Kenya's Post Election Incident and the International Criminal Court Trial

In retrospect of the political development in Kenya after independence, the country was again drawn into one of the most contested election in the country's political history. This election is one of its kinds primarily because it put Kenya on the spot light and eventually some of its top ranking leaders are presently facing trials at the International Criminal Court (ICC) in The Hague for alleged heinous crimes committed after the 2007 presidential elections. This piece will attempt to assess briefly the political events that took place during and prior this time and the Waki's report that eventually led to the conviction of Kenya's strong man Mr. Uhuru Muigai Kenyatta who is the acting president and his vice Mr. Samoei Ruto whose conviction at the ICC is jointly tried with former radio presenter Joshua Arap Sang all presently facing trials at The Hague. Part I will trace the political development, while Part II will assess the election and its consequences and finally Part III will look into the trials.

PART I: POLITICAL DEVELOPMENT AFTER INDEPENDENCE

It is a public secret that multiparty political paradigm during independence was to a greater extent formed along ethnic lines, partly because traditional societies in Africa still pay allegiance to their local leaders; this one can concur without fear or favour that this phenomenon is consonant for Kenya during the 1963 elections as evident in the apparently massive support for the Kenyan African National Union (KANU) spear headed by the Kikuyu and the Luo. This party was jointly among others led by Mzee Jomo Kenyatta a native of Kikuyu and Jaramogi Oginga Odinga a native of the Luo.[1] It is interesting to note that in the 1963 elections there were six political parties among which three were prominent (the Kenya African National Democratic Union (KADU); the African Peoples Party (APP)) including the afore mention party.[2] Speaking of the influence of tribal affiliations to political inclination, the leaders of the KADU (Mr. Daniel Arap Moi; Mr. Masinde Muliro and Mr. Ronald Ngala) and APP (Mr. Paul Ngei) got massive support from the Kelenjin sub-tribes, the Luhya sub-tribes; the Coastal people and the Akamba respectively because they are natives of these tribes.[3] However, multi-party politics in Africa today has taken a more liberal trend partly because traditional structures no longer have a tight grip to the populace and also there is the influence of globalization and other actors that intertwined to regulates political activities.

[1] *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-01/11, [03 September 2012], para. 4.
[2] ICC-01/09-01/11, [03 September 2012], para. 4.
[3] ICC-01/09-01/11, [03 September 2012], para. 4.

Speaking of multiparty elections, the 1992 elections unfolded with nine parties that contested in the election[4], seven of them presented presidential candidates. They include:

> *Kenya African National Union (KANU) which presented Mr. Daniel Arap Moi; Forum for the Restoration of Democracy-Aili (FORD-Asili) which presented Mr. Kenneth Matiba; Democratic Party (DP) which presented Mr. Mwai Kibaki; Forum for the Restoration of Democracy-Kenya (FORD-K) which presented Jaramogi Oginga Odinga; Kenya National Congress (KNC) which presented Mr. George Anyona; Party of Independent Candidate of Kenya (PICK) which presented Mr. John Harun Mwau; and Kenya Social Congress (KSC) which presented Mr. David Mukaru Ng'ang'a.*[5]

As mention earlier, it is a truism that political parties operate along ethnic lines as a consequence the 42 tribes in Kenya obviously participated in the 1997 elections. Speaking of elections, aside from the political parties that participated in the 1992 elections as outlined above, there was an increment of political parties in the 1997 election and these parties are as follows:

> *The National Development Party (NDP) which presented Mr. Raila Odinga, Forum for the Restoration of Democracy-People (FORD-People) which presented Mr. Kimani wa Nyoike, United Patriotic Party of Kenya (UPPK) which presented Mr. Munyua Waiyaki, the Green African Party (GAP) which presented Mr. Godfrey M'Mwereria, Labour party of Kenya (LDP) which presented Prof. Wangare Mathaai, Independent Economic Party (ICP) which presented Mr. Stephen Oludhe and Umma Patriotic Party of Kenya (UPPK) which presented Mr. David Waweru.*[6]

[4] Kenya African National Union (KANU); Forum for the Restoration of Democracy-Aili (FORD-Asili); Democratic Party (DP); Forum for the Restoration of Democracy-Kenya (FORD-K); Kenya National Congress (KNC); Party of Independent Candidate of Kenya (PICK); Kenya Social Congress (KSC); Kenyan National Democratic Alliance (KENDA); and Social Democratic Party (SDP).
[5] ICC-01/09-01/11, [03 September 2012], para. 5.
[6] ICC-01/09-01/11, [03 September 2012], para. 6.

Unlike previous multiparty elections that political parties were independently represented, the 2002 election was characterized by coalition of political parties before election proper.[7] First of its kind was the National Alliance of Kenya (NAK) led by Mr. Mwai Kibaki and Mr. Raila Odinga and the NAK alliance led the second the Liberal Democratic Party; which eventual became the National Rainbow Coalition (NARC) led by Mr. Emilio Mwai Kibaki.[8] This alliance was presented at the presidential election with the same leader while others such as the KANU led by Mr. Uhuru Muigai Kenyatta; Mr. Simeon Nyachae led the FORD-People; Mr. James Orengo led SDP and Mr. David Ng'ethe led the Chama Cha Umma (CCM) all contested for the presidential elections with the NARC scoring the top position 61.3 per cent while CCM got 0.1 per cent.[9]

It is interesting to note that 2007 was a turning point in the political ball game in Kenya; primarily because the political marriages that took place during the 2002 multiparty elections soon turn sour and by 2007 those who spearheaded the party with the majority (NARC) soon divorce from this union and form their own political parties that eventually contested during the most carefully observed election in the country's political annals. The parties and their candidates that contested were as follows:

> *The Party of National Unity (PNU) which presented Mr. Mwai Kibaki, Orange Democratic Movement (ODM) which presented Mr. Raila Odinga, Orange Democratic Movement-Kenya (ODM-M) which presented Mr. Kalonnzo Musyoka, Saba Saba Asili (SSA) which presented Mr. Kenneth Matiba, KPTP which presented Mr. Joseph Karani, KPP which presented Mr. Puis Muiru, WCPK which presented Ms. Nazlin Omar, CCUP which presented Mr. David Ng'ethe, and RPK which presented Mr. Nixon Kukuba*[10]

Ethnic, tribal, and religious tensions in Africa has earn the continent a nick name "*trouble continent"* this is obviously true especially in the political arena wherein political campaigns are usually a cut throat process as a consequence politicians and all a sundry exploit this lacuna essentially for gains.

[7] ICC-01/09-01/11, [03 September 2012], para. 7.
[8] ICC-01/09-01/11, [03 September 2012], para. 7.
[9] ICC-01/09-01/11, [03 September 2012], para. 7.
[10] ICC-01/09-01/11, [03 September 2012], para. 8.

To redress the political deadlock during the 2007 general election in Kenya; the Waki Commission[11] formally known as the Commission of Inquiry into the Post Election Violence (CIPEV) was tasked to perform an inquest into the situation. Following the announcement published in the Kenya Gazette Notice No. 4473 Vol. ex-no.4; The Commission's work commenced on 23rd May 2008[12] and it was tasked to carry out the following functions as per the amended Commission of Inquiry Bills 2009 CAP 102 in its Section 2 that instruct as follows:

> *Section 7 of the Commissions of Inquiry Act is amended by deleting sub-section (1) and substituting therefore the following new sub-sections –*
>
> *(i) It shall be the duty of a commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with the directions contained in the commission and on completion of the inquiry, to report to the President and to the National Assembly, in writing, the result of the inquiry and the reasons for the conclusions arrived at.*

With regards to the election, the basic terms of the Commission was to conduct an inquest into the facts relating to the post-election violence; to investigate the actions or omissions of State security agencies during the course of the violence; and provide recommendations of a legal, political, or administrative in nature as it deem necessary including steps with regard to bringing to justice those responsible for criminal acts, to eradicate impunity and foster national reconciliation and proposed to the Truth, Justice, and Reconciliation Commission the way forward as it deems fit.[13]

In its public hearing the CIPEV heard testimony from 156 witnesses and 144 other witnesses who submitted depositions during the Commission's inquest in Nairobi, Naivasha, Nakuru, Eldoret,

[11] The head of this Commission is Justice Philip Waki, a judge of Kenya's Court of Appeal; he is assisted by two Commissioners, Messrs. Gavin McFadyen and Pascal Kambale nationals of New Zealand and Democratic Republic of Congo respectively and two Kenyans serving as Counsel Assisting the Commission and Commission Secretary. See generally *Kriegler* and *Waki* Reports on 2007 Elections, p. 47.

[12] *Kriegler* and *Waki* Reports on 2007 Elections, p. 47; See generally the Kenyan National Dialogue and Reconciliation that defined the key activities of the Commission that include:

- To investigate the facts and circumstances related to the violence following the 2007 Preseidential election, between December 28, 2007 and February 28, 2008.
- To prepare and submit a final report containing its findings and recommendations for redress, any legal action that should be taken, and measures for future prevention.
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- To make recommendations, as it deems appropriate, to the Truth, Justice, and Reconciliation Commission.

