflict? Justice, Peace and the ICC in Africa*, ed., Royal African Society, London, 2008, 37-44.

<sup>55</sup> Waddell N and Clark P, *Courting Conflict? Justice, Peace and the ICC in Africa*, ed., Royal African Society, London 2008, 37-44.

<sup>56</sup> Waddell N and Clark P, *Courting Conflict? Justice, Peace and the ICC in Africa*, 39.

<sup>57</sup> Waddell N and Clark P, *Courting Conflict? Justice, Peace and the ICC in Africa*, 43.

<sup>58</sup> Waddell N and Clark P, *Courting Conflict? Justice, Peace and the ICC in Africa*, 44.

<sup>59</sup> Waddell N and Clark P, *Courting Conflict? Justice, Peace and the ICC in Africa*, 44.

Mariana Goetz explored the positive contribution the institution's work has brought to victims and affected communities.<sup>60</sup> She acknowledges that although the inaugural international interventions have been heavily criticised for their detached approach to the societies they purport to assist, the ICC's mandate includes novel provisions for victim participation and compensation. However, the implementation of these provisions and their parallel impact on the other affected populace has been controversial.<sup>61</sup> For Goetz, the court should accompany these current efforts with other extensive outreach programs to educate the citizens on the trial proceedings similar to those carried out by the Special Court for Sierra Leone. All of this is geared towards increasing 'positive complementarity' and, in doing so, have a more significant and enduring impact at the local level.<sup>62</sup>

Graeme Simpson further criticises these caricatured and reductionist arguments against the role of the International Criminal Court.<sup>63</sup> He posits that polarised debates about the ICC over alleged inconsistencies between international punitive justice and domestic peace, have hindered a more holistic approach in considering peace, justice and reconciliation in a more integrated way, and ultimately mutually reinforcing.<sup>64</sup> For Simpson, rather than focusing on the institution in isolation, the ICC should be seen as interdependent and co-existing with, a range of other transitional justice mechanisms that can complement one another.<sup>65</sup>

In conclusion, although there is a dearth of literature on traditional justice mechanisms and its efficacy in transitional justice context in various countries, there exists a lacuna on a critical assessment of its viability in the prosecution of international crimes committed during the PEV in Kenya.

## 1.8 HYPOTHESIS

Traditional dispute resolution mechanisms constitute enablers of peace and justice where formal justice systems have fallen short in transitional justice initiatives.

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<sup>60</sup> Waddell N and Clark P, *Courting Conflict? Justice, Peace and the ICC in Africa*, 65-71.

<sup>61</sup> Article 68(3), *Rome Statute of the International Criminal Court*, 17 July 1998; Rules 85, 89-93 of the Rule 92(3) of the ICC Rules of Procedure and Evidence, 17 July 1998.

<sup>62</sup> Africa Legal Aid, *'On the Shores of Lake Victoria: Africa and the Review Conference of the International Criminal Court'* <http://www.africalegalaid.com> on 15 February 2015.

<sup>63</sup> Waddell N and Clark P, *'Courting Conflict? Justice, Peace and the ICC in Africa'*, 78.

<sup>64</sup> Waddell N and Clark P, *'Courting Conflict? Justice, Peace and the ICC in Africa'*, 79.

<sup>65</sup> International Centre for Transitional Justice, *'Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice'*, Building a Future on Peace and Justice Conference in Nuremberg, Germany, 25-27 June 2008.

## 1.9 RESEARCH DESIGN AND METHODOLOGY

Research traditions in the international justice arena have long been dominated by quantitative data collection. However, research traditions in the recent past have paved way for qualitative methods in international and traditional criminal justice research.<sup>66</sup>

Survey research was found to be the most dominant data collection method in the field of criminal justice. It is a specific type of field study that involves the collection of data from a sample of elements drawn from a well-defined population through the use of questionnaires. This method has been used severally to collect data on The Gacaca Courts as it best explains how the success of a justice mechanism is influenced by the social environment enveloping it.<sup>67</sup> However, due to the financial and time constraints present, a desk study was the most appropriate method of data collection for this study.

To guide in data collection and interpretation, this research employed a qualitative approach. Given the legal nature of the field anchoring the research problem, this research first and foremost adopt the classical methodology of legal scholars when conducting legal research; that is to look to the *grund norm*, the statutory instruments anchoring the field, legislative history as a comparative case to capture how this dilemma has been dealt with in other countries with similar socio-legal conditions. Laws and legal institutions influence the level of success in any transitional justice process. The central question is whether the foundations of transitional justice in Kenya should focus on capacity building of alternative forms of transitional justice mechanisms.

In light of the fact that the study will be done over a span of five months, the study will be carried out in Kenya. As such, this research will primarily rely on the distillation of secondary data given the time and financial constraint. Secondary data will be retrieved from the following sources:

- Archival records from the Kenya National Archives.

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<sup>66</sup> International Centre for Transitional Justice, '*Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice*', Building a Future on Peace and Justice Conference in Nuremberg, Germany, 25-27 June 2008.

<sup>67</sup> Clark P, The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers' in '*Interpreting gacaca: the rationale for analysing a dynamic socio-legal institution*, ed., Cambridge University Press, 2010,

- Cases from the United Nations Mechanism for International Criminal Tribunals.
- Literature from University of Nairobi Library and Strathmore University Library.

Furthermore, the investigation technique employed in this research will be a correlational study. It will seek to delineate the important variables and factors that contribute to the successful prosecution of perpetrators of international crimes using Rwanda as a case study. The similarity or dissimilarity of factors between Kenya and Rwanda will be compared and contrasted in order to draw useful lessons from the Rwandan case study and subsequently, inform the Kenyan discourse on importance of having a complimentary framework in the prosecution of international crimes and facilitating peace and reconciliation in a country plagued by violence.

### **1.91 LIMITATIONS**

In spite of the best of efforts that will be undertaken to minimise all limitations that might creep in course of the research, there were certain constraints which seemed imminent. These are enunciated below:

- First and foremost, the study will only be based on secondary data and as such will only be as accurate as the assessment of data derived from the primary source.
- Secondly, the study does a comparative study of one country, Rwanda. This is because of the limited time allocated towards the dissertation.
- Another limitation is the potential multi-dimensionality of the factors contributing to the efficacy of the prosecution of international crimes.

### **1.92 CHAPTER BREAKDOWN**

#### **Chapter 1: Introduction**

This chapter gives a brief background to the research problem. Additionally, it contains a clear and concise statement of the research problem, the scope of the study as well as the accompanying research objectives. Furthermore, it outlines the conceptual framework that will form the back-drop against which the literature on the subject will be analysed. It also contains a brief literature review on the subject that will serve as a prelude to the contents graciously outlined in each of the ensuing chapters in the dissertation. Finally, it captures the various research techniques and methods that are employed in obtaining and synthesizing the data collected.

## **Chapter 2: Legal framework anchoring Transitional justice systems**

This chapter provides a cursory glance at the current legal framework that forms the bedrock of transitional justice in the international landscape. It also investigates the legal instruments in place in facilitating transitional justice in Kenya. It proceeds to assess whether traditional justice mechanisms have been sufficiently incorporated to adequately prosecute international crimes and facilitate peace and reconciliation in a manner that does not heavily assault the scales of peace and justice.

## **Chapter 3: The Rwanda case study**

This chapter forms a pivotal part of the dissertation. This is because it critically analyses the complimentary transitional justice approaches that were employed in delivering justice for the international crimes committed in Rwanda during the 1994 Genocide. The aim of this chapter is to draw lessons from Rwanda that can inform the discourse on policy and legal framework for prosecution of international crimes and more towards a process of peace and reconciliation in Kenya.

## **Chapter 4: Lessons from Rwanda and working towards Transitional Justice in Kenya.**

This chapter seeks to unpack the conceptual reflections of the various legal approaches to transitional justice emanating from the Rwandan case study and the viability of each in administering justice in the context of the post-election violence. Correspondingly so, this chapter aims to make a gentleman's case for the employment of indigenous dispute resolution mechanisms in clarifying the inconsistencies in the transitional justice framework in Kenya. In the same vein, it advocates that the institutional framework underpinning transitional justice mechanisms should be rationalized in the context of Kenya's unfolding realities; a critical aspect that is determinant of its success. It investigates whether a bottom up approach or top down approach is the best method to effectuate transitional justice of the 2007-2008 Post Election Violence, or both.

## **Chapter 5: Conclusions, Findings and Recommendations**

This chapter comprises of concluding statements that reflect an integration of the study findings, analysis, interpretation, and synthesis of the overarching objective of the study. It proposes various recommendations as well as practical implications on policy and practice of the employment of a complimentary transitional justice framework. Finally, it concludes on

whether the employment of traditional justice systems in Kenya's transitional justice framework will be successful in preventing another carnage in 2017.

### **1.93 CONCLUSION**

This chapter has presented the central pillars underpinning this legal inquiry. It has highlighted the analytical prisms be employed in ensuring the effective implementation and facilitating the sophistication and structure of this research endeavour with one aim; to provide substantive contribution to the pool of knowledge in this field.

## CHAPTER 2

### LEGAL FRAMEWORK UNDERPINNING TRANSITIONAL JUSTICE IN KENYA

#### 2.1 INTRODUCTION

By and large, the concept of transitional justice emerges in societies in transition. It encompasses a series of legal and quasi-legal tools associated with a nation's attempt to come to grips with a legacy of systematic human right violations and move towards a future in which accountability and fairness is promoted through the protection and vindication of rights.<sup>68</sup>

In light of the above, this chapter seeks to describe the statutory instruments and legislative provisions that address the subject under investigation; transitional justice at the international level and the domestic level. The legal framework reveals the mechanisms and techniques in place to ensure the right to justice. Shortly after, this chapter aims to explore the victims' rights and unearth the myriad of alternatives to criminal prosecution available to ensure the right to reparation is availed. Furthermore, it describes the institutional framework tasked with walking the tightrope between ensuring justice and peace simultaneously in order to facilitate a successful transition of a post-conflict ridden society.

