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RESEARCH ARTICLE

The international criminal court's agenda on justice and reconciliation: Response to the 2007/8 post-election violence in kenya

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ABSTRACT

In the endeavour to pursue justice in the post-conflict period, the International Criminal Court's (ICC) operations in Africa have met with significant challenges. While it has been acknowledged in some quarters that the ICC can excel in curbing the problems of violence stemming from a culture of impunity, the court has attracted immense and tremendous controversy, especially because of its propensity for prolonging conflict and undermining peace deals and reconciliation processes that have proved imperative in a society emerging from a period of gross human rights violations. Kenya, in particular, is currently struggling with international criminal cases emanating from the violence that rocked the country following the 2007 general election. This violence followed the announcement of the results of the presidential election in Kenya on 30 December 2007 which sparked severe political violence across the country. The Electoral Commission of Kenya (ECK) had declared President Mwai Kibaki of the Party of National Unity (PNU) the winner against Raila Odinga of the Orange Democratic Movement (ODM). Two months of civil unrest resulted in the deaths of 1,333 people and over 650,000 internally displaced persons (IDPs), making it the deadliest ethno-political unrest since the introduction of multiparty politics in 1991 (Dagne, 2008).

INTRODUCTION

Taking the Kenyan post-election violence of 2007/8 as its context, this article explores whether the ICC can promote reconciliation and an inclusive political community through retributive justice. Although the ICC is considered to be a legitimate and necessary institution for fighting impunity, it falls short of realizing its full potential for progressively promoting reconciliation, peace and stability in the country. This is seen to be the result of local and international politics engulfing the court and its structural make-up, and its emphasis on retributive justice, which pays little regard to national healing and reconciliation. This article pursues an understanding of the ICC's impact on justice and reconciliation as part of the process of national healing in Kenya after the 2007/8 post-election violence. To explore this understanding, the article is divided into four sections covering the following: an explanation of the ICC and the reconciliation process in Kenya; a discussion of restorative and retributive justice in a section which asks the question, 'When is justice, justice enough?'; an exploration of justice and reconciliation in Kenya; and, last but not the least, a section about changing the focus: restorative justice and reconciliation in Kenya.

The ICC and the reconciliation process in Kenya

This section takes, as a point of departure, three countries (Uganda, Sudan and the Democratic Republic of Congo) as examples to highlight the ICC's processes in Africa, with the purpose of showing how the court's operations in fighting impunity have been perceived and the implications for the peace and reconciliation process. This will in turn provide a deeper insight into how the ICC processes in the Kenyan case are likely to play out with regard to the quest for a reconciled nation. The ICC has so far opened more cases in Africa than anywhere else in the world. Twenty-five African individuals have cases pending before the ICC. They stand accused of various crimes committed in six African countries: Libya, Kenya, Sudan (Darfur), Uganda (the Lord's Resistance Army), the Democratic Republic of Congo, and the Central African Republic. The ICC has also commenced preliminary examinations in Ivory Coast, Guinea and Nigeria (Arieff *et al*., 2011), which may turn into full investigations.
In Uganda, the ICC has had an adverse impact on the community-level reconciliation. The intervention by the court has elicited a considerable polarization of the peaceful condition that had been established prior to the coming of the international court. Even though there were various calls to have the individuals behind the atrocities in northern Uganda tried, there was also the desire that the ICC should refrain from prosecutions on the grounds that it would negatively impact on the reconciliation efforts that were being pursued (Murithi and Ngari, 2011).