[13] ICC-01/09-01/11, [03 September 2012], para. 12; *Kriegler* and *Waki* Reports on 2007 Elections, p. 47.

Kisumu, Borabu and Mombassa from July 2008 to September 2008.[14] It is however submitted that the Commission did not exhaust its task for instance in Kisumu there were no witnesses, and also, the Commission relied on testimony of witnesses; its own observation and submissions made by other groups that presented their views to the Commission.[15] The Commission's report was summarized as follows:

- *A total of 1,133 people died as a consequence of the post-election violence. The geographical distribution of the deaths was unequal, with most of the post-election violence related deaths concentrated in the provinces of Rift Valley (744), Nyanza (134) and Nairobi (125). The districts of Uasin Gishu (230), Nakura (213) and Trans Nzoia (104) in the Rift Valley Province registered the highest number of deaths related to post-election violence.*
- *A total of 3,561 people suffered injuries inflicted by or resulting from sharp pointed objects- 1229, blunt objects – 604, soft tissue injury – 360, Gunshot – 557, Arrow shots – 267, Burns – 164, Assault – 196, etc.*
    - *A total of 117,216 private properties (including residential houses, commercial premises, vehicles, farm produce) were destroyed, while 491 Government owned properties (offices, vehicles, health centres, schools and trees) were destroyed.*
    - *Gunshots accounted for 962 casualties out of whom 405 died. This represented 35.5 % of the total deaths, making gunshot the single most frequent cause of deaths during post-election violence. It was followed by deaths caused through injuries sustained as a result of sharp pointed objects at 28.2%.*
    - *The post election violence was attributed to historical and long term tensions in the conflict red spots that seem to have endured since independence, and intermittently boiled over to active violence (investigated in part by the Akiwumi Commission in 1997) as well as immediate trigger of perceived rigging of the 2007 December presidential polls.*[16]

Building on the evidence she pieced together, the Commission then report its findings in what is known as the CIPEV report which was enveloped and handed to the then Secretary General of the United Nations Koffi Annan; this enveloped was further handed to the prosecutor of the ICC.[17] She

[14] *Kriegler* and *Waki* Reports on 2007 Elections, p.47.
[15] *Kriegler* and *Waki* Reports on 2007 Elections, p. 47 – 48.
[16] *Kriegler* and *Waki* Reports on 2007 Elections, p. 53.
[17] ICC-OTP-20090709-PR436 ; ICC-01/09-01/11, [03 September 2012], para. 14.

builds on the evidence provided by the Commission to secure summonses to six Kenyans[18]; three of them are currently facing trial, Mr. Uhuru Maigui Kenyatta the acting president of Kenya[19], Mssrs. Samoei William Ruto and Joshua Arap Sang both of them are tried together[20] and Mr. Walter Asapira Barasa whose case is still at the Pre- trial stage.[21]

Part II of this piece will explore the election proper and the consequences of this election to the provinces and the general populace, while part three will examine in seriatim the cases that are presently been tried at the ICC.

PART II: The Election Proper and its Impact

If political democracy is the panacea for African democracy then multi-party elections should be that balm to heal the gabbing wound that all too often divides politicians during political rallies and campaigns. It is public secret that elections in Africa especially after the democratic wind of change that swept across the continent in the early 90s carrying within particles of what Duncun Kennedy refer to as "perverse political economy" implying that politics is a 'dirty game' in this sense politicians and their supporters can engage in all kinds of techniques to either dilute the populace with the goods they purport to sell or win over supporters with fancy speeches and empty promises. However, it will be naïve to perceive politics in Africa from this lens, even though politics is usually a cut throat process in the continent, recent developments have demonstrated that politicians as well as campaign events have to be streamline in a more humane and transparent manner as the continent move forward in its democratic transformation with the partnership of the international community to set standards acceptable for smooth transitions during elections.

Speaking of partnership with regards to the role of the two committees (the Independent Review Committee (IREC) and the Commission of Inquiry on the Post Election Violence (CIPEV)) that were task to review and elaborate on the finding of the 2007 general elections in Kenya whose work finally ended in October 2008; to circumvent and ease the task of understanding the lengthy reports[22] that was piece together by a commission composed of eight[23], the Dialogue Africa Foundation with the partnership of Konrad Adenauer Foundation in Germany have compact the

[18] ICC-01/09-01/11.
[19] ICC-01/09-02/11.
[20] ICC-01/09-01/11.
[21] ICC-01/09-01/13.
[22] See generally the report: http://www.kenyamoja.com/tjrc-report/ [Access date 30 August 2013].
[23] **Amb. Bethuel A. Kiplagat** - Chairperson, Kenya; **Tecla Namachanja Wanjala** - Vice Chairperson, Kenya; **Ahmed Sheikh Farah** - Commissioner, Kenya; **Berhanu Dinka** - Commissioner, Ethiopia; **Gertrude Chawatama** - Commissioner, Zambia; **Margaret Shava** - Commissioner, Kenya; **Ronald Slye** - Commissioner, USA and **Tom Aziz** - CEO/ Commission Secretary.

finding of these committees which will serve as a guide to understand the issues that surrounded the 2007 general elections.[24] In the first part of this piece which is a continuation of the previous report[25], we shall examine the organisation of the elections and in part two, we shall elaborate on other actors in the electoral process; part three will explore the impact of the elections in the provinces. The conduct of the elections was neatly organized in tandem of the following ingredients: one man one vote principle; registration of voters; voter registration; nomination of candidates; recruitment and training of staffs; voter turnout and regulation of political campaigns. These ingredients will be briefly assessed in light of the prevailing circumstances at the time; and will be garnished with recommendations by the committees.

The notion of "one man one vote principle" found legal certainty in the 1964 United States Supreme Court case of *Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 136, 12 L. Ed. 2d 506 (1964)* wherein it was ruled that the Equal Protection Clause of the Fourteen Amendment requires that legislative districts across states be the same in population; the reasoning behind this constitutional law principle is to provide maximum protection to the populace. To this end Chief Justice Warren submits that "legislators represent people, not trees or acres and legislators are elected by voters, not farms or cities…"[26] this principle was popularised in Africa immediately after independence and has been the *modus operandi* of political campaigns in the continent. In Kenyan 2007 general elections there is apparently vast loophole to the application of this principle; the differences in size are great: Embakassi for instance is 351% greater than Lamu East which is just 18% on average; which implies the vote cast by a voter in Lamu East is nineteen times greater than that of one Embakassi voter.[27] This phenomenon has been aggravated with the shortcomings that bisect multiparty construct in the country; for instance any increase in the number of seats must be approved by parliament while the Electoral Commission of Kenya (ECK) that was accused of rigging the 2007 presidential election can proceed with red limitation if the number is not changed, all these amounts to the fact that the delimitation of boundaries in Kenya offends the basic principle of equality of vote.[28]

Section 32(2) of the Constitution of Kenya provides that 'every person who is registered in a constituency as a voter in elections of elected members shall… be entitled to vote in that

[24] *Kriegler* and *Waki* Reports on 2007 Elections, p. viii.
[25] See Part I above, p. 1 - 5.
[26] The Supreme Court: http://www.pbs.org/wnet/supremecourt/rights/landmark_reynolds.html [Access date 22 August 2014].
[27] *Kriegler* and *Waki* Reports on 2007 Elections, p. 16.
[28] *Kriegler* and *Waki* Reports on 2007 Elections, p. 17.

constituency'. Section **42A** goes further to define the responsibilities of the Electoral Commission which includes:

> *(a) the registration of voters and the maintenance and revision of the register of voters;*
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> *(b) directing and supervising the Presidential, National Assembly and local government elections;*
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> *(c) promoting free and fair elections;*
>
> *(e) promoting voter education throughout Kenya; and*
>
> *(f) such other functions as may be prescribed by law*

To satisfy s. 42A (a) a voter must be resident at least five months in the twelve preceding months and engaged in business or employment or possessing land or residential buildings; in practice, the requirements for voting in civic election is hardly applied by the ECK.[29] In 1992 during the first multiparty elections that was organised by the ECK, voters were registered in what is known as the "black books" from which mimeographed lists for use at the polling stations were derived, and in 1997 this was computerized using optical mark recognition (OMR) forms; this development rendered the black book worthless as a consequence it was not used during the 2000, 2001 and 2002 elections. However, in 2007 it was decided that black books could be used as back-up in an election that was massively conducted in 20,655 centres and witness a surge in numbers of voters to 1, 767,212 summing up to 14, 296, 180 voters in the 2007 election; this figure is 71% of a total of 19.8 million people over 18 years with national identity cards.[30]

Voter registration process has been identified with some lacuna, for instance the continuous registration system that was considered in 2002 to be a giant way forward was found to be expensive; to worsen the situation, the ECK still perennially organised registration that outweigh the cost of the periodic register[31]; to this end the system has been strongly criticised on the following grounds:

> *Continuous registration has not worked – only (2-3) per cent of the registration took place at the ECK offices. The ECK alleges that this is because the number of field offices is too small (and aims to have an office in each constituency). This is not*

[29] Ibid, p.17.
[30] Ibid, p. 17 – 18.
[31] Ibid, p. 18.

correct: a significant proportion of the Kenyan population lives within a reasonable distance of an ECK district office (located in populated areas) yet only a minimal fraction of that part of the population opts to register at ECK field offices.