#### 2.2 INTERNATIONAL LEGAL FRAMEWORK

##### a) The Rome Statute

The Rome Statute is arguably the most pertinent instrument anchoring transitional justice in the international arena.<sup>69</sup> The preamble affirms that the effective prosecution of the most heinous atrocities in the eyes of the international community must be secured and must not go unpunished.<sup>70</sup> In light of the above, the first element of the transitional justice legal framework can be identified as the legal obligation to prosecute international crimes;<sup>71</sup> an obligation that may contemporaneously curtail the discretion of the mediators negotiating

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<sup>68</sup>Elster J, *Closing the books: Transitional Justice in Historical Perspective*, ed., Cambridge University Press, 2004. The transition oriented definition has been endorsed by most scholars. However, some scholars have indicated that the term need not be used even if there is no transition of political regimes; see Roht-Arriaza N, *The New Landscape of Transitional Justice, in Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed., Cambridge University Press, 2006. Defining the term as the "set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law".

<sup>69</sup> Rome Statute of the International Criminal Court.

<sup>70</sup> *Preamble*, Rome Statute of the International Criminal Court, The fourth paragraph asserts the rule to fight against impunity and emphasizes the necessity for national measures at the national level and international cooperation.

<sup>71</sup> Article 4, The Resolution on the Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, Dec 3, 1973, 3074 (XXVIII).

amnesties with regard to exemptions from criminal prosecution.<sup>72</sup> In exploring the Rome Statute, this research will direct its attention to the provisions that serve a pivotal role in the transitional justice arena; namely Article 17 on the principle of complementarity, Article 16 on instances of the Security Council's permissible intervention and Article 53.

### **Article 16**

This article allows the Security Council to initiate investigations or commence prosecutions on the basis of a resolution under Chapter VII of the UN Charter in order to prevent occurrences identified as a threats to international peace.<sup>73</sup> This may ward off the violence as the perpetrators of the conflicts may take the "threat" by the ICC seriously well before the actual negotiations start. Ironically, non-member states are not immune from the potential legal scrutiny availed by this statute. As the Sudan case indicates,<sup>74</sup> even a non-member state can be subjected to ICC investigations as a result of Security Council referral in accordance with Article 13 (b) of the ICC Statute.<sup>75</sup> In effect, by such a decision, the Council may lend international approval to amnesties that are part of an ongoing peace process in the wake of grave human right violations or it could also stay proceedings which may otherwise be considered admissible under Article 17.<sup>76</sup>

However, given the autonomous nature of its jurisdiction, the ICC cannot be construed as giving complete deference to a national amnesty.<sup>77</sup> More importantly, the ICC cannot be made to accept an amnesty which would run contrary to its obligation to prosecute the human rights violations which are part of its subject-matter jurisdiction. For these reasons, it can be said that the Court has the power to indirectly review the Security Council's decision but is not inherently bound by their decision.<sup>78</sup>

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<sup>72</sup> Dugard J, 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?', 12 *Leiden Journal of International Law*, 1001 (1999), 45.

<sup>73</sup>U.N. Security Council, 'Functions and Powers', United Nations, [http://www.un.org/Docs/sc/unsc\\_functions.html](http://www.un.org/Docs/sc/unsc_functions.html) United on 23 January 2016.

<sup>74</sup>U.N. Security Council. Rep. of the Secretary-General on the Sudan, United Nations, <http://www.un.org/Docs/journal/asp/ws.asp?m=S/PV.5459> on 28 January 2016.

<sup>75</sup> Article 13, *Rome Statute of the International Criminal Court*.

<sup>76</sup> U.N. Security Council. Rep. of the Secretary-General on the Sudan, United Nations, <http://www.un.org/Docs/journal/asp/ws.asp?m=S/PV.5459> on 28 January 2016.

<sup>77</sup> Condorelli V and Villalpando S, *Relationship of the Court with the United Nations*, in *The Rome Statute of the International Criminal Court: A Commentary*, ed., The Rome Statute of the International Criminal Court, 2002, 212.

<sup>78</sup> Condorelli V and Villalpando S, *Relationship of the Court with the United Nations*, in *The Rome Statute of the International Criminal Court: A Commentary*, ed., The Rome Statute of the International Criminal Court, 2002, 214.

## Article 17

Article 17 captures the principle of complimentary.<sup>79</sup> It is not a provision on jurisdiction in the strict sense but presupposes the existence of national proceedings with reference to the same events. This article tries to solemnly strike a compromise between the states' sovereign exercise of criminal competence and the international community's interest in deterring commission of international crimes.<sup>80</sup>

Article 17 elucidates three elements in determining admissibility.<sup>81</sup> First, there must be investigations into the manner in which the atrocities were executed and the impact on the victim population. For the investigation requirement, the core issue is whether it takes place in the first place. The wording of Article 17 remains adamant that the duty to investigate remains a derivative of the duty to prosecute which rests upon the state.<sup>82</sup>

An additional issue accompanying the investigation requirement is whether the objective of an investigation is criminal prosecution, that is, "to bring the person concerned to justice".<sup>83</sup> Indeed the wording of Article 17 (1) ("being investigated"),<sup>84</sup> does not expressly state that a criminal investigation is required and leaves room for alternative methods such as the truth and reconciliation commission provided the legal and factual requirements of investigations by such a process are satisfied. There is extensive literature that highlights the interpretations provided in an attempt to fill this lacuna.<sup>85</sup>

Gavron argues that "to bring someone to justice" is to be construed in the legal rather than the moral sense.<sup>86</sup> In turn, this means that investigations of a general nature about past events which do not individualize responsibility do not satisfy the investigation requirement of

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<sup>79</sup>Olasolo H, *Triggering Procedure of the International Criminal Court*, ed., Martinus Nijhoff Publishers, Leiden, 2005, 230.

<sup>80</sup> Article 17(d), *Rome Statute of International Criminal Court*.

<sup>81</sup> Condorelli V and Villalpando S, *Relationship of the court with the United Nations, in the Rome Statute of the International Criminal Court: A Commentary*, ed., The Rome Statute of the International Criminal Court, 2002, 215.

<sup>82</sup> Condorelli V and Villalpando S, *Relationship of the Court with the United Nations, in The Rome Statute of the International Criminal Court: A Commentary*, ed., The Rome Statute of the International Criminal Court, 2002, 216.

<sup>83</sup> Condorelli V and Villalpando S, *Relationship of the Court with the United Nations, in The Rome Statute of the International Criminal Court: A Commentary*, ed., The Rome Statute of the International Criminal Court, 2002, 217.

<sup>84</sup> Article 31, *Vienne Convention on the Law of Treaties*, 22<sup>nd</sup> May 1969.

<sup>85</sup> Clark T, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance', *Washington University Global Student Law Review*, 2005, 414.

<sup>86</sup> Gavron J, 'Amnesties in light of developments in international law and the establishment of the International Criminal Court', 51 *International and Comparative Law Quarterly*, 91.

Article 17.<sup>87</sup> In the same vein, Holmes, adopts an even stricter stance and argues that the Rome Statute's provisions on complementarity are solely intended in reference to criminal investigations.<sup>88</sup> Cardenas also, is emphatic about the necessity of criminal prosecutions after the TRC's work has been finished.<sup>89</sup>

Secondly, there must be a conclusion arrived at on whether to prosecute the matter or not.<sup>90</sup> This is grounded on the presupposition that the organ that takes this decision must at least have two possibilities; to prosecute or not to prosecute. On the rare occasion that a state in its sovereign wisdom decides not to prosecute the alleged perpetrators, the respective state is still required to have conducted a systematic inquiry into the alleged violations and arrived at the decision not to prosecute.<sup>91</sup> By no means should the decision result from unwillingness or inability to prosecute the case.<sup>92</sup>

Of particular interest is the statute's gravity threshold enshrined in Article 17(1) (d).<sup>93</sup> These limitations effectively direct attention towards capturing the perpetrators identified as most culpable or most responsible in the execution of the human rights violations.<sup>94</sup> In determining this threshold, the prosecutor takes recourse to several other factors such as the nature and social impact of the alleged violations, the manner of commission and the status and role of the suspected perpetrators.<sup>95</sup>

Unwillingness is shown,<sup>96</sup> for instance, if the proceedings are undertaken in bad faith and for the sole purpose of shielding the suspected perpetrators from criminal prosecution. However,

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<sup>87</sup> Clark T, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance, *Washington University Global Student Law Review*, 2005, 414.

<sup>88</sup> Holmes J, *Complementarity: National Courts versus the ICC, in the Rome Statute of the International Criminal Court*, ed., Rome Statute of International Criminal Court, 2002, 667.

<sup>89</sup> Robinson D, *Comments on Chapter of Claudia Cardenas Aravena: Complementarity views on Complementarity*, Cambridge University Press, 2006, 144.

<sup>90</sup> Williams S, "Article 17" in: *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, ed., Otto Triffterer, 1999.

<sup>91</sup> Williams S, "Article 17" in: *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, ed., Otto Triffterer, 1990.

<sup>92</sup> Arsanjan M and Reisman W, 'The Law-in-Action of the International Criminal Court', *99 American Journal of International Law*, 2005, 389.

<sup>93</sup> Ocampo M, *Informal meeting of legal advisors*, International Criminal Court [https://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO\\_20051024\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf) on 14 February 2016.

<sup>94</sup> Williams S, "Article 17" in: *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, ed., Otto Triffterer, 1999.