The ICC generated controversy in the northern part of Uganda where the local leaders had laid the ground for peace negotiations with the Lord's Resistance Army (LRA). The determination to have the leaders of the LRA face retributive justice undermined the peace deals that had been initiated (McGreal, 2007). The issuance of the warrants of arrest against the LRA drove them away from the negotiating table and further rendered peace elusive in that troubled zone. Trials of the leaders of the LRA would have ensured the individual criminal responsibility of the perpetrators of heinous crimes. However, the same prosecutions would have been a setback to peacebuilding, healing and reconciliation in the war-torn region. By ensuring retributive justice for the individuals concerned, the ICC disregarded the ongoing peace processes and risked a backlash against its intervention (Murithi, 2010). Uganda sought traditional mechanisms in order to ensure that harmony was restored, peace prevailed and reconciliation goals were attained. Traditional systems stood a chance of promoting restorative justice among the members of a community. However, it was noted that crimes committed by the LRA were of enormous gravity and therefore traditional systems would not have been capable of pursuing justice. However, there was general

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acknowledgement of the role played by traditional mechanisms in the architecture of wider transitional justice and how they can be admitted to ensure good results (Murithi and Ngari, 2011). The crimes against humanity had been committed by all sides, including the Ugandan People's Defence Forces (UPDF). However, the court's impartiality in carrying out its mandate has been contested, since only members of the LRA rebel forces were targeted, hence opening up claims that the ICC sought to dispose of the LRA rebels instead of prosecuting crimes. Overall though, it had been reported that the worst violence, including murder, abduction, sexual enslavement, mutilation and forced conscription of Acholi young people, had been committed by the rebels; hence, these militants should bear the greatest responsibility for the mayhem (Human Rights Watch, 2005). In May 2007, the ICC issued arrest warrants in Darfur for the former Interior Minister, Ahmad Muhammad Harun, and a former Janjaweed leader, Ali Muhammad Ali Abd-Al-Rahman. They were accused of war crimes and crimes against humanity committed in Darfur between 2003 and 2004. This did not go down well with the Sudanese authorities, which refused to comply with the ICC's demands. In March 2009, the ICC Pre-Trial Chamber issued a warrant for the arrest of the Sudanese president, Omar al-Bashir, for war crimes (Dagne, 2010). Many observers have pointed out that such an arrest warrant will be an impediment to the peace negotiations that are underway, and might also frustrate efforts to achieve sustainable stability and reconciliation in the region (ICC, 2007).[1]

Even though many local legal systems grant sitting heads of state immunity from criminal prosecution, it is the prerogative of the Rome Statute to grant the ICC jurisdiction regardless of the official capacity of the accused (Dagne, 2010). A number of human rights organizations praised the issuance of the warrant against a sitting head of state. They argued that the ICC had taken the right step towards ending the impunity associated with abuse of office and power (Dagne, 2010). The referral by the UN Security Council of the Darfur situation to the ICC elicited unprecedented controversy about peace and justice in the region (Murithi and Ngari, 2011). This was a result of the ICC issuing an arrest warrant against President Omar Al-Bashir for allegedly being responsible for war crimes, crimes against humanity and genocide in Darfur. The African Union (AU) was categorical in opposing the issuance of the arrest warrant on the grounds that it undermined regional efforts to bring peace to Darfur and to Sudan in general (Murithi and Ngari, 2011). The differences between the AU and the ICC on the issues of peace and justice led to a decision by the AU Heads of State Summit not to cooperate with the court in enforcing the arrest warrant against the President of Sudan (Murithi and Ngari, 2011). The ICC arrest warrant for Al-Bashir played a role in derailing the recommendations for peacebuilding as outlined in the report of the AU High-Level Implementation Panel (AUHIP) on the Darfur situation (Murithi and Ngari, 2011).