The system has very low productivity. During the 2007 registration drives before the elections, the average number of voters registered per registration center was about one per day. The productivity of the continuous registration is even lower. In the four months after the 2007 registration, the ECK network of offices recorded 553 transactions, of which only 129 were new registrants (the rest being transfers, detected deceased voters, etc). This means that the ECK offices conducted only one transaction every two weeks per office.

The voter register has a low and biased coverage. Registered voters represent only 71% of the 19.8 million persons over 18 years of age who were issued national identity cards. Women are significantly under-registered: they represent 51.4 per cent of the population and only 47.1 per cent of the voter register. Worse, the population has been declining: in 1997 the population of women in the register was 47.9 per cent. Young people are similarly under- registered: the proportion of persons between 18 and 30 years of age is 46.2 per cent of the population and only 32.1 per cent of the registered voters. Furthermore, the deletion of names of deceased voters from the register is ineffective: the Central Bureau of Statistics estimates that 1,733,000 persons have died since 1997 but the ECK has been able to eliminate the names of only 513,000 deceased persons from the register. Statistically therefore, the names of some 1.2 million dead persons swell the voter register.

There is an almost complete lack of control by the ECK. One of the main reasons for maintaining a voter register is that the verification of entitlement to vote is conducted in advance, as it takes significant time to verify residence, etc. The ECK system operates entirely on trust regarding residence. Form B (application to register as an elector) includes a declaration of residence, but no further proof is required, nor does the ECK conduct any post facto investigation or any other form of verification (except for the notoriously ineffectual period for exhibition of the list of registered voters).

The system is outrageously expensive. The cost of the filed offices, mostly devoted to voter registration in non-election years, was Kenyan Shilling (K.Shs) 309 million in

> *2006 and it is expected to reach K.Shs 377.4 million in 2008. The cost of the 2006 registration drives in 2007 required K.Shs 2.179 million and the allocation for voter registration for 2007/2008 is K.Shs 596.6 million. The present situation is far from adequate.*[32]

The above analysis vindicate the lapses of the continuous registration of voters that was introduced in 2002; it succeeded to register a minuscule number of people at ECK district electoral offices, also women and youths are under-represented.[33] Building on the above premises, it is fair to conclude that the current system is not working and the plausible thing to do will be to change to a more sustainable and effective system that is inclusive of all Kenyans and that emulate what obtains at the international level as high-lighted above. To accommodate these lapses the Independent Review Committee has provided the following recommendations:

> *...that as soon as possible the issuance of the national Identity card be integrated with the registration of voters, so that when a person request an ID card, s/he will automatically be entered in the voter register and informed of the location of the polling station where s/he should vote (a cheap voter card containing such information can be provided to a voter). The ECK should immediately begin the necessary studies to implement this solution (resorting, if so desired, to external technical support) and a significant part of the human and budgetary resources today devoted to the registration of voters should be transferred to the new system. The availability of additional resources should allow a much faster implementation…*
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> *...that entitlement to vote is based on residency, unless there are strong arguments for maintaining some of the other categories presently included.*
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> *...voters are allowed to vote with simple presentation of the national identity or passport if their name is in the voter register.*[34]

Nomination is deem valid if it adheres to the provisions of the constitution, rules of political party concern and it bears the signature of the person delegated by the commission.[35] The ECK statutory notice demands that political parties nominate candidates to contest in the civic and parliamentary

[32] Ibid, p.19.
[33] Ibid, p.19.
[34] *Kriegler* and *Waki* Reports on 2007 Elections, p. 25.

elections by 16 November 2007, and that all approved list should be send in by November 19, 2007 to the ECK headquarters; it is interesting to note that the parties are responsible for organising the primaries using party rank and other people necessary for this process; however there has been recurrent flaws such as chaos, logistical challenges, vote buying and nepotism, again deadlines for submitting the names of candidates in the certified list for the primaries were not respected as a consequence the date was moved to 23 and 24 November 2007 in which 2,547 candidates in the parliamentary elections were sponsored by 117 political parties.[36] To circumvent these lacunae the Independent Review Committee (IREC) proposed that:

> *... Consideration is given to establishing a special election court to expeditiously receive and deal with disputes arising from party primaries. Such a court will deal with these matters, but only after the aspirants have exhausted the internal dispute resolution machinery in their respective parties and failed to obtain satisfactory relief. Guided by the constitution or rules of the parties in question, the special election court will then make a decision on the matter, and this decision should be final.*
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> *... The Electoral Commission of Kenya establishes a clear, non-adjustable, timeframe within which all parties should hold their primaries and certify their nominees. Such a timeframe should be written into the regulations and communicated to all stakeholders in the electoral process together with the notice for elections. It should take into account the time required not only to conduct primaries but also to settle disputes arising from primaries. It may be necessary to conclude, as a positive incentive for good behaviour, a requirement that candidates will not be gazetted while an election dispute is pending.*
>
> *...amendment to electoral law to require political parties to not only conduct elections in accordance with their constitutions or rules but to also conform to established standards of fair practice. The Registrar of Political Parties should, in constitution with political parties, adopt a standard that is then enforced when the constitution and rules are submitted for the party's registration (and with every amendment later) and which the electoral court can rely on to make a finding that a party's nomination rules are not in keeping with fair practice.*[37]

[35] Ibid, p.19.
[36] Ibid, p. 20.
[37] Ibid, p. 25 – 26.

The enlistment of and training of temporary electoral officers during electoral processes (voter registration, polling and counting) is to ensure that the skills acquired within the brief period should remain fresh in their memories; observers reports content that this was transparent although some instances of tribalism and nepotism was pointed out in some polling stations as some contending officers were replaced by the Commissioner in the final minutes of the campaign[38]; this scenario was further compounded by the recruitment of returning[39] and presiding officers without determining their basic arithmetic skills as evident in the numerous errors identified.[40] To this end the IREC recommend the training of personnel on management of modern IT-facilitated electoral process and that returning officers undergo special training to keep up with the joneses of modern electoral processes.[41]

With regards to the number of votes cast, one point should be neatly pieced out which is that the continuous registration system as indicated in paragraph 5 above is unfairly biased; in that names of deceased individuals or those who have immigrated or migrated to other countries or within the country, their information is usually being used; for instance it was alleged that the names of some 1.2 million deceased voters were still on register.[42] This phenomenon is true in many countries in Africa that still adhere to the continuous registration system; this explains why elections results are usually massively rigged. It is possible to inflate ballot boxes when such practices occur wherein some stations will be declared that there was 100 % voters' turnout when in fact less than say 80 % of the voters actually cast their votes given the difficulties involve in the process and the fact that some people do not really care. In the 2007 elections it is pointed out that the recruitment was biased and couple with the fact that those involved were inadequately trained to perform their duties and worse still it was ridiculously expensive.[43] Building on this premise, it is plausible to argue that sound education to both youths and adults will help breach the invisible gap that all too often create tension and frustrate electoral processes.

It is submitted that campaign period in Kenya is usually a fluid concept implying that it does not abide by the provisions of the law as a consequence there is the tendency to breach the Electoral

[38] Ibid, p. 21.
[39] With regards to recruitment of returning officers the testimony of the Commissioner from Australia is telling. He admitted during his cross examination by the defence counsel Mr. Khan in the on going proceeding of *The Prosecutor v. William Ruto & Joshua Arap Sang* at the International Criminal Court in The Hague that one among many of the returning officer made a phone call to assist in this process and she was given the job. See generally ICC Trial: https://www.youtube.com/watch?v=FBhHtNRoiRs [Access date 02 September 2014].
[40] *Kriegler* and *Waki* Reports on 2007 Elections, p. 21.
[41] Ibid, 26.
[42] *Kriegler* and *Waki* Reports on 2007 Elections, p. 21.
[43] *Kriegler* and *Waki* Reports on 2007 Elections, p. 22.

Code of Conduct; when this happens the outcome is obviously violence against women; undemocratic practices to isolate opponents; spam and short text messages which are defamatory including internet blogs[44], these incidents and the irrational utilization of state resources for partisan campaigns are the *modus operandi* of the 2007 political campaign in Kenya and this practice goes back immediately after independence. The IREC profess new reforms for instance electoral law should give power to the ECK to carry out it constitutional mandate such as barring errant candidates in the event of defiance of its orders; arrogating matters to itself with the High Court having the power of judicial review, rather than taking it to the High Court for sanctions as contemplated in rule 9; forbidding the use of state funds for elections and the participation of civil servants in politics; and that electoral laws be reform to provide prosecutorial powers to the ECK over all election offences, and not just those as prescribed in section 34A of the National Assembly and Presidential Election Act.[45] Having explored the organisation of the election, we shall now turn our focus to the actors involved in the electoral process.