<sup>95</sup> Williams S, "Article 17" in: *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, ed., Otto Triffterer, 1999.

<sup>96</sup> Williams S and Schabas W, *Article 17, Issues of Admissibility, in Commentary on the Rome Statute of the International Criminal Court*, ed., Otto Triffterer, 2008, 608.

one may argue that an amnesty may be designed solely for this purpose.<sup>97</sup> Correspondingly so, if one recognizes the right to a peaceful transition in the transitional justice legal framework; it would be contradictory to argue that this constitutes unwillingness.

### Article 53

Widely described as the interest of justice clause,<sup>98</sup> Article 53 gives the Prosecutor an additional instrument to exercise his discretion going beyond the rather “technical” Article 17.<sup>99</sup> The notion of “justice” in the interests of justice clause encompasses alternative forms of justice engineered towards the peace and reconciliation such as truth and reconciliation commissions, traditional justice mechanisms and national amnesties.<sup>100</sup> Olasolo further argues that the authors of the Rome Statute have granted the Prosecutor unlimited political discretion allowing so explicitly for policy considerations.<sup>101</sup>

In an attempt to limit the wide prosecutorial discretion built into this clause,<sup>102</sup> the legal analysis is limited to the more precise criteria.<sup>103</sup> The legal criteria stipulated such as gravity of the crime, interests of victims, age or infirmity of the alleged offender suggesting that his decision must be legally justified in each individual case.<sup>104</sup> A generous interpretation of the clause provides that restorative justice is encompassed and reaffirms the statutes’ interest in securing the interests of victims and for the well-being of society at large.<sup>105</sup> A more restrictive view of the clause argues that the use of the clause on whether or not to launch investigation cannot be based on considerations of transitional justice.

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<sup>97</sup>. Robinson D, *Comments on Chapter of Claudia Cardenas Aravena: Complementarity views on Complementarity*, Cambridge University Press, 2006, 144

<sup>98</sup>Robinson D, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, *14 European Journal of International Law*, (2003), 481.

<sup>99</sup>Office of the Prosecutor, ‘Policy Paper on the Interests of Justice’ *International Criminal Court*, <http://www2.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf> on 19 February 2016.

<sup>100</sup> Robinson D, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, *14 European Journal of International Law*, (2003), 481.

<sup>101</sup>Stahn C and Zeidy M and Olásolo H, ‘The International Criminal Court’s Ad Hoc Jurisdiction Revisited’, *99 American Journal of International Law*, (2005) 421–31.

<sup>102</sup>Brubacher M, ‘Prosecutorial Discretion within the International Criminal Court’, *2 Journal of International Criminal Justice*, (2004), 71- 95.

<sup>103</sup> Brubacher M, ‘Prosecutorial Discretion within the International Criminal Court’, *2 Journal of International Criminal Justice*, (2004), 71- 95.

<sup>104</sup>Lovat H, ‘Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court’, *1435 Bepress Legal Series*, (2006), 88.

<sup>105</sup> Robinson D, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, *14 European Journal of International Law*, (2003), 481.

## **b) International Covenant on Civil and Political Rights**

Regarded as one of the most fundamental international legislation on human rights, the International Covenant on Civil and Political Rights (ICCPR) came into force on 23 March, 1976.<sup>106</sup> ICCPR provisions apply to adults, children and juvenile persons, but the ICCPR does not present definitions of these terms. It is the first international human rights treaty to provide special treatment for children in criminal cases.<sup>107</sup> The Human Rights Committee (HRC) is the ICCPR's monitoring body.<sup>108</sup> The HRC has examined and critiqued minimum age of criminal responsibility (MACR) provisions in the domestic laws of specific states parties and the Committee has held MACR for age of 7, 8 and 10 years are too low and incompatible with international standards.

The ICCPR provides that criminal procedure shall take into consideration the age and the policy interest of promoting rehabilitation of juveniles convicted of criminal acts.<sup>109</sup> Article 10 states that juvenile offenders should be segregated from adults and accorded "treatment appropriate to their age and legal status."<sup>110</sup> As Don Cipriani notes,<sup>111</sup> the ICCPR's provisions culminate into the following conclusion: each member state is obligated to establish a respective MACR which should fall within the general limits of internationally accepted norms.

The ICCPR has further embraced due process protections available to suspected perpetrators.<sup>112</sup> Some of these protections include the duty to be "promptly informed of any charges against" them upon arrest; to be "entitled to trial within a reasonable time or to release"; to be "presumed innocent until proved guilty"; "to have adequate time and facilities for the preparation of [their] defence and to communicate with counsel of their own choosing"; to be "tried without undue delay"; to be "tried in their own presence and to defend themselves in person or through legal assistance of their own choosing" or in certain situations through free, assigned legal assistance; not "to be compelled to testify against

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<sup>106</sup> International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171.

<sup>107</sup> Bassiouni M, Crimes against humanity, International Criminal Law, 2<sup>nd</sup> ed., *Keluw Law International*, 1999, 60.

<sup>108</sup> *United States v. Duarte-Acero*, (11th Circuit 2000).

<sup>109</sup> Cipriani D, *Children's Rights and the Minimum Age of Criminal Responsibility*, ed., Ashgate Publishers, 2009, 42.

<sup>110</sup> Article 10(2) (b) (3) of the International Covenant on Civil and Political Rights.

<sup>111</sup> Cipriani D, *Children's Rights and the Minimum Age of Criminal Responsibility*, ed., Ashgate Publishers, 2009, 43.

<sup>112</sup> Bassiouni M, Crimes against humanity, International Criminal Law, 2<sup>nd</sup> ed., *Keluw Law International*, 1999, 60.

themselves or to confess guilt"; and "to have a conviction and sentence ... reviewed by a higher tribunal."<sup>113</sup> Although they are provided for minimally during the International Military Tribunal, these protections are reflected in the statutes of the modern tribunals and in their jurisprudence.<sup>114</sup> The ICTY and ICTR Statutes, for example, simply reflect many ICCPR due process protections word for word.

## **2.3 INSTITUTIONAL FRAMEWORK**

### **a) International Criminal Court**

As already demonstrated above, the Rome statute creates the International Criminal Court as an independent treaty body.<sup>115</sup> Pursuant to Article,<sup>116</sup> the ICC determines the admissibility "on its own motion". This is to minimize interference from other actors such as the United Nations and its affiliates. By virtue of Article 16, this curtailment does not apply to the Security Council.<sup>117</sup> As the case of Northern Uganda demonstrates, the United Nations acts merely as a peace broker and has no authority bestowed to commission or retract arrest warrants.<sup>118</sup> On the other hand, the Court's decisions have no limiting effect on third states, i.e., they decide autonomously on their jurisdiction and interest to prosecute international crimes.<sup>119</sup>

### **b) Ad Hoc Tribunals**

Ad Hoc Tribunals such as the ICTY and ICTR, for example, were established by the Security Council under Chapter VII of the United Nations Charter, an action that can only be invoked to maintain or restore international peace and security.<sup>120</sup> They are one of a portfolio of

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<sup>113</sup> Dunoff J, Ratner S, and Wippman D, *International Law, Norms, Actors, Process: A Problem-Oriented Approach*, 3<sup>rd</sup> ed., Aspen Publishers, 2010,441-43.

<sup>114</sup> Dunoff J, Ratner S, and Wippman D, *International Law, Norms, Actors, Process: A Problem-Oriented Approach*, 3<sup>rd</sup> ed., Aspen Publishers, 2010,441-43.

<sup>115</sup> Bassiouni M, Crimes against humanity, *International Criminal Law*, 2<sup>nd</sup> ed., *Kluwer Law International*, 1999, 60

<sup>116</sup> Article 19, *Rome Statute of the International Criminal Court*.

<sup>117</sup> Article 16, *Rome Statute of the International Criminal Court*.

<sup>118</sup> Office of the UN High Commissioner for Human Rights, *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda*, ed., UN Office of the High Commissioner for Human Rights, 2007, 26.

<sup>119</sup> Office of the UN High Commissioner for Human Rights, *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda*, ed., UN Office of the High Commissioner for Human Rights, 2007, 27.

<sup>120</sup> Tiefenbrun S, 'The paradox of international adjudication: developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court', 25 *North Carolina Journal of International Law*, (2000), 551.

transitional justice tools, along with truth and reconciliation commissions, traditional dispute resolution mechanisms and amnesties.<sup>121</sup>

The ad hoc tribunals have remarkable work in the field of international criminal law as they have created valuable jurisprudence and prosecuted high level perpetrators of human right violations which is said to assist in deterrence of impunity.<sup>122</sup> As pointed out by Jane Stromseth, new leaders must articulate the issue of accountability for past violations head-on lest they run the risk that the legal structures subsequently formed will be anchored on shaky foundations.<sup>123</sup> Ad hoc tribunals are located in the state in which the human rights violations have taken place with the view of incorporating the society in seeking justice. It also seeks to retain an international element widely acclaimed for assuring impartiality and compliance with international law as well as enable capacity building in the country by training lawyers and investigators.<sup>124</sup>

Furthermore, the fundamental aims of transitional justice may have played a role in the construction of the wide-sweeping liability doctrines used by both the International Military Tribunals and contemporary ad hoc tribunals. Additionally, they have prompted the tribunals to incorporate extensive outreach programs as part of their broader pursuit of transitional justice, an initiative that is often out of the purview of normal courts. The tribunals endeavour to educate the citizenry of the affected state about the trials and their accompanying decisions in the hope that it will bring retribution to the victims and facilitate national reconciliation. The Special Court for Sierra Leone (SCSL) has received particular praise in this regard.<sup>125</sup> Despite these victories, however, public opinion polls indicate dissatisfaction with the minimal information relayed about the trials' goals and judgments.<sup>126</sup>

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<sup>121</sup> Weinstein, H, *My Neighbor, My Enemy. Justice and Community in the Aftermath of Mass Atrocity*, ed., Cambridge Press, Cambridge, 2004, 29-48

<sup>122</sup> Stromseth J, "*Rethinking Humanitarian Intervention; The case for incremental Change*", ed., Cambridge University Press, 2003, 232-233.