Murithi and Ngari (2011) argued that the ICC disregarded the historical effects of marginalization, ethnic diversity and government oppression when it viewed the contemporary crisis. The prosecution of a few individuals does not address the much deeper structural and socio-economic concerns, which are the major sources from which violence erupts. In order to ensure stability and reconciliation, a society should be willing to confront violent crimes that are linked to a history of violence (Murithi and Ngari, 2011). Upon the intervention of the ICC, the government of the Democratic Republic of Congo (DRC) cooperated with the court to issue arrest warrants against the deviant rebel groups, particularly their leaders. The ICC has widely been viewed as politically motivated to go after the enemies of the government. But what is of great concern is that the selective approach to pursuing justice against the militia has undermined any efforts to encourage the rebels and the government to return to peace talks. This has been an impediment to the peacebuilding and reconciliation processes in the region (Murithi and Ngari, 2011).With reference to the issue of the ICC's retributive justice and reconciliation, it is widely argued that the ICC will not foster any stability in Kenya. The prosecutions of the suspects at The Hague are highly likely to spur chaos locally; hence, the process ought to be treated sensitively. The PNU side of the coalition government had asked for the cases at The Hague to be deferred. Article 19 of the Rome Statute allows the UN to defer the ICC cases only when there is a threat to international peace and security. Since the ICC process in Kenya does not pose any threat to international peace the petition was unsuccessful. As a matter of fact the ODM side of the coalition government opined that the failure to bring the perpetrators of post-election violence to justice poses a grave danger to Kenya's internal peace and security (Musila, 2009). The intervention of the ICC in the Kenyan post-election violence may hugely risk fuelling the divisions in a country where tribal loyalties and factionalism still take the centre stage of local politics. Kenya, often seen as a great African success story, is now heading towards a dangerous impasse. The ICC decision to have several individuals put on trial brought political opponents to loggerheads, making the situation volatile and peace unattainable.

When is justice, justice enough?

This section seeks to distinguish between retributive justice and restorative justice with the question of when justice can be said to be justice enough. This is achieved by seeking to understand the differences between retributive and restorative justice. A comparison between the perspectives of the two types of justice are presented and summarized in Table 1.

Understanding retributive justice

Retributive justice is punitive, and its main focus is on the defendant and the adversarial relationship between defence and prosecution (Teitel, 2005). In retributive justice success is measured by the fairness by which the process is carried out coupled with the determination to ascertain the compensation of the victims and punishment of the offenders. Retributive justice seeks to punish the perpetrators for their crimes, and it usually assumes the form of trials and prosecutions (Teitel, 2005). The trials of Nazi war criminals at Nuremburg from October 1945 constituted a great step forward towards enforcing accountability for crimes and gross human rights violations. Since then, individuals have been held responsible for their actions and can no longer escape the full force of the law while claiming that they were only following orders (Ratner *et al*., 2001). Equally, heads of state cannot commit atrocities with the comfort of a get out of jail free card or rely ultimately on the immunity accorded to all incumbent heads of state (Ratner *et al*., 2001). In most cases where transitional justice is pursued, the demand for accountability is formulated by the external actors, even though local mechanisms seem to be behind the calls for individuals to take political and personal responsibility. Too much emphasis on legal accountability may result in transitional justice programmes that are not appropriate to the political and legal cultures in which they are being applied (Sriram, 2007). Trials have been an established concept for pursuing and achieving the goal of transitional justice. In the Kenyan case, the prosecution of the individuals behind the 2007/8 post-election violence will seek to purge the leaders with the potential ability to orchestrate such violence in the future (Okuta, 2009). The trials may serve to end the political impunity in the country by subjecting the political leaders to the due process of law through which accountability will be emphasized (Gary, 2000). However, tribunals have come under fierce criticism for promoting 'victors' justice'. For instance, the Liberian president Ellen Johnson-Sirleaf used the platform to ensure her predecessor Charles Taylor was arrested. Additionally, these tribunals have been discredited for overlooking the victims' interests and needs, especially on matters pertaining to reconciliation and peacebuilding. Sriram (2007) asserts that this was highlighted in the case of the Rwandan tribunals where too many resources were used to establish and run these tribunals, whereas such

[1] ICC press release, 'Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a Leader of the Militia/Janjaweed', 2 May 2007.