Political parties are fundamental in any electoral ball game; it is submitted that they are the acceptable conduit for political representation. In Kenya the Constitution, the national assembly and the presidential election Act Cap 7 commands that party sponsorship is a prerequisite in presidential, parliamentary and civic elections because independent candidates are not acknowledged.[46] Section 40 of the Constitution stipulates that:

> "*A member of the National Assembly who, having stood at his election as an elected member with the support of or as a supporter of a political party, or having accepted appointment as a nominated member as a supporter of a political party, either –*
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> *(a) resigns from that party at a time when that party is a parliamentary party; or*
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> *(b) having, after the dissolution of that party, been a member of another parliamentary party, resigns from that other party at a time when that other party is a parliamentary party, shall vacate his seat forthwith unless in the meantime that party of which he was last a member has ceased to exist as a parliamentary party or he has resigned his seat…"*

[44] *Kriegler* and *Waki* Reports on 2007 Elections, p. 22.
[45] Ibid, p. 28.
[46] *Kriegler* and *Waki* Reports on 2007 Elections, p. 12.

This provision emphasizes the role of political parties in the electoral process. A careful study has however revealed that political parties are undemocratic in their functions and their leaders are autocrats who cannot be held to account.[47]

As democratic principles finds roots into the Kenyan society, the media which played a leading role during the 2007 general election comes under scrutiny. Even though electoral campaign was broadcast in local languages and ordinary Kenyans had the opportunity to part take in the election through the frequency modulated (FM) radio stations; the ECK granted 2,964 local and international journalists election fiat to cover this event with training provided by the Media Council of Kenya (MCK), it is however argued that, the Kenya Broadcasting Corporation (KBC) was accused for favouritism and monopolising the live coverage of this event and worse still it officially proclaimed the election results and then went further to banning of live coverage after the announcement of the presidential results; this attest that it is still a tightly control arm of the government under the former post independent rigid political setting.[48] To remedy this situation, the Independent Review Committee (IREC) submits that:

- *Even though the leading newspapers, television and radio stations were not very openly biased for or against any of the candidates, there were discernible preferences shown by the tilt they gave in favour of or against the candidates and their campaign issues;*
- *As election results started trickling in, the stations competed with each other to be the first to announce the results from various constituencies. Some stations relied on unspecified sources to broadcast and announce results ahead of the ECK.*
- *Most media houses avoided hate speech but several FM stations incited ethnic animosity, particularly during call-in programs.*[49]

Building from this perspective, one can subsumed and understand why this election span out of control and eventually led to the indictment of Kenyan strong men who are currently facing trials at the ICC for alleged crimes committed during this period.

Other important players in this electoral process were the civil society and the faith based organisations. These bodies served as regulatory organs in that they were present to ensure that

[47] *Kriegler* and *Waki* Reports on 2007 Elections, p. 12 – 13.
[48] *Kriegler* and *Waki* Reports on 2007 Elections, p. 14 and 68; Post Election Violence, p. 295 – 296.
[49] *Kriegler* and *Waki* Reports on 2007 Elections, p. 14.

there is fairness in the electoral process.[50] This signals that there was a degree of openness in the manner in which the election was organised.

Monitoring electoral process is fundamental through an effective domestic programme that ensure checks and balances, surpluses and deficits of electoral malpractices, voters attitudes, rational use of state funds and media coverage; to circumvent this situation the ECK approved a total of 24,063 electoral observers, 15,000 of whom are local monitors under the Kenya Elections Domestic Observation Forum (KEDOF), while the rest included the European Union (EU), the Commonwealth International Conference of the Great Lakes Region, the East African Community and the Independent Republican Institute (IRI).[51] However, despite the measures taken by the ECK to ensure that election materials and badges are available to the observers[52] and other logistical apparels necessary for this electoral process, the outcome of the elections span out of control and the reminisce is the resultant death of many innocent civilians and the eventual indictment of those considered to bear the greatest responsibility for the unspeakable things that occurred after the 2007 general election. To water down the lacuna and prevent future conflict, the IREC has proposed some guidelines as follows:

- *... that a media and elections policy should be developed, to include guidelines for verifying data before going on air, vetting of live broadcasts and screening of paid-for advisements, responsibility to announce accurate results and training of journalists on the Electoral Code of Conduct, and elections reporting and the manner of reporting on opinion polls;*
- *... that disclosure of the real owners of media be made on a regular basis;*
- *... that Kenya Broadcasting Corporation (KBC) Act be amended to provide the ECK with the commensurate power to compel KBC to act in accordance with the law;*

...

- *...that key provisions in the KBC Act pertaining to free access slots for party political broadcasts be clarified and precisely defined as to the rights of the parties and candidates in law; and*
- *...that a substantive Act prohibiting hate speech be drafted and enacted.*[53]

[50] *Kriegler* and *Waki* Reports on 2007 Elections, p. 14.
[51] *Kriegler* and *Waki* Reports on 2007 Elections, p. 15.
[52] Ibid, p. 15.
[53] Ibid, p. 16.

We shall now turn our focus on the impact of this election violence in the provinces. It is important to indicate here that the 2007 post election violence did not escalate in all the eight provinces in Kenya; in fact the following provinces were affected and will be our focal point. They include: the Rift Valley, Western Province, Nyanza Province, Nairobi Province, Central Province and Coast Province. It is submitted that the cause of the violence is diverse and can be trace back in the colonial era and the successive repressive regimes that ensued in the guise of democratic governments. What is obvious is that Kenya as well as other countries in Africa are imbued with a vast diversities of ethnic, tribal, language and cultural differences usually in one unified political identity; in some countries like Cameroon for instance there are about 250 tribes or cultures which by extension mean the same amount of languages; in South Africa there are eleven official languages and the ethnic groups are: the Black Africans, Coloured, Asian, European, Afrikaans and Others. In Kenya as in other countries in the Great Lakes Region the story is essentially similar; in Rwanda for instance there are the Tutsis, Hutus and Twa; in Burundi there are Hutus, Tutsis, Twa, European and South Asians; in Uganda the languages are Luganda, Southern Luo, Runyankore, Runyoro, Ateso, Lumusaba, Lusoga, Samia and Swahili, the ethnic groups are Baganda, Banyankole, Basoga, Bakiga, Iteso, Langi, Acholi, Bagisu, Lugbara and Others. Kenya is unified under a political power like other countries in the continent but the people are identified by their tribes and/or ethnicity which as it is submitted is one of the reasons for the violence as we shall examine in the ensuing paragraphs.

The Rift Valley according to official sources experience in the Uasin district alone 205 dead, followed by Langas and Kiambaa that received 127 bodies from the Moi Teaching and Referral Hospital; according to the post mortems finding in descending order of gravity most of the deaths were as a result of sharp objects that is about (33%), followed by burns (22%), then blunt objects (14%), gun shots about (14%), arrow wounds (6%), broken bones (3%) and others.[54] Beside deaths, property was destroyed during the attacks and as the police records indicated 52,611 houses were burnt including motor vehicles 58 of which belong to civilians and 2 to the government, in total 21,749 people were displace[55] and communities hardest hit are: the Kalenjin, Kikuyu, Luo, Kisii and Luhya while the area that witness the violence are as follows:

> *Usain Gishu, Kesses Location, Meteite, Eldoret, Tinderet, Nandi District, Kiambaa, Rurigi, Rukuini, Kiamumbi, Moiben Division, Matunda in Soi Division, Turbo; Trans Nzoia West - Gituamba, Timbora Location in Saboti*

[54] *Kriegler* and *Waki* Reports on 2007 Elections, p. 60.
[55] *Kriegler* and *Waki* Reports on 2007 Elections, p. 60.

Division and Waumini near kitale town; Trans Nzoia East, Geta Farm Salama, Kalaa area, and Naivasha districts; Nakuru, Molo and Naivasha Districts; South Rift and Kisii Region - Kipkelion Kericho, Bomet, Sotik/Borabu Border.[56]

According to the inquest conducted by the Commission of Inquiry into the Post Election Violence (CIPEV) in this region the conflict escalated because of dispute over land, cattle rustling, political differences as well as ecological factors with possible other reasons that includes:

- *The desire by resident Kalenjins in the province to recover what they think they lost when the Europeans forcibly acquired their ancestral land;*
- *The desire to remove "foreigners", derogatorily referred to as "madoadoa" or "spots" from their midst. The reference was mainly towards the Kikuyu, Kisii, Luo and other communities who had found permanent residence in the Rift Valley;*
- *Political and ethnic loyalty to the dominant political parties and political leaders;*
- *Negligence of the provincial administration and security officers to punish perpetrators of earlier political violence (1992 & 1997);*
- *Perceived arrogance, stereotypes and hostilities of certain ethnic groups;*
- *Incitements, especially from political leaders and other propaganda sources...*[57]

Western Province is largely dominated by the Luhya and the violence here was land disputes and most importantly bitter division in political differences that let to riots and eventual gunshots that saw a high toll of deaths; up to 98 people were killed amounting to 73 per cent of people who died as a consequence of firearms, also there was destruction of road infrastructures leading to other parts of the country, burning and looting of property belonging to the Kikuyu community and those sympathetic to the Party of National Unity (PNU), in this series of events the towns most affected were Kakamega, Mumias, Bungoma, Mbale, Lugari, Busia and Vihiga including Budalangi in Busia district.[58]

In Nyanza Province the destruction experience here is largely arson of government infrastructures and vehicles including the attack on the political home of Raila Odinga leader of the Orange

[56] Ibid, p. 58.
[57] Ibid, p. 59.
[58] Ibid, p. 60 - 61.