<sup>123</sup> Stromseth J, "*Rethinking Humanitarian Intervention; The case for incremental Change*", ed., Cambridge University Press, 2003, 232-233.

<sup>124</sup> Nollkaemper A and Kleffner, J, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, ed., Oxford University Press, Oxford, 2004, 12

<sup>125</sup> Nollkaemper A and Kleffner, J, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, ed., Oxford University Press, Oxford, 2004, 17

<sup>126</sup> Zacklin R, 'The Failings of Ad Hoc International Tribunals', 2 *Journal of International Criminal Justice*, (2004), 545.

### c) Hybrid courts

Hybrid Courts emerged in as a way to bypass the limitations of ad hoc tribunals<sup>127</sup>. As international consensus grew, they were capital intensive and too lengthy.<sup>128</sup> By mixing international and domestic law and staff, hybrid courts elicit more participation from the citizenry as well as the victims of the human right violations.<sup>129</sup> Inevitably, it engenders a greater sense of ownership over the decisions made in the court. It also increases deterrence because citizenry is made aware of the fate of perpetrators of human right violations. Involvement of the wider community seamlessly merges retributive justice with restorative justice.

The ECCC is good example. It has developed a novel prosecutorial structure where victims are given a greater opportunity to voice their concerns.<sup>130</sup> The enhanced role of the victim through civilian party representation victims to articulate their trials and tribulations, claim non-monetary compensation as well as appeal a decision made by the Trial Chamber.<sup>131</sup> Official exposure of the truth and increased interaction with all stakeholders of the transitional justice process provides a holistic form of redress to the victims.<sup>132</sup> It is exemplary of the fact that peace and justice can be attained simultaneously, albeit not perfectly, which is emblematic of the fundamental pillars of the transitional justice process.<sup>133</sup>

### d) Truth and Reconciliatory Commissions

These are workshops designed to facilitate contrition and forgiveness at the individual level in the hope of fostering reconciliation at the collective level in a post-conflict ridden society with the guidance of trained third parties.<sup>134</sup> Montville perceives reconciliation as a neat formula comprising of acknowledgement and contrition from the wrong-doers and

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<sup>127</sup> Zacklin R, 'The Failings of Ad Hoc International Tribunals', 2 *Journal of International Criminal Justice*, (2004), 545.

<sup>128</sup> Herman J and Ortega M, 'Hybrid Tribunals and the Rule of Law: Notes from Bosnia and Herzegovina and Cambodia', 7 *Working Papers Series*, (2010), 6.

<sup>129</sup> Herman J and Ortega M, 'Hybrid Tribunals and the Rule of Law: Notes from Bosnia and Herzegovina and Cambodia', 7 *Working Papers Series*, (2010), 9.

<sup>130</sup> Nollkaemper A and Kleffner J, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, ed., Oxford University Press, Oxford, 2004, 229.

<sup>131</sup> Nollkaemper A and Kleffner J, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia*, ed., Oxford University Press, Oxford, 2004, 229.

<sup>132</sup> Open Society Justice Initiative, '*Political Interference at the Extraordinary Chambers in the Courts of Cambodia*', June 2010, <http://www.soros.org/initiatives/justice> on 19 February 2016.

<sup>133</sup> Open Society Justice Initiative, '*Political Interference at the Extraordinary Chambers in the Courts of Cambodia*', June 2010, <http://www.soros.org/initiatives/justice> on 19 February 2016.

<sup>134</sup> Llewellyn J and Howse R, 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission', 49 *University of Toronto Law Journal*(1999),357.

forgiveness from the wrong doers.<sup>135</sup> Echoing Tutu's notion of Ubuntu, the national discourse of forgiveness cannot commence until there is some public acknowledgement of what transpired.<sup>136</sup>

As captured above, TRC's are fashioned by transition governments as the handmaidens of democracy. With such mechanisms, there are practical difficulties in ensuring the "accountability" in the utmost legal sense.<sup>137</sup> Kaye, among several other scholars, has argued that the granting of full amnesties would interfere with the notion of accountability as a pertinent ingredient for successful democratic transition.<sup>138</sup> The case of Chile is instructive on this point.<sup>139</sup> Justice was elusive to some of the victims given the constraints of amnesty laws and presidential pardons.<sup>140</sup> Similarly, the South African Truth and Reconciliation Commission offered amnesty to apartheid leaders as an incentive for them to divulge information regarding the crimes committed during the period.<sup>141</sup> Further, Article 33 of the United Nations Charter also provides for disputes that endanger international peace and security to be settled through any of the dispute resolution mechanisms listed above.

## 2.4 DOMESTIC LEGAL FRAMEWORK

Article 48 is fairly succinct in capturing the legal creature that is access to justice.<sup>142</sup> It enumerates that the state shall make justice accessible to all individuals irrespective of their financial disposition. It is essential in casting a degree of credibility in a justice system. It ensures that the citizenry are relieved with the financial burden often accompanied with seeking legal services by ensuring efficient, affordable and expeditious access to justice.<sup>143</sup>

Anchored firmly in the Constitution of Kenya 2010, Article 159(2)(c) serves as the constitutional basis for traditional dispute resolution mechanisms in Kenya.<sup>144</sup> In light of the fact that this thesis is investigating their efficacy in transitional justice, the latter captures

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<sup>135</sup> Montville J, "Complicated Mourning and Mobilization for Nationalism", ed., Brown, 1995, 46

<sup>136</sup> Montville J, "Complicated Mourning and Mobilization for Nationalism", ed., Brown, 1995, 46.

<sup>137</sup> Dugard J, *Retrospective Justice: International Law and the South African Model, in Transitional Justice and the Rule of Law in New Democracies*, ed., Leiden, 1997, 269

<sup>138</sup> Kaye M, 'The role of truth commissions in the search for justice, reconciliation and democratisation: The Salvadorean and Honduran cases.' 29 *International Journal of Latin American Studies*, (1997), 67.

<sup>139</sup> Hayner P, 'Fifteen Truth Commissions-1974 to 1994: A Comparative Study.' 16 *Human Rights Quarterly*, Volume: 16 (1994), 558.

<sup>140</sup> Hayner P, 'Fifteen Truth Commissions-1974 to 1994: A Comparative Study.' 16 *Human Rights Quarterly*, Volume: 16 (1994), 559

<sup>141</sup> Dugard J, *Retrospective Justice: International Law and the South African Model, in Transitional Justice and the Rule of Law in New Democracies*, ed., Leiden, 1997, 269.

<sup>142</sup> Article 48, *Constitution of Kenya* (2010).

<sup>143</sup> Article 48, *Constitution of Kenya* (2010).

<sup>144</sup> Article 159 (3), *Constitution of Kenya* (2010).

both a transitional sovereign and its power to dispense justice through traditional dispute resolution mechanisms during such a period rather succinctly. This study argues, given our unique stance, there is no persuasive reason why TDRMS should be excluded in effectuating justice in a transitional context.<sup>145</sup> Further, as Kariuki Muigua observes, not only are they geared towards engendering peaceful coexistence among disputants after a conflict, they are fast, flexible and cheap.<sup>146</sup>

From the above, one can see why its resilience is steadfast. For instance, Section 5(1)(f) of the National Land Commission Act, 2011 encourages the use of traditional dispute resolution mechanisms in resolving contentious land disputes. Moreover, Article 60 and Article 67,<sup>147</sup> also urge the populace to turn to traditional dispute resolution mechanisms to resolve any disputes in relation to land in an expeditious and affordable manner. In the same vein, Section 68 of the Marriage Act elucidates that spouses who participated in a customary marriage should aim to resolve any disputes that may arise through traditional dispute resolution mechanisms before the court may deliberate on a petition for dissolution.<sup>148</sup>

However, Section 176 of Kenya's Criminal Procedure Code (CPC) allows for limited application of alternative dispute resolution mechanisms and traditional justice systems.<sup>149</sup> There is however no provisions relating to the legal stance of traditional justice systems in relation to international crimes.

## 2.5 CONCLUSION

The domestic legal framework on transitional justice is patchy at best and devoid of any substantive rationale behind it. In light of this, this chapter culminates to the conclusion that there is a case for defensible review of policy and institutional framework underpinning transitional justice in Kenya.

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<sup>145</sup> Hizkias A , *Peace and reconciliation as a paradigm: A philosophy of peace and its implications on conflict, governance and economic growth in Africa*, Nairobi Peace Initiative, (1993), 6.

<sup>146</sup> Muigua K, *Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010* Kariuki Muigua and Company Advocates, <http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> on 13 February 2015.

<sup>147</sup> Article 60 and Article 67, *Constitution of Kenya* (2010).

<sup>148</sup> Section 68, *The Marriage Act* (No.4 of 2012).

<sup>149</sup> Section 176, *Criminal Procedure Code* (Cap 75 of the Laws of Kenya).

## CHAPTER 3

### RWANDAN CASE STUDY

#### 3.1 INTRODUCTION

The chapter commences by providing a brief glimpse into the catalytic elements leading up to the genocide. Following this brief exposition, it proceeds by tracing the metamorphosis of transitional justice mechanisms put in place from their innocuous beginnings to their successful, albeit controversial, legal standing in the transitional justice arena in post-genocide Rwanda. Furthermore, it explores the various structures and institutions underpinning the smooth transition in the hope of acquiring an appreciation of the gaps in the systems that may or may not have been ostensibly filled. The review largely seeks to acquire a granular understanding of the viability of such initiatives as vehicles of peaceful transition in Kenya.