funds could have been channelled to rebuilding national judicial capacity. The ICC has also been criticized for unfairly focusing excessively on African cases (Sriram, 2007). The pursuit of justice should not antagonize or undermine the efforts underway to move the country towards the attainment of national reconciliation. The fundamental question that needs to be asked is whether the ICC process in the country will frustrate initiatives to attain peace or whether it will promote them. Ultimately, justice should prevail in society, but this must not act as an impediment to the peace process. Kenya has so far taken a giant stride since the chaos rocked the country in December 2007. The country has come a long way and a lot of radical reforms have been instituted. This does not mean we still do not face the challenge of political violence. Effective mechanisms, such as the passing of a new Constitution, the revamping of the judiciary with a new Chief Justice, the vetting of judges, the restructuring of the police force and the establishment of a national cohesion and integration commission, have helped steer the country towards better governance and respect for the rule of law. These also demonstrate that Kenya is capable of handling its challenges as a sovereign state without invoking the principle of complementarity that requires the ICC to intervene where the national courts are unable to render justice. Also, the reconciliation process and national healing that has taken place since the violence ended is of great importance. The involvement of the ICC complicates and rather frustrates such efforts.

Understanding of restorative justice

Restorative justice is usually focused on restoring relationships rather than punishing the perpetrators of abuse or violators of human rights. Restorative justice has over the past decades assumed the place of second-best alternative, particularly when it is not possible to pursue prosecution, or alternatively, as the morally superior alternative to penal and retributive forms of justice (Minow, 2000). Restorative justice is a process by which individuals who are victims of a certain offence can jointly identify violations, redress the violations and seek common solutions to the problems of the past (Zehr, 2002). This kind of justice is community based, which serves to bring the stakeholders together to repair broken relationships and chart the way towards sustainable peace without blaming or shaming the offenders (Zehr, 2002). According to Kiss (2000), restorative justice can be characterized as a threefold commitment: (1) to affirm and restore the dignity of those whose human rights have been violated; (2) to hold perpetrators accountable, emphasizing the harm they have done to fellow human beings; and (3) to create the social conditions in which human rights will respected by all. The restorative justice approach is ideally meant to give respect to the victims and to allow them to tell their side of story to the rest. This victim-centred approach is seen a significant break from the retributive approach where the court puts the suspects on trial, and the law punishes them accordingly if found guilty (Kiss, 2000).

Instead of placing so much emphasis on the crime itself, or even the perpetrator, restorative justice has offered a different approach; that is, the healing of the victim and society at large (Kiss, 2000). Truth commissions have been utilized as a better mechanism and avenue for victims to tell their side of story than the courtroom. In this context, the victims need respect and dignity, and this is not likely to be achieved through withstanding cross-examination by an experienced professional lawyer defending a person who tortured them many years ago. This shows why the trial process is not likely to lead to the conviction of many suspects who are being prosecuted. Some atrocities might have taken place many years ago and may even have been committed in secrecy, which means the fate of the accused depends upon the word of one person against another. Kiss (2000) argued that in the binary world of the law, which only filters 'guilty' from 'not guilty', the process for the victim who has been yearning to tell his or her side of the story can be depriving, devastating and limiting. Rwanda embraced restorative justice after the 1994 genocide through the establishment of *gacaca* local courts. *Gacaca* is a *Kinyarwandan* term meaning 'justice on the grass (Philpott, 2012)'. Kenyans would do well to learn a similar system (Dennis, 2010). *Gacaca* was created to speed up trials, to reconcile Rwandans and to put to rest the culture of impunity through the use of a traditional dispute mechanism to search for solutions (Mamdani, 2001). *Gacaca* and restorative justice are considered to be more effective in reconciliation than the ICC and transitional justice because they focus on forgiveness and the establishment of a conducive environment for both offenders and victims to cooperate and rebuild the society (Dennis, 2010). Restorative justice involves victims participating in the justice system through decision-making and offenders being ready to take responsibility for their misdeeds (Zehr, 2002). Kenyans could also rebuild broken relations through storytelling about past experiences and active participation in the search for all-inclusive solutions (Dennis, 2010).