Democratic Movement (ODM) because of the perceived delay to release the presidential results, however, the police had to intervene in a timely manner to save lives and property.[59] It is interesting to point out at this juncture that the impact of this violence was enormous and the commission recorded the following:

> *... the commission heard that by 11 of February 2008, 102 people were reported dead - most of the people who lost their lives did so through gun shots and 685 people injured in the province while 40,000 non-Luos had existed in the province. Nine government offices, 73 business premises and 415 residential houses were looted or burnt across the province. Fifty government vehicles were destroyed, 16 public service vehicles damaged mainly on the roads or where they had been parked and another 16 damaged. Indeed about 90% of the deaths in New Nyanza General Hospital were from gun shots and bullet wounds. Three security personnel were killed in the course of suppressing the violence.*
>
> *2,886 people sought refuge as internally displaced persons (IDPs) within the town. The Commission heard that the province received 126,821 returnees from outside Nyanza because they had been ejected from other provinces or they feared continuing to stay in those places most of who were taken in by friends and relatives.*
>
> *Loss of property and businesses; one large enterprise, the Ukwala supermarket was burnt down from the explosion of an inflammable material thrown inside it during police clashes with the rioters.*[60]

Nairobi Province like other provinces witness crisis over land between the Luo and Luhya tenants, destruction of property, reported instances of forced circumcision, looting and arson for instance the Toi Market in Makina which formerly accommodated about 3,000 traders before the elections was burnt down and the rail line that passes through it was destroyed, also, between 30th December 2007 and 30th January 2008 it is submitted that in the Nairobi City Mortuary a total of 111 corps were registered by police as "Post Election Violence Bodies"[61] ; the situation in this province span

[59] Ibid, p. 61 - 62.
[60] Ibid, p. 62.
[61] Ibid, p. 63.

out of control with the killing of late Embakasi MP - Hon. Melitus Mugabe on 29th January 2008 in Nairobi`s Woodley Estate as a result many communities were affected.[62]

In Central Province the violence was largely ethnic based and mainly kikuyus targeting those perceived to be unsympathetic to the PNU presidential Candidate Mwai Kibaki, this is evident in the eviction of non - kikuyus in other parts of the country[63]; this scenario was further compounded with the arrival of internally displaced kikuyus coming from other parts of the country as they clash with members of other communities, also this state of events was obvious in the business sectors as non - Kikuyus were targeted and their jobs taken away in companies such as the Universal Corporation Limited (UCL) and Steel Rolling Mills, both in Kikuyu; KARI and KEFR; the Tea Estates and Bata Shoe Company in Limuru; BIDCO and other industries in Thika; flower farms in O1 Kalou.[64] It should be noted that the violence in this province was propelled essentially by direct incitement by politicians and other leaders; the resurgence of Mungiki to defend Kikuyus communities from non - Kikuyus; the circulation of hate speeches through mobile text messages and the outcome was that a total of 8,889 people were displaced internally:

> *... In some areas the incoming Kikuyu internally displaced persons would be absorbed into the society by the local residents and other humanitarian agencies;*
>
> *Non-Kikuyu IDPs left and concentrated in the following police stations: Nyeri police station hosted 900 IDPs; Tigoni police station, 5,390; Maragua police station 68; Kinangop police station, 66; Karatina police station, 193; and Kikuyu police station, 500.*[65]

As compared with the other provinces, the Coast Province was generally peaceful during election period but the fear of expulsion among the Kikuyus, Luos, Kamba and other communities within Kipini settlement scheme in Malindi district was looming as presidential polls results was disappointing to angry youths who took on the streets in Taveta, Mwatate and Voi towns; this led to massive destruction of property, looting and burning of houses and road blockades in Changamwe, Mikindani, Kisauni, Bamburi, Mtongwe, Bomu and Migadini areas.[66]

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[62] Dandora and Mathare North; Lucky Summer Quarry; Gituamba; Gitare Marigo and Dandora Dumpsite; Babadogo; Glue Collar; Kariadudu; Mugure and Kasabuni; Kibera - Kianda, Raila village, Gatwikira and Kisumu Ndogo. See generally *Kriegler* and *Waki* Reports on 2007 Elections, p. 63; Post Election Violence Report 2007, p. 196.
[63] Post Election Violence Report 2007, p. 195.
[64] *Kriegler* and *Waki* Reports on 2007 Elections, p. 64.
[65] Ibid, p. 64 - 65.
[66] Ibid, p. 65.

To dovetail our discussion on the impact of the 2007 election that bisect Kenya in the wake of its process of democratization, it should be bond in mind that this incident do not only remind Kenyans about the deep and vast divide that exist among the tribes, ethnic groups and communities but inform them about the need to build a harmonious Kenya; this requires reflecting and revisiting their historic past, addressing socio-economic issues, reform their political and economic structures to horizontal heights so that it is inclusive of all Kenyans and transition from there to avoid future incidents like the recent Westgate massacre and the 2007 post election violence itself that has taking some of Kenyan strong men to face trials at the International Criminal Tribunal (ICC) at The Hague which will be our next point of focus in this series.

PART III: The Trial of Kenya Statesmen at the International Criminal Tribunal

Cognizant of the events that unfolded after the 2007 general election in Kenya as discuss above, and the subsequent indictment of Messrs Uhuru Muigai Kenyatta, William Sameoi Ruto and Joshua Arap Sang, and Walter Osapiri Barasa. The first two cases will be our focal point and will be elaborated in the subsequent headings. But before we examine these cases it is worthwhile to highlight the events leading to the indictments, to begin with, the measures taken by the Kenyan National Dialogue and Reconciliation is worth given some consideration. It was proposed that a Truth, Justice and Reconciliation Commission (TJRC) be created to address this situation and on 27 October 2008 Parliament passed the TJRC Act, this Act provides in broad terms the Commission`s objectives in its preamble which as Musila submits conflicts with the objectives of previous Commissions and because the mandate is broad it makes it difficult for its implementation.[67] The TJRC has the power to recommend the prosecution of perpetrators; redress the plight of victims; ease the granting of amnesty; make available a forum for non-retributive truth-telling; enable victims to be heard and provide a forum for confession.[68] It was proposed that a Special Tribunal for Kenya be created to deal with the matter and later on this option was abandoned for the ordinary criminal courts as will be discuss below.

The Special Tribunal for Kenya was tasked with prosecuting those bearing the greatest responsibility for the crimes against humanity that was committed between 27 December 2007 and 28 February 2008 as recommended by the Waki Commission[69]; it endorse that the Special Tribunal should apply Kenyan law and the international Crimes Bill that was eventually passed by parliament and approved by the president on 28 December 2008.[70] Contrary to the suggestion of the Commission the government instead adopted a special statute for the Special Tribunal which as it is submitted it has retroactive effect in that it has to trigger proceedings of 27 December 2007; moreover, it introduces a new category of crime which is not found in the ICC Act.[71] Again arguments could be raised that the Special Tribunal Bill that defines crimes to be punished under the Special Tribunal Statute may not have been crimes under Kenyan law when they were committed to this point the Kenyan Constitution in Section 77(8) instruct that "no person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefore is

[67] *Musila G. M*, Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions, *The International Journal of Transitional Justice (ijtj)*, Vol. 3, 2009, p. 452 – 453.
[68] *Musila G. M*, Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions, *The International Journal of Transitional Justice (ijtj)*, Vol. 3, 2009, p. 453 – 454.
[69] see footnote 12 above.
[70] Ibid, 454.
[71] Ibid, 454.

prescribed, in a written law" this provision is in line with Articles 21, 22 and 23 of the Rome Statute.[72]

In response to the call for justice to victims of the post election violence (PEV), President Mwai Kibaki in a statement on 30 July 2009 announce that the ordinary criminal courts and the Truth, Justice and Reconciliation Commission (TJRC) will replace the Special Tribunal because as it is submitted if the Special Tribunal is established, it will try only 'those who bear the greatest responsibility' for the most serious crimes implying that other crimes committed will be tried elsewhere this position is consonant with the ICC that try only those who bear the 'greatest responsibility' for crimes committed; also the TJRC Act of 2009 in its Section 5 makes provision for amnesty for crimes against humanity and gross human right violations which will be prosecuted by the Special Tribunal if it is promulgated, again this Tribunal Statute makes provision for 'gross human right violations' that should be prosecuted by the ordinary courts because it fall under penal code offences.[73] However, it should be borne in mind that the Draft Special Tribunal in Section 3 provided for a Trial Chamber and Special Magistrates, both with jurisdiction to try crimes against humanity and gross human rights violations, with an additional function of the Special Magistrates to try penal code offences; the raison d'être of creating these jurisdictions it is submitted was to by-pass the corrupt judiciary.[74] Because the judiciary is porous and tainted and the citizens do not believe in the system to deliver justice, when the option for the ICC was raised, many Kenyans enjoined their support for justice to the victims. However, the support for the ICC trial shows a steady decline in some provinces, this statement is manifested in the face-to-face sample of opinion polls conducted for a targeted population of 2000 people nationwide release by *Ipsos-Synovate* Kenya on 19 August 2011, it shows that between June 30 and July 8 2011 although 56 per cent of Kenyans support the ICC process, there has been a 12 per cent decline from October 2010 before the Ocampo list was released.[75] We will now turn our focus to the cases that are currently on trial in The Hague.