#### 3.2 JUSTIFICATION OF RWANDA AS A CASE STUDY

First and foremost, the geopolitics of the region mirror each other. The ethnicity-driven politics prevalent in Rwanda is similarly a characteristic feature present in Kenyan politics.<sup>150</sup> The following example will prove instructive. In April 1994, an aeroplane carrying the Presidents of Rwanda and Burundi was shot down, an event that most scholars state, ignited the Rwandan Genocide.<sup>151</sup> The innocuous political event that ignited the ethnic rivalry between the Hutus and Tutsi's mirrors the catalytic elements that fuelled Kenya's post-election violence. Secondly, the principal variables and socio-legal conditions of both countries are similar. As such the results of this inquiry, subject to the scale of completed work, would be illuminating and instrumental in predicting the likelihood of similar initiatives in Kenya. Finally, Rwanda is the only country with two incommensurable transitional justice institutions engineered simultaneously towards the reconstruction of Rwanda.<sup>152</sup> As such, a juxtaposition of both in one legal system would provide resourceful insight.

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<sup>150</sup> Sarkin J, 'The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide', 45 *Journal of African Law*, (2001), 170.

<sup>151</sup> Mamdani M, *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda*, ed., Princeton University Press, 2001, 229.

<sup>152</sup> Forges A and Longman T, 'Legal Responses to genocide in Rwanda,' in Stover E and Weinstein H, ed. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, 56

## Background

Rwanda is a relatively small landlocked country snuggled in the Great Lakes Region of Eastern Africa, bordered by the Democratic Republic of Congo on the east, Uganda to the north and Tanzania to the west, and Burundi to the south.<sup>153</sup>

Between April and July 1994, an insurgence of extrajudicial killings and mass atrocities left approximately eight hundred thousand dead and Rwanda void of peace in what scholars described as the fastest genocide in history.<sup>154</sup> Inevitably, post-genocidal Rwanda turned into a country ravaged by the memories of untold suffering.<sup>155</sup> It necessitated the establishment of tailor-made transitional processes and institutions that would serve as an appropriate vehicle to restore a collective sense of national unity.<sup>156</sup> Two principal approaches that emerged in the Rwandan context is the International Criminal Court of Rwanda and the Gacaca courts.<sup>157</sup>

Rwanda's post-conflict transitional justice legal landscape is characterized by a legal pluralism that incorporates formal international trials facilitated by the International Criminal Court of Rwanda and domestic criminal trials coordinated by the Gacaca Courts at the grass-root level.<sup>158</sup> Cognisant of the fact that that for South Africa reconciliation and justice were incongruent and irreconcilable goals, a truth reconciliation commission was the best fit as the former was a superior objective for the nation.<sup>159</sup> For Rwanda, reconciliation would be

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<sup>153</sup>'Rwanda Geography', World Atlas, September 29 2015, <http://www.worldatlas.com/webimage/countrys/africa/rwanda/rwland.htm> accessed on 12th February 2016.

<sup>154</sup>'Burundi violence: Scores flee homes before crackdown starts' BBC News, 7 November 2015, <http://www.bbc.com/news/world-africa-34758791> accessed on 10 November 2015.

<sup>155</sup> Sadat L, 'Transjudicial dialogue and the Rwandan genocide: Aspects of Antagonism and Complementarity', *Leiden Journal of International Law*, Vol.22, 2009, 543.

<sup>156</sup> Sadat L, 'Transjudicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity', *Leiden Journal of International Law*, Vol.22, 2009,552

<sup>157</sup> Forges A and Longman T, 'Legal Responses to genocide in Rwanda,' in Stover E and Weinstein H, ed. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, 65.

<sup>158</sup>Nagy R, *Transitional Justice and Legal Pluralism in a transitional context: The case of Rwanda and the Gacaca Courts*, ed., J.R Quinn, 2009, 97.

<sup>159</sup>Bradley E, 'In Search for Justice-A Truth and Reconciliation Commission for Rwanda', 7 *Detroit College of Law at Michigan State University Journal of International Law and Practice*, (1998), 129.

inconceivable without some form of justice.<sup>160</sup> The Rwandan model was a candid response to the UN Security Council need to do away with eschewing the one size fits all importation of a Eurocentric based transitional justice model.<sup>161</sup>

### **3.2 GACACA COURTS**

#### **Traditional Gacaca**

Widely known as Inkiko Gacaca to the Rwandan citizenry, the roots of the indigenous dispute resolution can be traced back to precolonial Rwanda, a period in which much content remains scarce given the unwritten nature of information relayed.<sup>162</sup> However, there is existing literature in which most scholars on the subject agree on the fundamental characteristics of traditional Gacaca system outlined below.<sup>163</sup>

#### **Institutional framework of Traditional Gacaca**

Traditional Gacaca dealt with disputes in accordance with customary law and practice instead of written laws.<sup>164</sup> Gacaca were non-permanent ad-hoc arrangements.<sup>165</sup> Their procedures were flexible and informal. Disputes were adjudicated to members who usually enjoy respect from the community. The members of these panels were men; women were not involved unless they were a complainant or a defendant.<sup>166</sup> Submission of disputes was on a voluntary basis. By and large, traditional Gacaca largely dealt with civil cases such as succession, land disputes, claims for compensation for loss of livestock or crops, family disputes.<sup>167</sup> On the rare occasion that serious cases such as murder or theft emerged, they were appealed to the

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<sup>160</sup>Bradley E, 'In Search for Justice-A Truth and Reconciliation Commission for Rwanda', 7 *Detroit College of Law at Michigan State University Journal of International Law and Practice*, (1998), 129.

<sup>161</sup> *Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda*, Letter from Kofi A. Annan, Secretary-General, United Nations, to the President of the Security Council 3, December 16, 1999, 3.

<sup>162</sup> Sarkin J, 'The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide', 45 *Journal of African Law* (2001), 132.

<sup>163</sup> Forges A and Longman T, 'Legal Responses to genocide in Rwanda,' in Stover E and Weinstein H, ed. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, 56.

<sup>164</sup>Sarkin J, 'The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide', 45 *Journal of African Law* (2001), 143.

<sup>165</sup> Sarkin J, 'The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide', 45 *Journal of African Law* (2001), 143.

<sup>166</sup> Bradley E, 'In Search for Justice-A Truth and Reconciliation Commission for Rwanda', 7 *Detroit College of Law at Michigan State University Journal of International Law and Practice*, (1998), 129.

<sup>167</sup> Sarkin J, 'The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide', 45 *Journal of African Law* (2001), 144.

superior chief and ultimately the king who exercised the final judicial power.<sup>168</sup> Social pressure was the principal motivation for compliance with the decisions of Gacaca. The objective of the process was to restore peace and order after and facilitating the reintegration of the offender into the community.<sup>169</sup>

### **Modern Gacaca**

Prompted by the inability of the domestic judicial system to tackle backlog of cases that mushroomed after the genocide, the Gacaca system underwent reforms by virtue of Organic Law 40/2000 which came into force on 15th March 2001.<sup>170</sup> The system incentivized perpetrators to come forward and confess their wrong doings in the form of confessions by permitting a reduction in sentences for those who come forward out of their own volition.<sup>171</sup> Further, it devolved the right of accountability to the grass-root level; any individual could lodge a complaint and the complainant afforded the opportunity of facing the wrongdoer in a judicial process convened by the community.<sup>172</sup> Thereafter, an institutional arrangement resembling that of a panel of judges was tasked with determining the person's guilt.<sup>173</sup>

In 2004, the Rwandan government spearheaded an initiative to modernize and institutionalize the process with the promulgation of Organic Law 16/2004.<sup>174</sup> Among other changes, it reorganized the Gacaca system by abolishing courts at the district and provincial level and leaving one court at each cell and establishing courts at each sector level; a court of first instance and an appellate court. Every Gacaca court had three organs; namely a general assembly, a bench of judges and a coordinating committee.<sup>175</sup>

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<sup>168</sup>Tully L, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda ', 26 *Boston College of International and Comparative Law Review*, (2003), 389.

<sup>169</sup> Tully L, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda ', 26 *Boston College of International and Comparative Law Review*, (2003), 390.

<sup>171</sup> Forges A and Longman T, 'Legal Responses to genocide in Rwanda,' in Stover E and Weinstein H, ed. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, 63.

<sup>172</sup> Forges A and Longman T, 'Legal Responses to genocide in Rwanda,' in Stover E and Weinstein H, ed. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, 64.

<sup>173</sup> Forges A and Longman T, 'Legal Responses to genocide in Rwanda,' in Stover E and Weinstein H, ed. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, 65.

<sup>174</sup> Tully L, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda ', 26 *Boston College of International and Comparative Law Review*, (2003), 393.

<sup>175</sup> Teitel R, 'Transitional Justice Genealogy', 16 *Harvard Human Rights Journal* (2003), 69.

The basic qualification of a judge is being a person of integrity and being regarded as such by members of the community.<sup>176</sup> Furthermore, one needs to have attained the age of majority, (eighteen), be a resident of the cell in which the complaint is being heard and not be accused of participating in the genocide.<sup>177</sup> The judges could cease to hold office or be removed from office for a number of reasons including but not limited to, failing to attend three successive meetings of the court without a convincing justification, disclosing details of in-camera court proceedings; showing indications of being adherent to the acts of genocide.<sup>178</sup>

By and large, the objectives of the newly formalized Gacaca process were to uncover the truth of what transpired during the carnage, to accelerate the legal proceedings against the alleged perpetrators; to weed out the culture of impunity and to deliver alternative forms of justice through Rwandan custom.<sup>179</sup> Soon after, about 1127 prisoners confessed to various genocide-related crimes.<sup>180</sup> These results encouraged the government to continue to expand and legitimize the process.