Comparing the retributive justice and restorative justice

Proper reconciliation and healing can be achieved through non-judicial mechanisms, and thus the ICC has no more than a remote chance of attaining reconciliation through retribution. Local tribunals may not meet the victims' needs in their entirety, but they can bring about reconciliation and peace faster than the ICC and its transitional justice (Zehr, 2002). Local tribunals should put emphasis on a psychological healing process which should stem from the shame of the offenders and help them to coexist peacefully with the victims (Zehr, 2002). On the other hand, the culture of impunity has existed in Kenya because the suspects are left unprosecuted, and have in the past intimidated their victims. This probably explains why some Kenyans consider retributive justice by the ICC as the better option (Dennis, 2010). According to Dennis (2010), truth-telling serves as a prerequisite for the attainment of reconciliation. The search for the truth, however, cannot be imposed on Kenyans by an international body; it has to be intrinsic and community based. This will enable the offenders to be released from the historical shame of the events of 2007/8, and hence build a society free from the culture of impunity (Dennis, 2010). Truth, justice and reconciliation must take into account the existence of the wide gap between the rich and poor in Kenya, and must put forward an agenda that works to bridge the divide. Kenya is more likely to attain reconciliation through local justice than by subscribing to transitional justice and the ICC (Dennis, 2010).

We are living at a defining moment whereby peace in the country is paramount. The ICC cannot address the underpinning issues that spur conflicts. The ICC does not have a significant mandate for redressing the past atrocities or historical injustices that may have been committed against the victims. This means that efforts to settle these injustices and foster reconciliation will be met with enormous challenges if retribution is applied. The former ICC chief, Luis Moreno-Ocampo, speaking in Cape Town, argued that there is an element in African peacebuilding that does not focus on retribution, as there is in Europe and America. He lamented that this element is inconceivable in Western society because the Western view justice is focused on retribution (Sriram and Pillay, 2009). The prosecutor's 'zero sum case load' prescribed by the West may be hard to apply in an African setting. On the same note, Archbishop Desmond Tutu, who played a key role in the success of the South African Truth and Reconciliation Commission, observed that 'the retributive justice is largely western. The African understanding is far more restorative – not so much to punish or redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of people' (Minow, 1998). The discussion of whether retributive justice has significance in achieving reconciliation has revealed that the ICC's approach is not the better course to take. Owing to its over-reliance on prosecution, trials and punishments, the ICC is seen as an impediment to reconciliation, peace and a politically stable society. Before embarking on how retributive and restorative justice impacts on the reconciliation process, let us compare and contrast retributive and restorative justice (see Table 1 below). In a nutshell, Table 1 sets

Table 1. Comparison of retributive and restorative justice

Retributive justice	Restorative justice
Crime defined by violation of rules (i.e. broken rules)	Crime defined by harm to people and relationships (i.e. broken relationships)
Crime defined abstractly	Harms defined concretely
Crime seen as categorically different from other harms	Crime recognized as related to other harms and conflicts
State has a victim	People and relationships as victims
State and offender seen as primary parties	Victim and offender seen as primary parties
Victims' needs and rights ignored	Centrality of victims' needs and rights
Interpersonal dimensions irrelevant	Centrality of interpersonal dimensions
Conflictual nature of crime obscured	Conflictual nature of crime recognized
Wounds of offender peripheral	Wounds of offender important
Offence defined in technical legal terms, devoid of moral, social, economic, political dimensions	Offence understood in full context: moral, social, economic and political
Focus on establishing blame, on guilt, on past (did he/she do it?)	Focus on problem-solving, on liabilities and obligations, on future (what should be done?)
Adversarial relationships and process	Dialogue and negotiation normative
Imposition of pain to punish and deter	Restitution as a means of restoring both parties; reconciliation /restoration as goal
Community sidelined, represented abstractly by state	Community as facilitator in restorative justice
Action directed to offender: victim ignored, offender passive	Victim's and offender's role recognized in both problem and solution: victim's rights/ needs recognised and offender encouraged to take responsibility
Offender accountability defined as taking punishment	Offender responsibility defined as understanding impact of action and helping decide how to make things right.
Debt owed to state and society in abstract	Debt/liability to victim recognized
Response focused on offender's past behaviour	Response focused on harmful consequences of offender's behaviour
Stigma of offence is not removable	Stigma of offence removable through restorative action
No encouragement for repentance and forgiveness	Possibilities for repentance and forgiveness
Dependence upon proxy professionals	Direct involvement by participants