On 10 September 2013 the trial of Messrs William Sameoi Ruto and Joshua Arap Sang commences both charged as indirect co-perpetrators under Article 25(3) of the Rome Statute for crimes against humanity that includes murder (Art 7(1) (a)); deportation or forcible transfer of population (Art 7(1) (d)); and persecution (Art 7(1)(h)). While Mr. Uhuru Maigai Kenyatta who is the acting president of Kenya is equally charged with infringing Article 25(3) of the Rome Statute and therefore

[72] Ibid, 454 – 455.
[73] Ibid, 455 – 456.
[74] Ibid, 456.

allegedly liable for the following crimes against humanity: murder (Art. 7(1)(a)); deportation or forcible transfer (Art. 7 (1)(d)); rape (7)(1)(g)); persecution (7 (1)(h)); and other inhumane acts (7 (1)(k)). To understand the raison d'être of these cases we shall piece apart and examine the cases seriatim. In the first part we shall look at the proceeding in light of the constitutional obligations bestowed on Mr. Ruto who is the acting vice president of Kenya and in part two we shall examine the proceedings at the ICC in the prism of the powers vested on Mr. Kenyatta.

1. The Trial of William Samoei Ruto and Joshua Arap Sang

Cognizant of the obligations resting on Mr. William Ruto as statesman in Kenya and his international obligation to comply with the call from the ICC on the charges levied against him, he is bound to currently discharged these demands as we shall analyzed in the ensuing paragraphs. To understand Mr. William Sameoi Ruto's request for excusal from continuous presence at the trial, it is imperative to examine the judgment of the Appeals Chamber delivered on 18 June 2013 entitled "Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial"[76]; it is interesting to note that this judgment drew its legal stance mainly from the 'Impugned Decision'; Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1963; the jurisprudence of the ICC, ICTR, ICTY; the European Court on Human Rights (ECtHR) and Articles 21(3); 27(1); 63(1)(2); 64(6)(f) and 67(1)(d) of the Rome Statute. Article 63 titled Trial in the presence of the accused commands as follows:

> *(1). The accused shall be present during the trial.*
> *(2). If the accused, being present before the court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.*

In the judgment it is submitted that the discretion which the Trial Chamber has under Art. 63(1) is limited and must be exercised with caution; it therefore outlines the following limitations:

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[75] Copy with author, see generally http://www.ipsos.co.ke/home/ [21 October 2014].
[76] ICC-01/09-01/11 OA 5, [25 October 2013].

(a) the absence of the accused can only take place in exceptional circumstances and must not become the rule;

(b) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial;

(c) any absence must be limited to that which is strictly necessary;

(d) the accused must have explicitly waived his or her right to be present at trial;

(e) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and

(f) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regards to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.[77]

Building on the above premise we shall proceed to examine the proceedings before the Trial Chamber and the Appeals Chambers in part A and in part B we shall look at the merits.

A. Proceedings before the Chambers

The Trial Chamber V(a) pursuant to Article 63(1) of the Rome Statute on 18 June 2013 grant Mr. William Sameoi Ruto a waiver of his right to be continually present during the entire period of the proceedings in what is referred to as the "Impugned Decision"; this decision was reached after the accused on 17 April 2013 filed a request in regards of excusal from trial despite the opposition by the Prosecutor and the participating victims whom on 1st and 22nd of May 2013 respectively challenged the defence request for excusal of Mr. Ruto.[78] The Impugned Decision requires his absence on condition that he discharges his constitutional duties entrusted to him by the State of Kenya.[79]

The Appeals Chamber on 20 August 2013 granted the "Decision on Suspensive Effect" to a request by the Prosecutor on 29 July 2013 in this regards despite opposition from the Defence on 8 August 2013 to uphold the Impugned Decision; the Chamber maintain that Mr. Ruto is required during trial pending the final determination of the Prosecutor's appeal.[80] In reaction to this, a joint observation

[77] ICC-01/09-01/11- 1066, [25 October 2013], p. 3 – 4.
[78] ICC-01/09-01/11- 1066, [25 October 2013], p. 4 – 5.
[79] ICC-01/09-01/11- 1066, [25 October 2013], p. 5.
[80] ICC-01/09-01/11- 1066, [25 October 2013], p. 5 – 6.

was submitted by Tanzania, Rwanda, Burundi, Eritrea and Uganda[81] pursuant to Rule 103 of the Rules of Procedure and Evidence regarding leave granted by the Appeals Chamber and on 20 September 2013 both Mr. Ruto and the Prosecutor reacted to this observation, mean while that of Ethiopia and Nigeria was dismissed by the Appeals Chamber for repetition; it should be noted however that Mr. Ruto`s appeal for reconsideration of the Decision for Suspensive Effect was dismissed.[82]

B Merits

In response to Mr. Ruto`s request for oral hearing, Rule 156(3) of the Rules of Procedure and Evidence commands that the appeal proceedings shall be in writing unless the Appeal Chamber decides to convene a hearing; in this case, the oral hearing was dismissed.[83] It is worthwhile at this juncture to consider the Impugned decision and the submission of the parties.

1. Impugned Decision

The Trial Chamber concludes that the provisions in the Statute must be read in tandem; implying the Chamber will consider the presence of the accused (Article 63); the irrelevance of the official capacity of the accused (Article 27); the presumption of innocence (Article 66); ensuring fair trial and protection of victims and witnesses (64(2)); and using its discretion to rule on any relevant matter (Article 64 (6) (f)) must be given due consideration in this case.[84]

Building on the above premise and based on the fact that it is the right of the accused to be present during trial as enunciated in Article 67(1) (d), the Trial Chamber concluded that Article 63(1) affords an unquestionable statutory basis for the Chamber to make impositions upon the time and whereabouts of the accessed for which he must comply failure which it will attract sanctions against the accused.[85] The question that arise then is if the accused has good reason not to be present and has given consent that trials should proceed, to this the Chamber submits that an interpretation that imposes a duty on the chamber to comply with the accused demands even if he has good reason will frustrate justice; so therefore in performing its function prior to trial or during the course of trial as engrained in Article 64(6) (f), the Trial Chamber may if necessary, rule on any other relevant matters; to this end the Chamber arrived at the conclusion that a seasoned interpretation of the afore

[81] ICC-01/09-01/11- 1066, [25 October 2013], p. 16.
[82] ICC-01/09-01/11- 1066, [25 October 2013], p. 6 - 7.
[83] ICC-01/09-01/11- 1066, [25 October 2013], p. 7.
[84] ICC-01/09-01/11- 1066, [25 October 2013], p. 7.
[85] ICC-01/09-01/11- 1066, [25 October 2013], p. 8.

mentioned article will be one that accommodates the general power of the Trial Chamber to do what is fair, reasonable and just, in this light the Trial Chamber summarized the interpretation of Article 63(1) as follows;

> *In the end, the Chamber considers that the purpose of Article 63(1) is to ensure that a Trial Chamber will maintain judicial control over the accused, from the perspective of making impositions on his time and whereabouts, for purposes of effective inquiry into his individual responsibility for the crimes as charged. It is neither reasonable nor necessary to interpret the provision in a manner that eliminates the discretion of the Trial Chamber reasonably to permit the accused to carry out his duties as his country`s executive Deputy Head of State who, as an accused, remains fully subject to the jurisdiction of the Court for purposes of the inquiry into his individual criminal responsibility under the Court`s Statute*[86]

It was not the intention of the draftsmen of the Rome Statute to exhaust the circumstances that the Trial Chamber may permit the absence of an accused during trial or its discretion to do so as engrained Articles 63(2) and 61(2) (a) the Trial Chamber submits.[87] It further contend as per Article 27(1) that the official position of an accused is no barrier to prosecute such an individual and that the presumption that excusing an accused from continues presence during trials will compromise the validity of the court has no valid premise.[88] I concur with the Trial Chamber reasoning given that this tribunal has been branded "*International Criminal Court of Africa*" this case will boast the image of the court and instill confidence and hope for those seeking justice.