### **Juxtaposition of Modern Gacaca and Traditional Gacaca**

The modern Gacaca is largely different with the traditional Gacaca in many respects. Unlike the traditional Gacaca, the new Gacaca was created by written laws and is an integrated part of the formal state system of administration of justice.<sup>181</sup> It has applied state law instead of customs and relies on the coercive powers of the state instead of social control to function. It has dealt with international crimes.<sup>182</sup> It has had formal rules of procedure and was not as flexible as the traditional counterpart.<sup>183</sup> The new Gacaca has had powers to impose penal sanctions whereas the traditional Gacaca merely had powers to award compensation as a remedy.<sup>184</sup> The old Gacaca is purely restorative while the modern Gacaca has combined

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<sup>176</sup> Teitel R, 'Transitional Justice Genealogy', 16 *Harvard Human Rights Journal* (2003), 73.

<sup>177</sup> Teitel R, 'Transitional Justice Genealogy', 16 *Harvard Human Rights Journal* (2003), 75.

<sup>178</sup> Teitel R, 'Transitional Justice Genealogy', 16 *Harvard Human Rights Journal* (2003), 76.

<sup>179</sup> Tully L, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda ', 26 *Boston College of International and Comparative Law Review*, (2003), 396.

<sup>180</sup> Tully L, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda ', 26 *Boston College of International and Comparative Law Review*, (2003), 397.

<sup>181</sup> Waldorf L, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', 79 *Temple Law Review*, (2006), 48.

<sup>182</sup> Waldorf L, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', 79 *Temple Law Review*, (2006), 58.

<sup>183</sup> Waldorf L, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', 79 *Temple Law Review*, (2006), 58.

<sup>184</sup> Waldorf L, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', 79 *Temple Law Review*, (2006), 59.

restorative as well as retributive justice functions.<sup>185</sup> Under the new Gacaca, the consent of the parties to the process has been irrelevant, as appearance is compulsory not only for the accused but for the public at large.<sup>186</sup>

An avenue of appeal is available for those found guilty; their matter may be awarded an opportunity for review in the appeal court at the sector level composed of judges from the same constituency.<sup>187</sup> Finally, the aspect of sentencing is characteristic of the modern Gacaca. In light of the fact that truth and reconciliation is a dominant consideration for the courts, confessions are taken into consideration in sentence determination.<sup>188</sup>

### 3.3 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

On 4 May 1994, Mr. Jose Ayala Lasso, the United Nations High Commissioner for Human Rights then, drew attention to the unravelling human rights violations in Rwanda. In sensitizing the international community, he convened an emergency session of the Commission of Human Rights. Shortly after, he published a report in which he urged the international community to mobilize efforts towards stopping the “wanton killing” in Rwanda.<sup>189</sup>

The United Nations has embraced a different judicial suit in the pursuing the perpetrators of the atrocities committed as well as the violations international law committed during the genocide in Rwanda. By virtue of Resolution 955, the Security Council established the International Criminal Court of Rwanda.<sup>190</sup>

The jurisdiction of the ICTR is limited in various respects. The ICTR statute confers power over the tribunal to prosecute individuals who are responsible for perpetuating genocide and facilitating the commission of other human rights violations that occurred in Rwanda. In this

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<sup>185</sup> Waldorf L, ‘Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice’, 79 *Temple Law Review*, (2006), 60.

<sup>186</sup> Teitel R, ‘Transitional Justice Genealogy’, 16 *Harvard Human Rights Journal* (2003), 77.

<sup>187</sup> Teitel R, ‘Transitional Justice Genealogy’, 16 *Harvard Human Rights Journal* (2003), 78.

<sup>188</sup> Waldorf L, ‘Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice’, 79 *Temple Law Review*, (2006), 48.

<sup>189</sup> Schabas W, ‘Post-Genocide Justice in Rwanda: A Spectrum of Options’, in Clark P and Kaufman Z (ed), *After Genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*, 2008. 212.

<sup>190</sup> Schabas W, ‘Post-Genocide Justice in Rwanda: A Spectrum of Options’, in Clark P and Kaufman Z (ed), *After Genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*, 2008. 217.

sense, it is limited in the purpose for which it is was formed.<sup>191</sup> Secondly, it has limited timeframe as the ICTR only has jurisdiction on crimes committed between 1 January and 31 December 1994.<sup>192</sup>This jurisdiction does not extend to legal or juridical persons,<sup>193</sup> but rather to natural persons only.<sup>194</sup> It has subject-matter jurisdiction over genocide, crimes against humanity and violations of article 3 common to the Geneva Conventions.<sup>195</sup> This jurisdiction does not extend to legal or juridical persons, but rather to natural persons only.<sup>196</sup>

The Tribunal has concurrent jurisdiction with national courts to prosecute individuals suspected of committing heinous violations of international law.<sup>197</sup> However, the ICTR has primacy over national courts and therefore may at any stage of the procedure formally request a national court to defer any defendant or case to it.<sup>198</sup> The ICTR Statute lacks a general article on applicable law.<sup>199</sup>Being an international judicial entity, the ICTR must apply in the first instance, international law, its Statute and the Genocide Convention and may only revert to other sources of law, if international law is not competent to address a specific issue.<sup>200</sup>

With respect to deterrence, it categorically relays to potential enablers of atrocious crimes, not only in the war-torn state, but to the international community as well, that they will not escape punishment and condemnation for such crimes.<sup>201</sup> Secondly, the historical record provided aids in the development of international criminal law.<sup>202</sup>

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<sup>191</sup> Schabas W, 'Post-Genocide Justice in Rwanda: A Spectrum of Options', in Clark P and Kaufman Z (ed), *After Genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*, 2008. 218.

<sup>192</sup> Article 1, Statute of the International Criminal Court of Rwanda.

<sup>193</sup> Article 1, Statute of the International Criminal Court of Rwanda.

<sup>194</sup> Article 1, Statute of the International Criminal Court of Rwanda.

<sup>195</sup> Article 2, Statute of the International Criminal Court of Rwanda.

<sup>196</sup> Article 1, Statute of the International Criminal Court of Rwanda.

<sup>197</sup> Article 2, Statute of the International Criminal Court of Rwanda.

<sup>198</sup> Article 2, Statute of the International Criminal Court of Rwanda.

<sup>199</sup> Schabas W, 'Post-Genocide Justice in Rwanda: A Spectrum of Options', in Clark P and Kaufman Z (ed), *After Genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*, 2008. 219.

<sup>200</sup> Article 1, Statute of the International Criminal Court of Rwanda.

<sup>201</sup> Schabas W, 'Post-Genocide Justice in Rwanda: A Spectrum of Options', in Clark P and Kaufman Z (ed), *After Genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*, 2008. 220.

<sup>202</sup> Schabas W, 'Post-Genocide Justice in Rwanda: A Spectrum of Options', in Clark P and Kaufman Z (ed), *After Genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*, 2008. 221.

In this platform, a victim's opportunity to narrate their full story is often denied.<sup>203</sup> Given that the focus is often directed towards trial lawyers, impartial judges and perpetrators of the violations, this often has a disempowering effect on victims seeking more than retributive justice.<sup>204</sup> This is because the sole focus of International Criminal tribunals such as the ICTR is individual responsibility of perpetrators rather than peace and national reconciliation.<sup>205</sup> Invariably subject to pragmatism, international criminal trials only mobilize efforts to prosecute only high level officials or senior leaders who facilitated or commanded the commission of these crimes.

### 3.4 CONCLUSION

Proceeding on the basis that this chapter forms the foundational case study for this research inquiry, it seems fitting that the deductions of this chapters evaluations are relayed into a series of law and policy implications that would advocate or renounce the efficacy of indigenous dispute resolution mechanisms in transitional justice arena.

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<sup>203</sup> Schabas W, 'Post-Genocide Justice in Rwanda: A Spectrum of Options', in Clark P and Kaufman Z (ed), *After Genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*, 2008. 221

<sup>204</sup> Schabas W, 'Post-Genocide Justice in Rwanda: A Spectrum of Options', in Clark P and Kaufman Z (ed), *After Genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*, 2008. 222.

<sup>205</sup> Schabas W, 'Post-Genocide Justice in Rwanda: A Spectrum of Options', in Clark P and Kaufman Z (ed), *After Genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*, 2008. 222.

## CHAPTER 4

### DISTILLATION OF LESSONS FROM RWANDA

#### 4.1 INTRODUCTION

It is readily observable that both contemporary legislation and the legal institutions underpinning the transitional justice field in Kenya continue to drive a certain degree of legal uncertainty that introduces varying levels and types of inefficiencies. Correspondingly so, this chapter aims to unpack the legal arguments underpinning this narrative. Secondly, this thesis proposes that in strengthening the institutional framework underpinning transitional justice mechanisms, the legal framework should be rationalized in the context of Kenya's unfolding realities; a critical aspect that is determinant of its success.

#### 4.2 LEGAL RATIONALE BEHIND IMPORTING THE RWANDAN MODEL

The first pertinent issue regarding the inconsistencies between the ICC Statute and International Crimes Act and complimentary domestic criminal law legislation as regards punishment and minimum age of criminal responsibility. Whereas the maximum punishment that can be given by the Rome Statute is life imprisonment,<sup>206</sup> the maximum punishment that can be dispensed under the aforementioned Act is the death sentence.<sup>207</sup>

Additionally, the minimum age of criminal responsibility reflected by international instruments is noteworthy. Article 40(3) (a) of the UNCRC,<sup>208</sup> stipulates that member states shall aim to promote the establishment of a penal law that shall stipulate a minimum age under which an individual shall be presumed not to have the capacity to execute a crime. Furthermore, Article 37(a) of the UNCRC, obligates State parties to ensure that no child is subjected to cruelty inhuman acts, including a prohibition on life imprisonment and capital punishment being imposed upon individuals below eighteen years of age.<sup>209</sup> The Rome Statute reflects that the International Criminal Court has no competence over persons under the age of 18 years who are alleged to have executed a crime.<sup>210</sup>

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<sup>206</sup> Article 77(1), *Rome Statute of the International criminal Court*.