out the differences between the retributive justice theory and restorative justice theory. It is important to note that what is captured in Table 1 can differ with different contexts for understanding the retributive and restorative justice practices. This means the table does not necessarily capture the generally accepted understanding of the differences between the two theories.

Retributive justice and the reconciliation process in Kenya

Immanuel Kant (1724–1804) observed that punishment's primary objective is retaliation. He argued that in order to restore a natural balance of justice, an offence must be parried by a just punishment. He further lamented that even the last murderer remaining in prison would have to be executed just to reciprocate what his deeds deserve. Thus, justice would be effectively rendered (Zedner, 2004). This kind of emphasis on retributive justice has impacted negatively on the reconciliation efforts that are usually crucial for a society emerging from a gross violation of human rights (Teitel, 2005). Sriram and Pillay (2009) critically observe that there is no clear answer to the question of whether individuals breaching international law should be prosecuted or pardoned, especially when the prosecution of such individuals can lead to more conflict and unrest in society. The use of the pardon for political leaders, especially in the quest for peace and order has been used in the past and has achieved the desired goals (Sriram and Pillay, 2009). But in the attempt to bring sanity and promote a politically inclusive society after gross violations of human rights, an incisive question has to be posed: Does the pardon promote order and peace or does it promote the culture of impunity?

On one hand, to argue that the perpetrators of crimes against humanity, genocide and war crimes should be pardoned is to promote a perspective that denies the evolution of international society and negates accountability. On the other hand, to say that all the violators of human rights have to be subjected to the full force of the law through trials and prosecutions is to fail to take into account fundamental factors that present a dilemma in the quest for a transformed peaceful and stable society, and that provide a strong platform on which reconciliation can take place. The litmus test of the effectiveness of the ICC's prosecutions and trials is the question of whether the process will contribute to national healing, political reconciliation and peacebuilding. If the political reconciliation does not take place and social cohesion and institutional reforms fail to stem the abuse of power and reduce social polarity, then the goal of applying transitional justice lacks any reasonable significance (Sriram and Pillay, 2009). At the height of the post-election skirmishes the Kenyan authorities sought national dialogue and reconciliation to calm a country that was on fire. The process resulted in a power-sharing arrangement and a national accord for the government (Okuta, 2009). The accord stipulated four crucial agendas that were meant to provide a road map for both short- and long-term changes to protect against the occurrence of such violence in the future. The fundamental changes put in place were expected first and foremost to resolve the humanitarian crises and acute problems, and secondly to deal with the culture of impunity and promote stable and efficient national institutions. This is how the national accord represented the official consensus on a national strategy for ensuring that the country achieved the desired reconciliation and peacebuilding (Okuta, 2009).
Murithi and Ngari (2011) have argued that the ICC took over the Kenyan case because it believed that Kenya did not have either the capacity or the political will to bring to book all the human rights violators involved in the 2007/8 violence. The office of the ICC's chief prosecutor came up with names of six individuals who were to face justice. Two of the six suspects were however exonerated at the ICC's Pre-Trial Chamber (Murithi and Ngari, 2011).