2. The Parties Submissions

We shall examine the submissions of the Prosecutor, Mr. Ruto, and the Joint Observation by the United Republic of Tanzania; the Republic of Rwanda; the Republic of Burundi; the State of Eritrea and the Republic of Uganda; and finally the Appeals Chamber in the paragraphs below.

a) The Prosecutor's Submissions

The Prosecutor put forth two grounds of contention on appeal: she submits that the Trial Chamber erred in law by disregarding the attendance condition offered by Article 63(1); she further submits that a literal reading of Article 63 shows that the accused has to be present during trial and that only

[86] ICC-01/09-01/11- 1066, [25 October 2013], p. 8.
[87] ICC-01/09-01/11- 1066, [25 October 2013], p. 9.

a disruptive accused is to be removed from trial this she says is reaffirmed by contextual and teleological interpretation of the statute and that Article 63(1) does not give room for judicial discretion.[89] I do not agree with the Prosecutor on this point, rather I humbly submit that the Rome Statute should be interpreted in the spirit of the law not just the letter of the law so in my opinion the Trial Chamber did not erred in law given the arguments raised above. To corroborate this point, the Trial Chamber submits as follows:

> *In construing article 63(1), mindful of its general power to do justice under [a]rticle 64(6) (f), the Chamber will read the Statute as a whole. In doing so, the Chamber will, as noted earlier, have due regard to [a]rticle 64(2) that requires the trial to be fair and expeditious and 'conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'. What is called for then, for purposes of the present request, is an outcome that reflects a balance suitably calibrated to accommodate all the concerned interest.*[90]

The Prosecutor argue that "the legislative intent" provided in Articles 58(1) (b) and 58(7) allows the issue of summonses or arrest warrants by the Pre-Trial Chamber to ensure that the accused be present at trial; again, she continues on similar lines that Article 67(1) (d) establishes the presence of the accused as a right while Article 63(1) establishes a mandatory procedural requirement.[91] In the case at hand the accused is already on trial and he is cooperating with the tribunal so therefore there is no need to invoke Articles 58(1) (b) and 58(7) of the Statute. In her Joint Separate Opinion Judge Erkki Kourula and Judge Anita Ušacka instruct with regard to the mandatory requirement of Article 63(1) that:

> *[W]e would find that although the strict terms of Articles 63(1) of the Statute do not appear to permit any absence of the accused during the trial, absences from particular hearings or parts of hearings may be considered to be insignificant that they do not amount to a violation of the fundamental requirement of presence. They continue that no rigid mathematical formula can be applied to determine with certainty the point at which it would become necessary to adjourn the trial rather than continue in the absence of*

[88] ICC-01/09-01/11- 1066, [25 October 2013], p. 9.
[89] ICC-01/09-01/11- 1066, [25 October 2013], p. 10.
[90] ICC-01/09-01/11- 1066 - Anx, [25 October 2013], p. 2.

> *the accused; a common sense approach they said must be adopted to the management of proceedings based on the facts of the particular case.*[92]

The *travaux préparatoires* it is submitted demonstrate that presence at trial was viewed as a condition *sin qua non* for the validity of the trial rather than a feature that could be waived; in line with this reasoning the Prosecutor pointed out that the 1995 Report of the *Ad hoc* Committee on the Establishment of an International Criminal Court endorsed the presence of the accused during trial and also the deletion of the word "[a]s a general rule" from the 1994 International Law Commission draft of words implying the drafters frown against the idea that the accused presence is a "general rule" and that the removal of a disruptive accused should be the only exception as per Article 63(1).[93] Judge Kourula and judge Ušacka building on Articles 31 and 32 of the Vienna Convention on the Law of Treaties[94] content that:

> *As the meaning of article 63(1) of the Statute is clear there is no need to have recourse to the travaux préparatoires, in order to confirm or determine its meaning; in particular, regarding the latter there is no suggestion that the interpretation set out above would lead to a manifestly unreasonable or*

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[91] ICC-01/09-01/11- 1066, [25 October 2013], p. 11.
[92] ICC-01/09-01/11- 1066-Anx, [25 October 2013], p. 2.
[93] ICC-01/09-01/11- 1066, [25 October 2013], p. 11.
[94] *Article 31,* GENERAL RULE OF INTERPRETATION
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.
Article 32, SUPPLEMENTARY MEANS OF INTERPRETATION
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :
(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable

> *absurd result…in this context, a wholesale departure from the intention of the drafters in order to give effect to a creative interpretation of the Statute would appear to be an inappropriate arrogation of the legislative function by the judiciary. The drafting history of the Statute confirms the interpretation of article 63 of the Statute set above. In this regard, we disagree with the majority's resort to the travaux préparatoires in order to support its conclusion at paragraph 54 that "part of the rationale for including article 63(1) of the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, to preclude any interpretation of article 67(1)(d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial.*[95]

On her second ground of appeal the Prosecutor content that the Trial Chamber erred in law to excuse Mr. Ruto on grounds of important functions, this she says violates Articles 27(1) and 21(3) that provides for equality of all persons and the application and interpretation of the law without distinction based on status respectively; she concluded by stating that even if the Trial Chamber had justification base on the law of this court, the excusal of Mr. Ruto will open room for others to put forth the same argument of important function from attending trial.[96]

b) Ruto's Submissions

On grounds of Appeal Mr. Ruto submits that the Prosecutor's approach to statutory interpretation is erroneous, narrow and overly simplistic in that the jurisprudence of the court favour a holistic approach this he content is not consonant with Article 31 of the Vienna Convention on the Law of Treaties[97] rather he said "[t]he Statute must be read as whole".[98] Mr Ruto in the same line of argument reason that the Trial Chamber had carefully considered articles 63(1) and 67(1)(d) and that the prosecutor's submission that the Trial Chamber had failed to consider Article 63(1) in context of the Statute was unfounded.[99]

The Working Paper on Article 63 was intended to reject the holding of trials in *abstantia* and there was no need for special provisions because it has been dealt with in Articles 64 and 67 of the

[95] ICC-01/09-01/11- 1066-Anx, [25 October 2013], p. 6.
[96] ICC-01/09-01/11- 1066, [25 October 2013], p. 12 – 13 ; ICC-01/09-01/11-948 [18 September 2013], p. 5.
[97] See footnote 93 above.
[98] ICC-01/09-01/11- 1066, [25 October 2013], p. 13.
[99] ICC-01/09-01/11- 1066, [25 October 2013], p. 13.

Statute Ruto submits; he continued that the Trial Chamber interpreted Article 64(6) (f) of the Statute in the Spirit of International Law and used its discretionary power to discharged its duties with regards to protection of witnesses and victims.[100] Ruto argues that the Appeals Chamber does not need to decide whether it is permissible for an accused to be absent for small number of court session as was held in the cases of the *Prosecutor v. Jean - Pierre Bemba Gombo* and the *Prosecutor v. Thomas Lubanga Dyilo*[101] but rather whether it has power to excuse an accused who cooperate with the court no matter the duration of the absence.[102]

On the second grounds of the Prosecutor's Appeal, Mr. Ruto content that the Trial Chamber arrived at a seasoned conclusion because Article 63(2) is not the solitary exception to Article 63(1); this conclusion he says has been reached through application of the Court jurisprudence and by reference to the *travaux préparatoires* and international human right law.[103] He precede similarly that the Impugned Decision did not violate the principle that all people are treated equally and that granting his request will ease the tension that the court is a double standard forum.[104]

c) Joint Observation

Cognizant of the functions of the Deputy Head of State in Kenya and his unique role to serve the population[105] as per Section 15 of the Constitution that bestowed on him the right to serve the People of Kenya, and the urgent need to enhanced justice in the continent, building on this premise a joint observation was submitted by the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi, the State of Eritrea and the Republic of Uganda also known as *Amici Curiae* affirms the importance of the Deputy Head of State[106] and that by granting the request of the accused, the Court will send out a positive note to non member states hesitant to joint the court[107]; this position is affirmed by Mr. Ruto in response to his submission by the *Amici Curiae*, however, the Prosecutor in her own submission request that the Joint Observation is founded on "policy consideration extraneous to the narrow legal issue on appeal" and so should be dismissed.[108]

[100] ICC-01/09-01/11- 1066, [25 October 2013], p. 14 ; ICC-01/04-01/06-2035-RSC, [10-06-2009], p. 6.
[101] See footnote ICC-01/09-01/11- 1066-Anx, [25 October 2013], p. 1.
[102] ICC-01/09-01/11- 1066, [25 October 2013], p. 14 .
[103] ICC-01/09-01/11- 1066, [25 October 2013], p. 15.
[104] ICC-01/09-01/11- 1066, [25 October 2013], p. 15.
[105] ICC-01/09-01/11-948 [18 September 2013], para. 6
[106] ICC-01/09-01/11- 1066, [25 October 2013], p. 16 ; ICC-01/09-01/11-948 [18 September 2013], p. 5 – 6.
[107] ICC-01/09-01/11-948 [18 September 2013], para. 10 ; ICC-01/09-01/11-964 [20 September 2013], para. 10.
[108] ICC-01/09-01/11- 1066, [25 October 2013], p. 16.

d) Determination by the Appeals Chamber

The Appeals Chamber content that the Prosecutor's first ground of Appeal aims at pointing that Article 63(1) imposes a strict condition of presence without a discretion on the part of the Trial Chamber to compel the accused to be present and this she submits must be addressed.[109] In the Impugned Decision she submits that Article 63(1) does not impose an obligation on the Trial Chamber not to excuse the accused, it rather imposes an obligation on the accused to be present for this reason the Trial Chamber argue that "the better construction is one that respect and comfortably accommodates the general power of the Trial Chamber to do what is fair, reasonable and just under [a]rticle 64(6) (f)".[110] Again, the Appeal Chamber observed that Article 63(1) does not function as an absolute bar in all circumstances to the continuation of trials proceedings without the accused; against these grounds, the Appeals Chamber held that the Trial Chamber did not err in law to excuse the accused on a case-by-case basis but held that the Trial Chamber's reference to Article 64(6) (f) for exercising this discretion is misplaced but concluded that the two grounds of "important functions" and "excusal from attending all trials" was properly addressed by the Trial Chamber.[111]