<sup>207</sup> Section 6(3) (a), *International Crimes Act*.

<sup>208</sup> *Convention on the Rights of the Child*, 20 November 1989.

<sup>209</sup> Cipriani D, *Children's Rights and the Minimum Age of Criminal Responsibility*, ed., Ashgate Publishers, 2009, 75.

<sup>210</sup> Cipriani D, *Children's Rights and the Minimum Age of Criminal Responsibility*, ed., Ashgate Publishers, 2009, 76.

However, for ad hoc tribunals such as the ICTY and ICTR, their respective legislations do not expressly exclude competence over persons under the age of eighteen years.<sup>211</sup> According to the UNICEF report on International Criminal Justice and Children, no person under the age of eighteen has been prosecuted to date.<sup>212</sup> Both tribunals have jurisdiction over “natural persons pursuant to the provisions of the present Statute”, without identifying a concise minimum age.<sup>213</sup> The fact that no child has been charged by either the ICTY or ICTR, is indicative of the fact that, neither views it as an appropriate forum for trying children responsible for human rights atrocities within its jurisdiction.<sup>214</sup>

The Special Court for Sierra Leone asserts competence over persons between fifteen and eighteen years of age.<sup>215</sup> However, it is highly unlikely that they will commence criminal prosecution of children between the aforementioned age brackets because the court is required to focus on perpetrators who bear the greatest responsibility.<sup>216</sup>

Paradoxically, section 14 of the Penal Code articulates that a person under the age of eight years is not criminally responsible for any act or omission provided one can prove that at the time of committing the crime he or she had the capacity to know that he or she ought not to do the act.<sup>217</sup> Furthermore, the definition of childhood has an impact on the age of criminal responsibility. Article 1 of the UNCRC states that: “a child means every human being below the age of eighteen years.” The Children Act 2001 affirms this definition word for word.<sup>218</sup>

In light of the above inconsistency, compliance relating to the minimum age of criminal responsibility provided by Kenya’s penal law poses a serious challenge in light of the provisions of the UNCRC and the Children Act Age of criminal responsibility.

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<sup>211</sup> ‘UNICEF report on International Criminal Justice and Children’, UNICEF Innocenti Research Centre on <http://www.unicef.org/emerg/files/ICJC.pdf> on 12 February 2016.

<sup>212</sup> Cipriani D, *Children’s Rights and the Minimum Age of Criminal Responsibility*, ed., Ashgate Publishers, 2009, 76.

<sup>213</sup> UNICEF report on International Criminal Justice and Children, UNICEF Innocenti Research Centre on <http://www.unicef.org/emerg/files/ICJC.pdf> on 13 February 2016.

<sup>214</sup> UNICEF report on International Criminal Justice and Children, UNICEF Innocenti Research Centre, <http://www.unicef.org/emerg/files/ICJC.pdf> on 13 February 2016.

<sup>215</sup> UNICEF report on International Criminal Justice and Children, UNICEF Innocenti Research Centre, <http://www.unicef.org/emerg/files/ICJC.pdf> on 13 February 2016.

<sup>216</sup> UNICEF report on International Criminal Justice and Children, UNICEF Innocenti Research Centre, <http://www.unicef.org/emerg/files/ICJC.pdf> on 13 February 2016.

<sup>217</sup> *The Children Act* (Chapter 141 of the Laws of Kenya).

<sup>218</sup> *The Children Act* (Chapter 141 of The Laws of Kenya)

Further, witness protection concerns appear to be key motivators to fuel resistance towards transitional justice dispensed solely by the domestic sovereign.<sup>219</sup> Given the infancy of data protection legislations in Kenya, it would appear to be a legitimate concern given the fact that prosecution of international crimes attract a maximum penalty of life imprisonment or death sentence. Furthermore, corruption was noted to be a key institutional factor in Kenya, and there could be legitimate apprehension about security of disclosed information.<sup>220</sup> Without a clear legislated duty to protect data, it is uncertain the extent to which witness protection information disclosed to the prosecutor will remain confidential. The fact that Kenya in 2010 did not have a law on data protection only exacerbates the resistance of various stakeholders in transitional justice to come forward and hampers the process of reconciliation further.<sup>221</sup>

Additionally, this chapter seeks to explore the following research question. In the wake of civil strife and state failure, how sovereign is the sovereign when delegating the power to dispense transitional justice to an extraterritorial sovereign? In light of the Rwandan case study, this chapter proposes the argument that sovereignty is lost when power to dispense transitional justice is permanently delegated to an extra-territorial sovereign.<sup>222</sup> This opinion is vindicated by the following rationale.

Prior to there being democratic state, however, there must first and foremost be a state.<sup>223</sup> Since the state has, to varying degrees in the cases under consideration, but on occasion completely failed, the early phases of legal intervention must focus on restoring the most basic function of any state: the maintenance of order.<sup>224</sup> Accordingly, this power can only be exercised by the sovereign. Given the status of a nascent nation, more often than not, there is an imperative for international actors to act as temporary extraterritorial sovereigns. Lending

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<sup>219</sup>Percy E, 'Surveillance in a legal vacuum: Kenya considers massive new spying system' <https://www.accessnow.org/surveillance-in-a-legal-vacuum-kenya-considers-massive-new-spying-system/> on 25th February 2016.

<sup>220</sup> Percy E, 'Surveillance in a legal vacuum: Kenya considers massive new spying system' <https://www.accessnow.org/surveillance-in-a-legal-vacuum-kenya-considers-massive-new-spying-system/> on 25th February 2016.

<sup>221</sup> Percy E, 'Surveillance in a legal vacuum: Kenya considers massive new spying system' <https://www.accessnow.org/surveillance-in-a-legal-vacuum-kenya-considers-massive-new-spying-system/> on 25th February 2016.

<sup>222</sup> Cowans J, *To Speak for the people: Public Opinion and the Problem of Legitimacy in the French Revolution* ed., Routledge, 2001, 462.

<sup>223</sup> McAuliffe P, *Transitional Justice and Rule of Law Reconstruction: A contentious relationship* ed., Routledge, 2013. 97.

<sup>224</sup>Cowans J, *To Speak for the people: Public Opinion and the Problem of Legitimacy in the French Revolution* ed., Routledge, 2001, 462

credence to this idea is Grotius' concept of sovereignty.<sup>225</sup> Grotius proposed the argument that sovereignty may still be maintained by a "lesser power" even in scenarios of total subjugation to another sovereign which merely demonstrates the divisibility of sovereignty.<sup>226</sup>

Vastly embraced in World War II literature on transitional states, nation building often emerges as a term used to describe the process of seeking international intervention to convert collapsed and collapsing states into vibrant hubs of democracy.<sup>227</sup> The wide dearth of literature highlights the challenge of forging a common sense of nationhood among states such as Germany and Japan emerging from World War II, and more recently Libya and Syria.<sup>228</sup> The question is not so much the legitimate boundaries of "the nascent sovereign" as the legitimate character of the sovereign. It is not so much the question of scope but rather of quality. That is the one challenge all of these cases share in common: reconstructing a legitimate and effective sovereign. Efficacy is derived when the nation has the democratic consent, participation, and validation of their own people.<sup>229</sup>

Kenya's resolve to task the International Criminal Court to persecute the perpetrators responsible for the 2007-2008 post-election violence, does not pay homage to Kenya's legitimate character as a sovereign.<sup>230</sup> First, the lack of an alternative recourse to international justice mechanisms imports the conclusion that the delegation of the power to dispense justice has permanently been vested with the International Criminal Court. Adopting Krasner's lens on sovereignty, permanently delegating the power to dispense transitional justice results in the loss of sovereignty with regard to that particular function. Logic dictates that, lack of domestic initiatives to compliment those of extraterritorial sovereign inevitably

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<sup>225</sup> Nijman J, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law*, Cambridge University Press, 2008, 43.

<sup>226</sup> Nijman J, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law*, Cambridge University Press, 2008, 45.

<sup>227</sup> Matt Murphy, 'Transitional Justice' Swarthmore College, <http://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0052.xml> on 26 February 2016.

<sup>228</sup> Nijman J, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law*, Cambridge University Press, 2008, 47.

<sup>229</sup> Nijman J, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law*, Cambridge University Press, 2008, 48.

<sup>230</sup> Nijman J, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law*, Cambridge University Press, 2008, 52.

leads to a dilution of this collective power. This opinion is vindicated by the supreme law of the land.

Article 159 of the Constitution of Kenya 2010 is categorical in its stance that judicial authority should be guided by certain values. One of these ideals is that alternative forms of dispute resolution mechanisms such as indigenous dispute resolution mechanisms shall be promoted provided that they are not pervasive to the Bill of Rights, or repugnant to justice and morality or results to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.<sup>231</sup>

A prominent theme in post-conflict reconstruction of Rwanda was legal pluralism. It demonstrated that multiple legal systems can also coexist both domestically as well as in the international criminal justice arena.<sup>232</sup> Despite having different objectives, legal pluralism may actually be complimentary, if not more effective, than a singular legal mechanism employed in supporting the transition of a nation. From the findings of the previous chapter, Rwanda's legal pluralistic regime, within which the ICTR and Gacaca courts coexist, operate to each other's mutual benefit. Arguably so, this model is more effective in emulating transitional justice values and their accompanying goals than either the ICTR or Gacaca courts could be in isolation.<sup>233</sup>

Similarly, Kenya mirrors similar socio-legal conditions.<sup>234</sup> Despite the fact that in theory, Kenya possess a legal pluralistic lens when it comes to conflict management scenarios, in practice, the transitional justice arena in Kenya is only anchored on legal monism.<sup>235</sup> Suffice to say, the cultural and legal differences can culminate in such distinctiveness as to effectively militate that to a substantial degree, the average citizen's right to their own law has been denied.