The Director of Public Prosecutions has compiled cases touching concerning 5,000 individuals in relation to the violence (*Daily Nation*, 2012).The ICC began to investigate Kenyan suspects before Kenya's new constitution came into effect. There were reasonable grounds to believe that, with the old constitution, the local judicial mechanisms could be deemed unfit to administer justice to all. The *Washington Post* pointed out that the former chief prosecutor had inserted the ICC into a delicate situation, referring to the court's proceedings on the Kenyan case. Mr Moreno-Ocampo diplomatically singled out three leaders from each of the two warring political parties, while leaving out the two principals, President Mwai Kibaki and Prime Minister Raila Odinga. Instead of seeking to obtain arrest warrants from the court, the prosecutor sought to issue summonses, which in essence do not require the Kenyan government to detain the suspects (*Washington Post*, 2010). The reaction of the Kenyan parliament to

the indictment of the suspects was unsupportive. The parliament passed a resolution with the aim of persuading the government to withdraw from the Rome Treaty and not to be party to the ICC. The government's wish was for Kenya to conduct its own trials, although initially there seemed to be a division on the resolution between the sides of the coalition in the government. The proponents of domestic trials argued that it was the right move for Kenya since it would ensure speedy trials for many suspects. The negative aspect of having the ICC carry out retributive justice against the Kenyan suspects is its high potential for dragging the country back toward civil war instead of helping consolidate the fragile new political order: 'Justice for human rights crimes is important; but Kenya's continued peace and democratic progress is of greater value than another endless prosecution in The Hague' (*Washington Post*, 2010). Although it is hard to determine a perfect option to end impunity in a society recovering from gross human rights abuses, criminal trials faces tough challenges when it comes to achieving a significant degree of peace, stability and reconciliation in society (Sriram and Pillay, 2009). This is not to discredit the role of criminal justice in ensuring accountability for the individuals alleged to have been the perpetrators of crimes. Both Sriram and Pillay (2009) lament that trials in courts of law to prosecute individuals who have committed politically related atrocities stand no chance of promoting a reconciliation process.

However, the trials do provide an appropriate background for seeking alternative processes to address grave issues in a post-conflict period. The problem with trials is that they are seen as vengeance by the weak parties or those individuals they seek to have tried, thus making it rather difficult to have a stable society with peaceful coexistence (Sriram and Pillay, 2009). In the event of ethnic conflicts like those witnessed in Kenya in 2007/8, a political dialogue is required that brings together the groups involved to ensure effective post-conflict peace processes. According to Archbishop Desmond Tutu, a formidable presence in bringing order and peace to the South African political landscape after apartheid, trials may be instrumental in fighting impunity but they cannot contribute to reconciliation. In Rwanda, the Tutsis instigated trials against the Hutus through the International Criminal Tribunal for Rwanda (ICTR), which proved to be a cumbersome task when it came to promoting peaceful coexistence (Tutu, 2008). In any given society where atrocities have been committed, there are large numbers of people who get victimized because of their identity. With reference to the Kenyan post-election violence, many people became the objects of victimization on account of belonging to a particular ethnic group and so were perceived to have voted for a candidate from their community (Moghalu, 2009). Trials in this context may fail to serve their intended purpose. This is because the group aspect is perceived as a form of conspiracy, whereby many people are labelled as wronged. This gives a certain ethnic group a sense of collective guilt in what could be perceived as 'the Nuremberg paradigm' when all the members labelled as violators are subjected to a collective retribution (Moghalu, 2009).