As indicated in the paragraph above, the Appeals Chamber concurs with the reasoning of the Trial Chamber on "important function of the accused" and added the exercise of its discretionary power with reference to Article 64(6) (f) is misplaced and submitted that it will not interfere with its discretionary power. On the ground of important function the Appeals Chamber considers the Trial Chamber reasoning as follows:

> *In exceptional circumstances, however, the Chamber may exercise its discretion under Article 64(6) (f) of the Statute to excuse an accused, on a case-by-case basis, from continuous presence at trial. The exceptional circumstances that would make such excusal reasonable would include situations in which an accused person has important functions of an extraordinary dimension to perform. It will not be possible to prescribe a hard and fast template for the test. It will be for each Trial Chamber to appraise the situation according to its own judgment. But it suffices, for now, to venture the view that the functions that meet the test are not ones that*

[109] ICC-01/09-01/11- 1066, [25 October 2013], p. 17 – 18.
[110] ICC-01/09-01/11- 1066, [25 October 2013], p. 18.
[111] ICC-01/09-01/11- 1066, [25 October 2013], p. 23.

many people are in a position to perform at the same time and in the same sphere of operation.[112]

In this same line of argument the Trial Chamber continue thus:

Only one person at a time is constitutionally authorized to perform the functions of the Deputy President of Kenya during any presidential term of five years, and those functions include the following: the Deputy President of Kenya is the execution of the President's functions; when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall, within certain limits, act as the President; in the event of vacancy in the office of the President, the Deputy President shall assume office as President for the remainder of the term of the President; and, the President and the Deputy President are the principal members of the National Executive of the Republic[113]

On the standard of discretionary power the Appeals Chamber held that:

The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion […] merely because the Appeals Chamber, if had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre- Trial Chamber

[…][T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre- Trial Chamber's exercise of discretion […], save where it is shown that the determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The

[112] ICC-01/09-01/11- 1066, [25 October 2013], p. 23 – 24.
[113] ICC-01/09-01/11- 1066, [25 October 2013], p. 24.

jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion[114].

Building on this premise and considering the case at hand the Appeals Chamber concludes that the Trial Chamber did not properly exercise it discretionary power although she pointed out that the Trial Chamber has limited powers under Article 63(1), she must prudently discharge this power because in this case it has not been seasonably applied thus it has affected the impugned decision so therefore it should be reversed.[115] This view enjoys judicial support from the joint and separate opinion of Judges Kourula and Ušacka.

2. The Trial of Mr. Uhuru Maigai Kenyatta

Recent events in Kenya have demonstrated that Kenyans have endorsed further cooperation with the ICC.[116] Presently Mr. Uhuru Kenyatta the accused is facing trials (Status Conference)[117] not in the capacity of the President of Kenya but as a regular citizen; this signal a shift from the conventional view of non cooperation by some member states who have been indicted. On September 30, 2014 the Trial Chamber V(B) was seised with the "Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014" which will be our focal point to assess to what extent the Court is discharging its obligation to dispense justice for all a sundry.

After careful consideration of the submissions of the parties (Defence, Prosecutor and the Legal Representative of Victims) and the provisions of Article 64(2) and (6) of the Rome Statute; Rules 132(2), 134 *bis* and 134 *quarter* of the Rules of Procedure and Evidence and Regulation 30 of the Regulations of the Court, the Trial Chamber V(B) concluded that the accused be present during the Status Conference scheduled for 8 October 2014 considering that it is at a crucial point of the

[114] ICC-01/09-01/11- 1066, [25 October 2013], p. 24 – 25.
[115] ICC-01/09-01/11- 1066, [25 October 2013], p. 25 – 27.
[116] Ipsos in Kenya: http://www.ipsos.co.ke/home/index.php/downloads, [07 October 2014]
[117] Before heading to The Hague for the Status Conference scheduled for 8 October 2014, Mr. Kenyatta publicly handed over power to his vice to act as president in his absence, this move is ordained by Section 11 of the Constitution of Kenya; this provision limits the power of the incumbent to the wording in Section 6(3) of the same Constitution.

proceedings.[118] This position of the Trial Chamber enjoys judicial favour from the partially dissenting opinion of Judge Kuniko Ozaki who concurs with the majority opinion.[119] Their submissions were as follows:

- That in his capacities as President of Kenya and Chairperson of Head of State of East African Community, the defence submits that Mr. Kenyatta is scheduled to attend a summit in Kampala, Uganda, on 8 October 2014 where he will engage in talks on 'economic development and regional security issues' and that this meeting was arranged prior to the date set for the Status conference by the Trial Chamber;
- That the set meeting in kampala amounts to 'extraordinary public duties at the highest national level' within the meaning and intent of Rule 134 *quarter* of the Rules and Procedure of Evidence and that he should be excused from attendance and that the alternative form of video-link provided under Rule 134 *bis* be stroke out because of inconveniences; the accused states that he has 'explicitly waives his right of attendance' in respect of the Status Conference as he will be represented by his legal team and finally;
- The defence request that the Status Conference be set for a date convenient to all parties and that should the Status Conference be rescheduled, the accused be allowed pursuant to Rule 34 *bis* of the Rules of Procedure and Evidence to attend through video-link because it will enable him discharge his extraordinary functions without causing inconveniences to the Court.[120]
- In response, the Prosecution submits that the provisions on Rule 134 *bis* and *quarter* only apply when 'trial has begun' and during opening statements and that the Defence reliance on this Rules is 'misplaced'; she however content that the Chamber has a discretionary power to either compel or excuse the accused depending on what will be discuss in the Status Conference;
- The Prosecution submits that there has not been any tangible reason for non attendance other than that the Defence has relied on the distance the accused will travel and his status.[121]
- The Legal Representative of Victims on their part indicated that the accused has not been physically present in court for three years and that his presence gives a sense of fair trial according to the opinion of some victims; they continued similarly that the

[118] ICC-01/09-02/11- 960, [30 September 2014], para. 1 – 9.
[119] ICC-01/09-02/11- 960 -Anx, [30 September 2014], para. 1.
[120] ICC-01/09-02/11- 960, [30 September 2014], para. 10 – 12.

> accused should not be allowed to use circumstances under his control to abscond from being physically present for trial and that the Chamber should order a short adjournment if that will necessitate the accused physical presence.[122]

Building on the arguments presented the Chamber is not persuaded that for an adjournment because the accused has no prior engagement that have been planned before the status conference and so concludes that for the sake of justice and the interest of the accused, witnesses and victims his presence is necessary.[123] It is interesting to note that as we speak the accused is presently on a status conference[124] as an ordinary citizen, this move is a shift from the original perception that it will be difficult for the ICC to get cooperation from States Parties whose citizens occupy leadership position; it is my hope that as the first acting president to stand trial at the ICC Mr. Kenyatta has hopefully set in motion an example for others who regard the court with disdain and as an instrument to oppressed or target a particular group. My point is that humanity has to come in terms with what we have at least for now in the hope that we can strike a common ground to achieve a peaceful world we hope will come one day.

Conclusion and Recommendation

The reminisce of the 2007 post election violence in Kenya is being piece together by the ICC justice machinery in The Hague in a bit to heal the gabbing wounds that afflicted thousands of Kenyan citizens some of whom their plight will never be heard in a court of law or other forms of justice mechanism like the TJRC wherein an attempt to institute one failed woefully. The events that took place after this historic election is not by chance but simply a litmus test for Kenya to return to the beginning and try to understand or redress the challenges facing the country.

My humble submission to Kenyans and other African countries is that they need to start from the genesis of every situation facing the continent now this requires returning to the origin of every situation before anything feasible will be realized because historical records dictates that policies, legislative measures and development projects undertaken in the continent have all proven to be short live; the reason does not require a metal physical deduction, Kenya and Africa as a whole have always ignore the things that matter and relentlessly focus on things that is appealing for awhile. The plausible thing for Kenyans to do in my opinion is to return to the main questions that has always divided them and transition from there, only when they have decided to come to a

[121] ICC-01/09-02/11- 960, [30 September 2014], para. 13 – 14.
[122] ICC-01/09-02/11- 960, [30 September 2014], para. 15 – 17.
[123] ICC-01/09-02/11- 960, [30 September 2014], para. 20 – 21.

consensus ad idem can any meaningful dialogue reach a point of fruition, failure which the country risk plunging to another tragedy worse than the post 2007 elections and this phenomenon is true in many countries across the continent as recent events demonstrate.

Recently the Executive Council of the African Union during its Twenty-Fifth Ordinary Session on 20 - 24 June 2014 adopted a Report that provide for immunity of acting statesmen in its Article 46A *bis* as follows:

> *No charges shall be commenced or continued before the court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.*

It is doubtful if such a move will forge a new way forward that will protect citizens and leaders alike or is it another means to shield the powerful and rich against their people who may hold them accountable while they discharge their constitutional duties. As mentioned earlier a system that is transparent, horizontal and sustainable economically, socially and politically is obviously the best way forward for Kenya and by extension Africa.

[124] ICC Status Conference: https://www.youtube.com/watch?v=T7dg2dKkdko [28 October 2014].