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<sup>231</sup>Article of 159 (2) , *Constitution of Kenya* (2010).

<sup>232</sup> Nagy R, *Transitional Justice and Legal Pluralism in a transitional context: The case of Rwanda and the Gacaca Courts*, ed., J. R Quinn, 2009, 97.

<sup>233</sup> Nagy R, *Transitional Justice and Legal Pluralism in a transitional context: The case of Rwanda and the Gacaca Courts*, ed., J. R Quinn, 2009, 97

<sup>234</sup> Kamau W, 'SM Otieno revisited: A view through legal pluralist lenses', 5 *The Law Society of Kenya Journal*, (2009), 69.

<sup>235</sup> Kamau W, 'SM Otieno revisited: A view through legal pluralist lenses', 5 *The Law Society of Kenya Journal*, (2009), 71.

Unlike the extra-territorial sovereign, the home-grown sovereign has therefore elevated the importance of indigenous conflict resolution mechanisms in conflict management in the Kenyan context.<sup>236</sup> Despite this, state practice continues to pay homage to formal mechanisms as the citizenry are yet to access indigenous justice mechanisms in the transitional justice arena, effectively diluting their sovereignty in the matter.

Moreover, formal mechanisms employed in the transitional justice arena only pay homage to the euro-centric ideologies on justice.<sup>237</sup> Numerous putatively “post-conflict” states revert to violent conflict where national reconciliation efforts are absent hence the dire need for restorative justice; a notion that is absent many international justice mechanisms.<sup>238</sup> Many international interventions such as the International Criminal Tribunal of Rwanda are often focused on punitive justice based on euro-centric notions of the concept. Moreover, when they succeed they bring about a democracy but not peace. Conversely, when traditional dispute mechanisms are employed as the sole transitional justice mechanism, as in Cambodia, they bring peace but not democracy.<sup>239</sup> Indeed, the lessons of the Rwandan case study are deeply sobering. Transitional justice mechanisms committed to the task must be commensurate with the difficult challenge of restoring harmony as well as justice.<sup>240</sup>

Furthermore, the adoption of an economic analysis of Article 17(1) (d) of the ICC Statute would advance this study’s proposition for a dire need for inclusion of indigenous dispute resolution mechanisms in the transitional justice legal framework in Kenya. The case of Northern Uganda is particularly instructive.<sup>241</sup> In that scenario, gravity was a fundamental concern assisting the selection of the prosecutor’s first case in Northern Uganda.<sup>242</sup> The prosecutor commenced investigations into the crimes allegedly committed by both the Lord’s Resistance Army (“LRA”) and the national Uganda Peoples Defence Forces (“UPDF”), but

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<sup>236</sup> Article 159(2) (c), *Constitution of Kenya* (2010).

<sup>237</sup> Kamau W, ‘SM Otieno revisited: A view through legal pluralist lenses’, 5 *The Law Society of Kenya Journal*, (2009), 61.

<sup>238</sup> McAuliffe P, ‘*Transitional Justice and Rule of Law Reconstruction: A contentious relationship*’ ed., Routledge, 2013, 67.

<sup>239</sup> McAuliffe P, ‘*Transitional Justice and Rule of Law Reconstruction: A contentious relationship*’ ed., Routledge, 2013, 73..

<sup>240</sup> Nagy R, *Transitional Justice and Legal Pluralism in a transitional context: The case of Rwanda and the Gacaca Courts*, ed., J.R Quinn, Reconciliation, 2009, 104.

<sup>241</sup> McAuliffe P, ‘*Transitional Justice and Rule of Law Reconstruction: A contentious relationship*’ ed., Routledge, 2013, 74.

<sup>242</sup> McAuliffe P, ‘*Transitional Justice and Rule of Law Reconstruction: A contentious relationship*’ ed., Routledge, 2013, 76

only proceeded to file charges against the former.<sup>243</sup> He repeatedly substantiated his decision by stating that he was following the admissibility criterion in Article 17(1) (d), noting of course, that human rights violations allegedly committed by the LRA were more serious and graver than the alleged crimes committed by the UPDF.<sup>244</sup>

Furthermore, as highlighted in Additional Protocol I to the 1949 Geneva Convention, the extraterritorial sovereign's primary focus is only prosecuting those most responsible for the human right violations committed.<sup>245</sup> The policy interest served by this provision is practical considerations which include among others, likelihood of apprehending the suspect and financial resources anchoring successful prosecutions.<sup>246</sup> While focusing on senior leaders is sound within the context of a limited-resource tribunal such as the ICC, indigenous dispute resolution mechanisms such as the Gacaca has adequate resources already in existence to pursue all the perpetrators who are responsible. In not limiting jurisdiction to a particular class of persons, indigenous justice systems facilitate universal accountability. Rwandan courts have tried almost two million genocide suspects.<sup>247</sup>

#### **4.3 CONCLUSION**

In conclusion, the arguments advanced in this chapter do not entirely support a categorical choice over either consolidation or a dispersed legal framework for transitional justice in Kenya. From these findings, it is legally deductible that the legal and institutional framework underpinning transitional justice in Kenya would benefit from a review. Further, that traditional dispute resolution mechanisms are instrumental in resolving some of the issues enunciated above.

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<sup>243</sup>Sacouto S and Kleary K, 'The Gravity Threshold of the International Criminal Court', *23 American Journal of International Law*, (2008), 75.

<sup>244</sup> Sacouto S and Kleary K, 'The Gravity Threshold of the International Criminal Court', *23 American Journal of International Law*, (2008), 75.

<sup>245</sup>Sacouto S and Kleary K, 'The Gravity Threshold of the International Criminal Court', *23 American Journal of International Law*, (2008), 75.

<sup>246</sup> Sacouto S and Kleary K, 'The Gravity Threshold of the International Criminal Court', *23 American Journal of International Law*, (2008), 75.

<sup>247</sup> Nagy R, *Transitional Justice and Legal Pluralism in a transitional context: The case of Rwanda and the Gacaca Courts*, ed., J.R Quinn, 2009, 97.

## CHAPTER 5: CONCLUSIONS, FINDINGS AND RECOMMENDATIONS

### 5.1 INTRODUCTION

Within the context of the preceding chapters, this study has grappled with the question whether traditional dispute resolution mechanisms are efficient tools in the quest to facilitate transitional justice in light of the 2007/2008 PEV. This chapter highlights findings enunciated in each chapter together through a concise thematic reflection on a series of factual deductions drawn from them while contemporaneously meditating on the overarching research question. These ideals will be captured in a thematic analysis.

### 5.2 FINDINGS

#### a) Legal pluralism in transitional justice

The study found that, within the transitional justice field, multiple legal systems can complement each other in the quest for transitional justice. International Criminal Tribunals' punitive focus aid victims in obtaining retributive justice, whereas indigenous mechanisms anchored on the notion of Ubuntu assist in nurturing an environment of peace and national reconciliation.

#### b) Delay

From the case study, it was evident that international criminal tribunals process cases at unreasonably slow pace.<sup>248</sup> Further, suspected perpetrators are detained for lengthy periods prior to transfer to the tribunals failing to deliver timely justice. Given the current backlog of cases plaguing the judiciary, it is deductible that the necessity for indigenous dispute resolution mechanisms in dealing with 2007-2008 crimes remains an ongoing need in Kenya.

#### c) Affordability

Given the high costs associated with seeking redress for human rights violations committed during the PEV through the available mechanisms, litigation and hiring lawyers are some of the impediments to accessing transitional justice by a majority of Kenyans.<sup>249</sup> Provision of traditional dispute resolution mechanisms in accessing transitional justice would prove to be a rather seductive choice for the marginal citizen.

#### d) Inconsistencies

This pursuit is contextualized in light of the fact that Kenya has a patchy legal framework for transitional justice. This deduction is grounded on the finding highlighted in Chapter 4, that

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<sup>248</sup> Forges D and Longman A.T, *Legal Responses to genocide in Rwanda*, ed., Cambridge University Press, Cambridge, 2004,56.

<sup>249</sup> Class discussions with esteemed mediator Antony Gross.

Kinoti K, *'Is justice for post-election violence victims a myth or a reality?'* ICJ Kenya, <http://www.icj-kenya.org/index.php/media-centre/commentary/611-kinoti-kibera> on 06 February 2015.

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Muigua K, *'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010'* Kariuki Muigua and Company Advocates, <http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> on 13 February 2015.

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*Burundi violence: Scores flee homes before crackdown starts'* BBC News, 7 November 2015, <http://www.bbc.com/news/world-africa-34758791> accessed on 10 November 2015.

UNICEF report on International Criminal Justice and Children', UNICEF Innocenti Research Centre on <http://www.unicef.org/emerg/files/ICJC.pdf> on 12 February 2016.

Percy E, ' Surveillance in a legal vacuum: Kenya considers massive new spying system' <https://www.accessnow.org/surveillance-in-a-legal-vacuum-kenya-considers-massive-new-spying-system/> on 25th February 2016.

Matt Murphy, ' *Transitional Justice*' Swarthmore College, <http://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0052.xml> on 26 February 2016.