Justice is considered complete if it addresses the needs of victims in the form of compensation, which in this case means that restorative justice has to be taken into account since it ultimately focuses on victims as the target group (Arendt, 1977). Moghalu's (2009) argument discredits the possibility of a society achieving reconciliation through trials. He observes that there is no empirical proof that either the Nuremberg or the International Criminal Tribunal for Rwanda (ICTR) trials delivered reconciliation. Much emphasis has been put on justice as it is stipulated by the courts. However, it is significant to note what justice means to the victims of Kenyan post-election violence. Most victims understand justice through the lens of compensation for what they have lost, restoration of their dignity, getting the offenders to seek forgiveness and ultimately demanding that government assures them that such atrocities will never recur. The victims' discontent with ICC's activities in the country is deeply rooted in the possibility of backlash and the polarization of society. Most of the victims are more concerned with living in harmony, without the tensions that are seen to be emanating from the prosecutions of leaders of different political divides.

Changing the focus: Restorative justice and reconciliation in Kenya

As argued by Teitel (2005), the goals of restorative justice are to repair harm, heal the victims and community and, most importantly, restore a cordial relationship between the perpetrators and the victims and society at large. Restorative justice is the alternative to retributive justice because it seeks to bring together both offenders and victims for reconciliation and to gain a mutual understanding of each other's actions and reactions. Success in restorative justice is usually determined by measuring the value of the offender to the society and level of emotional restitution for the victims. Unlike retributive justice, restorative justice does not focus on shaming over guilt. It is, however, very rich in ensuring reconciliation and peacebuilding in the post conflict period (Teitel, 2005). For there to be stability, the country needs healing and reconciliation more than anything else. Based on what we know about the ICC, it is unlikely that the court will achieve this kind of healing. If anything, it is going to cause division and polarize the country. It would be prudent to embark on restorative forms of justice, as opposed to retributive justice. This would foster unity and correct the wrongs of the past without risking repeating the country's darkest moment witnessed following the controversial announcement of the presidential election results. By and large, the demand for punishment is likely to affect any reasonable negotiations aimed at bringing conflict to an end. This does not mean that a peace process should on focus on ending the conflict, for this may compromise the rights of those were directly affected by the conflict and, hence, fail to address the deep-seated grievances that time and again have spurred the conflict (Sriram and Pillay, 2009).

The *gacaca* courts of Rwanda achieved success by using restorative justice to render justice to the victims of the 1994 genocide. By so doing Rwanda set a good example of how community-based justice systems can be effectively used to address past crimes and restore peace in a society (Clara, 2012). Kenya will need to redefine its goals with respect the interests of the victims of post-election violence. This means that, if reconciliation is to be prioritized, the country has to pursue the restorative kind of justice and capitalize on its successes and strengths. Restorative justice is understood as the promotion of reconciliation through involvement of victims and offenders of post-election violence in Kenya. It can also be understood as a system of open forum where all parties involved post-election violence come together to resolve it collectively by agreeing the means of healing and how to confront their future. Restorative justice provides an alternative method of conflict management since it helps the society to confront its quandary without resorting to the tedious and time consuming Kenyan legal system. There is a lack of trust in the ability of the judicial legal system in Kenya to arrive at fair judgement. Restorative justice therefore works better in this context, where institutions like the church and councils of elders can be of help in amicably addressing the challenge of violence in Kenya. In the Kenyan case, for reconciliation to take place, both victims and offenders must be engaged in a process that addresses the past crimes and, most importantly, uses restorative justice to repair the already strained relationships.

Conclusion

This article has demonstrated that the International Criminal Court cannot promote reconciliation and peaceful coexistence among members of different communities. The article has cited concerns that, due to the ethnic demographic realities of the country, the ICC will polarize society as perceptions that the court is being used to settle political scores continue to emerge. It has also pointed out that reconciliation can be better achieved through non-judicial mechanisms that strive for the restoration of victims' dignity with the

violators being taken through a due process of owning their misdeeds, seeking forgiveness and compensating the victims where necessary. The ICC's capability for ensuring peaceful co-existence among the communities that fought after the 2007 general election is limited. Reconciliation ensues when mechanisms are established to allow affected locals to come together and engage in a dialogue about the past crimes, and ultimately to enable offenders to take brave steps towards seeking forgiveness from their victims.

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